

Negotiating Mining Agreements under the Native Title Act 1993

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From an economic perspective, mining should be allowed to occur on Aboriginal land up to the point where the cost to Aborigines equals the net social benefits. However, economic analysis suggests that this level of mining may not be occurring under the Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) (Industry Commission [IC], 1991; Tasman Institute, 1993). This is either because transactions costs are hindering negotiations between miners and Aborigines or because some strategic behaviour problem is present.

As transaction costs fall, the potential benefits of negotiating an agreement increase, and parties are better able to decide upon a level of mining that reflects their valuation of the land. Ronald Coase (1960) identifies three kinds of transactions cost: the cost of searching for parties with whom to negotiate; the cost of negotiation; and the cost of enforcing a contract. A comparison of the three kinds of cost associated with the ALRA and the Native Title Act 1993 (NTA) should enable us to judge whether the NTA has the potential to overcome certain difficulties apparent in the operation of the ALRA.¹

Overview of the ALRA and the NTA

Under the ALRA, Aboriginal land is held for the traditional owners in a land trust that operates under the direction of a land council. The consent of this land council must be sought before any dealing with the land, including mining, is allowed. Rights to sub-soil minerals remain with the Northern Territory or the Commonwealth, but the need to secure a land council's consent gives traditional owners a veto over exploration for, or extraction of, minerals. Initially, this veto could be exercised at both the exploration and the mining stages of a grant, making mining contracts 'disjunctive' agreements. The ALRA was amended in 1987 so that the veto could be exercised at the exploration stage only, making mining contracts 'conjunctive'. If land councils consent to a mining lease application, moneys

¹ The Coase theorem is concerned solely with allocative efficiency. It ignores the wealth effects that are associated with a reassignment of rights between parties.

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equivalent to statutory royalties are paid by the Commonwealth government into the Aboriginals Benefit Trust Account (ABTA), with a proportion (30 per cent) earmarked for distribution among traditional owners and Aborigines living in areas affected by the mining. The veto power provided by the ALRA can be viewed as a de facto property right that is traded between miners and Aboriginal land holders.

The NTA, in contrast, contains no veto provision. Instead, native title holders are able to negotiate over the amount of compensation and over the terms and conditions under which their land will be mined: negotiation rights that non-Aboriginal land holders do not enjoy to the same extent. During this negotiation period, the compensation agreement can make reference to the mine's potential income, output or profits. If no agreement is made within a specified period, the issue is submitted to arbitration for resolution. In this arbitration phase, Aborigines are entitled to compensation only for the impairment of native title rights, which is independent of the value of minerals present.

This is essentially a liability rule, that is, a rule that creates a right to claim damages for certain injuries to a resource. Liability rules permit the use of a resource if the users are prepared to pay for the damage they inflict. Some economists (Posner, 1986:Ch. 3; Demsetz, 1982:41-3) have argued that a liability rule (such as the NTA provides) may be more efficient than a property-right assignment (such as the ALRA provides) where market transactions costs are prohibitive (Landes & Posner, 1987:29-41) or a bilateral monopoly exists (Cooter & Marks, 1984).

Costs of Finding Negotiation Partners

ALRA. Under the ALRA, the creation of a register of traditional owners is discretionary; but the land councils have not exercised this discretion. Traditional Aboriginal ownership can incorporate myriad rights and obligations; and these rights may not be consistent across groups or over time (Peterson, 1983). It would therefore be very costly to establish these differing rights and to maintain information on them (Smith, 1984). Moreover, the benefit of such a register under the ALRA would be limited, given that miners cannot in any case negotiate directly with traditional owners. Miners have therefore relied on land councils to identify traditional owners. But the identification process caused so much delay that in 1987 a time limit of twelve months was introduced for land councils to identify traditional owners and to begin negotiations with mining companies for the grant of exploration licences. No limit was introduced at the mining tenement stage. The new time limit has often been extended by the minister. In 1993, 77 exploration licences were under consideration; in 75 cases the twelve-month negotiation period was extended by more than six months, and in 67 cases by more than twelve months (Pinney, 1993:8).

