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Centre for
Aboriginal
Economic
Policy
Research

Discussion Paper



**Assessing the relative allocative
efficiency of the *Native Title Act 1993*
and the *Aboriginal Land Rights*
(*Northern Territory*) *Act 1976***

S.L. McKenna

No.79/1995

ISSN 1036-1774
ISBN 0 7315 1753 9

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Professor Jon Altman
Director, CAEPR
Australian National University

ABSTRACT

Economic analysis indicates that a socially optimal level of mining may not be occurring under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA). This paper suggests that this is either because transactions costs are hindering negotiations between miners and Aborigines or because some strategic behaviour problem is present.

This paper discusses whether the mining provisions of the *Native Title Act 1993* (NTA) have, at a statutory level, the potential to overcome the difficulties evident in the ALRA's operation. It is argued that transactions costs will probably be less under the NTA than under the ALRA and that a liability rule is likely to be more efficient than a property right as transactions costs increase. This suggests that the ALRA is inefficient compared to the NTA. The merits of arbitration in an environment of strategic behaviour, which is generally better disciplined by a liability rule, are also discussed. The general conclusion is that the NTA has the potential to lead to more efficient outcomes than the ALRA.

Definitions of technical economic terms used in this discussion paper can be found in the glossary at the end of the paper.

Acknowledgments

This discussion paper is a revised version of sections of a sub-thesis submitted for Economics IV Honours at the Australian National University. I would like to thank Jon Altman, Mike Dillon, Robert Albon, Martin Zelder, Neil McKenna and Diane Smith for helpful comments on earlier drafts. Thank you also to Krystyna Szokalski and Hilary Bek for their assistance with subediting and Linda Roach for proofreading.

Siobhan McKenna was employed as a visiting Graduate Research Assistant by the Centre for Aboriginal Economic Policy Research after completing a BEc(Hons) at the Australian National University. She is currently working as a business analyst at McKinsey and Company in Sydney.

Foreword

In May 1994 I gave a lecture on the economic significance of land rights and native title to a small group undertaking a course Economic Policy Issues in the Faculty of Economics and Commerce. One of the students in that class, Siobhan McKenna, engaged me in a discussion about the relative efficiency of statutory land rights and native title regimes. Subsequently, Siobhan decided to write her Bachelor of Economics Honours thesis on this topic and I was one of her advisers. While completing her degree, Siobhan was recruited by McKinsey and Company in Sydney as a business analyst; she was to begin work early in 1995.

I read Siobhan's thesis *A Second Best Choice: Does the Native Title Act 1993 or the Aboriginal Land Rights (Northern Territory) Act 1976 Generate Greater Allocative Efficiency* as it was written and was concerned that a potentially significant piece of research might be lost to both the academic and policy community. Subsequently, I offered Siobhan a post as a visiting graduate research assistant at CAEPR to rework her Honours thesis into a CAEPR Discussion Paper. During the time Siobhan was with CAEPR, from November 1994 to late January 1995, she not only completed this Discussion Paper, but also further developed it into a refereed article 'Negotiating mining agreements under the *Native Title Act 1993*', to be published in *Agenda* in August. In March 1995, Siobhan returned to CAEPR for a brief visit and presented a version of this paper in a CAEPR Seminar Series 'Policy Aspects of Native Title'.

In a special section Focus on Mabo in the *Australian Economic Review* in September 1993, Peter Kenyon and I argued that not only is the analytic toolkit of microeconomics admirably suited to focus on efficiency aspects of native title law, but that economists should take the plunge and use this toolkit to enter a very significant and contemporary policy debate. Siobhan McKenna as a young graduate economist is to be commended for her willingness not only to participate in the debate, but also for making a valuable contribution to it.

Jon Altman
Series Editor
April 1995

The issue of Aboriginal ownership and control over land entails political and social decisions. However, given different land rights regimes, an economic assessment should be made of their relative efficiency. Economists tend to evaluate property rights systems on the basis of whether they ensure resources go towards their most valued use. From an economic perspective, mining should be allowed to occur up to the point where the value of allowing increased mining equals the detriment to Aborigines from that mining occurring. If mining is allowed to increase past this point there will be an efficiency loss because Aboriginal valuation of that undisturbed land use is greater than the total benefits accruing from the increased level of mining. Within this context a desirable legal regime would be one that allowed both miners and Aborigines to clearly express their valuations of land and allowed land to pass freely between them.

Under s.11 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), the Aboriginal Land Commissioner recommends to the minister whether an Aboriginal group making a claim to land has by Aboriginal tradition, the right to use or occupy an area of land. If it is, then this land is held for the traditional owners in a land trust that operates under the direction of the relevant land council who must consent before any dealing with the land, including mining, is allowed (ss.40(a)). Under ss.12(2) and (3) of the ALRA, rights to sub-soil minerals remain with the Northern Territory or the Commonwealth, but the land council's right to consent provides traditional owners with a veto over the exploration for, or the extraction of, minerals on their land. Initially this veto was exercisable at both the exploration and mining stages of a grant, meaning that mining contracts were 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 application moneys, generally equivalent to statutory royalties derived from the project, are paid into the Aboriginals Benefit Trust Account (ABTA) by the Commonwealth Government, with a proportion (30 per cent, ss.64(3)) 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.

In the *Native Title Act 1993* (NTA) there is no veto provision; instead, native title holders are able to negotiate (Division 3, subdivision B) as to the compensation amount and the terms and conditions under which their land will be used; negotiation rights not enjoyed to the same extent by non-Aboriginal land holders. During this negotiation period the compensation amount agreed upon by the parties can make reference to the mine's potential income, output or profits (s.33). If no agreement can be reached within a specified period, an arbitration process follows where a determination of whether the act may proceed is made (ss.38(1)). In this arbitration phase Aborigines are only entitled to compensation for the

impairment of native title rights, which is independent of the value of minerals present (ss.38(2)). This is essentially a liability rule.

