Reforming the Native Title Act

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Reforming the Native Title Act

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INTRODUCTION

In this Topical Issue I seek to explore the ramifications of the Native Title Act Reform Bill, a private senator’s bill introduced by Senator Rachel Siewert of the Australian Greens. The Bill seeks to amend the Native Title Act 1993 (NTA) to effect reforms that target two key areas for native title claimants: the barriers that registered native title claimants experience in making the case for determination of native title rights and interests, and procedural issues relating to the complex future act regime. These issues need to be addressed in the interests of native title claimants, but also in the wider national interest. I concur with the view in the Explanatory Memorandum for the Bill that, if passed into law, it will implement important and arguably long overdue reforms to the NTA that will enhance its effectiveness.

Of particular significance here is the attempt to move the NTA in a direction that is more consistent with principles enunciated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was belatedly supported by the Australian Government in April 2009. Domestically, changes to the future act regime are likely to ensure more equitable and efficient processes for negotiating resource development projects on land where there is a registered native title claim or a determination of native title.

The issues that this Bill seeks to address have been highlighted for a number of years and are complex, indeed so complex and politically contentious that they have been largely ignored. So as an academic whose research over the past three decades has focused on Indigenous development and policy, I want to commend the Australian Greens for developing and tabling this comprehensive reform package in the Australian Parliament.

I do not propose to rehearse in any detail the extensive native title literature and arguments within it on the two broad issues of native title recognition under Australian law and the operations of the future act regime that has afforded asymmetric power favouring resource developers in negotiations. That is because there are a number of recently published books that do this very well including Lisa Strelein's *Compromised Jurisprudence: Native Title Cases since Mabo* (2009), David Ritter's *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights* (2009) and *The Native Title Market* (2009) and a volume of essays *Power, Culture, Economy: Indigenous Australians and Mining* (2009) that I have co-edited with David Martin. And this is just a selection of recent titles.

So rather than provide a comprehensive submission heavily referenced as is the usual academic approach, I am keen to provide a brief submission written in an accessible essay style. For me personally, this submission is the latest in a surprisingly large number made to parliamentary and departmental inquiries on native title matters in the last two years. Rather than rehearse my earlier arguments in any detail, I will merely provide links here to my three most recent submissions: to the House Standing Committee on Economics Inquiry into Indigenous economic development in Queensland and review of the Wild Rivers (Environmental Management) Bill 2010 (dated 18 February 2011; and published as CAEPR *Topical Issue 6/2011*); to the Senate Legal and Constitutional Affairs Committee Inquiry into the Wild Rivers (Environmental Management) Bill 2010 (No.2) (dated 31 March 2010; and published as CAEPR *Topical Issue 2/2010*); and to the Australian Government's Indigenous Economic Development Strategy Draft for Consultation (dated 17 December 2010; and published as CAEPR *Topical Issue 3/2011*). I do so in part because it is my view that many of the issues to be addressed in this Inquiry, at least in so far as they relate to the economic empowerment that native title might bestow on Indigenous Australians, are closely linked with issues raised in these earlier Inquiries. I also do so to provide members of the Senate Standing Committee on Legal and Constitutional Affairs a sense of my perspectives on native title property rights and associated development implications that will inform the following commentary.

I draw attention in particular to two of my recommendations. My only recommendation to this Committee's earlier Inquiry into the Wild Rivers Bill was (and I paraphrase) that there is a need to review all land rights and native title laws Australia-wide to ensure that important resource rights and free prior informed consent rights proposed for Cape York by the Abbott Opposition be given national attention. My first recommendation to the House Standing Committee on Economics was that the unprecedented form of native title property rights being proposed in the Wild Rivers Bill as a special measure for advancement and protection on Cape York be extended to all parts of Australia as proposed by the Australian Greens in the Bill that is the subject of this Inquiry. I highlight these submissions to make my vested intellectual interest in this Inquiry transparent, while noting that I was referring to a draft of the current Bill.

I provide this somewhat reflexive opening commentary because of the conflicted and highly politicised nature of Indigenous policy making, including sensible legal reform, in Australia. Under such circumstances the need for transparency seems paramount. And now to some scene setting, brief commentary on several areas of proposed reforms, a comment on what is missing in the reform agenda and a final comment on the politics of reform.

