

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

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The recognition of native title in the High Court's Mabo decision in 1992, the Commonwealth Native Title Act in 1993, and the Wik decision in 1996 have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

Payment of compensation for mining on Aboriginal land has occurred for over two decades under the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA). Such compensation has similarities to payments that are made under the future acts regime of the Native Title Act 1993 (NTA). This paper provides historical background to issues of compensation; explains the mining moneys and compensation regimes in the ALRA; evaluates whether ALRA precedents have been incorporated in the NTA; and discusses principles for effective and fair compensation for native title and practical implementation issues in the assessment of such compensation. This is the first of a group of papers focussing on compensation issues.

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COMPENSATION FOR NATIVE TITLE: LAND RIGHTS LESSONS FOR AN EFFECTIVE AND FAIR REGIME

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Compensation issues under the *Native Title Act 1993* (NTA) are not new. There is already considerable debate in the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) literature about compensation which generally focuses, in NTA parlance, on 'permissible

future acts' and in the ALRA on mining on Aboriginal-owned land. This paper traces the history of the compensation issue from the early 1950s. It will focus on policy and

empirical, rather than legal, precedent and will use a property rights framework to help clarify enormous confusion in this area. The discussion focuses on major resource development projects (rather than exploration activity), because major impacts on land or native title rights with consequent just terms compensation is most likely in such scenarios. Such projects, however, are only one of many potential future acts.

The ALRA and NTA frameworks have more similarities than differences. Both have a tradeable property right, which can be provided quickly with the right commercial inducements. This right is probably less valuable under the NTA than the ALRA. Both provide recourse to arbitration, and at this time the potential for trade declines and eventually disappears. But in arbitration there is a requirement to tangibly and transparently assess compensation according to stipulated statutory guidelines. In both the ALRA and the NTA there are no precedents for determined compensation.

The issue of compensation has often been based on ad hoc and confused objectives. Furthermore, since the concept of paying Aboriginal people compensation based on royalties was introduced in the early 1950s there has been considerable change in microeconomic understanding about the implications of differing royalty regimes and appropriate bases for paying compensation.

Critical ambiguities exist in this area of policy and hence in practical implementation of compensation regimes. In particular, mining payments to regional indigenous interests are very often confused with compensation, and the compensatory components of payments are rarely differentiated from the non-compensatory commercial payments. These problems have a long history in the land rights arena in the Northern Territory that are being addressed yet again in the current review of the ALRA. Many of these policy legacies have been replicated in the NTA and, unless understood and addressed soon, they will bedevil the financial operations of the NTA in much the same way as they have the ALRA.

The aims of this paper are threefold:

- to explain the mining moneys and compensation regimes in the ALRA, providing examples from some major resource development agreements in the Northern Territory (NT);
- to briefly evaluate whether ALRA precedents have been incorporated in the right to negotiate (RTN) processes in the NTA, with reference to the Century Mine Agreement; and
- to discuss principles that need to be incorporated in any compensation framework for native title and to highlight practical implementation issues.

Some historical antecedents

It is easy, with the benefit of hindsight, to see fault with enlightened Liberal Party policy in the early 1950s, when the issue of compensation to indigenous

Australians first emerged. In 1951, there was a government proposal to mine bauxite on the Wessel Islands within the Arnhem Land reserve at a time when entry onto reserves was prohibited. The Minister for Territories Paul Hasluck initially opposed this proposal and then provided an ingenious trade-off. If the national interest required mining on Aboriginal reserves, then this could proceed on two conditions. First, statutory royalties (payments by miners to government for extracting minerals owned by the Crown) would be doubled. Second, this entire double royalty would be reserved exclusively for Aboriginal interests. However, from the outset the policy intent was confused:

- the double royalty (at 2.5% ad valorem) was primarily intended as a disincentive to marginal developments on lands reserved for Aboriginal people (we now know that it is not ad valorem royalties that will determine a mine's overall viability); and
- the payment of the double royalty to the Aborigines (Benefits from Mining) Trust Fund (ABTF) did not clearly stipulate that those affected by mining should benefit (or be compensated for loss of access to reserved lands).