NTA. The costs associated with identifying native title parties should be lower under the NTA, for two main reasons. First, the NTA established two registers, one for native title holders and the other for native title claimants. Once a determination of native title has been made, a body corporate is created to represent the na-

tive title holders.² This body corporate is then registered and miners can negotiate directly with it. The operation of these provisions provides a degree of transparency not present in the ALRA.

Second, under the NTA, it is the responsibility of a native title claimant to make the claim known within a two-month notice period at the time a future act is proposed. If a native title party comes forward after that two-month period the act will still be valid. But if a native title claim has been previously registered, it becomes the responsibility of the government to make the native title party aware of the miners' proposed future act.

The Cost of Negotiations

Mining companies indicate (Giants Reef Mining NL, 1993:79; Tasman Institute, 1993:15) that negotiating exploration and mining agreements on Aboriginal land is more costly than on non-Aboriginal land. These additional costs arise for three reasons. First, the Aborigines living in the areas affected by a mine's operation must be consulted (a procedure that is not widely required on non-Aboriginal land). Second, certain procedural mechanisms are stipulated for negotiating contracts between miners and Aborigines. Third, the ALRA provides for compensation. (The first cost is not discussed below because consultation prior to mining Aboriginal land is required by both the NTA and the ALRA.)

Procedural mechanisms: ALRA. There has been much discussion in the literature on the significance of disjunctive/conjunctive agreements under the ALRA. Aboriginal interests argue that it is difficult to negotiate satisfactory conjunctive agreements because a mine's potential operation is uncertain at the exploration stage. Miners argue that it is difficult to negotiate satisfactory disjunctive agreements because of the risk associated with spending money in exploration when the right to mine may be subsequently refused. Since 1987, when amendments removed the veto at the mining stage,³ some land councils have countered the associated reduction in costs by requiring detailed provisions relating to mining to be included in exploration agreements. Given the potential for mining to impose social and environmental costs on Aborigines (Commonwealth of Australia, 1991), these provisions seem justified. In effect, however, this has meant that miners who want only to explore are being asked to negotiate a production agreement even though very few exploration licences (perhaps one in a thousand) lead to the development of a mine (Ewing, 1994:6).

² There may be more than one native title holder at common law but for the purposes of the NTA all holders are legally represented by the one body.

³ The Stockdale Case (*Northern Territory of Australia v Robert Tickner, Minister for Aboriginal Affairs, Northern Land Council, Nuralindji Aboriginal Corporation, and Stockdale Prospecting Ltd*, unreported decision of the Supreme Court of the Northern Territory, 11 March 1992) confirmed that the 1987 amendment made disjunctive agreements unenforceable and void.

Procedural mechanisms: NTA. The NTA provides a disjunctive framework. A mining company can come to a negotiated or arbitrated exploration agreement with a native title holder. If a mining licence application is made, the negotiation/arbitration procedures again apply, although that native title holder can reopen discussion at this time on a matter already discussed at the exploration stage only at the discretion of the arbitrator. Given that the ALRA has been conjunctive since 1987 (albeit unintentionally), it is somewhat surprising that the NTA is disjunctive. It must be presumed either that this reflects the strength of Aboriginal interest groups (perhaps in exchange for the lack of a veto right) or that the costs associated with designing conjunctive agreements under the ALRA have proved to be very high.

Irrespective of whether conjunctive agreements generate higher costs, the NTA has other provisions that can be utilised to substantially reduce transactions costs: exclusion clauses, an expedited process, and a binding arbitration system. The Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs may exempt a future grant from the negotiation/arbitration procedures if the grant will have minimal impact on native title rights and the native title holder/claimant can be properly consulted about access. As well, an expedited procedure may apply only if the grant, in the opinion of the arbitral body, will not interfere with the community life of the native title holders or their areas of significance, and will not cause major disturbance to the land or waters involved. If the expedited provisions are used to exempt exploration activities, the negotiation/arbitration procedures will apply only at the mining licence grant stage. This provision is yet to be exercised, but if it operates as outlined above, it will provide an opportunity for mining companies to explore land and then engage in the costly negotiation/arbitration procedures only if they subsequently wish to mine.

