ABORIGINAL LAND RIGHTS AND MINERAL EXPLOITATION IN AUSTRALIA

by

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ABSTRACT

The paper reviews the development of the concept of native title and its application up to the passing of the Native Title Act Amendments 1997. The history of native title prior to the Native Title Act 1993 is briefly outlined, and the main provisions of the Act are discussed. The operation of the right to negotiate process under the Act is then reviewed, and the application of the Act to pastoral leases discussed. The record of success and failure of negotiation to resolve questions of access to mineral resources is then considered. The structure of property rights to mineral resources in Australia is briefly described, and conditions favouring an efficient outcome to bargaining between mining companies and native title claimants are analyzed. Some studies of the effect of native title on the development of the mining industry are briefly reviewed, and it is concluded that there is so far no evidence of any adverse effect.

1. INTRODUCTION

When Australia was annexed by the Crown it was believed that its lands were automatically vested in the Crown, free of any pre-existing title. This belief was based on the view that when Englishmen settled in unoccupied territory they automatically carried English law, including property law, with them. Unoccupied territory, termed *terra nullius*, meant either uninhabited territory or land not occupied by people with settled laws or customs. At the time of English settlement, Australia was certainly inhabited; Butlin (1993) estimates the indigenous population in 1788 to have been just under one million. Recent legal cases have established that Aboriginal traditional laws and customs were a system of laws (see Section 2 for a discussion of the Gove 1971 legal case), and that interests in land, held by virtue of occupation prior to European settlement, and not extinguished by a legal act of government, continue to survive (see below for a discussion of the Mabo cases).

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1 I wish to thank the members of the postgraduate natural resource economics seminar, 1998, for their significant contributions to this paper and colleagues who commented on earlier drafts and contributed to the bibliography.
The concept of *terra nullius* arose because Aborigines had a nomadic non-agrarian culture which was not properly understood by Europeans coming from an agrarian culture based on occupation and exploitation of land. It was not a unique concept in colonized lands, although it survived longer in Australia than elsewhere. *Terra nullius* was rejected in the United States (1832) and New Zealand (1847), and aboriginal land rights are recognized in various countries such as the United States, Canada, Sweden, Russia and Japan.

The end of the concept of *terra nullius* in Australia was occasioned by the two Mabo cases in the last two decades of the twentieth century, although the history of land rights cases in Australia goes back to at least thirty years earlier. The first Mabo case, which was launched in 1982, sought legal recognition of common law title to land in the Murray Islands in the Torres Strait and a review of *terra nullius*. The Queensland Government sought to extinguish any native title that might have existed (Queensland Coast Islands Declaratory Act 1985), but in Mabo (1) it was found that this Act contravened the Commonwealth 1975 Racial Discrimination Act. In Mabo (2) (1992) the High Court found that Australia was not *terra nullius* at the time of occupation and that native title survived the Crown’s acquisition of sovereignty, although it could be extinguished by valid acts of government. The federal government response to Mabo (2) was the 1993 Native Title Act.

2. **ABORIGINAL LAND RIGHTS PRIOR TO THE NATIVE TITLE ACT**

In 1963 the Milirripun people launched a law suit against Nabalco which was mining bauxite on Gove Peninsula. The case was settled in 1971 with the concept of native title being rejected. However Aboriginal traditional laws and customs were recognized as a system of laws.

The Commonwealth government response to the Gove decision was the Aboriginal Land Rights Act, 1976. The Aboriginal Land Rights Act transferred all Aboriginal reserves in the Northern Territory (about 15% of the land area) to Aborigines as inalienable freehold land, and established a claim process for other areas of unalienated Crown land within the Northern Territory. It provided Aboriginal groups with the right to veto mining activity on their land. The veto can be withdrawn in exchange for payment in cash or kind, or maintained if damage to sacred sites or social cohesion is likely to be severe. Under the Act the
Aboriginal Land Councils negotiate with the mining companies on behalf of the indigenous land owners. The Act provided funds for traditional owners and community projects in two ways: a 2.5% *ad valorem* royalty on minerals produced from aboriginal land was to be administered by the Commonwealth government, and paid into a trust account for the benefit of Aborigines, with 30% of the funds going to residents in the area of the development, and the balance used to improve the economic status of all Northern Territory Aborigines (often by financing land rights claims); and the traditional landowners could negotiate additional payments in excess of the 2.5% royalty. These additional royalties varied from 0 – 2% (Altman and Peterson (1984), p. 46).

In 1980 the Commonwealth government transferred responsibility for mining rights to the Northern Territory and in 1987 the Aboriginal Land Rights Act was amended in three main ways. Veto power over mineral exploration was maintained, but no veto could be imposed at the mining stage and compensation would have to be negotiated. If agreement could not be reached on the terms and conditions of access, the matter would be referred to a tribunal. If the nature of the mining project changed (for example, from open-pit to underground as in the case of the Jabiluka uranium deposit) the access agreement could be re-negotiated. These amendments were a response to claims that the Aboriginal Land Rights Act had discouraged mineral exploration on Aboriginal land.