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SCENE SETTING

The NTA was passed in 1993 in response to what some have referred to as the judicial revolution of the High Court’s *Mabo* judgment of 1992 that recognized a form of Indigenous ‘native title’ at common law. Some, and I include myself here, viewed this as a ‘judicial revolution’; while others such as David Ritter in his recent book *Contesting Native Title* (2009) have argued that by recognising native title, Australia was merely catching up with precedents set in other settler colonial societies, caught up, perhaps, in the tide of global history.

There has been a spectrum of views about the benefits of native title to Indigenous people on two inter-linked issues. The first is the extent of land over which there have been successful native title determinations. The second is what development benefit native title determinations, even from so-called ‘exclusive possession’, might have actually generated.

For the Committee’s information I present two maps developed with my colleague John Hughes from a variety of sources including the National Native Title Tribunal. Fig. 1 shows the national coverage of land vested with Indigenous groups as a result of land rights and native title laws. To summarise briefly, an estimated 1.7 million sq kms is now vested in diverse forms of Indigenous ownership or management following land claims and over 100 successful native title determinations. Clearly, however, there is enormous inequity in their geographic distribution, with over 98 per cent by area being in remote Australia. And a successful determination does not equate to ownership; it could mean that the group has simply been determined to hold non-exclusive rights to hunt, fish, camp etc. In other words, despite apparent massive land and native title coverage, the cliché about Aboriginal people being ‘land-rich but dirt poor’ needs to be challenged given the weak property rights under which much of this land is held.

Fig. 2 shows areas where there are registered Indigenous Land Use Agreements (ILUAs), although in such situations there are generally very weak, if any, procedural rights in relation to future acts. The map also shows declared Indigenous Protected Areas of high conservation value.

What is becoming increasingly clear is that the national diversity in land rights and native title laws constitute very different forms of property. The cogent argument that is being increasingly put forward by Indigenous interests is that for land ownership to have economic development potential land owners must enjoy a form of free prior informed consent rights that constitutes a meaningful form of property. Such a form of property is only effectively recognised under land rights law in the Northern Territory. This issue has been at the heart of the Wild Rivers debate, as well as development disputes in the Pilbara and west Kimberley.

In a broader Indigenous policy context it can readily be argued that if the Closing the Gap policy framework is to have any realistic prospect for reducing disadvantage for the estimated 100,000 Indigenous people living at the 1,200 discrete Indigenous communities (as shown on maps) on what I term the ‘Indigenous estate’, there will be a need to strengthen their rights to not just own but also to use, develop and control the lands, territories and resources that they possess by reason of traditional ownership as noted in Article 26 (2) of UNDRIP. Or to put it more bluntly, how can socioeconomic gaps be closed without economic development where people live? Such development will surely require property rights in commercially valuable resources and more balance in possibilities for negotiation for equitable compensation deals when commercial activities, especially mineral extraction, occurs on Indigenous land. As the Australian government itself seeks to extract a greater share of mineral rent from resource developers, with its proposed Mineral Resources Rent Tax (MRRT), so consideration needs to be given to how native title groups might similarly gain an equitable share of mineral rents generated from their land.

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**ILUA:**
Indigenous Land Use Agreement

**MRRT:**
Mineral Resources Rent Tax
THE NATIVE TITLE ACT AND UNDRIP

The NTA was passed in 1993, 14 years before the adoption of UNDRIP by the General Assembly on 13 September 2007. 144 states voted in favour of UNDRIP, with Australia being one of only four nations who voted against. On 3 April 2009 Australia reversed its position. The NTA Reform Bill aspires to more closely align Australia's native title law with UNDRIP principles that themselves seek to embody recognition and implementation of international human rights. As a General Assembly Declaration UNDRIP is not a legally binding instrument under international law, but clearly in now supporting UNDRIP the Australian government is keen to see its principles reflected in Australian domestic law dealing with Indigenous Australians.