Standard economic analysis examining the implications of assigning property rights or setting liability rules can be applied to determine the relative efficiency of the ALRA and the NTA, although given the extremely complex nature of Aboriginal and Torres Strait Islander affairs policy, some general simplifications are needed. There are two reasons to suppose that a liability rule solution would be efficient relative to a property right assignment in the situation described above. First, because if market transactions costs are prohibitive then the assignment of a property right will generate allocative inefficiency (relative to some utopian allocation, see Demsetz 1982: 41-3) and the assignment of a liability rule, where the transaction is removed from the market and placed in front of an arbitrator, may be efficient in comparison (Landes and Posner 1987: 29-41). This will only be so if the arbitrator correctly reflects the valuations of both parties in its decision. Secondly, because the existence of a bilateral monopoly can require the threat of arbitration (a liability rule) to generate trade (Cooter and Marks 1982).¹

Transactions costs

Coase's (1960) definition of transactions costs which includes (a) the cost of searching for parties with whom to negotiate, (b) the cost of negotiations, and (c) the cost of enforcing a contract, will be used to identify the transactions costs associated with trading property rights under the ALRA compared with the costs associated with transacting under the NTA. It should be noted that transactions costs have the potential to generate inefficiency irrespective of to whom they accrue and that the Coase theorem is solely concerned with allocative efficiency. It ignores the wealth effects that are associated with a reassignment of rights between parties.

The cost of searching for parties with whom to negotiate

Under the ALRA

Before negotiations for an agreement to allow exploration can commence traditional owners have to be identified. The exhaustive process necessary to identify the range of traditional owners' rights and interests, has been claimed as a major factor delaying the start of negotiations under the ALRA (Northern Territory Department of Mines and Energy 1984: 9). This problem has been exacerbated because 90 per cent of unsuccessful Aboriginal land claims are resubmitted (Pinney 1993: 3). If a claim for traditional ownership has already been successful then negotiations can immediately commence, although under ss.46(4)(b) and ss.48A(4)(b) of the ALRA other affected parties also have to be identified and consulted.

Under s.24 of the ALRA, the creation of a register of traditional owners is discretionary and the land councils have not exercised this discretion. Traditional Aboriginal ownership can incorporate a myriad of rights and obligations and these rights may not be consistent across groups or consistent over time (Peterson 1983; Brandl and Walsh 1983; Ingold, Riches and Woodburn 1991). Therefore, the costs associated with establishing these varying rights as well as maintaining information on them, would be high. The benefit of having such a register within the context of the ALRA is limited, given that miners could not negotiate directly with traditional owners even if a continually updated and definitive register of traditional owners did exist.² This is in contrast to the NTA where a body corporate, representative of native title holders' interests, will be registered and miners can negotiate directly with that body corporate.

Under the NTA

The costs associated with identifying native title parties under the NTA should not be as significant as those of identifying traditional owners under the ALRA for three main reasons.

The first potential reduction in transactions costs under the NTA compared with the ALRA, stems from the option for native title claimants to be represented by their own bodies for the claims process rather than by the land councils. This option of multi-representative bodies was outlined by Prime Minister Keating in the Native Title Bill's second reading speech of 16 November 1993; 'We will therefore under the bill, determine representative Aboriginal and Torres Strait Islander organisations to assist claimants. They will not have a monopoly on representing native title claimants: individual claimants or groups of claimants can go elsewhere if they wish.' There is also provision under s.203 of the NTA for ministerially approved representative bodies to apply for federal funding to assist them in establishing native title claims.³ It was certainly the intent of the legislators to provide scope for claimants to have choice in representation, however, there may be a limit on the resources available to fund representative bodies, meaning that in practice Aborigines wanting to make claims may be forced, for financial reasons, to accept representative bodies that not only represent them but also represent opposing claimants, (within the limits imposed by legal ethics which ensure separate legal representation for the parties). The NTA's funding provisions are in contrast to those of the ALRA where, under ss.64(1), Aboriginal representation is funded by resources with a direct nexus to mining royalties from the ABTA. Discussion of this aspect of the ALRA has continued throughout the ALRA's existence (Turnbull 1978; Rowland 1980; Altman 1983; Vachon and Toyne 1983; Altman and Dillon 1988; Industry Commission (IC) 1991).

Secondly, the NTA under Part 7 and Part 8 created two native title registers; one contains native title holders and the other claimants.

Following lodgement of an application for a claimant or non-claimant determination of native title, the Registrar makes available for public inspection a summary of the information contained in the application, except for information in respect of which a request for confidentiality has been made and accepted. Supporting material is not made available for public inspection until after formal acceptance. Following acceptance of an application, two files are created, an Open File containing material relating to the application which is available for public inspection. Any material lodged with or obtained by the Tribunal in relation to the application and correspondence between the Tribunal and parties, or persons seeking to become parties, is also placed on the Open File. There is also a Confidential File created in respect of each application and material may be placed on that file at the discretion of the Registrar pursuant to the provisions of s.155 of the NTA (French 1994: 24).

Once a determination of native title has been made, a body corporate will be created to represent the native title holders. There may be more than one native title holder at common law but for the purposes of the NTA that holder or those holders will be legally represented by the one body (s.57). This body corporate will then be registered and miners can negotiate directly with it. The operation of these provisions will provide a degree of transparency not present in the ALRA. The native title register is not definitive in the sense that the Torrens Register of ordinary land ownership, that gives indefeasible title to those land holders registered on it, is definitive. The security that the native title register does offer, however, is that if an agreement for mining is reached between a registered body corporate and a miner then the registered body corporate can be guaranteed the contractual terms agreed to by that miner and the government not the miner, will be liable for compensation for that act to any subsequent native title party.