While the Aboriginal Land Rights Act was the most important piece of legislation in the period from 1963 until the Native Title Act 1993, a series of land rights Acts was enacted by the States, with the exception of Tasmania and Western Australia. Details are provided in Altman (1993). Some examples are the South Australia Pitjanjatjara Land Rights Act 1981, which provided outright grants to Aboriginal communities; a 1971 Queensland Act which instituted self management of some Aboriginal lands without conferring title; and the Northern Territory Aboriginal Sacred Sites Act 1989 which recognized cultural ownership of land.

The 1992 Mabo (2) decision reversed the decision in the Gove land rights case. It established that Native Title exists where Aborigines or Torres Strait Islanders have maintained their connection with the land, and title has not been extinguished by valid acts of Imperial, Colonial, State, Territory or Commonwealth government.
3. THE NATIVE TITLE ACT 1993

As noted above, the Native Title Act, which came into force on January 1st 1994, was a response to the Mabo decision. It had two main objectives: first, to provide for the validation of past acts of State and Commonwealth governments that may have been inconsistent with the existence of Native Title; and, second, to provide a framework for establishing Native Title claims and providing future access for developers to land subject to Native Title. With respect to the first objective, details are provided in Horrigan and Young (1997), but, in summary, Native Title was deemed to be extinguished where grants of freehold land had been made, partially extinguished where it was inconsistent with a grant of leasehold land, subordinated to the conditions of a mining lease for the period of the lease and any legitimate renewals, and likewise subordinated to the terms of any licence or permit for the period of the licence. In the case of mining leases, compensation was payable by the relevant government under the mining regime, and in other cases compensation was payable on just terms.

The second objective of the Act was to be achieved by the establishment of a National Native Title Tribunal to adjudicate land rights claims, and by providing a Right to Negotiate process for the allocation of rights to developers wishing to access land subject to Native Title. As of the end of August 1998 the National Native Title Tribunal had received 767 Native Title claims in all States and Territories, had rejected 13, and had settled two claims: a claim to a 110,000 hectare former mission station at Hopeville in eastern Cape York; and a claim to 125 hectares at Crescent Heads, NSW, which was settled by extinguishment of Native Title in return for compensation. Details of the numbers and status of claims by State and Territory are provided in Table 1.

Under the Right to Negotiate process the mining company approaches the State or Territory government for approval to undertake exploration or mining. The government then issues a Section 29 notice under the Native Title Act to notify all stakeholders, who have two months to respond. Negotiations then take place and if an outcome is not achieved in 4 months of negotiations, in the case of an exploration lease, or 6 months, in the case of a mining lease, negotiations can be referred to the National Native Title Tribunal for arbitration. The National Native Title Tribunal then has 4-6 months to make a determination, and the Commonwealth government subsequently has 2 months in which to over-rule all or part of the National Native Title Tribunal determination if it wishes. In principle, the maximum
delay to exploration or mining activity should be 12 – 16 months after the issuing of a Section 29 notice.

**Table 1: Native Title Claims Lodged with the National Native Title Tribunal**

<table>
<thead>
<tr>
<th></th>
<th>Australia</th>
<th>NSW/ACT</th>
<th>VIC</th>
<th>TAS</th>
<th>QLD</th>
<th>NT</th>
<th>SA</th>
<th>WA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Native title claims before the tribunal</td>
<td>664</td>
<td>99</td>
<td>24</td>
<td>-</td>
<td>197</td>
<td>31</td>
<td>27</td>
<td>286</td>
</tr>
<tr>
<td>Accepted for mediation</td>
<td>504</td>
<td>74</td>
<td>7</td>
<td>-</td>
<td>128</td>
<td>22</td>
<td>14</td>
<td>259</td>
</tr>
<tr>
<td>Not yet accepted</td>
<td>160</td>
<td>25</td>
<td>17</td>
<td>-</td>
<td>69</td>
<td>9</td>
<td>13</td>
<td>27</td>
</tr>
</tbody>
</table>

**In addition:**

| Claims referred to Federal Court | 28        | 3       | 1   | -   | 5   | 4  | 1  | 14 |
| Claims rejected by Tribunal       | 13        | 6       | 2   | 3^b | 2   | 0  | 0  | 0  |
| Claims withdrawn By applicants     | 61        | 5       | 2   | -   | 16  | 0  | 0  | 38 |
| Determinations of Native Title     | 2         | 1       | 0   | -   | 1   | 0  | 0  | 0  |

**Total claims lodged With the Tribunal Since January 1994** | 767       | 114     | 29  | 3   | 221 | 35 | 28 | 337|

Source: National Native Title Tribunal, 1998

a. Information current at 30/04/98

b. Tribunal’s rejection of one of these claims is on appeal to the Federal Court

The States and Territories most affected by Native Title are those with substantial areas of land under pastoral leases (54% of Queensland, 49% of the Northern Territory, and 37% of Western Australia), or as vacant Crown land (34% of Western Australia). These substantial areas of land may be subject to exploration or mining lease applications.