Within the mining industry there seems to be support for the use of the expedited provisions (*Business Review Weekly*, 1994:26), although overtures by the Commonwealth Government towards the Western Australian government suggesting the use of the exclusion provisions or the expedited provisions have been rejected (Altman, 1994:16n.6).

Mnookin's (1979) characterisation of divorce as a 'Pre-trial bargaining . . . game played in the shadow of the law' applies to the framework of the NTA. There is a possibility of settling out of court through bargaining, but if bargaining breaks down, arbitration occurs and a binding resolution is reached.⁴ Under the ALRA, in con-

⁴ It would seem that mining industry criticisms of the ALRA have influenced the adoption of an arbitrated process in the NTA. A report by the Northern Territory Department of Mines and Energy suggested reforms to the ALRA based upon a survey of the 33 companies to whom it had granted leave to negotiate with the land councils for exploration licences. On the basis of this survey the Department recommended that the ALRA should be amended to allow for the automatic appointment of an arbitrator should negotiations prove unsuccessful after a period of one year from the start of negotiations. The requisite period in the NTA is set at only four months for exploration and six months for mining (Northern Territory Department of Mines and Energy, 1984:18).

trast, bargaining can continue indefinitely at the discretion of the Minister for Aboriginal and Torres Strait Islander Affairs. The NTA's binding arbitration system has the potential to reduce transactions costs because it provides an incentive for the parties to self-regulate.

Yet it may not be transactions costs that are precluding Aborigines and miners from negotiating agreements under the ALRA. Perhaps there is some strategic behaviour problem that needs to be overcome. Aborigines and miners are essentially bilateral monopolists; Aborigines have a monopoly in the supply of land on any given plot of Aboriginal land, and miners effectively monopolise the demand for that land through the exclusive exploration licence system. The presence of a bilateral monopoly will preclude a bargain being reached only if the parties concerned are not subject to competitive takeover bids, since otherwise the possibility exists that firms intent on seizing the potential gains from an agreement will institute a takeover of the parties concerned. But because Aboriginal land rights are inalienable, Aboriginal groups are not subject to the pressure of possible takeover.

A different solution to the problem of bilateral monopolies failing to bargain efficient outcomes is some institutional mechanism, such as compulsory arbitration, that can dictate the terms of the contract (Cooter & Marks, 1982). If this is the case, then the NTA's arbitration system may be able to overcome the problem in a way that the ALRA cannot.

Financial incentives: ALRA. The costs associated with negotiating agreements between Aborigines and miners are exacerbated by the unclear incentive structure of the ALRA. If mining occurs on Aboriginal land, moneys are paid into the ABTA; mining companies pay the Northern Territory government royalties when they mine (18 per cent of profits for minerals and 10 per cent for petroleum and gas)⁵ and the Commonwealth government then pays, dollar for dollar, the same amount into the ABTA.⁶

Only 30 per cent of the ABTA's income is earmarked for the purpose of redistribution by the land councils to Aborigines living in areas affected by mining, including the traditional owners (s.64(3)). This incentive structure was noted in the IC report (1991) as being potentially insufficient to generate a level of mining that adequately reflects Aboriginal valuation of undisturbed land use. The IC recommended that s.64(3) grants be increased to allow payment of 70 per cent of the ABTA income to those living in areas affected by mining. It should be noted that traditional owners and Aborigines living in areas affected by mining receive additional negotiated royalties (ss.43 and 44). These payments, which are made by min-

⁵ Minerals Royalties Act 1982 (NT) and Petroleum Processing and Mining Act 1978 (NT) respectively.