Bauxite was never mined in the Wessel Islands because the deposits were not commercially viable. Nevertheless, statutory and policy precedents were established that continue to have ramifications today: the Aborigines and Mining Ordinances were amended allowing mining on Aboriginal reserves; the ABTF was created; and the principle of earmarking statutory royalties as a potential resource for Aboriginal benefit was established.

Two major resource developments occurred under this regime, both introducing additional ambiguity. A large manganese mine was established on Groote Eylandt in 1965; the mining company Gemco paid the double royalty to the Commonwealth (paid to the ABTF), but also paid an additional 1.25% royalty to the Church Missionary Society. These moneys were paid into a trust, the Groote Eylandt Aboriginal Trust (GEAT), established to benefit all Groote Eylandt Aboriginal people (irrespective of direct mine ownership or impact). In 1968, an agreement between the Commonwealth and Nabalco for bauxite mining at Gove was immediately challenged in the NT Supreme Court. The Aboriginal plaintiffs lost in 1971 and the mine proceeded. Initially the royalty rate was set at a special output-based rate worth less than 1% ad valorem and there was no mention of loss of lands or social impact on Aboriginal people residing at Yirrkala. This was counter to specific recommendations for direct compensation made by a House of Representatives Select Committee in 1963 with respect to an earlier proposal to mine at Gove. It was only in 1971, after the Gove case, that Cabinet decided to earmark 10% of the ABTF income from Nabalco for the immediate use of Yirrkala people. A year later 10% of Gemco statutory royalties paid to the ABTF were similarly earmarked for the GEAT.

The pre-land rights context can be summarised as initially well-intentioned and relatively generous, but a poorly formulated policy that paid little attention to

issues of impact. In compensation terms, the Crown levied a double statutory royalty on developers that it reserved for Aboriginal people on their behalf: hence, private deals aside, 'compensation' was provided 50/50 by the state (in foregone royalty income) and the developer. These payments were only broadly compensatory rather than specifically focused on providing recompense to those directly or indirectly affected. The basis for calculating these payments was the value of minerals rather than on any evaluation of the extent of physical, economic, social or cultural damage. From the outset, however, this was termed 'compensation'.

From reserved lands to land ownership

Mr Justice Woodward was appointed to head the Aboriginal Land Rights Commission in February 1973. While Woodward is perceived as the doyen of the land rights movement, the compensation regime he recommended has ambiguities and shortcomings. In terms of property rights, Woodward recommended that appropriately-determined Aboriginal people be vested with corporate land ownership, but that as with most other Australian land owners, this land ownership should not extend to sub-surface minerals. However, Woodward did recommend that Aboriginal land owners be able to veto exploration (but not mining) on their land. In the ALRA this gave Aboriginal interests what is now referred to as a de facto (rather than de jure) mineral right: they cannot trade the minerals but they can trade the right of access, national interest provisions aside.

Woodward's recommendations not only differentiated land ownership from mineral ownership but also provided a mechanism to fund land councils independently of government. He recommended an admittedly arbitrary formula whereby statutory royalties (then still at the double rate) from each resource development project would be divided as follows: 30% to communities of traditional owners and others affected (geographically defined); 40% to land councils; and the balance to, or for, the benefit of all Aboriginal people in the NT.

The intent of these three categories of payments can be variably interpreted. The 30% to areas affected was clearly intended to be directly compensatory. Woodward proposed that these moneys would go to communities and not to individual land owners; provided these moneys were spent on community purposes they would be 'compensation for disturbance'. In marked contrast, Woodward recommended that statutory permit or licence fees (that is exploration licence or mining tenement payments) should 'go to the clans, for equal distribution among adult clan members, as a recognition of clan ownership of the area' (Woodward 1974: 111), as compensation for land disturbance. The proposed payment of 40% to land councils could be regarded as broadly compensatory as these moneys could be used to fund additional land claims. The remaining 30% was again broadly compensatory.