These three jurisdictions responded to the negotiation process in different ways. Western Australia first unsuccessfully challenged the Native Title Act in the High Court. It then issued a large number of Section 29 notices. The National Native Title Tribunal expended $2.32 million in dealing with 9948 exploration licence and mineral tenements applications in
Western Australia. Of these only 672 required further negotiations. However there were delays of up to 18 months in completing the process. In the period 1995-98, 2526 licenses were sought in Western Australia through the Right to Negotiate process, 2240 were granted, 224 were subject to objections and 62 were subject to negotiation. In the same period, 1508 applications from Western Australia went to the National Native Title Tribunal, with 300 granted and the remainder subject to negotiation.

Queensland generally refused to issue Section 29 notices, with an exception being made for Century Zinc, which was a high profile project. This policy imposed delays on the mining industry and led to frustration with the process. This approach was similar to that earlier adopted by the Northern Territory government under the Aboriginal Land Rights Act 1976. As of June 1986 only one exploration licence had been successfully negotiated under the Aboriginal Land Rights Act and there were 103 cases pending. In 1991 the Minister refused to issue a number of exploration licences after agreement had been reached between the mining companies and the Land Councils. In one case the Minister went to court to overturn an agreement which had been reached.

4. **NATIVE TITLE AND PASTORAL LEASES**

Following the Mabo case and the 1993 Native Title Act it was believed that the issuing of a pastoral lease extinguished native title; this view was unequivocally expressed by Prime Minister Keating at the time. Pastoral leases cover 38% of New South Wales, 51% of the Northern Territory, 55% of Queensland, 44% of South Australia, and 37% of Western Australia (note that 34% of Western Australia is vacant Crown land, whereas the percentage of vacant Crown land in the other States is no more than 6%). However, the High Court Wik decision of December 23rd, 1996 found that Native Title can co-exist with a pastoral lease.

The Wik and Tyayarre peoples made a claim for Native Title to land on Cape York Peninsula over which pastoral leases had been issued by the Queensland government. The Federal Court rejected the claim, taking the view that the issuing of a pastoral lease extinguished Native Title. However, the Wik people won their case on appeal to the High Court. The Wik judgement found that Native Title can only be extinguished by a written law or act of government with the intent to extinguish such title; the grant of pastoral leases, under the Queensland Land Acts of 1910 and 1962, did not show such an intent; Native Title can co-
exist with a pastoral lease, but, where they conflict with activities authorized by the terms of the pastoral lease, native title rights are subordinate.

Following the coming into force of the Native Title Act on January 1st 1994, the Queensland and Western Australian governments had issued mining leases on pastoral land without any reference to the Right to Negotiate process. Queensland had issued 4600 mining tenure leases, and Western Australia had issued 4900 mineral and petroleum tenements, 3355 of which were on pastoral leases, in the period up to the Wik decision. A consequence of the Wik decision was that all mining leases issued on pastoral land which had not followed the Right to Negotiate process were potentially invalid.

The Federal Government's response to the Wik decision was the Native Title Act Amendments 1997, referred to as the 10-point Plan. The main aim of the 10-point Plan was to reduce the cost of the uncertainty involved in the Right to Negotiate process. The time-frame for negotiation was to be reduced from around 20 to 8 months; there would be one negotiation per project; the claimants would be limited by a tougher registration test, and would be represented in the National Native Title Tribunal by a Native Title Representative; a six-year time limit would be placed on claims; and the proposal to exclude exploration activity from the negotiation process would make it easier for companies to gather information about mineral prospects. Narrowing the range of claimants and requiring a single representative at the National Native Title Tribunal would, however, pose problems for Aboriginal tradition where knowledge of sites is not universal and the rights of various groups overlap.

