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Implementing native title: economic lessons from the Northern Territory

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ABSTRACT

The economic future of Aboriginal Australians in the Northern Territory will be significantly improved in the 21st century if strategic gains in land ownership made in the late 20th century can be converted to economic development of that land. In this paper, in a specific regional context, it is argued that leverage provided by the *Aboriginal Land Rights (Northern Territory) Act 1976*, and now the *Native Title Act 1993*, has the capacity to facilitate regional development options for Aboriginal people. The potential for such a scenario is assessed by considering the economic lessons that can be learnt from the operations of the *Aboriginal Land Rights (Northern Territory) Act 1976* over the past 17 years and the extent that these have been, and can be, incorporated into the *Native Title Act 1993*. The paper begins by outlining the institutional and legislative history of making mining payments to Aboriginal people for the use of their land. It then moves to examine financial components of the *Aboriginal Land Rights (Northern Territory) Act 1976* and to evaluate the efficacy of their operation. The paper ends by asking how economic lessons from the Northern Territory might have been incorporated into the *Native Title Act 1993* and examining two mining agreements completed in the post-Mabo era. Policy issues that emanate from this analysis, especially in relation to the implementing of native title, are raised in conclusion. This discussion paper is a revised version of a paper presented at the Mabo and Native Titles Seminar convened by the Macquarie University Mineral and Energy Economics Centre and the Australian Mining and Petroleum Law Association, ANA Hotel, The Rocks, Sydney, 14-15 April 1994.

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The economic future of Aboriginal Australians in the Northern Territory will be significantly improved in the 21st century if strategic gains in land ownership made in the late 20th century can be converted to economic development of that land. Such economic development will occur primarily through joint ventures with non-indigenous mining, tourism and pastoral interests. Some Aboriginal people, especially those living at outstations on Aboriginal-owned land, might continue to pursue tradition-oriented lifestyles largely removed from the mainstream economy. But others will seek either direct or indirect commercial options as a means to bridge the current gulf in living standards between themselves and non-indigenous Australians.

This paper examines the potential for such a scenario by considering the economic lessons that can be learnt from the operations of the *Aboriginal Land Rights (Northern Territory) Act 1976* over the past 17 years and the extent that these have been and can be incorporated into the *Native Title Act 1993*. The applicability of the Northern Territory case to the rest of Australia can be called to question: nowhere else do indigenous people constitute 23 per cent of the population; nowhere else, with the possible exception of Western Australia, could they potentially own 49 per cent of a State or Territory; and nowhere else have their land interests, admittedly limited at first, been recognised in law for over eighty years. On the other hand, the *Aboriginal Land Rights (Northern Territory) Act 1976* has had some important influences and has been used as a benchmark in negotiating native title legislation in much the same way as it was used as a benchmark to reject the Commonwealth's preferred national land rights model in 1985; the major difference is that in 1993 the Aboriginal leadership acquiesced to the absence of a veto right.

The focus here is on Aboriginal economic policy issues that is based on research undertaken over the past ten years on the impact of mining moneys on Aboriginal people in the Northern Territory.[1] The paper begins by outlining the institutional and legislative history of making payments to Aboriginal people for the use of their land. It then moves to examine financial components of the *Aboriginal Land Rights (Northern Territory) Act 1976* and to evaluate the efficacy of their operation. The paper ends by asking how economic lessons from the Northern Territory might have been incorporated into the *Native Title Act 1993* and examining two mining agreements completed in the post-Mabo era.

To begin, though, some caveats. There are a very wide range of interests involved in land rights issues, not just the simplified spectrum, indigenous to business, with government mediating between them, but a spectrum within each of these, and between different levels of government. A healthy diversity of views and positions is evident in all policy processes, but it is probably highlighted in Aboriginal and Torres Strait Islander affairs because of its high profile, because it is an arena for open

disputation between the Commonwealth and the States and because it is a policy area that is loaded with symbolism. This presentation is not entirely sympathetic to theoretical economic models because two of the key ingredients in Aboriginal affairs policy formulation, historical precedent and political reality, are often missing from such models, yet these two elements are central to the overall argument presented. Land rights and native title issues are extremely complex to analyse and there are some simplifications in this paper: it intentionally focuses on broader economic issues that emanate from land rights, and, potentially, from native title legislation.

Historical antecedents

The introduction of land rights law in the Northern Territory was the product of progressive social policy of the Whitlam Labor Government, 1972-75; this period marked the start of the modern era in Aboriginal affairs. Federal intervention was limited to the Northern Territory primarily because at that time the Territory was administered from Canberra. The Northern Territory land rights legislation contained important financial provisions to facilitate Aboriginal economic development. These provisions were largely a legacy of decisions made in the early years of Commonwealth administration of the Northern Territory to restrict miners' access to Aboriginal reserves under the broad colonial policy ambit of protection and preservation. From 1911, an unusual political economy of reserved land, and associated controls over commercial development, and especially mineral exploration of these reserves, existed. At the outset, the Commonwealth moved to reserve considerable tracts of land for Aboriginal people under Crown Land Ordinances. The *Aboriginals Ordinance 1918* limited access of non-Aboriginal people onto declared reserves. And Mining Ordinances also denied the holders of miners' rights access to Aboriginal reserves; prospecting was forbidden. During the period 1911 to 1952 this restrictive regime held sway, with very few exceptions (Altman 1983).