Lastly, and probably most significantly, under s.29 of the NTA, it is the responsibility of the native title claimant to make its claim known, within a two-month notice period, at the time of the proposed future act. If a native title party comes forward after that two-month period the act will still be valid (ss.28(1)(a)). Once a native title claim is registered, however, it becomes the responsibility of the government to make the native title party aware of the proposed future act. In contrast, amendments had to be made in 1987 to attempt to overcome delay problems inherent in the original ALRA. These amendments set out a time limit (12 months) within which land councils should identify traditional owners and commence negotiation 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, under ss.42(13)(c). Of the 77 exploration licences under consideration in 1993, the 12 month negotiation period was extended by more than six months in 75 cases and by more than 12 months in 67 cases (Pinney 1993: 8).

The cost of negotiations

Under the ALRA

The costs of negotiating agreements under the ALRA have been substantial. Giants Reef Mining NL (1993: 79) estimated that its base acquisition costs for an exploration licence of average size on non-Aboriginal land in the Northern Territory, including identification, application and retention, is around \$46,500. The additional cost on Aboriginal land is estimated to be \$30,000 per exploration licence of average size. The average size of exploration licence applications on Aboriginal land is larger than on non-Aboriginal land which indicates that this averaging process would tend to overstate the cost contrast between Aboriginal and non-Aboriginal land. These additional costs are functions, first, of the need to consult Aborigines living in the areas affected by a mine's operation (a procedure that is not widely required on non-Aboriginal land), secondly, of the costs associated with the procedural mechanisms necessary to negotiate contracts between miners and Aborigines, and thirdly, of the compensation provisions of the ALRA. The first cost is not discussed below because the requirement for consultation prior to mining Aboriginal land is inherent both in the NTA and the 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 subsequent right to mine may be refused. Since the 1987 amendments that removed the veto at the mining stage, some land councils have countered the reduction in costs associated with this amendment by requiring detailed provisions relating to mining to be included in exploration agreements.

These provisions have specified, for example, the potential operation of the project, protection of sacred sites, the miner's facilities at the mine site, instruction on Aboriginal culture, employment, training, Aboriginal participation in the mine's development, employee transport (including access roads) and accommodation, medical facilities, liquor control, preparation of the recovery of minerals, and termination of activities (Brown and Claridge 1994: 13). Given the potential for mining to impose both social and environmental costs on Aborigines (Christensen 1985; Ross and Johnson 1989; Commonwealth of Australia 1991; Howitt 1991; O'Faircheallaigh 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 few exploration licences, perhaps one in 1,000, lead to the development of a mine (Ewing 1994: 6).

Some miners and land councils have tried to overcome these difficulties by making disjunctive agreements. In the Stockdale Case,⁴ for example, the mining agreement was disjunctive in the sense that the prior consent of the NLC was required to grant any mining interest over the land in question. The contract also stipulated that if the parties did enter into a mining agreement it would be based upon the terms and conditions set out in the exploration agreement, and that the parties would not resort to arbitration if the terms and conditions of mining could not be agreed upon (Brown and Claridge 1994: 14). Justice Kearney found that the above provisions were unenforceable and void because they were contrary to Part IV (Mining) of the ALRA. He found that it was integral to the ALRA's operation that there should only be one opportunity for the land councils to refuse consent. Since this case only conjunctive agreements have been entered into (M. Davis, 'Miners, Aborigines get down to business', *Business Review Weekly*, 26 September 1994: 24-28).

The compensation arrangements of the ALRA add to the difficulties associated with negotiating agreements between miners and Aborigines. If mining occurs on Aboriginal land then 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) and the Commonwealth Government then pays, dollar for dollar, the same amount into the ABTA.⁵

The outlays of the ABTA fall into three main categories.⁶ Payment of 40 per cent of ABTA revenue to land councils to finance ministerially-approved budgets occurs under ss.64(1); supplementary amounts are available under ss.64(7). Ss.64(4) allows for grants for the benefit of Northern Territory Aborigines generally, although traditional owners are not excluded from receiving such moneys. These ss.64(4) payments are made in recognition that not all Aborigines have access to their traditional land and therefore do not have the opportunity to benefit from the use of it or gain from its commercial productivity. The ABTA earmarks 30 per cent of its revenue for this purpose. Since 1989 these grants have mainly been used to purchase pastoral stations for dispossessed Aborigines, which can then be claimed under s.50 of the ALRA.

Ss.64(3) stipulates grants to land councils for the purpose of redistribution, under s.35(2), to Aborigines living in areas affected by mining, including the traditional owners; 30 per cent of the ABTA's income is earmarked for this purpose. These moneys are distributed by the land councils to Incorporated Aboriginal Associations and Aboriginal Councils. This incentive structure was noted in the 1991 IC report as being potentially insufficient to generate a level of mining that adequately reflects Aboriginal valuation of undisturbed land use. The IC recommended that ss.64(3) grants be increased to allow payment of 70 per cent of ABTA income to those living in areas affected by mining and that the land

councils be funded, like other statutory authorities, from consolidated revenue. It should be noted that traditional owners and Aborigines living in areas affected by mining also receive s.43 and s.44 payments (additional negotiated royalties) and these go some way towards overcoming incentive problems. These payments are administered according to contractual arrangements with the mining companies, and are usually paid to incorporated groups of traditional owners and residents via land councils.