Importantly, in the Wild Rivers (Environmental Management) Bill 2010 proposed by the Leader of the Opposition Tony Abbott direct use was made of Articles in UNDRIP that refer to the right of Indigenous peoples to own, use, develop and control their lands while also guaranteeing that Indigenous land owners have a right of consent over any decision that might affect their lands. This reference by the Opposition Leader to UNDRIP is surprising given the Howard government’s strong opposition to the Declaration.

In my view it is quite appropriate for the NTA to be updated to comply as closely as possible to key ‘property and procedural rights’ principles in UNDRIP. I note additionally that Indigenous groups are invoking articles in UNDRIP to highlight their relative disadvantage in benefitting economically from their lands and in having more equitable leverage for negotiating with powerful economic actors over development where native title interests have been recognised.

THE DEFINITION OF ‘TRADITIONAL’ AND BURDEN OF PROOF

Ever since the NTA was passed there has been criticism of the courts’ interpretation of S223 which has been very narrow and uninformed by the body of international common law on native title. Arguably, the problem is not so much the requirement that claimants must legally demonstrate continuity of rights and interests under ‘traditional laws acknowledged’ and ‘traditional customs observed’ or in the need to demonstrate the maintenance of connection with lands and waters since colonisation. Rather, the problem stems from the Federal and High Courts’ interpretations of these requirements resulting in Indigenous Australians have become trapped in a western legal definition of authenticity to gain formal title to their ancestral lands. The onus has been on them to prove their authenticity.

The operations of S223 have obviously worked for some native title claimants as clear from the maps above. And in other cases native title claimants have missed out perhaps most clearly in the Yorta Yorta case. Some commentators have been highly critical of the processes for claiming land under native title law, referred to by historian Patrick Wolfe as 'repressive authenticity' and by anthropologist Elizabeth Povinelli as the ‘cunning of recognition’ because the late modern Australian liberal democracy is permitting return of land, but only if claimants can legally prove forms of ‘original’ connections and continuity of custom as required by western laws, as if never invaded.

The NTA Reform Bill looks to deal with this issue in two ways. First, it is proposed that the burden of proof be shifted so that in determining native title it will be assumed that registered claimants enjoy continuity of custom and connection unless government parties can prove otherwise. Second, it is proposed that the notion of ‘traditional’ is not frozen at some fictitious time of colonial contact but is recognized as both evolving and adaptive as all cultures are. This appears to have been the intention of the High Court in the Mabo judgment but this intent was lost in the codification in the NTA and subsequent legal interpretation of the law by differently constituted High Courts.
Such changes will allow the recognition that contemporary Aboriginal social norms, even in the remotest parts of Australia, comprise a mix of customary and western social norms and values to various degrees. In recent years, cultural analysis in Australia has increasingly rejected the false essentialised distinction between modernity and tradition. Instead there is a recognition of the intercultural circumstances of Indigenous life everywhere, with the precise nature of this interculturality varying enormously across the continent.

Having said this, it is important to note that these changes will reduce the legal burden of proof that claimants have to demonstrate to a generally non-Indigenous wider jural public and the state. But there will still be a need for detailed and complex connection research both for passing the registration test to lodge a claim and to ensure that the correct native title interests are identified within regional Indigenous domains.

The proposed changes to the NTA here will not entirely undo the ‘repressive authenticity’ embedded in Australian law, but it will go some way to ameliorating its impact.

THE FUTURE ACTS REGIME AND GOOD FAITH NEGOTIATIONS

From the time that the NTA was passed it was recognized that its ‘future acts regime’ conferred a weaker form of property on native title groups than those enjoyed by traditional owners of land in the Northern Territory under Commonwealth land rights law passed in 1976. This is because at best, native title groups only had a right to negotiate with resource developers, not a right to exclude them. In the Northern Territory on the other hand, in part because of historical precedent limiting access on pre-land rights Aboriginal reserves, land owners have rights that amount to free prior informed consent rights, sometimes called a right of veto. While this is not a de jure property right in minerals, it is a de facto right created by the right to exclude. The only reason for this weaker property right in the NTA was political: at the time the NTA was being debated and was eventually passed a judgment was made that such an approach was needed to expedite passage through the Australian Parliament. At that time it was also unclear if native title rights might include mineral rights that were retained by the Crown (the Australian government) on land granted under the Northern Territory Land Rights Act.