It was only in 1952, in the very different assimilationist policy environment, that restrictions on mining appeared likely to be lifted after the discovery of bauxite in the Wessell Islands and a perceived strategic need for this mineral in the immediate post-war period. The Minister for Territories at the time instituted a process whereby Aboriginal people could benefit financially from any mining that occurred on reserves. The discourse of that time focused on regional economic development, rather than on cultural or social issues: the then Minister, Paul Hasluck was adamant that the Administrator, who could now issue miners' rights for reserves, would only do so in circumstances where significant and strategic resources were discovered. If mining went ahead on reserves Aboriginal people were to be compensated, presumably for loss of land.

The Aborigines Benefits Trust Fund (initially the Aborigines (Benefits from Mining) Trust Fund) established under new provisions in the federal *Northern Territory (Administration) Amendment Act 1952* introduced policies that continue to exist, in modified form, some 42 years later. First, the new provisions allowed for returns from mining on reserves to be earmarked for the use of Aboriginal people irrespective of the absence of statutory or common law recognition of Aboriginal land ownership; Aboriginal people neither owned the land nor the minerals. Second, amendment of the *Mining Ordinance 1939-52* resulted in the levying of a double royalty of 2.5 per cent ad valorem (of the value of minerals extracted) if mining occurred on Aboriginal reserves. It is important to note, though, that no administrative or statutory mechanism was established until the early 1970s to ensure that those who directly bore economic (and other social and cultural) costs associated with mining actually received a share of royalty payments or that such payments were linked to costs incurred. Under these provisions mining companies were penalised for mining on reserves, a disincentive that the Minister for Territories intentionally wanted to establish to discourage small-scale and piecemeal development.

Policy aims do not necessarily match policy practice. Mining did not eventuate in 1952, but began on Groote Eylandt in 1965. Manganese deposits were discovered on the island and the Church Missionary Society (CMS) took out prospecting rights on behalf of Aboriginal residents of the reserve. Subsequently, Broken Hill Proprietary Company Ltd (BHP) successfully negotiated with CMS to give up its prospecting rights in exchange for a negotiated royalty: BHP was willing not only to pay the double royalty of 2.5 per cent ad valorem, but also an additional 1.25 per cent. At Gove, on the other hand, the North Australian Bauxite and Alumina Company Ltd (Nabalco) was unwilling to pay the statutory double royalty to mine a massive bauxite deposit, but Commonwealth desire for the mine resulted in the passage of the special *Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968* which incorporated an output-based statutory royalty that only converted to about 1 per cent ad valorem. The passage of this ordinance resulted in the unsuccessful attempt by Yirrkala Aborigines to halt mining in the case *Milirrpum and Others versus Nabalco and the Commonwealth* before the Northern Territory Supreme Court.

Financial aspects of land rights legislation

A central paradox of the *Aboriginal Land Rights (Northern Territory) Act 1976* is that it is financed from mining activity on Aboriginal land. This is an aspect of the legislation that is poorly understood. In 1977, with the passage of the Act, former reserves were transferred to Aboriginal ownership. The expansion of the Aboriginal land base via the claims process has been largely funded from what are generally termed today

'mining royalty equivalents'. This clumsy term came into common usage when it became more widely recognised that Aboriginal people did not receive mining royalties as generally perceived, but received their equivalents paid from consolidated revenue (Altman 1983: 48). This change occurred because financial provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* were enacted at the same time as the Northern Territory became self-governing. Consequently, mineral rights (and associated royalty rights) for all minerals, except uranium, were vested with the Northern Territory.

The operations of the Aboriginals Benefit Trust Account (ABTA), the institutional mechanism created to both distribute and accumulate mining royalty equivalents, are complicated. There are two broad types of minerals in the Northern Territory resulting from different ownership regimes: uranium and non-uranium. The ownership of the former is vested in the Crown in the right of the Commonwealth; ownership of the latter is vested in the Crown in the right of the Northern Territory. To simplify the analysis somewhat the concentration here is on the payment to the ABTA of what are termed 'statutory royalty equivalents', that is the equivalents of royalties stipulated in statute. This is a simplification because even these royalties can have a negotiated component. The income of the ABTA comes from these royalty equivalents and from investment income earned on accumulated funds. All non-investment income of the ABTA comes from consolidated revenue and while from the ABTA's perspective there is no difference between uranium and non-uranium royalty equivalents, from the Commonwealth's perspective there is one major difference: as uranium royalties are paid to the Commonwealth their transfer to the Northern Territory merely represents income foregone. Non-uranium royalties, however, represent a greater net cost to consolidated revenue as the Commonwealth has to pay the equivalent of royalties that it does not receive.

The total income of the ABTA from 1978-79 to 1992-93 is documented in nominal dollars in Table 1. There are no especially pertinent features of the income variable except that there was a revenue decline in the late 1980s from 1985-86 to 1989-90 and again in 1992-93. Total income of the ABTA to 30 June 1993 is in the region of $296 million. This has been paid with respect to statutory royalties from the following mines on Aboriginal land: Gemco on Groote Eylandt, Nabalco at Gove, the Energy Resources of Australia (ERA) Ranger uranium mine at Jabiru, the Queensland Mines uranium mine at Nabarlek, the Magellan oil and gas projects at Mereenie and Palm Valley, and the North Flinders Mines and Henry and Walker gold mines at the Granites and Tanami. Since legislative amendment in 1990, the ABTA receives equivalents of all statutory royalties raised on Aboriginal land. The one exception remains the ERA case; the ABTA receives 77 per cent of the royalty of 5.25 per cent ad valorem levied on ERA; the remainder is paid by the Commonwealth to the Northern

Territory Government 'in lieu of' royalties it does not receive with respect to uranium, a mineral that it does not own.