Under the NTA

The granting of exploration and mining licences under the NTA would seem, at the level of the actual legislation, to be simpler and cheaper than under the ALRA. The two costs associated with negotiating mining agreements under the ALRA that are discussed above, will probably be ameliorated to some extent by provisions in the NTA, although actual costs will only become apparent as the NTA's operations shift from theory to practice. These costs have the potential to be reduced first, because the NTA includes provisions to accelerate negotiations and a binding arbitration system that will encourage the parties to self-regulate, and secondly, because the financial incentive structure within the mining provisions of the NTA is clearer than that of the ALRA.⁷

The NTA provides a disjunctive framework. A mining company can come to a negotiated or arbitrated agreement with a native title holder to explore; if a mining licence application is made, the negotiation/arbitration procedures will again apply, although that native title holder cannot reopen discussion at this time on matters already discussed at the exploration stage, except at the discretion of the arbitrator (s.40). The native title holder can apply to the arbitral body for the mine not to proceed irrespective of negotiations at the exploration stage (s.39). 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 the strength of Aboriginal interest groups was such that the NTA was made disjunctive rather than conjunctive (perhaps in exchange for the lack of a veto right?) or that the costs associated with designing conjunctive agreements, under the ALRA, have been such as to induce this change in policy.

Irrespective of whether disjunctive or conjunctive agreements generate greater costs, the NTA has other provisions that can be utilised to substantially reduce transactions costs: exclusion clauses, an expedited process, and a binding arbitration process.

It is possible that the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs, under ss.26(3) and (4), 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.⁸ It is also possible that an expedited procedure (s.29, s.32, s.75 and s.237) may apply - this only applies 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 only apply 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 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 (M. Davis, 'Miners, Aborigines get down to business', *Business Review Weekly*, 26 September 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: 16).

The financial incentives for Aborigines to come to agreements with miners would appear to be clearer under the NTA than under the ALRA. Within the negotiation period the native title party has the scope to appropriate rents from activity on land over which native title is either recognised or has not been extinguished, by including in the negotiated agreement reference to the profits, income or output of the mine (s.33). This represents a potential *de facto* royalty. The negotiated agreement can also include any terms and conditions as to the mine's operation (including, for example access, supply of essential services, sacred site protection, environmental issues) and any joint ventures, employment conditions, or training. Any compensation amount agreed upon will be paid in full by the mining company to the body corporate. These moneys will probably be paid retrospectively and periodically as they would be under the ALRA.

At arbitration the arbitral body will decide whether the proposed act will go ahead and if so on what conditions; ss.38(2) states that these conditions cannot be determined by reference to any profits, income or output of the mine. When determining the amount of compensation that should be paid, the arbitral body is bound by a similar compensable interest test (ss.23(4) and s.240), meaning compensation that would be payable if the native title holder instead held ordinary title (freehold estate in fee simple). The payment of this money will be from the mining company to the body corporate and will probably be paid prospectively and in lump sum, as is made to ordinary land holders.

There has been much discussion on the nexus between royalty payments and Aboriginal consent under the ALRA. 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 1985, 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 their consent to mine attracts the payment of royalties for *minerals* rather than for consent. These sources all generally suggest that minerals should not be the criterion upon which compensation for mining activity be based, if compensating Aborigines for the damage mining does to their rights is in fact the objective of the payments. The reason for this being that the damage bears little, if any, relation to the value of the minerals extracted.

It would appear that when drafting the NTA the government took these considerations into account. In the negotiation period the contract between miners and Aborigines can refer to the value of the minerals present, a quasi-royalty payment, but in the arbitration stage the arbitral body bases the amount of compensation it awards upon the damage done to native title rights by the mine. 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. The removal of the nexus between minerals and compensation gives rise to the new issue of the basis for ascertaining the compensation determinations of the arbitral body.

The issue of compensation payment determination arises because 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/detriment 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, then Aborigines have the potential 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 the mine. In this case Aborigines have no incentive to minimise the effects of their behaviour on miners because they will receive more compensation the greater their damage claim. If instead the compensation paid to Aborigines is independent of whether they will decide to minimise the effects of the mine then there is no incentive for Aborigines to take fewer precautions in their actions. Cooter (1982), at a theoretical level, 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. Cooter claims that this will generate allocative efficiency. Applying this kind of lost rental value analysis to the ALRA and NTA is problematic given that native title is inalienable, although there may be scope for internal alienation within a group of native title holders if that right of transfer constitutes a native title right. Inalienability means that there can be no market in Aboriginal land within which to 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.

The cost of enforcing a contract

Under the ALRA

The cost of enforcing contracts under the ALRA has been high. The Oenpelli road dispute (Carroll 1983: 345-46; Kesteven 1983) was an example of the continual pressure to maintain property rights once contracts have been signed. In this case there was disagreement between the land council and the local Aborigines as to the distribution of both s.43 and ss.64(3) payments amongst those Aborigines living in the areas affected by the mine. In particular there was one group of traditional owners through whose land the road to the mine ran, but who 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 to the ALRA 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.

In 1980 ss.48D(3) was inserted into the ALRA, stating that inadequate consultation under s.48 is an insufficient reason to invalidate a mining agreement. This amendment also protects the property rights of mining companies since mining agreements will be valid even if Aborigines affected by a mine have not been fully informed of the mine's impact, or have not been given the opportunity to voice their objection to it (Altman 1983: 109).

Another problem Aborigines have in enforcing their property right in the post-agreement stage is that ss.64(3) grants are distributed by the land councils, under ss.35(2), to those Aborigines living in areas affected by a mine, including the traditional owners. 'The ALRA requires that ss.64(3) payments are not just reserved for traditional owners (irrespective of place of residence) but they should be shared with other Aborigines residing in areas affected by mining (irrespective of their land ownership status)' (Altman 1994: 6). There has been enormous discretion in these payments which has meant that traditional owners cannot be guaranteed any of the moneys paid into the ABTA, even though they had the right to exercise the veto. Hence, unless one group of traditional owners occupies the whole of an area affected by a proposed mine there has been little incentive to allow mining to proceed.