⁶ Except for uranium royalties, which are Commonwealth royalties paid to the Department of Primary Industry and Energy. From the 5.5 per cent ad valorem collected according to the Ranger agreement, 4.25 per cent goes to the ABTA and 1.25 per cent goes to the NT government.

ers to incorporated groups of traditional owners and residents through land councils, go some way towards overcoming incentive problems.

Financial incentives: NTA. Mr Justice Woodward's report recommended that minerals continue to be vested in the Crown but that in the interest of Aboriginal self-determination access to Aboriginal land be controlled by them (Woodward, 1974:104). This recommendation gave rise to the quasi-property right system of the ALRA. Several sources express concern over the indistinct nexus between the veto right and the ownership of minerals (Altman, 1993; IC, 1991; Tasman Institute, 1993). The IC went so far as to suggest that the nexus be made explicit, that is, de jure rights to minerals be vested in Aborigines so that their consent to mine attracts the payment of royalties for *minerals* rather than for consent.

The government apparently took these considerations into account when drafting the NTA. In the negotiation period the contract between miners and Aborigines can refer to the potential profits, income or output of the mine — a quasi-royalty payment — but in the arbitration stage the arbitral body is bound by a similar compensable interest test, that is, compensation that would be payable if the native title holder instead held ordinary title.⁷ The value of the minerals extracted is explicitly excluded from the arbitral body's determination, thus removing the nexus between the value of minerals and compensation. This gives rise to the new issue of how the arbitral body should determine compensation, since the strategic behaviour problem of asymmetric information will not be overcome by the inclusion of arbitration in the NTA. There will still be incentives for both miners and Aborigines to misrepresent the benefit/damage of allowing mining, given that the arbitral body does not have access to each party's true valuation.

If any damage done to Aborigines' native title rights must be fully compensated by the miner, Aborigines may be able to influence the compensation payment they receive, since the arbitrator may not be aware of how Aborigines could alter their behaviour to minimise the impact of the mine. Cooter (1982) recommends basing compensation payments on the lost rental value of the land, because this is determined by the market and cannot be influenced by either party's actions. Applying this kind of lost rental value analysis to the ALRA and NTA is problematic given that no market in Aboriginal land exists that could establish lost rental values. In other spheres of the law the courts award compensation for the infringement of rights that are not traded, although standard guidelines for compensation payments are often set. This option could be exercised in the NTA's arbitration stage and may go some way towards overcoming marginal rent seeking by miners or by Aborigines.

⁷ Any compensation amount agreed upon by the parties or determined by the arbitral body will be paid in full by the mining company and will go in total to the body corporate.

The Cost of Enforcing Contracts

ALRA. The cost of enforcing contracts under the ALRA has been high for both Aborigines and miners. In the Oenpelli road dispute (Kesteven, 1983), for example, the land council and the local Aborigines disagreed about the distribution of mining payments among those Aborigines living in the areas affected by the mine. In particular, one group of traditional owners through whose land the road to the mine ran were not receiving a significant share of the agreement moneys distributed. The ALRA was amended in 1980, following the dispute, so that miners would be guaranteed access to a mine site for which an agreement on compensation had been reached. The amendment protected the property right acquired by the miner but in the process it diminished the property right of the traditional owners of the area through which the road had to run.

Another 1980 amendment to the ALRA (s.48D(3)) that protects the property rights of mining companies at the expense of traditional owners states that inadequate consultation between a land council and Aborigines is an insufficient reason to invalidate a mining agreement. This means that mining agreements will be valid even if Aborigines affected by a mine have not been fully informed about the mine's impact, or have not been given the opportunity to voice their objection to it.

Another problem Aborigines have had in enforcing their property right in the post-agreement stage is that s.64(3) grants are distributed by the land councils to those Aborigines living in areas affected by a mine, irrespective of their land ownership status. Since these payments are highly discretionary, traditional owners cannot be guaranteed any of the moneys paid into the ABTA, despite their right of veto. So unless one group of traditional owners occupies the whole of an area affected by a proposed mine, there is often little incentive to allow mining to proceed.