So, an innovative and somewhat experimental mechanism was introduced in the NTA’s future acts regime that encouraged resource developers and native title groups (including registered claimants) to come to an agreement within six months without any restrictions on the financial provisions in such ‘commercial’ agreements. However, if agreement is not reached during this narrow window of opportunity, then under S38(2) of the NTA the matter is referred to an arbitral body [the National Native Title Tribunal] but the value of minerals cannot be taken into consideration in determining compensation.

This regime was introduced in response to mining company views that delay represented a ‘transaction cost’ that could undermine the commercial viability of mines and result in a flight of shareholder capital. It was intended that an incentive structure would be created to encourage all parties to settle in good faith and out of court. The message to miners was to expedite proceedings by making reasonable, even generous, compensation offers. The message to native title groups was not to use the rights to negotiate as a de facto right of veto because in all likelihood less compensation would be provided from an arbitrated, rather than negotiated, agreement. At the time I was skeptical that such a blanket approach would necessarily work owing to site by site differences in the need for rapid mineral extraction, the type of mine and the size and affluence of the mining company.

Over time it has emerged, mainly through the research of Ciaran O'Faircheallaigh, Tony Corbett and David Ritter, which have found that in almost all cases when agreement could not be reached, the decision of the arbitral body favoured miners. So a moral hazard has arisen whereby there is actually an
The historic genesis of the problem is that the NTA (like the Aboriginal Land Rights Act before it) has never been clear whether the negotiated agreements between resource developers and native title groups are compensatory for loss of native title rights, in which case it is unclear why the value of the mine is an issue; or whether benefit sharing is intended as a fair division of mineral rent with native title groups who have a legally recognized interest in the land, but no legal rights in sub-surface minerals. If mineral rent is recognized as a legitimate basis for calculating compensation, why does this rationale suddenly end after six months? Excluding the value of minerals from the equation after six months merely acts to further weaken an already weak property right represented by the right to negotiate.

It is unquestionable, in my view, that if the arbitral body was legally empowered to recommend profit linked, royalty type, payments to native title groups in arbitration and operated in an impartial way, the negotiation playing field would be more level; and there would be an incentive for all parties to engage in negotiations in ‘better’ faith.

COMMERCIAL RIGHTS AND INTERESTS

There are two puzzling aspects of the Native Title Act in relation to commercial rights and interests.

The first is that while customary (non commercial) rights are recognized under S211 of the NTA, commercial rights in resources appear excluded. This might make sense if one were to interpret native title as frozen in some imagined ‘at the threshold of colonisation’ (to use the term coined by Ian Keen in his book *Aboriginal Economy and Society*, 2004) and so commercial rights, especially to subsurface minerals, are viewed as too modern to encompass tradition.

The second is the view that property rights can be neatly divided between customary and commercial. This is clearly not the case, as I have demonstrated in research in relation to fresh water property rights. If there are competing customary and commercial interests in fresh water (surface or ground) it is obviously the case that, not only is the competition over the same water, but that customary use might impact on commercial use and vice versa. In the interests of clarifying property rights to reduce potential for legal disputation (and associated transaction costs that might arise from litigation) over which rights take primacy it is probably sensible not to make imagined distinctions based on the nature of use over the same resource.

Legal scholar Lisa Strelein in her book *Compromised Jurisprudence: Native Title Cases Since Mabo* (2009) refers to a series of native title test cases since the Mabo judgment as ‘compromised jurisprudence’. Nowhere is this clearer than in High Court decisions to support the customary right of a native title party in Yanner v Eaton (1999) but to dismiss the mineral rights of a native title claimant group in Western Australia v Ward (2002). Just as in the case of water above, what if the sub-surface mineral right is actually a surface mineral right as is the case in much strip mining for iron ore in the Pilbara.
Can the land surface that constitutes native title and the mineral that is extracted from that surface be neatly demarcated and merely be the subject of a negotiation process whereby native title parties cannot say no?