The total income, expenditure and accumulated assets of the ABTA are presented in Table 1. Total income refers to both royalty equivalents and investment income. Interestingly, all payments from royalty equivalents made out of the ABTA attract mining withholding tax (currently 5.8 per cent). However, this tax does not apply to the non-royalty equivalent income (that is, investment income) of the ABTA.

Table 1. ABTA income and expenditure, 1978-79 to 1992-93.[a]

Year	Total income ($ million)	Total expenditure ($ million)	Balance at 30 June ($ million)
1978-79	2.2	3.2	2.4
1979-80	2.5	3.1	1.7
1980-81	4.4	3.7	2.4
1981-82	6.2	6.4	2.1
1982-83	18.3	13.3	7.1
1983-84	18.2	14.2	11.0
1984-85	19.7	18.7	12.0
1985-86	23.6	18.9	16.7
1986-87	23.3	15.9	23.3
1987-88	21.9	21.9	23.4
1988-89	21.7	26.2	18.9
1989-90	37.7	28.5	28.0
1990-91	37.2	33.3	33.5
1991-92	37.5	37.3	33.7
1992-93	21.3	31.4	23.6
Total	295.7	276.0	-

a. Data do not always add up due to rounding error, other expenditure, taxation, etc.

Sources: ABTA Annual Reports 1987-88 to 1992-93; Altman (1983); Altman and Dillon (1988).

Payments out of the ABTA are of two broad types (to simplify again), discretionary and non-discretionary. In making non-discretionary payments, the ABTA primarily acts as a clearing house; discretionary payments are made on the recommendations of an all-Aboriginal Advisory Committee and the approval of the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs or his delegate.

The payments out of the ABTA, documented in Table 2 are mainly of three broad types defined under ss.64(1) and 64(7), s.64(3) and s.64(4) of the legislation.[2] These accounted for $272 million, or 93 per cent of the ABTA's income, in the period 1978-79 to 1992-93. Most of the balance has been saved, although some has also been spent to meet the administrative expenses of the ABTA under s.64(5).

Table 2. ABTA major expenditure categories, 1978-79 to 1992-93.[a]

Year	Major expenditure categories Land councils expenses ss.64(1) and 64(7) ($ million)	Areas affected moneys s.64(3) ($ million)	General grants to NT s.64(4) ($ million)
1978-79	0.5	0.3	2.5
1979-80	1.4	0.6	1.1
1980-81	2.0	1.2	0.5
1981-82	3.8	1.7	0.9
1982-83	7.4	5.3	0.7
1983-84	7.1	5.1	2.0
1984-85	8.6	5.2	4.9
1985-86	8.7	6.7	3.5
1986-87	8.7	6.0	1.1
1987-88	11.9	5.6	4.1
1988-89	12.2	5.6	8.1
1989-90	14.9	8.4	2.5
1990-91	14.3	10.7	8.2
1991-92	17.8	11.4	7.9
1992-93	16.1	5.6	9.5
Total	135.4	79.4	57.4

a. Data do not always add up due to rounding error, other expenditure, taxation, etc.

Sources: ABTA Annual Reports 1987-88 to 1992-93; Altman (1983); Altman and Dillon (1988).

The least discretionary payments are those to incorporated groups whose members are traditional owners of, or residents in, areas affected by mining, although the geographic jurisdictions of such areas have never been precisely defined. It is land councils who determine, under s.35(2) how these moneys will be divided between regional incorporated groups, often termed 'royalty associations'. These payments under s.64(3) account for 30 per cent of the royalty equivalents received with respect to any particular resource development project. For example, the Gagudju Association receives 30 per cent of the statutory equivalent payments made by ERA with respect to the Ranger uranium mine to the ABTA. Over the period 1978-79 to 1992-93, $79 million, or 27 per cent of ABTA income, was paid to incorporated groups in areas affected via land councils.

Payments to land councils to meet their operational expenses are also largely non-discretionary. Land councils are statutory authorities established by Commonwealth law with legally specified functions. This is not to say that they are not very unusual statutory authorities, primarily because they are openly, and at times extremely, political (Altman and Dillon 1988). Their budgets are submitted for approval to the Minister for Aboriginal and Torres Strait Islander Affairs. Under s.64(1), only 40 per cent of ABTA royalty equivalent income is earmarked for land council

operational costs, but if approved budgets exceed this amount, additional resources can be made available under s.64(7). Conversely, if s.64(1) payments exceed approved budgets, these 'surpluses' must be distributed. During the period 1978-79 to 1992-93, land councils received $135 million to meet their operational expenses. This amount accounted for 46 per cent of ABTA income; while the costs of land councils has been politically contentious, it has also been argued that these costs could have been limited to s.64(1) payments without the impost of the incongruous mining withholding tax (Altman 1985; Australian National Audit Office 1993).