Woodward's formula was incorporated in the ALRA, with complicating modifications. The spatial definition of areas affected which he recommended was

not included in the Act and immediately tension arose between the de facto mineral right of those required to consent to development (traditional owners) and others socially affected by the development. Similarly, there was no clear stipulation about how direct compensation payments should be used and no requirement that they be earmarked for communities, with incorporated groups also being potential beneficiaries. This imprecision has all too often resulted in regional disputation (see Altman 1997). The ALRA also provided for additional payments beyond statutory royalties equivalents in negotiations to consent. All post-land rights mining agreements have included such additional payments (as an ad valorem calculation, as a flat rental payment or as a rental calculated with reference to area of land used) to beneficiaries, defined precisely or imprecisely in agreements.

From the perspective of those in the general vicinity of a resource development project at least four forms of compensatory payments are possible under the ALRA:

- access to a share (30%) of royalty equivalents;
- access to statutory permit and licence fees (reserved for traditional owners who may or may not live in the mine's immediate vicinity);
- access to negotiated agreement payments of cash, employment, training or housing, and payable to anyone stipulated in the agreement irrespective of residence location; and
- access to statutory royalty equivalents granted by the Aboriginals Benefit Trust Account (now called the Aboriginals Benefit Reserve or ABR) to benefit Aboriginal people in the NT.

These financial flows can be variably interpreted in the following four ways:

- as compensation paid as a highly variable share of royalties and other benefits;
- as a share of mineral rent, or as a means to profit share with the resource developer and government;
- as a convenient mechanism to transfer resources from Commonwealth consolidated revenue to Aboriginal interests; and
- as some combination of the above.

Having such a multi-faceted compensation package is not unusual in the international context. What is unusual in the Australian land rights context is that there is no explicit reference to what payments are intended for what purpose, areas affected are never well defined, intended beneficiaries are rarely comprehensively listed and beneficial agreements are rarely adequately monitored to ensure compliance.

A problematic compensation regime

Sometimes it is overlooked that the compensation regime in the ALRA is intended to ameliorate the negative impacts of mining. The possibility that mining may

have a positive impact in terms of access to amenities, employment options and enterprise opportunities is rarely countenanced in negotiations and, if it is, there is never a suggestion that those who benefit should compensate the provider on some user-benefits basis. Having said that, the empirical evidence suggests that the mechanisms available in the ALRA to provide compensation to people who are either owners of land directly affected or who are economically, socially or culturally impacted upon by resource development projects are ineffective. The following five issues, many of which can be presented as dilemmas, are apparent.

First the negotiable basis of agreements means that there is enormous variability in mining payments. For example, members of the GEAT receive over 3% ad valorem in contrast to those in the Kakadu region who only receive 1.3% of Ranger royalties. Such inconsistency has created regional resentment about the 70% of royalty equivalents earmarked for land councils and the ABR. Some have queried, for example, why people residing in areas affected should be taxed 40% to meet the administrative expenses of land councils, Commonwealth statutory authorities that could legitimately be funded directly from consolidated revenue.

Second, there has been considerable debate over whether mining moneys paid to those affected are public or private moneys. The key issue is that public moneys require regular accountability to government while private moneys do not, but do require regional accountability. Most fiscal flows to areas affected include agreement payments negotiated with the resource developer which are arguably private, and statutory royalty equivalents which are arguably public. In assessing the financial performance of so-called 'royalty associations' it is usually impossible to differentiate these two types of money in financial accounts.

Third, traditional owners argue that all mining moneys are private and that they should not be accountable for their expenditure any more than other (non-indigenous) land owners receiving compensation payments. While such a perspective can be persuasive, there are no guarantees in the ALRA that traditional owners will receive any compensation, especially if they reside outside areas affected (although they might receive a share of lease and licence payments). Conversely in the Gove region there are disputes about internal accountability: compensatory payments are technically public (being in the form of a share of royalty equivalents), but there are concerns that traditional owners receive a disproportionate share and some residents receive nothing (Martin 1995). This raises an important issue for compensation: just how far does an impact spread?

Fourth, there is tension in the ALRA between the policy intent and statutory provision of a right to veto development on Aboriginal land and the desire to provide an incentive structure that will encourage traditional owners to trade away this veto. Consequently, the provisions for a Mining Commissioner to arbitrate and assess compensation payments at exploration, or fair and reasonable terms and conditions at mining, have never been used because all the signals for miners and for Aboriginal interests are to negotiate direct.