In similar vein, the NTA makes a neat distinction between terrestrial and marine estates in relation to the operations of the right to negotiate framework as if such a distinction is logical either on ecological or cosmological grounds. Indigenous people who live in the coastal zone has always asserted that their terrestrial and marine interests are interlinked and so it makes sense to extend the right to negotiate offshore in situations where there has been an offshore native title registered claim or determination. Some of the issues that have arisen in relation to the intertidal zone in the Blue Mud Bay High Court decision (2008) are instructive here.

Lisa Strelein notes in her book (p. 63) that 'The assertion by the Crown of property in minerals was always going to be a problematic fiction for the courts and it has to be seen as a political compromise'. I concur with this view and now wonder how, in accord with Article 26 (2) of UNDRIP native title groups can now be granted commercial rights and interests. While sub-surface mineral rights might still require ‘political compromise’, there are many other old and new forms of property including forestry, fisheries, fresh water and carbon, to name four, that could be vested with native title groups to ensure that the land is a potential economic asset. I intentionally underline the term potential here to emphasise that native title is first and foremost a property right and it is the prerogative of native title groups alone, not well-intentioned politicians or resource developers, to decide to what purpose this property right might be exercised.

OTHER ISSUES

There are three other issues not addressed in NTA Reform Bill that I would like to briefly raise.

First, as noted already, the precise nature of payments made to native title groups for future acts impairment of native title has never been clearly defined. Nevertheless, there is general agreement that, at least in part if not in whole, payments to native title parties in relation to a future act on land where there is a registered claim or a native title determination are compensatory payments from a private source (a mining company) to groups with interest in the land to be mined. This is a very different arrangement from that current in the Northern Territory where payments to Aboriginal interests from mining on Aboriginal owned land are mainly provided from the equivalents of statutory royalties paid by the Commonwealth. In the former case payments are definitely private, in the latter there is some debate about their status but the payments are technically at least public.

And yet over the last three years we have seen considerable attention paid by first the Rudd and now Gillard governments to how native title payments should be both taxed and regulated by the state. And so there have been three discussion papers released by the Australian government ['Optimizing Benefits from Native Title Agreement' by the Department of Families, Housing, Community Services and Indigenous Affairs in February 2009; 'Native Title, Indigenous Economic Development and Tax' by Treasury in July 2010; 'Leading Practice Agreements: Maximizing Outcomes from Native Title Benefits' by Attorney-General’s in July 2010] that have all advocated for these compensation payments to be used for community purposes. Indeed, mining companies and the Australian government seem to be on a concerted campaign to ensure that such payments should be closely regulated in a manner that would not be countenanced if made to non-indigenous land owners.
I have made submission on each of these discussion papers that this focus is a misallocation of reform zeal, while also pointing out that the state is conflicted here as using compensation payments for general public and/or community purpose could result in cost shifting away from expenditure areas that are the legitimate responsibilities of the state. This reform process appears to have stalled, possibly because the paternalistic tone of the discussions papers that reinforces the view of governments and mining companies that they have a legitimate role to play in dictating how compensation payments are utilized and what form compensation might take, has been challenged. In my view there is no legitimate role for either a mining company or the state in regulating the use to which moneys provided in benefit sharing agreements are applied.

Second, in so far as at least some share of payments made to native title groups in benefit sharing agreements are linked to profit sharing and royalties, there is clearly a political economy struggle over the division of the total mineral rent extracted from native title lands between four sets of actors: the Australian government; States and Territories; mining companies; and native title groups. There is a steep gradient in power from the Australian government and States and Territories that issue licences to operate, export licences and have taxation powers being most powerful and native title groups who have a mere right to negotiate (despite having ‘exclusive possession’ rights over much land) being least powerful and having least leverage. Again in my view the state is conflicted operating in a manner that Peruvian lawyer and anthropologist Patricia Urteaga-Crovetto has termed the ‘broker state’.