Table 2 details the original 10 points of the Plan and the extent to which each point survived the debate in the Senate. The main outcomes were: validation of acts or grants on non-vacant Crown land between passage of the Native Title Act and the Wik decision; exclusive tenures, such as freehold and agricultural leases specifying or implying exclusive possession, confirmation of extinguishment of native title on exclusive tenures; native title rights are extinguished for the term of a pastoral lease to the extent that these rights are inconsistent with those of the pastoralist; the definition of pastoral activities was broadened to include a range of primary production activities, such as farm-stay tourism, logging, and the taking of gravel, but not extending to mining or quarrying; and the registration test for claimants seeking the right to negotiate over mining activity on vacant Crown land was tightened,
<table>
<thead>
<tr>
<th>The original 10-point plan</th>
<th>What happened in the Senate</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Validation of grants between January 1, 1994, and December 23, 1996</strong>&lt;br&gt;Legislative action to ensure beyond doubt the validity of acts or grants on non-vacant Crown land between passage of the Native Title Act and the Wik decision.</td>
<td>✓ Accepted</td>
</tr>
<tr>
<td><strong>2. Confirmation of extinguishment of native title on 'exclusive' tenures</strong>&lt;br&gt;States and Territories would be able to confirm that 'exclusive' tenures such as freehold, residential, commercial and public works in existence on or before January 1, 1994, extinguish native title. Agricultural leases would also be covered if it could reasonably be said that because of the grant or the nature of the permitted use of the land, exclusive possession must have been intended. Any current or former pastoral lease conferring exclusive possession would also be included.</td>
<td>✓ Accepted, but ...&lt;br&gt;... Senator Brian Harradine amendment would suppress native title only for the term of a lease, and not extinguish it permanently.</td>
</tr>
<tr>
<td><strong>3. Provision of government services</strong>&lt;br&gt;Impediments to the provision of government services in relation to land on which native title may exist would be removed.</td>
<td>✓ Accepted</td>
</tr>
<tr>
<td><strong>4. Native title and pastoral leases</strong>&lt;br&gt;As provided in the Wik decision, native title rights over current or former pastoral leases and any agricultural leases not covered under item 2 (above) would be permanently extinguished to the extent that those rights are inconsistent with those of the pastoralist.</td>
<td>✓ Accepted, but ...&lt;br&gt;... with a qualification by Senator Brian Harradine that native title is suppressed rather than permanently wiped out.&lt;br&gt;✗ Senator Harradine narrowed the definition.</td>
</tr>
<tr>
<td><strong>5. Statutory access rights</strong>&lt;br&gt;Where registered claimants can demonstrate that they currently have physical access to pastoral lease land, their continued access will be legislatively confirmed until the native title claim is determined. This would not affect existing access rights established by State or Territory legislation.</td>
<td>✓ Accepted</td>
</tr>
<tr>
<td><strong>6. Future mining activity</strong>&lt;br&gt;- For mining on vacant Crown land there would be a higher registration test for claimants seeking the right to negotiate.&lt;br&gt;There would be no negotiations on exploration, and only one right to negotiate per project. As currently provided in the Native Title Act (NTA), States and Territories would be able to put in place alternate regimes with similar right to negotiate provisions.</td>
<td>✓ Accepted, but spiritual or traditional connection with the land accepted (see item 9)&lt;br&gt;✗ Rejected. The amendments would extend the right to negotiate to all renewals of existing and future mineral leases. This would bring many existing mines into the right to negotiate net.</td>
</tr>
</tbody>
</table>
7. **Future development and commercial development**

- On vacant Crown land outside towns and cities there would be a higher registration test to access the right to negotiate, but the right to negotiate would be removed in relation to the acquisition of native title rights for third parties for the purpose of government-type infrastructure. As currently provided in the NTA, States and Territories would be able to put in place alternate regimes with similar right to negotiate provisions.
- For compulsory acquisition of native title rights on other ‘non-exclusive’ tenures such as current or former pastoral leasehold land and national parks, the right to negotiate would continue to apply in a State or Territory ...
- ... unless and until that State or Territory provided a statutory regime acceptable to the Commonwealth which included procedural rights at least equivalent to other parties with an interest in the land (for example, the holder of the pastoral lease) and compensation which can take account of the nature of co-existing native title rights (where they are proven to exist).
- The right to negotiate would be removed in the acquisition of land for third parties in towns and cities, although native title holders would gain the same procedural and compensation rights as other landholders.
- Future actions for the management of any existing national park or forest reserve would be allowed.
- A regime to authorise activities such as the taking of timber or gravel on pastoral leases would be provided.

8. **Management of water resources and air space**

The ability of governments to regulate and manage surface and subsurface water, off-shore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.

9. **Management of claims**

In relation to new and existing native title claims, there would be a higher registration test to access the right to negotiate, amendments to speed up handling of claims, and measures to encourage the States to manage claims within their own systems.

Introduction of a sunset clause within which new claims would have to be made

10. **Agreements**

Measures would be introduced to facilitate voluntary but binding agreements as an alternative to more formal native title machinery.

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**Source:** The Minerex Report, December 1997
although a spiritual or traditional connection with the land was still sufficient. The significant parts of the 10-point Plan which were rejected by the Senate include a proposal that there should be no negotiations on mineral exploration, and only one right to negotiate per project; and a proposal for a six year time limit (the sunset clause) on native title claims.