NTA. These problems could be overcome under the NTA, both because the land councils' monopoly on representation at the mining licence grant stage is removed, and because the payments made by miners to native title holders are payable only to them.

The Northern Territory Department of Mines and Energy (1984) and the IC (1991) recommended that the ALRA be amended to allow face-to-face negotiations between miners and traditional owners. This option has been incorporated to some extent in the NTA. Under the NTA, native title holders may elect to have their native title held in trust or to remain common-law native title holders. Irrespective of the trust decision, the native title holders must also nominate a body corporate to represent their native title rights, carry out functions specified in the NTA, and be the point of contact for other interests in the land.

The advantage of the NTA's body corporate system over the ALRA's land council system is that each body corporate can negotiate directly with miners, thus increasing the likelihood that Aborigines' valuation of their land will be accurately reflected in the body corporate's decision whether to negotiate a mining agreement. It could be argued that having large Aboriginal peak organisations such as the land councils represents an economy of scale. The Northern Territory experience indi-

cates, however, that some Aboriginal groups have been dissatisfied with the quality of representation afforded by the land councils and that a free-rider problem may exist (IC, 1991:66). The additional costs incurred by a large number of small groups may be offset by their higher-quality representation.⁸

If an Aboriginal group is granted native title over an area of land occupied by other groups of Aborigines, it is doubtful whether compensation moneys would accrue to it in the event of a mine opening. Since all moneys paid by miners under the NTA will go to the body corporate for distribution among native title holders, native title holders will be able to enforce their native title rights against other Aboriginal interests in the post-agreement phase. Under the ALRA, in contrast, moneys are payable, under s.35(2), to those Aborigines living in the area affected by a mine, irrespective of their ownership status. Here, the government was effectively addressing equity issues through the 'areas affected' provisions, at the expense of efficiency.⁹ The NTA appears to reflect the argument that the government should address Aboriginal welfare problems directly.

One contract-enforcement cost created by the NTA that does not exist in the ALRA is the absence of a sunset period within which native title parties must come forward. (There was initially no sunset period in the ALRA; the provision to lodge claims by 1997 was inserted into the ALRA by amendment to s.50 in 1987.) This will potentially give rise to two costs. First, a native title party may come forward claiming the right to negotiate with a mining company applying for a mining lease even though the company's previous application for an exploration licence had not been opposed. As well, a native title party could come forward after the mine has begun operation. To protect itself from such claims, a mining company can make a non-claimant application for determination of native title at a cost of \$300. If this application is unopposed, the mining company is entitled to the protection of s.24 of the NTA. Under this provision, if a native title party subsequently comes forward, the government, not the mining company, is liable for any compensation that is payable for its past acts, although the miner is liable for compensation for any future acts, subject to the exclusion provisions.

A second contract-enforcement cost could arise from the absence of a sunset period if a mining company, having negotiated an agreement with a native title claimant at the time a mining lease was granted, subsequently found that the claimant was not in fact the native title holder. Mining companies can protect themselves from this eventuality by making the contract with the claimant dependent on the claimant being found to be the native title holder and stipulating either that no money will be paid until a determination of native title is made in that claimant's

⁸ The benefits of having land councils as umbrella organisations are discussed by Vachon and Toyne (1983:323-4) and the hazards by von Sturmer (1982:100-02) and IC (1991).

⁹ Berndt (1982:10) argues that the ALRA's areas affected provisions are in fact too narrow. He notes that while the ALRA stipulates that royalties be paid to territorial units, including those Aborigines with a traditional spiritual affiliation, the ALRA does not recognise the economic ownership of those persons who would traditionally share in the resources of the land.

favour or that any moneys paid be held in trust, under the provisions of s.52 of the NTA, until native title is determined.