Payments made under s.64(4) as grants to be used to, or for, the benefit of Aboriginal people residing in the Northern Territory are discretionary, being based primarily on the recommendations of an all-Aboriginal Advisory Committee. While Mr Justice Woodward (1974) recommended that these payments should account for 30 per cent of the ABTA's receipts, over the period 1978-79 to 1992-93 they have totalled $57 million, or 19 per cent of the ABTA's total income. These payments are arguably intended to compensate Aboriginal people who do not own land in the Northern Territory, but since a review of the ABTA in 1989 (Crough 1989b), a high proportion of these moneys have been used to purchase pastoral stations that have then become eligible for land claim under s.50 of the *Aboriginal Land Rights (Northern Territory) Act 1976*.

Evaluating financial aspects of Northern Territory land rights

Evaluating financial aspects of land rights legislation is open to variable interpretation, depending on one's standpoint. The analysis here focuses on two broad sets of issues. The first set focuses narrowly and directly on financial aspects from an Aboriginal perspective by examining utilisation of ss.64(1) and 64(7), 64(3) and 64(4) moneys. The second set focus on three wider financial aspects for both indigenous and non-indigenous interests: the costs of the claims process; delays in processing exploration licence applications; and associated incentives provided to traditional owners to allow mining on their land.

Whether the $135 million paid to the Northern Territory land councils to claim and manage Aboriginal land has been optimally spent is a complex question. Land councils, like all statutory bureaucracies, can be of variable efficiency (see Australian National Audit Office 1993 with respect to the Northern Land Council) and given their wider political activities they will always seek to maximise their ministerially-approved budgets. Whatever the cost, there is little doubt that the transfer of land to indigenous interests via the claims process is a redistribution of a key factor endowment that has the potential to be of future economic significance. In 1977, 258,000 square kilometres of then existing reserves were scheduled in the *Aboriginal Land Rights (Northern Territory) Act 1976* and transferred to inalienable Aboriginal title. This represented 19 per cent of the Northern

Territory land base. By March 1994, the Aboriginal land base had doubled to 520,000 square kilometres or 39 per cent of the Northern Territory: some of this expansion occurred owing to negotiated Northern Territory title to land (11,000 square kilometres) and additional scheduled land (6,000 square kilometres). But the vast majority of the expansion was due to successful claims which expanded the Aboriginal land base by 245,000 square kilometres, almost all of which was unalienated Crown land. It is estimated that once the claims process is completed (new claims cannot be lodged after 1997) Aboriginal land could cover 49 per cent of the State.

The utilisation of moneys paid to areas affected has never been rigorously assessed. There is evidence that in some situations impressive and strategic regional developments have occurred, most notably at Kakadu National Park via the Gagudju Association (Altman 1983; O'Faircheallaigh 1986), but also in central Australia via the Ngurratjuta Association (Marshall 1994). There is also evidence of some notable failures, in terms of regional economic development, as with the Kunwinjku Association in Western Arnhem Land (O'Faircheallaigh 1988; Altman and Smith 1994). There is some discretion possible in the allocation of areas affected moneys, but an evident reluctance by the Commonwealth and land councils to closely scrutinise the operations of so-called 'royalty' associations (all also receive additional income from non-royalty based agreement and rental payments). Some consideration needs to be given to defining 'affectedness' and to specifying how mining moneys should be utilised to ameliorate negative impacts of resource development projects if they occur.

It is the granting operations of the ABTA, the most discretionary residual that has been most closely monitored, primarily because the ABTA has been institutionally located within the Aboriginal affairs bureaucracy and has been very accessible to scrutiny. It has been commented on and reviewed on a number of occasions (Toohey 1984; Altman 1985; Crough 1989a, 1989b; Walter and Turnbull 1993) and each time it has been criticised primarily for lacking appropriate financial and expenditure policies, but also for making grants in contravention of its own policies. Blame has invariably been laid with the ABTA Advisory Committee or its sub-committee, but rarely with the Commonwealth Minister or his delegate. A key criticism made of the ABTA as a Trust Account, especially by the Australian National Audit Office, is that it has a poor savings and investment performance: its accumulated reserves at 30 June 1993 only totalled $24 million or 7 per cent of income. However, there is no statutory requirement for the ABTA to save; indeed Woodward's (1974) recommended 40/30/30 formula merely treated the ABTA as a royalties clearing house.

The fact that the ABTA only retains income after the payment of non-discretionary areas affected moneys and land council administration expenses (including supplementary funding) has not only marginalised its

operations, but has also placed it in an unfortunate adversarial relationship with land councils as supplementary funding of land councils directly impinges on resources available to the ABTA Advisory Committee for granting purposes. The ABTA is in an invidious position: when it responsibly purchases pastoral stations for Aboriginal interests it is criticised for providing a means under the Land Rights Act to convert these stations to inalienable Aboriginal freehold title. When it responds to Aboriginal priorities, like the funding of transport, it is criticised for irresponsible expenditure. One of the continual tensions that has influenced the ABTA's granting operations is that between the policy of self-determination, which emphasises that granting activity should be according to Aboriginal prerogatives and which has resulted in high expenditure, and the economic rationality of accumulation. In 1984 it was recommended that the ABTA should become a peak organisation that operated as an independent statutory authority to manage financial aspects of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Altman 1985: 26-9); this recommendation was never implemented. In 1994, ten years later, the ABTA, which remains under closer ministerial control than the Aboriginal and Torres Strait Islander Commission (ATSIC) itself, is looking increasingly anachronistic.