5. CAN NEGOTIATION WORK?

The alternatives to negotiation are litigation or lobbying to bring about changes to the law. Both litigation and lobbying can be risky and expensive. The Mabo and Wik judgements produced outcomes that were unexpected, and unwelcome in some quarters, and the attempt by mining, pastoral and State government interests to change the law, which culminated in the 10-point Plan, was only partially successful. It is fair to say that the political consequences of litigation and legislative change have been to raise the profile of the Aboriginal side in the native title debate, and it is not clear that opponents of native title have gained any long-term benefit.

If litigation and political action are to be avoided, is there any evidence that progress can be made through negotiation? There are several examples of successful negotiations over native title interests:

(i) the Coppabella coal mining lease (Queensland): a Section 29 notice was issued and the three parties (the native title claimants, the mining company and the government) reached agreement in three months;

(ii) the Century Zinc project (Queensland): a Section 29 notice was issued and agreement was eventually reached involving a $60 million payment (less than 5% of the capital cost of the project) to the native title claimants;

(iii) Naylor Ingram Pty Ltd and the Anungu Pitjantjanjara people in South Australia negotiated a 1-3% ad valorem royalty and an option to purchase up to 10% of a production joint venture; the SA government agreed to forgo royalties on the project;

(iv) Zappopan NL and the Jawoyn Association in South Australia agreed to extinguish native title in exchange for development of community and tourist facilities, employment opportunities, a bus service contract and education scholarships;

(v) the Iron Princess mine, an operating BHP mine near Port Augusta, South Australia, was temporarily shut down by the South Australia National Parks and Wildlife
Service because of claims by the Barngarla people that it was destroying sacred sites; the dispute was resolved amicably and reasonably quickly.

On the other hand, there are examples of disputes over access to resources which have not proved amenable to negotiation:

(i) the Gordonstone coal mining lease application (Queensland): the mining company and the farmer could not reach agreement over surface access and, in the absence of compulsory arbitration, such as that provided by the NNTT, the dispute dragged on;

(ii) the Togara North coal project (Qld): no Section 29 notice was issued and the company and the native title claimants took the matter to the Supreme Court;

(iii) the Union Mining NL company in Georgetown, Queensland, relies on continually exploring and up-grading small deposits to feed its mill. The Queensland government delayed issuing a Section 29 notice (see Section 3 above) for four months. This delay was sufficient to cause the company to close its operations in mid-1997.

There are other examples of completed negotiations, such as those over the Ranger, Nabarlek and Jabiluka uranium mines in the Northern Territory, which can broadly be judged as successful.

It seems that negotiation can produce a successful outcome under some conditions. Before going on to examine these conditions, which relate to the property rights which the various parties entering the negotiations have and the size of the potential gains to the parties, the paper presents a brief review of property rights to mineral resources in Australia.

6. PROPERTY RIGHTS TO MINERAL RESOURCES

When Australia was annexed by England, ownership of all surface and sub-surface minerals were vested in the Crown. With a small number of exceptions, where land was alienated without reserving mineral rights for the Crown, that remains the case today. In practical terms "the Crown" means the State governments, the Northern Territory government since 1980, and the Commonwealth government where off-shore minerals are concerned. Mineral rights are allocated by means of a regulatory scheme which imposes fees and conditions on the
licence holder. The holders of surface rights cannot veto exploration by an exploration leaseholder, although they are to be compensated for surface damage. The exploration lease holder normally has the first option on a mining lease.

In traditional Aboriginal society, individuals or groups do not normally have exclusive rights to land. Native title claimants generally seek protection of sacred sites, protection of regions of cultural significance, access to sites and regions, and the right to collect and hunt traditional foods. Whether or not native title holders have the right to exploit surface and subsurface minerals depends on whether those minerals were used under traditional laws or customs. The Woodward Aboriginal Land Rights Commission (1973) recommended that the Crown should retain sub-surface mineral rights on Aboriginal land, on the grounds that the traditional owners had no use for them, but that the landowners should have a right of veto over development. However it appears that even if native title holders do enjoy mineral rights they will be subject to the provisions of existing mining legislation in relation to exploration and mining activities. Under the Native Title Act the traditional owners are entitled to compensation on just terms for any disturbance; this is a weaker right than the right to negotiate mineral royalties which exists in South Australia and the Northern Territory.