The potential for conflict here has grown since the Australian government has proposed its new Mineral Resources Rent Tax regime because now both state and mining company actors will be competing more directly over the division of mineral rent and there is the prospect that native title groups will miss out (an argument made opportunistically by some miners who do not want to pay the new tax). This situation can be contrasted again with arrangements in the Northern Territory where Aboriginal interests and the Northern Territory government are far less conflicted because both want to see the 20 per cent profits tax payable under the NT Mineral Royalty Act levied, cognisant that the Australian government will pay equivalents to the Aboriginals Benefit Account. Furthermore, in the Northern Territory, there is provision for additional negotiated payments to be made above the statutory royalty equivalent minimum that operates as a base. However, it should be noted that only 30 per cent of payments made in relation to any mine are paid to Aboriginal corporations whose members live in, or are the traditional Aboriginal owners of, the area affected by those mining operations.

Arguably, if the Australian government wants a say in how mining moneys are spent it should share or hypothecate a proportion of the mineral rent it levies on resource developers with native title groups, as in the Northern Territory.

Third, in recent months considerable popular and social media coverage has been aired on the future acts negotiation dispute between Fortescue Metals Group (FMG) and the Yindjibarndi Aboriginal Corporation (YAC) in relation to the multibillion dollar Solomon Hub iron ore development in the Pilbara. This has been shown to be a highly divisive dispute in large measure because the YAC has been offered a relatively poor deal by Pilbara industry standards in terms of financial benefits. Furthermore FMG have demonstrated an extremely paternalistic attitude in seeking to regulate native title compensation payments. Such an approach should not be possible in 21st century Australia.

When the NTA was passed in 1993 there was an Australian government reluctance to introduce a statutory land council system as operating quite effectively in the Northern Territory. This reluctance reflected a Keating government acquiescence to concerns expressed by the States that a statutory system would give native title interests too much political power. It seems to me that there may be a need to revisit this issue to consider the benefits of a statutory role for well resourced and independent ‘land councils’ (Native Title Representative Bodies or NTRBs) in assisting native title groups negotiate...
with powerful mining companies and act as ‘at-arms-length’ advocates for native title groups with a statutory role as co-signatories of agreements. As in the Northern Territory, consideration could be given to providing NTRBs with a revenue stream from royalties that are at least partially independent of annual government appropriations.

THE POLITICS OF REFORM

Many of the issues being addressed in the NTA Reform Bill have been around for over a decade and yet have remained unresolved. There seems to be an emergent trend in Australian policy making at the national level for reform either to be extraordinarily protracted or else be perennially delayed. Part of the problem in this particular case might be that despite policy rhetoric of practical reconciliation or Closing the Gap, elected governments are too conflicted to initiate truly beneficial reform for Indigenous Australians. In this submission I have suggested that the Australian government (of the day) might be too conflicted on one hand keen to maximize its mineral rent revenue flows from native title lands; on the other, being keen to minimize its expenditures by cost shifting legitimate government expenses on citizenship entitlements onto native title groups and mining companies. In general, governments do not want to antagonize the mineral resources sector in such arrangements, although clearly the attention to this priority slipped in 2010 with the political dispute over the Resource Super Profits Tax.

It seems to me that at long last the NTA Reform Bill addresses some hard issues that have been identified as problematic for a long time and that have been neglected. Aspects of this Bill may need some fine tuning, but in my view the Bill should attract multi-party and Independent support if Australia as a nation is serious about Closing the Gap on native title lands most of which are located, owing to the process of colonisation, in remote Australia.

Ultimately, and a little paradoxically, the impetus for reform appears to have been born from a combination of the failure to pass the conservative opposition’s Wild Rivers (Environmental Management) Bill 2010 [No.2] and the reform initiative and zeal of the Australian Greens who have tabled the NTA Reform Bill. Both the Australian Greens and the Liberal National Party Opposition appear to agree that principles articulated in UNDRIP should be applied in Australian domestic law, in the name of development opportunity for Aboriginal people living on their own land in remote Australia. There might be rare opportunity for reform in the current parliament from an unusual political coalition.

AFTERWORD

16 NOVEMBER 2011

On 9 November 2011 the report into the Inquiry into the Native Title Amendment (Reform) Bill 2011 by the Senate Standing Committee on Legal and Constitutional Affairs was tabled in the Senate chamber. The Committee recommended that the Senate should not pass the Bill. In a dissenting report Senator Rachel Siewert recommended that the Bill, incorporating revised drafting that would remove reference to UNDRIP, be passed.