From a wider perspective, the costs of the claims process has been substantial and has been largely borne by the Commonwealth: land council costs have been met from royalty equivalents, the costs of the Aboriginal Land Commissioner by the Aboriginal affairs budget, and the costs of the Northern Territory Government (opposing claims, testing traditional evidence, appealing to Federal or High Courts or merely appearing at hearings) largely from 'land rights factors' adjustments made by the Commonwealth Grants Commission. A cost that the Commonwealth has not had to consider to date is 'just terms' compensation to the Northern Territory Government for the transfer of land to Aboriginal ownership, a possibility that has been recently raised.[3]

An inefficiency that has become increasingly apparent in the Northern Territory is the unworkability of mining provisions, particularly in relation to the processing of exploration licences. Such delays can come under the short-hand rubric of 'transactions costs'. These have been borne in part by mining companies and in part by Aboriginal traditional owners who may wish exploration (and mining) activity to proceed. The reasons for the slow processing of exploration licences include legal disputes over the operation of the veto, in particular whether conjunctive (that is exploration and mining) or disjunctive (that is separate negotiation at exploration and mining stages) agreements are appropriate. While the Northern Territory Supreme Court ruled in the Stockdale decision of March 1992 that disjunctive agreements are not permitted under the *Aboriginal Land Rights (Northern Territory) Act 1976*, such agreements would appear extremely suitable to expedite exploration, and then, sequentially, mining.[4] There has

also been a continual inability by all parties to meet timetables stipulated in amendments to the Land Rights Act in 1987 (Pinney 1993). While at times, resulting transactions costs can be strategically turned to transactions gains if depressed prices for minerals increase over time, this is obviously an area in the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* that requires further streamlining. Exploration licence processing needs to be more effective; the resolution of this problem requires a degree of Commonwealth political will that has not been evident to date.

An associated issue is related to the clarity of property rights in minerals on Aboriginal land. There is a view expressed by both the mining industry and the Industry Commission (1991) that traditional owners of Aboriginal land face a distorted incentive structure and are subsequently unnecessarily anti-development because they are only guaranteed a maximum 30 per cent of royalties (aside from additional negotiated deals allowed under ss.43 or 44). On one hand, it could be argued that this should provide a sufficient incentive given that traditional owners have not been vested with a legal mineral right. On the other hand, the *Aboriginal Land Rights (Northern Territory) Act 1976* requires that s.64(3) payments are not just reserved for traditional owners (irrespective of place of residence), but that they are shared with other Aborigines residing in areas affected (irrespective of their land ownership status). There is enormous discretion in the distribution of such areas affected moneys. For example, between 1982 and 1988 such moneys paid with respect to the Nabarlek uranium mine were shared between the 1,200 plus members of the Kunwinjku Association. Between 1988 and the present, payment of moneys from the same mine have been limited to the less than 100 members of the Nabarlek Traditional Owners Association (Altman and Smith 1994).

The above analysis indicates that there are elements of the *Aboriginal Land Rights (Northern Territory) Act 1976* that are not working and that require rectification. There are problems inherent in some of the incentive structures established by the statute most of which will require legislative amendments, and an associated political commitment to develop workable policy. One of the lessons that can be learnt from the Northern Territory is that the legislation can be working sub-optimally, or badly, but required statutory amendment or changes in administrative practice will not automatically occur. This can be due to lack of imaginative and transparent policy-making, but it can also be due to an absence of obvious solutions to complex problems. The bottom line is that legislative change requires a conjunction of appropriate policy and the political incentives to all interested parties to proceed to resolutions.

A radical recasting of the financial provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* is needed. Options that have been raised, but rarely seriously considered, have included: funding of land councils directly from consolidated revenue; establishing the ABTA as an

overriding statutory authority that manages all financial resources raised from commercial activity on Aboriginal land, but also has statutory functions to develop that land; specifying the role of 'areas affected moneys' in statute; specifying, again in statute, the means to accumulate development capital if this is regarded as a priority; and the abolition of s.64(4) grants if these are regarded as duplicating either the granting activities of ATSIC or the land claims activities of land councils.

Land rights lessons and native title[5]

It has been argued elsewhere in some detail that many of the problems evident in the *Aboriginal Land Rights (Northern Territory) Act 1976* have been addressed by different provisions and institutional arrangements in the *Native Title Act 1993* (Altman 1993, 1994). The focus here is limited to two issues highlighted above: transactions costs and property rights. While there are no empirical examples yet of resource development projects negotiated under the *Native Title Act 1993*, two mining agreements alluding to native title 'principles' completed after the Mabo High Court judgment of July 1992 will be briefly discussed.