With the exception of Aboriginal Freehold, native title rights, in common with most other rights to the use of natural resources, generally do not have the characteristics of the individual property rights to resources which are necessary if these resources are to be allocated efficiently by the market system. They are not exclusive but are jointly held and used; this may not be a problem where the use of the land is non-consumptive. They are not comprehensive but may be subordinated to other activities, such as pastoralism or mining, taking place on the land. They are not transferable unless surrendered to the Crown. They provide the holder with only a portion of the economic benefit generated by the land; this may take the form of compensation for disturbance, mineral royalties, or partnerships; and Aboriginal and Torres Strait Islander commercial ventures are subject to the usual range of taxes. They are enforceable, but the enforcement process is sometimes clumsy and may involve considerable cost. They are perpetual in duration, although they can be extinguished by an intentional act of government at any time provided that the Racial Discrimination Act 1975 is not breached.
7. CONDITIONS FOR EFFICIENT NEGOTIATIONS OVER PROPERTY RIGHTS

Coase's theory of bargaining states that irrespective of which of two parties holds the property right to an asset, bargaining will result in the efficient use of the asset, providing that transactions costs are negligible. In terms of access to mineral or pastoral resources, this theory predicts that, under particular conditions (including the absence of income effects), the same development outcome will occur whether the traditional landowners or the miners or pastoralists have the property rights. It is unlikely that income effects can be ignored in the analysis of bargaining between mining or pastoral interests and native title claimants. This means that the allocation of rights will make a difference to the outcome, although the outcome will still be efficient from an economic viewpoint. The following discussion concentrates on the factors which affect transactions costs and hence the likelihood of achieving a negotiated outcome at reasonable cost.

Five conditions are now considered which contribute to bargaining achieving an efficient allocation of resources. The first condition is that the property rights structure needs to be reasonably clear – what the rights are and who owns them. The Crown generally owns the mineral rights and assigns these to the explorer or developer, but the native title holder owns the surface rights and may be able to delay or deny access; in other words, neither side has a comprehensive right to the property. Furthermore, native title rights have several dimensions and various groups may have different bundles of rights over the same piece of land; in other words, native title rights are not exclusive. This makes it difficult for developers to decide with whom to negotiate. The Native Title Act 1993 provided no guidance, but under the Aboriginal Land Rights Act of 1976 the Aboriginal Land Councils were nominated to act for the claimants, and under the Native Title Act Amendments 1997 a Native Title Representative was nominated. While the appointment of these negotiators provides a channel of communication between potential developers and native title holders, the negotiators acting for the native title claimants are, in effect, agents rather than principals in the bargaining process. This raises the question of whether the set of incentives the agent brings to the bargaining process will lead to a settlement which is acceptable to the principals.

The second condition is that there must be a mutual advantage to be had. For example, estimates suggest that 1000 hectares of land in Queensland mined for coal has a net present
value of around $9 million to the company and $178 million to the government in royalties and other payments. The net present value of the same area in pastoral use is a tiny fraction of these values. This example illustrates the substantial economic gains to be made, in some cases, from reallocating land from one use to another.

Figure 1 uses an Edgeworth Box diagram to illustrate the process whereby the native title or pastoral lease-holder bargains away some of their rights in exchange for economic gain, with both the landowner and the developer gaining by the process. The diagram is based on the assumption that there are fixed quantities of land-rights and money to be divided between two groups – the land-rights holders and the mining industry – and that each group is willing and

\[ \text{Figure 1: Achieving Pareto Optimality through Trading some rights in Exchange for Compensation} \]
able to trade one asset for the other along an indifference curve. The latter assumption implies that the analysis ignores the possibility of the existence of discontinuities in the form of threshold effects. The variable "dollars" is a proxy for the flow of goods and services which is accepted in exchange for land rights. The quantities of land-rights and money held by the mining industry are measured north and east respectively from the mining industry origin in the bottom left corner of the diagram. The quantities held by the rights holders are measured west and south from the origin at the top right corner. The initial endowment is represented by point A, which describes a situation in which the land-rights holders have a significant quantity of rights but access to a small amount of money, with the reverse being true of the mining industry. If the rights holders give up some rights in exchange for money, both sides can be made better off. As indicated by the arrow, mining industry utility rises as the equilibrium moves to the north-east, and the utility of land-rights holders rises as the equilibrium moves to the south-west. A redistribution of rights and money, such as that represented by point B, is preferred over the initial endowment by both parties.

In a situation in which the mining industry held a significant quantity of rights, such as that represented by the endowment point C in Figure 1, bargaining might not readily lead to mutual advantage. While the mining industry has access to capital markets to finance the purchase of rights, or to dispose of the proceeds from the sale of rights, those wishing to acquire land rights might find it difficult to borrow, especially if they plan to use the rights they acquire to generate a non-marketable output. If bargaining does not occur because of capital market imperfections which prevent the potential purchasers borrowing on reasonable terms to finance the acquisition, it is the imperfect market system rather than the bargaining process which results in economic inefficiency. If, on the other hand, those wishing to acquire land rights would be unable to finance the purchase even if they had access to perfectly functioning capital markets, then the no-trade outcome is efficient in a narrow economic sense, even if some would judge it to be inequitable.