Under the NTA

The two problems identified above have the potential to be overcome in the NTA. The first, by having the land councils' monopoly on representation during negotiations for exploration and mining agreements removed, and the second, by having the payments made by miners to native title holders payable only to them.

The Northern Territory Department of Mines and Energy recommended in 1984, as did the IC in 1991, that the ALRA be amended to allow face-to-face negotiations with traditional owners (Northern Territory Department of Mines and Energy 1984; IC 1991). 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 may elect to continue to be the common law native title holders.⁹ Irrespective of the trust decision, the native title holders must also nominate a body corporate to represent their native title rights, carry out functions in the NTA, and be the point of contact for other interests in the land.¹⁰

The advantage the NTA's body corporate system will have over the ALRA's land council system will be that each body corporate can negotiate directly with miners. There will therefore be a greater chance 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 indicates, 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). This would suggest that the extra costs generated by having a large number of small groups may be offset by the superior representation afforded by smaller bodies.¹¹

All moneys paid by miners under the NTA will go to the body corporate for distribution among native title holders.¹² This will mean that native title holders will be able to enforce their native title rights in the post-agreement phase as against other Aboriginal interests; Aborigines living in areas affected by a mine's operation who cannot claim native title will not be compensated.¹³

If an Aboriginal group is granted native title over an area of land upon which other groups of Aborigines reside it is doubtful that compensation moneys will accrue to non-native title holders if a mine opens. This situation does not statutorily exist under the ALRA where moneys are payable, under ss.35(2), to those Aborigines living in the area affected by a mine, irrespective of their ownership status. From the perspective of the native title holders the guarantee that mining moneys will accrue to them alone will provide a clear incentive structure, but in the process these provisions have the potential to impact negatively upon Aborigines who are unable to claim native title. Under the ALRA the government was

effectively addressing equity issues through the 'areas affected' provisions, at the expense of efficiency.¹⁴ It has been argued that the government should simply address Aboriginal welfare problems directly and it would seem that the NTA reflects these criticisms.

A contract enforcement cost created by the NTA that does not exist in the ALRA is that there is no 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 mining company could apply for an exploration licence unopposed (ss.28(1)(a)) then apply for a mining lease at which time a native title party may come forward claiming the right to go through the negotiation/arbitration procedures with the mining company. There is also the potential for a native title party to come forward after the mine has commenced operation. To protect itself from such claims a mining company can make a non-claimant application for determination of native title (ss.61(1), s.67) at a cost of \$300. If this application is unopposed then the mining company is entitled to the protection of s.24 of the NTA, meaning that if subsequently a native title party comes forward the government, not the mining company, is liable for any compensation payable for past acts, although the miner will be liable for compensation for any future acts, subject to the exclusions of ss.26(3) and (4).

Secondly, a mining company could negotiate an agreement with a native title claimant at the time of the grant of a mining lease but subsequently find that a native title determination decides that the claimant is not in fact the native title holder. A mining company can protect itself from this by writing a clause into its contract with a native title claimant stating that the contract is dependent upon the native title claimant being determined the native title holder and that no money will be paid until a determination of native title is made in that claimant's favour or, alternatively, 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 demonstrated by the Mt Todd experience. 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 judgement identified, and the NTA statutorily recognised (s.21), 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 Jawoyn can now claim native title to portion 3469.

The potential for a breakaway Jawoyn group was obviously contemplated,

however, since the Jawoyn Association agreed to indemnify Zapopan in respect of any losses occasioned by any assertion of native title or repeat land claims by their people. Undertakings were also given by the Jawoyn Association 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 which may jeopardise or threaten financial arrangements by the company in relation to the Mt Todd project. The potential for a claim of native title by a non-Jawoyn Aboriginal group at a subsequent time was also addressed. The Northern Land Council (NLC) formally agreed that the Jawoyn were the only Aboriginal group whom they would act for or recognise for native title or land claims issues over portion 3469 in the future. Given that the Mt Todd area has been subject to an earlier, exhaustive land rights claim and no group other than the Jawoyn was found, there is little probability that such a scenario will arise (Stapp 1994: 14-6).

Moral hazard problems in a liability rule environment

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, through the exclusive exploration licence system, the demand for that land. The presence of a bilateral monopoly will only preclude a bargain being reached if the parties concerned are not subject to competitive takeover bids. If the parties are subject to takeover then other firms will see the opportunity for the gain of surplus through coming to an agreement and will institute a takeover of the parties concerned. This pressure does not exist in lands rights because Aboriginal groups are not subject to takeover; if one group of Aborigines will not come to an agreement with miners for the development of a mine, another Aboriginal group cannot buy the land and come to an agreement with the miners, because Aboriginal interests in land are inalienable. When bilateral monopolies exist a strategic situation can develop and there can be incentives for parties to conceal true intentions. In cases such as these, private bargaining may not achieve efficiency unless there is an institutional mechanism, such as compulsory arbitration, to dictate the terms of the contract (Cooter and Marks 1982).

The Coase theorem suggests that a competitive market with no transactions costs will achieve efficiency and Cooter and Marks show that in non-competitive markets, such as bilateral monopolies, there is the potential for an arbitration system to remove the inefficiency resulting in cases where bargaining over the property right breaks down. The obstacle to cooperation in these cases is not necessarily costs but the strategic nature of the situation. Firms remain unsure as to how other firms will react, not because it is too costly to tell one another but because the strategic nature of the situation can make it worthwhile to conceal true valuations.

The phrase coined by Mnookin (1979), 'Pre-trial bargaining is a game played in the shadow of the law', embodies 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. This is in contrast to the ALRA where bargaining can continue indefinitely at the discretion of the Minister for Aboriginal and Torres Strait Islander Affairs, under ss.42(13)(c).