Finally, there is little transparency either in the activities of regional incorporated organisations that receive compensation payments or in the financial relations that governments have with them. A fundamental issue is that compensatory payments are meant to be supplementary to the normal entitlements of Aboriginal people in areas affected as Australian citizens. However, there are indications that these payments were intended to be, and have been, fiscal substitutes for legitimate government expenditure. This suggests that there may be no net financial benefit from mining to offset negative impacts. Aboriginal regional interests may have unstrategically used compensation payments to finance services that government would have provided anyway, or governments may have used mining as an excuse not to meet their obligations (Kakadu Region Social Impact Study 1997). Concern remains that many so called 'royalty associations' have neither objectives nor actions that effectively ameliorate the negative impacts of mining, nor appropriate checks and balances to their membership (see Altman 1997).

Compensation and the future acts regime

Compensation payments under the NTA future acts regime have fundamental similarities and differences with the ALRA. Because the RTN is a weaker form of property than the consent provisions in the ALRA it might not have the commercial worth of the veto. The key differences between the two regimes are:

- native title parties (NTPs) are not provided automatic access to royalties raised on their land (if determined), unlike the access of people in areas affected under the ALRA to 30% of royalty equivalents and the access of traditional owners to statutory lease and licence payments. In the ALRA there is a bottom line which is potentially much lower in the NTA;
- under the NTA, negotiated mining payments are reserved for NTPs (including registered claimants). Native title representative bodies are not funded from these payments and there is no State-wide distribution of such moneys as from statutory royalty equivalents in the NT; and
- under the NTA all negotiated payments are earmarked for NTPs in contrast to a share of statutory royalty equivalents to residents of areas affected in the ALRA. In a sense, negotiated payments in the NTA represent more of a mineral rental than a compensation payment, but this changes completely in arbitration.

Interestingly, both the ALRA and the NTA allow open-ended negotiations about terms and conditions for a time, but then have arbitration provisions that in the case of the NTA do not allow reference to the value or profitability of the mine by the arbitral body (although significant rental-type payments as in the Queensland Mines Nabarlek Agreement may be possible) (Altman 1983). In both, an incentive structure is provided to indigenous interests to hasten deal making, but the opposite perverse signal is provided to resource developers and governments (unless an early determined compensation clearly exceeds a negotiated outcome). In the NTA, this incentive for NTPs is strengthened by the fact that in negotiated

outcomes claimants can maintain access to mining payments even if subsequently not determined to be native title holders. However, in arbitration, such payments are held in trust until after determination and are not payable to unsuccessful claimants whether impacted on or not.

At present, the RTN is disjunctive in much the same way as consent provisions were disjunctive prior to the amendment of the ALRA in 1987. Proposed amendments to the NTA in the ten-point plan will make the RTN once-only and hence conjunctive. Already in Western Australia where mining leases are issued for exploration purposes, all future act financial negotiations must be agreed at the exploration stage unless, presumably, a bilateral voluntary agreement specified otherwise. In arbitration of such cases a compensation determination could be made for both exploration and mining prior to the discovery of a viable deposit, hardly a sound basis for assessing compensation. However, in both the NTA and the ALRA a compensable interest requirement means that 'just terms compensation' must be provided as stipulated in mining laws for other land owners, although in the ALRA such compensation would be on top of royalty equivalents. However, what constitutes the common law principles of native title in various States is an entirely new area for consideration (see Altman and Pollack 1998).

The only very public resource development agreement negotiated under provisions of the NTA is the Century Mine Agreement. Its financial and other compensatory provisions are purported to be confidential, although they have received considerable media coverage. The compensation package include the following which are to be provided by both the company and the Queensland Government:

- direct cash payments to the Gulf Aboriginal Development Corporation (GADC) to be distributed to native title negotiating parties for actual compulsory acquisition of the Century to Karumba pipeline corridor and port facilities;
- compensation for a bulk sampling pit in the form of cash and offsetting land grants and licences to occupy;
- cash payments to NTPs that are unrelated to any direct impacts;
- provision of enterprise funds and employment and training opportunities to 'local' Aboriginal community members (local being regionally-defined but excluding Mt Isa) and members of registered native title claimant groups irrespective of current residence location; and
- provision of roads, infrastructure and a range of community services by the Queensland Government (valued at \$30 million) many of which are arguably provision of normal services to indigenous communities (as well as non-indigenous beneficiaries and the Century project itself) in a remote and historically neglected region.