The *Native Title Act 1993* provides native title holders with no veto over mineral exploration activity and no royalty rights. As noted above, from the indigenous perspective the absence of the veto and no nexus with statutory royalties are the weakest financial elements of the legislation. Under the broad ambit of racial equality, indigenous Australians are provided similar negotiation and appeal rights with respect to exploration available to other land owners in Australia, with the exception that any disagreements will be resolved before a tribunal. Aware of mining industry criticism of the *Aboriginal Land Rights (Northern Territory) Act 1976*, the Commonwealth has provided institutional arrangements that will minimise delays in making claims for native title, negotiating for the use of such land by developers and for assessing compensation. For example, maximum time frames are stipulated in the legislation to reach agreements (four months for exploration, six months for mining; and then, the same periods again if disagreement requires a tribunal determination). There is a heavy emphasis on 'alternative dispute resolution' and associated attempts to avoid costly appeals litigation in the Federal Court and options for informal arrangements between parties that can be formalised in agreements. There are also so-called 'expedited' procedures that will quicken negotiations (maximum of two months), national interest and other override provisions, and the potential to undertake 'low impact future acts' if native title is not yet determined.[6]

An innovative mechanism in the *Native Title Act 1993* is proposed negotiation procedures with respect to future acts on native title land. Because Crown ownership of minerals is maintained, s.38(2) emphasises that the value of minerals cannot be taken into account by an arbitral body

in determining compensation in marked contrast to provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976*. However, the *Native Title Act 1993* encourages miners and native title holders to come to an agreement prior to arbitration without any restrictions on financial provisions of such agreements. The signal here to miners is to expedite proceedings by making reasonable, even generous, offers to native title holders; the signal to native title holders is not to use the right of negotiation as a de facto right of veto because an arbitral body will, in all likelihood, offer less compensation than might be negotiated direct with mining companies. An incentive structure is established to encourage all parties to settle 'out of court'. Whether this occurs will depend on many factors, including the need to hasten mineral extraction, the type of mine and the size and financial resources of mining companies.

A minimisation of transactions costs will only occur with a degree of goodwill from all parties, including governments. The fact that negotiation will need to occur with corporate land-holding groups is potentially problematic, because there is always room for intra-group disagreement. On the other hand, given the High Court judgment, mechanisms have been established to facilitate negotiation and the system is to be funded largely by the Commonwealth: one only needs to consider the enormous financial costs that would eventuate, for both private sector interests and Australian taxpayers, in the absence of such statutory structures if all disputes ultimately needed to be adjudicated by the High Court.

There are already indications, evident in two very different agreements at Mt Todd and McArthur River, that where mining companies and indigenous interests are willing to negotiate, with governments mediating, positive outcomes for all parties can occur. While neither agreement was conducted under the *Native Title Act 1993*, indeed the Mt Todd Agreement was completed in January 1993, both are instructive because they were conducted in a political environment heavily influenced by the Mabo judgment and the Mt Todd agreement is especially important because it, in turn, appears to have influenced the drafting of the *Native Title Act 1993*.

The Mt Todd Agreement is a deed signed by the Northern Territory Government, a gold mining company Zapopan NL and the Jawoyn Association. The basis of the Agreement was a repeat claim (after the failure of an earlier claim) under the *Aboriginal Land Rights (Northern Territory) Act 1976* by the Jawoyn to an area known as Northern Territory portion 3469 and Jawoyn assertion of common law 'native title' to this same area. In exchange for Northern Territory title to this land (without any veto right), important financial and territorial concessions by the Northern Territory Government and a mining agreement with Zapopan, the Jawoyn agreed to withdraw the repeat claim and to surrender and extinguish any native title. Economic and land benefits from the Agreement to Jawoyn include Northern Territory Government request for

Commonwealth scheduling of additional land under the *Aboriginal Land Rights (Northern Territory) Act 1976*, a commitment to the development of Werenbun outstation, financial assistance with the development of tourism facilities at Eva Valley and increased annual rentals for Nitmiluk National Park (owned by Jawoyn). Zapopan has guaranteed employment opportunities, a bus service contract and education scholarships to the Jawoyn. A direct spinoff of the Mt Todd Agreement has been the establishment of the Mirrkworlk joint venture between the Henry and Walker Group (50 per cent), the ATSIC Commercial Development Corporation (25 per cent) and the Jawoyn Association (25 per cent). Mirrkworlk won the major tender to mine and transport 10 million cubic metres of ore and waste over a three-year period to the Zapopan mill. There are options for a third of the Mirrkworlk workforce to be Jawoyn (currently 25 per cent) and the Jawoyn Association has the option to buy out the Commercial Development Corporation share of the company.

More recently, in March 1994, a less favourable agreement was signed between the Commonwealth, the Northern Land Council (on behalf of Gurdanji, Yanyuwa and Mara people) and the Gurdanji-Bingbinga Corporation that will provide economic opportunities for Aboriginal people in the McArthur River region in exchange for the granting and validation of certain mining interests to Mt Isa Mines. In this agreement, local Aboriginal people accepted a package, funded almost exclusively by the Commonwealth, in exchange for unhampered go-ahead for the McArthur River mining project. Benefits to local Aboriginal people include the purchase for them of Bauhinia Downs pastoral station, a significant employment and training package to facilitate local employment in the mine and a financial package from ATSIC to develop the pastoral enterprise. As at Mt Todd, a joint venture company, Carpenteria Shipping Services, has been set up between the Commercial Development Corporation, Burns Philp and the Gurdanji-Bingbinga Corporation. McArthur River Mines awarded the contract to barge silver, zinc and lead concentrates over a ten-year period to Carpenteria. There are options for up to 50 per cent of the company workforce to be Aboriginal and guaranteed training opportunities with Burns Philp.