Cooter and Marks (1982) have developed a model that helps to demonstrate the impact eight observable factors will have on whether a negotiated settlement will occur or whether arbitration will have to be resorted to. From the results of their model it is possible to make some policy recommendations, based on the assumption that it is preferable to have private regulation (a negotiated settlement) than imposed regulation (arbitration).

Table 1. Impact of parameter changes on probability of negotiated settlement.

Result	Parameter Change	Probability of negotiated settlement
1	Increased urgency of resolution	Increases
2	Improved value of the arbitrated outcome for either Aborigines or mining companies	Decreases
3	Increase in the transaction costs in the negotiation period	Increases
4	Increase in the transaction costs of the arbitration period	Increases
5	Increase in earnings per period contingent upon no resolution of dispute	Decreases
6	Increase in spitefulness towards opponent	Decreases
7	Less risk aversion	Decreases
8	Increase in familiarity of opponent (less uncertainty)	Increases

Source: Based on Cooter and Marks (1982).

According to result 1, a higher discount rate makes a miner more eager to settle rather than postpone resolution of the dispute until arbitration. A small mining company is likely to have a high discount rate because its investment in any particular mining licence/lease application represents a larger proportion of its investment potential, and for this reason it is unable to have very many applications for licences/leases in at any one time. It is therefore imperative to a small mining company that it negotiate a deal swiftly so that its investment in any one project can quickly come to fruition. Under the ALRA, only minor mining companies, including

subsidiaries of the major mining companies, had until 1993 succeeded in completing exploration agreements on Aboriginal land in the Northern Territory (Tasman Institute 1993:12). This trend could well continue under the NTA.

Contrast, for example, the Mt Todd and the McArthur River agreements both of which were negotiated in the shadow of the NTA's development. The Mt Todd agreement is more favourable to Aboriginal interests, took less time to negotiate and has Zapopan NL (a small mining company), the Northern Territory Government and the Jawoyn Association as signatories. The McArthur River agreement is funded almost exclusively by the Commonwealth, was negotiated over a prolonged period and has only the Commonwealth, the NLC and the Gurdanji-Bingbinga Corporation as signatories; the mining company Mt Isa Mines, a large mining company and the Northern Territory government are not signatories to the agreement. The reluctance of the larger mining companies is indicted by the director of the Kimberley Land Council, Peter Yu who suggests that

some companies ... have acted in concert with the State [WA] government and the Chamber of Mines and Energy to thwart agreements between small, subsidiary mining companies and Aborigines. He names Stockdale Prospecting [a small mining company] as one company 'that may have got the wrong end of the stick where there might have been some joint venture arrangement where they may have wanted to be more progressive and their partner has been reluctant. That is not unusual in joint venture arrangements (M. Davis, 'Miners, Aborigines get down to business', *Business Review Weekly*, 26 September 1994: 28).

According to result 2, if the arbitral body makes the value of arbitration attractive to either Aborigines or miners then this will decrease the probability that a negotiated outcome will be reached. For example, if the arbitral body generally awards miserly compensation to Aborigines for the impairment of their native title then arbitration will become a less risky option for the mining company and there is greater probability that miners will hold out for an arbitrated outcome. For this reason the membership of the arbitral body is of great significance since its decisions will, to some extent, determine the success and workability of the NTA. There is also the need for the arbitral body to be relatively consistent so that there is no constant imperative for either Aborigines or miners to seek arbitration in the expectation of a non-precedent bound decision. Uncertainty about the arbitrated outcome will generally also increase transactions costs. If there is no objective source of information about the actual probabilities of different outcomes occurring, the parties may expend considerable resources attempting to convince the other party that it has overestimated its prospects for success at the arbitration stage. There is also the potential for both mining companies and Aborigines to be repeat players. In this case the value of arbitration in terms of favourable precedent setting becomes greater without this affecting the other player's expected value of an arbitrated outcome. This will result in a negotiated settlement becoming less likely.

Result 3 concerns the cost of negotiating an agreement (for example legal costs, parties' time and the cost of communication). If one round of negotiating becomes more costly, then the parties will want to settle more quickly to avoid the cost of protracted bargaining. There is also the possibility that one party to the negotiations can affect the magnitude of the transactions costs that must be borne by the other party. Under the NTA, Aborigines can file native title claims on a *prima facie* basis.

Justice French [has] ruled that those claiming native title do not have to initially present a *prima facie* case in support of their claim. The implication of this ruling is that Aboriginal communities need not initially have to invest in heavy legal resources to prepare a detailed case for native title claims (L. Tingle, 'Law of the Land', *The Australian*, 28 September 1994: 51).

This ruling seems 'fair' given that non-claimants only have to pay \$300 to submit an application for a determination. This ruling may impose costs on the mining industry if Aborigines, in response to notification of a proposed future act, file vexatious native title claims that do not have to be stringently investigated before being registered. Aborigines can also impose costs by applying for the negotiation phase to be extended, although the risk associated with pursuing such an action is that the NTA will be amended to eliminate the negotiation phase (Altman 1993). The potential for these actions will make miners more likely to settle earlier within the negotiation phase to avoid the costs of protracted bargaining.

Result 3 may not strictly hold under the NTA. First, because there is no adequacy of negotiation clause within the NTA. Therefore if negotiation costs increase, miners or Aborigines can opt out of the negotiation process and wait for arbitration, if waiting for arbitration costs less than negotiation. (Cooter and Marks specifically preclude this in their model.) Secondly, Cooter and Marks' model assumes the relationship between the litigants to be pre-existing (as in a divorce). If however, the transaction can be voluntarily entered into, then additional negotiation costs may result in decreased probability of settlement. That is, miners may simply choose not to enter into a relationship with Aborigines.