Another solution to this problem is suggested by the Mt Todd case. The mining company Zapopan required as part of its contract with the Jawoyn people that they surrender any future native title claims and halt repeat land claims under the ALRA, in exchange for the grant of the freehold title (without veto power) to the Mt Todd area, portion 3469. The *Mabo* judgment noted, and the NTA statutorily recognised, that a group of Aboriginal people could voluntarily surrender their native title to the Crown, thereby extinguishing native title. As this surrender was part of the Mt Todd agreement no member of the Jawoyn Association can now claim native title to portion 3469. The possibility of a breakaway Jawoyn group was obviously contemplated, however, since the Jawoyn Association agreed to indemnify Zapopan in respect of losses occasioned by any assertion of native title or repeat land claims by their people. The Jawoyn Association also undertook not to take, support or promote any action by any Jawoyn that might prevent or impede the issue or continuance of the mineral leases, or that may jeopardise or threaten financial arrangements by the company in relation to the Mt Todd project. To address the possibility of a subsequent claim of native title by a non-Jawoyn Aboriginal group, the Northern Land Council formally agreed that the Jawoyn were the only Aboriginal group for which it would henceforth act or recognise for native title or land claims issues over portion 3469. But as the Mt Todd area has been subject to an earlier, exhaustive land rights claim and no group other than the Jawoyn was found, any such claim by non-Jawoyn Aborigines seems unlikely (Stapp, 1994:14-6).

Conclusion

When drafting the final version of the NTA, the Commonwealth government seems to have taken into account some of the criticisms levelled at the ALRA by economic commentators. By creating a native title register, and by making Aborigines responsible for making known their claim of native title if a mining licence is proposed, the NTA renders the identification of native title parties simpler than under the ALRA. It makes negotiations between miners and Aborigines less costly than under the ALRA by several means: the option of disjunctive mining contracts; time limits within which negotiations must occur; the rapid recourse to arbitration if negotiations are unsuccessful; the potential use of expedited provisions for exploration activity and the exclusion provisions; clear incentives for Aborigines and miners to resolve competing land use issues; and a better defined nexus between mining activity and moneys paid to Aboriginal land holders.

The ability of both Aborigines and miners to enforce their contractual rights in the post-agreement phase is stronger under the NTA than under the ALRA, since the monopoly of the land councils has been removed and compensation payments are payable directly to body corporates. The NTA, however, creates no sunset period within which native title claimants must come forward. This could have created substantial costs for those wishing to mine had the government not included provisions for non-claimant applications.

Some commentators (IC, 1991; Kenyon, 1993) have noted that if Aborigines value the land associated with a proposed exploration/mining licence more than miners do, then the land should remain in Aboriginal hands. Notwithstanding this, if transactions costs are prohibitive then it is impossible to determine either miners' or Aborigines' valuation of the land. The lower transactions costs are, therefore, the greater the potential benefits are of negotiating an agreement and the better able parties are to decide upon a level of mining that reflects their valuation of the land.

This analysis would suggest that the NTA will result in greater allocative efficiency than the ALRA. Nevertheless, transactions costs under the NTA could remain too high for many mining agreements, based upon the exchange of a property right, to be negotiated. For this reason, the introduction of the liability rule under the NTA, through the establishment of the arbitral body, could generate relative efficiency by removing the transaction from the market and placing it before an arbitrator who can determine whether mining should occur and, if so, upon what terms.

Such an arbitral body would be needed also if mining agreements are precluded by strategic behaviour problems flowing from the presence of bilateral monopolies, which could prevent efficient exchanges even if transaction costs were reduced to zero. In this case too, greater efficiency can be achieved under the NTA than under the ALRA.

Mining Aboriginal land imposes a negative externality on Aborigines. An ideal legal regime in such circumstances is one under which competing land use issues can be readily resolved: where the parties to the externality can be easily identified and where the negotiation and enforcement of a compensation agreement between these parties is not excessively costly. On paper at least, the NTA meets these criteria better than the ALRA; the actual costs will become apparent only as NTA's operation shifts from theory to practice.

A final comment: this comparison between the ALRA and the NTA is of a 'second-best' nature only. A first-best solution would involve a system of fully tradable property rights, such as neither the NTA nor the ALRA provides.

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