These two agreements have been quite different with the McArthur River agreement being somewhat more contentious, partly owing to diverse regional Aboriginal views, with more prolonged negotiation than at Mt Todd. The McArthur River Agreement is also inferior because neither the Northern Territory Government nor the mining company, Mt Isa Mines, are signatories; indeed delays in the agreement resulted in lost opportunities that were to be financed by both. Furthermore, local people have not withdrawn native title claims to offshore islands. In these two agreements positive outcomes have resulted for miners and Aboriginal interests, with limited net cost to government. The economic impact of both agreements for Aboriginal people and mining companies will require

future assessment: certainly there are early indications that it might prove cost-effective for mining companies to recruit staff locally and to let contracts to competitive joint venturers with Commercial Development Corporation and regional Aboriginal equity.

Aboriginal interests appear to be increasingly recognising that land alone will not result in regional economic development: capital and human capital is also needed. A new form of joint venture with indigenous equity participation, employment and training opportunities and buy-back options is evolving. Ultimately it appears that when both parties are willing to move from confrontation to consultation to negotiation, positive outcomes will eventuate. Importantly, the absence of automatic royalty-equivalent payments under both agreements and the *Native Title Act 1993* framework appears to be encouraging a more active Aboriginal involvement in resource development projects. There is also a growing Aboriginal recognition that the payment of royalty equivalents to incorporated bodies in areas affected by mining will often result in excessive regional politicking for these mining moneys, with a concomitant lack of attention to longer-term economic opportunities and an inability to accumulate venture capital for investment.

Native title: some wider implementation issues

In implementing native title legislation, there are lessons to be learnt from the Northern Territory experience. An important part of the *Native Title Act 1993* that itself may have limited relevance in the Northern Territory is the establishment of a National Aboriginal and Torres Strait Islander Land Fund that will be used to purchase land for those whose native title has been totally extinguished; pastoral lands purchased will be convertible to native title in much the same way as Aboriginal-owned stations in the Northern Territory can be claimed under s.50 of the *Aboriginal Land Rights (Northern Territory) Act 1976*.[7] The operations of the ABTA in particular (but also ATSIC's land acquisition program recently reviewed by the Office of Evaluation and Audit 1992) will be of interest here. In particular, there are indications that the ABTA has had enormous difficulty in accumulating sufficient reserves to establish a sustainable capital base. If accumulation is an objective then it will be necessary to incorporate a savings ratio in statute as was recommended for the ABTA in 1984 (Altman 1985) and as occurred after amendment to the New South Wales *Aboriginal Land Rights Act 1983* in 1986.

The pressure to purchase land will remain a priority now that the National Aboriginal and Torres Strait Islander Land Fund is established, but consideration has to be given to the resources needed to develop the land, an issue highlighted by ATSIC's Office of Evaluation and Audit and one that has also hampered the ABTA when it has purchased pastoral properties. There may be merit in the Commonwealth separately

earmarking resources for land purchases and adequate resources for land development in its social justice package. The ATSIC Commercial Development Corporation provides an appropriate conduit to facilitate commercial joint ventures on land owned by indigenous Australians. Quarantining of resources could provide the means to finance indigenous equity stakes in development.[8] The fact that the two post-Mabo mining agreements at Mt Todd and McArthur River do not include even partial royalty equivalent payments to Aboriginal people suggests that active Aboriginal participation in resource development projects (as joint venturers, employees or contractors) might supersede a more passive 'rentier' role evident in all mining agreements signed since passage of the *Aboriginal Land Rights (Northern Territory) Act 1976*. A key difference in recent joint ventures is that Aboriginal interests hold significant equity stakes and matching representation on boards of management.

It has been suggested above that the *Native Title Act 1993* provides a conducive institutional framework to facilitate negotiations between mining interests and native title holders. At times, a view is expressed that delays in negotiations will result in an economic cost to governments, in terms of jobs and revenue forgone, if minerals remain unexploited (Centre for International Economics 1993). This argument is not persuasive: from the governmental perspective, minerals left in the ground are not necessarily forgone. Indeed, risk associated with unwillingness to negotiate is greatest for mining and indigenous interests. Continual delays in exploration and mining will result in losses for mining companies. The political risk for indigenous interests is that an unwillingness to negotiate will see the loss of the exploration veto right (stipulated in the *Aboriginal Land Rights (Northern Territory) Act 1976*) or the loss of negotiation rights (currently guaranteed by the *Native Title Act 1993*). There is a need to carefully balance veto or negotiation rights as commercial leverage with wider perceptions of potential transactions and associated costs.

Conclusion

In a paper titled 'Economic implications of native title: dead end or way forward?' (Altman 1994), it was suggested that we will not see an automatic economic takeoff of the indigenous sector Australia-wide because of native title legislation. Land alone has a limited ability to guarantee economic development: capital accumulation and entrepreneurial expertise will also be needed to allow the development of the indigenous land base. In this paper, in a specific regional context, it is argued that leverage opportunities provided by the *Aboriginal Land Rights (Northern Territory) Act 1976*, and now the *Native Title Act 1993*, have the capacity to create regional development options for Aboriginal people.

Such views have been expressed in the past. But the fundamental difference in the mid-1990s is that some economic lessons, from both past failures

and successes have been absorbed. It is increasingly recognised by Aboriginal interests that the payment of mining royalty equivalents alone will not guarantee economic development or longer-term economic benefit. The critical path to economic gain will occur via active indigenous participation, as significant stakeholders, in resource development. To a great extent, the *Native Title Act 1993* with its absence of a direct nexus with statutory royalties, provides a strong signal to take such a route. Equity participation in resource development projects might not only provide the means to dismiss the negative stereotype that indigenous people are anti-development, but it might also demonstrate that given real opportunities for participation, indigenous people will be pro-development. The policy implications to government of this option are that appropriate mechanisms are needed to allow maximum capital accumulation for investment and to facilitate commercial joint ventures on land owned, either by statute or in common law, by indigenous Australians.