The policy implications of this analysis are that everything possible should be done to minimise transactions costs for all parties in the negotiation phase. S.82 and s.109 of the NTA charge the National Native Title Tribunal (NNTT) and the Federal Court with the task of providing a determination mechanism that is fair, just, economical, informal, and prompt. These words should not be interpreted lightly. The NNTT has the somewhat opposed tasks of not wanting to discourage or intimidate Aboriginal native title claimants from applying for a determination while at the same time satisfying the concerns of the industries with whom it must negotiate in the future. Justice French has said that despite the connotations of the word 'tribunal' as a court of law, 'it might more accurately and appropriately have been called the National Native Title Dispute

Resolution Service' (L. Tingle, 'Law of the Land', *The Australian*, 28 September 1994: 51).

Result 4 suggests that as the cost of arbitration increases, the wish to avoid arbitration and settle in the negotiation phase increases. For this reason the non-availability of royalty-type payments in the arbitration stage appears to be good policy because it significantly increases the cost to Aborigines of not coming to a negotiated agreement, therefore increasing the likelihood of them coming to a negotiated agreement. As arbitration costs increase miners, because they directly bear such costs, are also more likely to wish to settle in the negotiation phase.

Result 5 suggests that if Aborigines do not want mining on their land then it could potentially be advantageous for them not to come to a negotiated agreement before the arbitration phase since they will continue to enjoy occupation of the disputed land until the decision of the arbitrator is made, irrespective of whether the decision is in their favour or not. This may decrease the probability of reaching a negotiated settlement.

Result 6 indicates that spite will make a party willing to destroy some of the surplus of doing a deal in order to reduce the payoff for the other player, even if so doing reduces its own payoff. Increased spite increases a party's willingness to proceed to arbitration to attempt to destroy the surplus.

Result 7 indicates that risk averse players are less inclined to gamble in an attempt to get a larger share of the stakes. Mining companies that are large have their company risk spread over a large number of projects, both in Australia and offshore. This will tend to mean that in any one project they are less likely to be risk averse compared with smaller mining companies, because that project's risk is to some extent diversified. Larger companies are as a result more likely to gamble and demand a higher share of the stakes in the negotiation period and take the risk of this resulting in arbitration. For larger companies therefore there is a decreased probability of settlement in the negotiation phase. Smaller companies on the other hand, already have a large amount of risk in their operations, and are unable to spread greater project risk over other successful projects. For this reason they will tend to more risk averse in the negotiation period and this will increase the probability of settlement.

Result 8 suggests that increased familiarity of opponents will increase the probability of a negotiated settlement. This is because as each player receives more information about the other they both become more familiar with their opponent's likely strategy, meaning there is less likelihood of miscalculation in the negotiation period which results in arbitration occurring. Therefore if both parties to the negotiations are repeat players it is more likely that a negotiated settlement will occur.

Summary and Conclusion

The potential for inefficiencies in the ALRA and the NTA has been discussed at some length above. A summary of the arguments given are contained in the synoptic table below.

Table 2. Potential inefficiencies in the ALRA and the NTA.

Reason for potential inefficiency	Aboriginal Land Rights Act (Northern Territory) 1976	Native Title Act 1993	NTA provisions to increase or decrease efficiency compared to the ALRA
(1) Transaction costs			
(a) The cost of searching for parties with whom to negotiate	Traditional owners must be represented by the land council for the claims process.	Native title claimants can be represented by any representative body they choose.	Increase.
	Land councils funded from mining royalties.	Representative bodies can be funded from consolidated revenue.	Increase.
	Creation of register of traditional owners is discretionary.	Creation of a public register of body corporates is mandatory.	Increase.
	Responsibility of the land council to notify traditional owners of a mining lease application.	Responsibility of native title parties to register a claim at the time a mine is proposed, or of the Registrar to notify registered native title claimants and holders.	Increase.
(b) The cost of negotiations	Conjunctive agreements.	Disjunctive agreements subject to the exclusion and expedited procedures.	Unsure, but probably increase if the expedited and exclusion provisions are utilised.
	Recourse to arbitration not automatic.	Mandatory binding arbitration if negotiations fail.	Increase.
	Minimum of 30 per cent of ABTA income goes to traditional owners; they can also receive s.64(4) payments and additional negotiated royalties. All payments are made via the land councils.	All of the negotiated or arbitrated payments go to the native title holders via the body corporate. This will make incentive structures clear.	Increase.

Table 2. cont'd.

Reason for potential inefficiency	Aboriginal Land Rights Act (Northern Territory) 1976	Native Title Act 1993	NTA provisions to increase or decrease efficiency compared to the ALRA
	There are time limits on negotiations for exploration licenses but these are not binding in practise. There are no time limits within which mining license negotiations should occur.	Parties can only negotiate for four months for an exploration license and six months for a mining license. Arbitration must attempt to be completed within the same time frames.	Increase, if the NTA's time limits are strictly adhered to.
(c) The cost of enforcing contracts	Land councils negotiate with miners and decide whether to allow mining. Inadequate consultation with traditional owners is insufficient to invalidate a mining agreement.	A body corporate, representative of the native title holders, negotiates directly with miners and makes the decision whether to allow mining.	Increase/decrease depending on economy of scale issue.
	Distribution of areas affected moneys determined by the land councils; moneys are paid to Aborigines living in areas affected by mining and traditional owners.	All compensation moneys go to the native title holders via their body corporate.	
	Sunset period within which traditional owners must come forward.	No sunset period. This is mitigated by: ability of mining companies to make non-claimant applications for native title; trust provisions for the payments to claimants; and potential for the surrender of native title rights.	Probably decrease.
(2) Bilateral monopoly	Arbitration only occurs if both parties agree to it, therefore, there is no discipline of moral hazard problems.	Automatic recourse to arbitration, forcing parties to self regulate. Potential increase in efficiency if the arbitrator can reflect the valuations of both parties.	Potential to increase but in some cases may decrease.