The third condition is that there must be a payment vehicle – a method by which title holders can be recompensed for surrendering some of their rights. Native title is inalienable, except to the Crown, and the Crown reserves statutory rights to collect royalties or other forms of charges. Leaving aside arrangements such as exist in South Australia and the Northern Territory, where the Crown remits royalties to the native title holders, the native title holders are left to rely on non-statutory rights such as the right to veto exploration or mining under
the Aboriginal Land Rights Act 1976. Also, while mining companies may be charged royalties and fees in connection with exploration or mining leases, they have not been required to make substantial up-front payments commensurate with the value of the resource as has been the case when companies obtain access to mineral and petroleum deposits in the United States.

The fourth condition is that the transactions (bargaining) costs imposed by the administrative process should not be prohibitively high. It is difficult to evaluate the performance of the system set in place under the Native Title Act and its amendments because some of the participants, such as the Queensland and Northern Territory governments, for example, appear to have been slow to grasp what was required of them. Transactions costs rise as the number of hearings required rises and as the time taken to complete the bargaining process rises. As noted above, there were examples of 18 month delays in Western Australia, but, on the other hand, the average cost to the National Native Title Tribunal in dealing with the claims put to it was only $2400. If the costs of the claimants and the developers were of a magnitude similar to this, the process does not appear to be highly costly.

The fifth condition is that parties to the negotiations should not be subject to undue risk. Risk could be classed as a transaction cost, but it is so significant as to deserve separate mention. The mineral exploration and development process is inherently risky, and the bargaining process should not add political or “sovereign” risk to the uncertainties imposed by nature. The 10-Point plan attempted to reduce the level of the latter type of risk by requiring one set of negotiations per claim, by imposing a six-year “sunset clause” on claims, and by providing for a single Native Title representative. The payment vehicle should take account of the need to share risk in a cost-effective way, through an appropriate balance of up-front and royalty payments from the developer to the native title holder.

8. THE EFFECT OF NATIVE TITLE ON THE MINING INDUSTRY

The institutions for dealing with native title claims are still evolving and it is difficult to draw any long-term conclusions about the effects of native title on the mining industry. As noted in Section 4, Queensland and the Northern Territory did not initially embrace the native title claims process, although the system seemed to work well in Western Australia despite being
overloaded. There are a few studies which have looked for economic indicators which might suggest that the native title process has reduced the value of Australia’s mineral resources.

A study by the Australian Mining Industry Council presented evidence comparing metres drilled in the Northern Territory with the rest of Australia in the period 1971-2 to 1983-4. The figures show no relative decline in the Northern Territory following the Aboriginal Land Rights Act 1976. There is inconclusive evidence of a relative decline after 1980-81 when the Commonwealth handed responsibility for minerals over to the Northern Territory government, but this period also coincides with a recession. Harris and Ramsay (1996) found no evidence of effects on mining share prices as a result of the Mabo decision. A study by Manning (1997) regressed mineral exploration expenditures against mineral prices and operating surplus in the mining industry (a proxy for availability of funds) over the period pre- and post-Mabo, with a dummy variable included to represent the post-Mabo period, but no significant effect was found. A cross-sectional analysis of mineral and energy explorations in the States and Territory found no discernible relative decline post-Mabo in the States most affected by native title – Western Australia, Queensland and the Northern Territory. The figures reported in Table 3 show that the shares of those States in total mineral and energy exploration expenditures in Australia did not change significantly in the post 1993-94 period.

Table 3: Mineral and Energy Exploration Expenditures per State 1986-87 – 1996-97

<table>
<thead>
<tr>
<th>Year</th>
<th>WA</th>
<th>SA</th>
<th>VIC</th>
<th>TAS</th>
<th>NSW</th>
<th>QLD</th>
<th>NT</th>
<th>TOTAL</th>
</tr>
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<tbody>
<tr>
<td>1986-87</td>
<td>323</td>
<td>11</td>
<td>15</td>
<td>11</td>
<td>48</td>
<td>121</td>
<td>28</td>
<td>557</td>
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<tr>
<td>1987-88</td>
<td>466</td>
<td>19</td>
<td>34</td>
<td>10</td>
<td>65</td>
<td>159</td>
<td>49</td>
<td>802</td>
</tr>
<tr>
<td>1988-89</td>
<td>387</td>
<td>16</td>
<td>22</td>
<td>13</td>
<td>51</td>
<td>140</td>
<td>69</td>
<td>698</td>
</tr>
<tr>
<td>1989-90</td>
<td>315</td>
<td>13</td>
<td>21</td>
<td>12</td>
<td>55</td>
<td>128</td>
<td>63</td>
<td>607</td>
</tr>
<tr>
<td>1990-91</td>
<td>325</td>
<td>15</td>
<td>13</td>
<td>10</td>
<td>61</td>
<td>124</td>
<td>54</td>
<td>602</td>
</tr>
<tr>
<td>1991-92</td>
<td>333</td>
<td>19</td>
<td>13</td>
<td>8</td>
<td>63</td>
<td>110</td>
<td>58</td>
<td>632</td>
</tr>
<tr>
<td>1992-93</td>
<td>348</td>
<td>21</td>
<td>12</td>
<td>8</td>
<td>61</td>
<td>118</td>
<td>64</td>
<td>632</td>
</tr>
<tr>
<td>Pre-Native Title Act Share</td>
<td>0.55</td>
<td>0.03</td>
<td>0.03</td>
<td>0.02</td>
<td>0.09</td>
<td>0.20</td>
<td>0.09</td>
<td></td>
</tr>
<tr>
<td>1993-94</td>
<td>454</td>
<td>24</td>
<td>21</td>
<td>10</td>
<td>74</td>
<td>140</td>
<td>70</td>
<td>793</td>
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<tr>
<td>1994-95</td>
<td>495</td>
<td>21</td>
<td>31</td>
<td>15</td>
<td>79</td>
<td>176</td>
<td>76</td>
<td>893</td>
</tr>
<tr>
<td>1995-96</td>
<td>520</td>
<td>24</td>
<td>42</td>
<td>19</td>
<td>80</td>
<td>181</td>
<td>94</td>
<td>960</td>
</tr>
<tr>
<td>1996-97</td>
<td>691</td>
<td>35</td>
<td>52</td>
<td>26</td>
<td>94</td>
<td>161</td>
<td>89</td>
<td>1148</td>
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<tr>
<td>Post-Native Title Act Share</td>
<td>0.57</td>
<td>0.03</td>
<td>0.04</td>
<td>0.02</td>
<td>0.09</td>
<td>0.17</td>
<td>0.09</td>
<td></td>
</tr>
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</table>
9. CONCLUSION