Notes

1. The term Aboriginal is used here in the Northern Territory context, rather than the terms indigenous or Aboriginal and Torres Strait Islander, because most of the issues raised relate specifically to Aboriginal Australians.

2. For definitions of sections of the *Aboriginal Land Rights (Northern Territory) Act 1976* and other technical terms see the glossary below.

3. This possibility is being raised in part in the case *Newcrest Mining (WA) Limited versus the Commonwealth* (on appeal from the Federal Court) seeking compensation from the Commonwealth in relation to the ban on mining at Coronation Hill. More recently, on 9 May 1994, the Northern Territory Government lodged a writ in the High Court challenging the constitutional validity of the *Aboriginal Land Rights (Northern Territory) Act 1976* ('Perron takes land veto battle to High Court', *The Australian*, 9 May 1994).

4. This is a complex issue. From the Aboriginal perspective, disjunctive agreements are preferable because they provide greater negotiation leverage at the mining stage. From the miners' perspective, conjunctive agreements are preferable because once successful exploration has been financed, it is unacceptable for mining go-ahead to be denied.

5. If the appeal (*Janice Pareroultja and others versus Robert Tickner, Kumanara Breadon and Max Stuart*) before the High Court on 13 April 1994 had been successful, the *Native Title Act 1993* might have overruled the *Aboriginal Land Rights (Northern Territory) Act 1976* in whole or in part. The High Court, however, refused to consider the appeal.

6. The Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs has the capacity to exclude certain types of exploration from the right to negotiate. This would allow State and Territory Governments to grant 'low impact' exploration rights to mining companies. To date, no arrangements have been announced with any State or Territory, and Western Australia has responded negatively to Commonwealth overtures to consider this option.

7. In debate in the Senate on 16 December 1993, Senator Evans indicated in response to a question from Senator Tambling that the National Aboriginal and Torres Strait Islander Land Fund would not be used to purchase pastoral stations in the Northern Territory that could then be converted to inalienable title under

the *Aboriginal Land Rights (Northern Territory) Act 1976*. However, the Fund could be used to purchase stations that could be converted to native title. The difference will be that the right of veto exists under inalienable title, but not under native title.

8. Noel Pearson, Director, Cape York Land Council made a case, at a recent Australian Petroleum Association Conference, for the establishment of an equity bank to facilitate Aboriginal access to capital for joint ventures with resource companies wanting to explore and mine on Aboriginal land (see 'Equity bank answer for Aborigines', *The Australian*, 23 March 1994).

Glossary of terms used in the *Aboriginal Land Rights (Northern Territory) Act 1976*

ABTF: The Aborigines Benefits Trust Fund, established in 1952. Operated from 1969-1978. Made grants and loans to Aboriginal organisations and individuals. Controlled by the Welfare Branch of the Northern Territory Administration.

ABTA: The Aboriginals Benefit Trust Account. Established in 1977, started operating from 1 July 1978, inheriting the assets and liabilities (including policies and practices) of the ABTF. Primarily a clearing house of royalty equivalents.

Royalty equivalents: Payments made from consolidated revenue equivalent to royalties raised on Aboriginal land. Up until January 1990 royalty equivalents were not really equivalents because of a difference between Northern Territory and pre-self government (Mining Ordinance) royalty regimes. This anomaly has now been removed, except in the case of uranium.

S.64(1) payments: Payments made by the ABTA to Aboriginal land councils, statutory bodies with specified functions. Land councils receive a minimum 40 per cent of mining royalty equivalent receipts of the ABTA. Their budgets are approved by the federal Minister for Aboriginal Affairs. From 1979-80 to 1992-93, the approved budgets of land councils regularly exceeded amounts available under s.64(1) and supplementary payments under s.64(7) were needed. There are currently four land councils, the Northern, Central, Tiwi and Anindilyakwa Land Councils that receive a minimum 22 per cent, 15 per cent, 2 per cent and 1 per cent of ABTA royalty equivalent receipts respectively.

S.64(3) payments: Often referred to as areas affected moneys. Thirty per cent of royalty equivalent receipts of the ABTA paid with respect to any particular resource development project are paid to the land council in whose jurisdiction the project is being undertaken. Under s.35(2) of the Act, these moneys have to be paid, within six months, to Aboriginal Councils whose areas are either in whole or in part in (undefined) areas affected; or to any incorporated Aboriginal Association the members of which live in (but need not be traditional owners of) or are traditional owners of (but need not live in) areas affected (still undefined).

S.64(4) grants: Amounts paid out of the ABTA to be used to or for the benefit of Aboriginal people living in the Northern Territory. The amounts to be paid out of the ABTA under this section are determined by the Minister for Aboriginal and Torres Strait Islander Affairs and are totally discretionary. Purposes for which they are to be applied are recommended by an Aboriginal Advisory Committee and approved by the Minister or his delegate (currently the Northern Territory 'State' manager of ATSIC). Mr Justice Woodward recommended that these grants account for 30 per cent of the ABTA's royalty (now equivalent) receipts, but such a formula was never included in the Act.

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