This agreement replicates many ambiguities evident in the ALRA 'compensation' regime: direct payments are made via the GADC to land owners (irrespective of

residence); there is little correlation between social impact and compensation; there is government substitution funding under the guise of compensation; and it is unclear how much of the company's contribution will generate spinoffs for the company as well as indigenous employees. What is perhaps different and innovative in this case is that the GADC (a regional organisation) is created by the Century Mine Agreement to directly represent the interests of agreement beneficiaries (people affected?). This organisation represents a larger group and region than most ALRA-induced 'royalty' associations. It is not a representative body and it is potentially more likely to be accountable to agreement beneficiaries because it directly represents their interests. Time will tell how effectively this new institution functions in the Century post-agreement phase.

Conclusion

It is clear that the compensation regime in the NTA framework is suboptimal. The reasons for this include the weakness of the RTN as a form of property; the positive legislative intent to ensure equal treatment of NTPs and other Australians (via the compensable interest test); and statutory inconsistency resulting from political expediency and too much compromise in fine-tuning the initial Native Title Bill. What is daunting is that shortcomings have existed in the ALRA's compensation regime for some twenty years, yet there has been little concerted effort to amend this earlier statute appropriately. A fundamental dilemma, then, is how to work within a highly imperfect statutory regime? In particular:

- How can native title rights and interests that are potentially affected by a future act be documented?
- How can social impacts be documented, especially in the absence of baseline data?
- How can other impacts be documented?
- How can these impacts, if negative, be valued in monetary or other terms? and
- How should the appropriate beneficiaries of compensation be defined?

It will be crucial for policy makers and those engaged in practical implementation to understand the principles that underpin compensation regimes (that compensation is provided for loss or damage) and the ambiguity in the statute. It is likely that States and Territories will develop their own future act regimes and use existing mining law to assess compensation. Such provisions are very different from the open-ended mining payments that can result from commercial negotiations in the NTA prior to arbitration or court action.

It is instructive to examine some of the mine-specific agreements that have been negotiated overseas. In Papua New Guinea, recent agreements completed at mines like Porgera (Banks 1996) clearly differentiate direct compensation payments (usually for loss of lands and livelihood) that are rigorously assessed to agreed formulae from other mine-related payments for relocation or economic development. Lessons have been learnt from the Bougainville experience.

Agreements must not only be fair in principle, but outcomes must be effective from the perspective of those people impacted upon.

In Australia, those representing indigenous interests continually strive for higher compensatory benchmarks, but there is a failure at all levels (governmental, indigenous representative and regional) to ensure appropriate compensatory outcomes. At present, there is also inadequate documentation and supporting evidence on the nature of impacts on native title that might require compensation. This might be partly because of a preoccupation with legal processes and insufficient attention to intended outcomes. There is also a lack of rigour in differentiating and defining inter-related economic, social and cultural components of loss experienced by indigenous land owners and affected communities (rarely as distinct entities). There is certainly a failure to learn from domestic and international precedent and to transport these across State or national borders, as indicated by the brief description of the Century Mine Agreement above.

Native title parties must be prepared to enter a very fraught arena where they may be required to not only translate their culture to courts, lawyers, mining companies and governments, but also to place a value on loss or damage to this culture. What value should be placed on native title? And when compensation is received how should it be managed and distributed so as to ensure effective outcomes and minimise the social impact of contestation over mining moneys?

Finding the appropriate balance between working within a highly imperfect framework and striving to change that framework will not be easy. It is similarly difficult to find the right balance between national native title aspirations and regional concerns about limiting the impacts of a major resource development project or ensuring adequate economic benefit to disadvantaged indigenous stakeholders. Ultimately, getting the appropriate compensatory framework is important, and working within the existing law is unavoidable. It is important for policy makers and representative organisations to strike the appropriate trade-offs in ensuring effective and fair compensation regimes. In particular, it is important to get appropriate checks and balances and guarantees enshrined in legally-binding agreements, to monitor these agreements and to set up workable and accountable regional structures.

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