The main contribution of economic analysis to the native title debate lies in helping to define the kind of environment in which bargaining can be effective. In the absence of transactions costs, the bargaining process will achieve an efficient outcome irrespective of which party has the rights to mineral resources. There are various ways in which bargaining costs can be reduced – establishing a clear structure of property rights, facilitating the making of side-payments, simplifying the administrative process, and reducing the risk and uncertainty involved. When these conditions are in place, parties will be more readily able to negotiate to their mutual advantage.

Several factors have contributed to raising the level of transactions costs involved in bargaining over rights to lands which are currently or potentially under native title. First, the nature of native title rights has contributed to the level of bargaining costs because the rights are neither individual nor comprehensive. The structure of aboriginal society means that rights are generally held collectively, and the rights of one group may overlap to some extent with those of another. The fact that native title rights are land rights means that, in common with other rights to natural resources, they are not comprehensive and this makes exchange more difficult. Secondly, the level of uncertainty surrounding native title negotiations was raised by the different interpretations placed on native title by different groups following the Mabo decision and by the consequent court actions and legislative changes which occurred in the period leading up to the 10-point Plan. Thirdly, in the climate of uncertainty some parties did not comprehend or embrace the process for native title determination laid down by the Native Title Act 1993.

Some commentators have expressed concern that the existence of native title rights will “lock up” natural resources and prevent development. At first sight this seems in direct conflict with the Coase Theorem which maintains that, under certain conditions, the outcome of a costless bargaining process will be the same irrespective of which group holds the property rights. Leaving aside the costs imposed by imperfections in the bargaining process, there are other circumstances under which the outcome will differ from that predicted by the Coase theorem. If the preferences of native title holders are discontinuous, in the sense that they are unwilling to sell their right to a particular site for any sum of money, as might be the case with a sacred site, then bargaining will not result in a reallocation of resources or an
improvement in economic welfare. However this no-trade outcome is efficient from an economic viewpoint: in these circumstances one group cannot be made better off without making the other group worse off. Discontinuity of preferences is not uncommon in situations involving changes in land use. There are many examples of property owners who refuse to sell at any price to make way for a new or widened highway. In such cases properties are subject to compulsory purchase on terms which the government and the courts judge to be reasonable. The outcome is not efficient in a narrow sense, since the property owner is made worse off, but the loss suffered by one group is judged to be more than outweighed by the gains accruing to others. It seems unreasonable to single out any group of property owners for hindering development because their preferences do not conform to the economic model favoured by the textbooks, especially where society has a mechanism in place for reaching decisions on land use in these circumstances through balancing the gains to some against the losses to others.

There is little hard evidence available about the effects of native title on development. Studies have examined the level and pattern of mining industry activity before and after the Aboriginal Land Rights Act 1976, and before and after the Native Title Act 1993, but were unable to identify any effect of these measures on the level of mineral exploration. Similarly a study of market valuations of mining companies before and after 1993 could find no effect which could be attributed to native title. Mining industry activity tends to be volatile, responding to significant fluctuations in mineral prices and other factors, and it is difficult to design a study which can correct for these other influences on activity or valuations so as to identify the influence, if any, of native title. Additional experience of negotiations under the Native Title Act Amendments 1997 will provide a larger sample which may help to resolve this issue.
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