The above analysis suggests that the Commonwealth Government took into account some of the criticisms levelled at the ALRA by economic commentators when drafting the NTA.

The NTA includes provisions that make the identification of native title parties significantly more simple than under the ALRA, including a mandatory native title register, of a different nature from that included in the ALRA; funding Aboriginal representative bodies from consolidated revenue; and making it the responsibility of Aborigines to make their claim of native title known if a mining licence is proposed.

The NTA also includes provisions to make negotiations between miners and Aborigines less costly than under the ALRA. These include the option for disjunctive mining contracts; time limits within which negotiations must occur; the rapid and mandatory recourse to arbitration if negotiations are unsuccessful; the potential for the use of expedited provisions for exploration activity; 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 owners/native title holders.

The ability of both Aborigines and miners to enforce their contractual rights in the post-agreement phase is stronger under the NTA than the ALRA; this is because the monopoly of the land councils has been removed and because compensation payments are payable directly to body corporates. The NTA, however, creates no sunset period within which native title claimants must come forward. This may create costs for those wishing to mine although the government has included provisions for non-claimant applications which should go some way towards mitigating this problem.

Commentators have noted (IC 1991; Kenyon 1993) that if Aborigines value the land associated with a proposed exploration/mining licence more than miners value it, then the land should remain in Aboriginal hands. Notwithstanding this, if transactions costs are prohibitive then it can become impossible to determine either miners' or Aborigines' valuation of the land because transactions costs erode the value to both parties of negotiating an agreement. For this reason the lower the transactions costs, the better parties are able to decide upon a level of mining (level of Aboriginal specific investment) that reflects their valuation of the land. This analysis would suggest that the NTA will generate greater efficiency than the ALRA.

It may well be, however, that transactions costs will still be high under the NTA; too high for many mining agreements, based upon the exchange of a property right, to be negotiated. For this reason the introduction of a liability rule under the NTA, through the establishment of the arbitral body, has the potential to generate relative efficiency in this situation because it removes the transaction from the market and places it before an arbitrator who can exogenously determine whether mining should occur and if so under what terms. It must be recognised, however, that an arbitral system has the potential to generate inefficient outcomes if the arbitrator cannot correctly determine the value of the resource to the parties.

If it is not transactions costs that are precluding mining agreements under the ALRA but a strategic problem due to bilateral monopolies, then the reduction of transactions costs, even to a zero level, will not necessarily generate efficiency. The presence of an arbitral body is needed in such circumstances to determine whether mining should occur and if so on what

terms. If this moral hazard model accurately reflects the land rights situation then greater efficiency can be achieved under the NTA than under the ALRA.

Irrespective of whether the allocation problems in the ALRA stem from transactions costs or moral hazard issues the NTA represents a potential means to overcome those problems.

Notes

1. For a discussion of the economic conceptualisation of property rights and its application to the land rights issue, see McEwin (1993).
2. For an examination of the costs and benefits associated with creating a register under the ALRA see Smith (1984).
3. Dodson 1994 discusses the potential role of representative bodies under the NTA.
4. *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.
5. *Minerals Royalties Act 1982 (NT)* and *Petroleum Processing and Mining Act 1978 (NT)* respectively. Uranium royalties, however, 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.
6. See Altman (1983) for a full discussion of the financial arrangements of the ALRA.
7. 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 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 (Northern Territory Department of Mines and Energy 1984). The requisite period in the NTA is set at only four months for exploration and six months for mining.
8. See Sullivan (1994) for a discussion of the potential problems associated with ss.26(3) and (4) exclusions.
9. For a full discussion of the benefits and risks of trustees versus agents see Tanna 1994. See Stead (1994) for a discussion of the ALRA experience of vesting title in Land Trusts.
10. For elaboration of the Part 2 Division 6 procedures see Fingleton (1994).
11. 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: 100-102) and IC (1991).
12. This is consistent with Justice Woodward's recommendation that *individuals* should not receive 'compensation' moneys (Woodward 1973: 131).

13. See McIntyre (1994) for a discussion of the issues confronting Aborigines living in areas that are the subject of native title claims but who are not part of the claiming group. Also see Merlan (1994) who describes the differences between the ALRA's provisions and the NTA's provisions in this area and who notes the distinction between 'entitlement' and 'need'.
14. 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 land.
15. The potential for revocations and revisions is discussed by Forbes (1994: 13).

Glossary

Allocative efficiency: There is a gain in allocative efficiency whenever resources shift to a more highly valued use. Allocative efficiency in this context means that land after trade/arbitration is in the hands of the party that values it the most (see Posner 1986). A socially optimal level of mining is a level that fully reflects both the private and social benefits and costs of allowing mining on Aboriginal land, on a dollar-is-a-dollar welfare basis.

Bilateral monopolies: Bilateral monopolies exist in an environment where one party has a monopoly in supply the other party has a monopoly in demand.

Discount rate: A firm's discount rate depends on its time preference; a firm with a high discount rate is one for whom delay is particularly costly.

Economy of scale: If it is efficient to have a large rather than small organisation then there is an economy of scale. Economies of scale arise in operations because fixed costs need to be incurred only once and can be shared by the operation as a whole.

Free rider problem: Free rider problems arise when costs cannot be directly attributed to those on whose behalf they are incurred. Free rider problems are prevalent in the provision of public goods such as the services of land councils.

Liability rule: A liability rule creates a right to claim damages for certain injuries to a resource. Liability rules allow a person to use a resource if they are prepared to pay for the damage their use inflicts.

Moral hazard: Whenever the expected returns that one party will receive from another depends in part on the recipients own actions there is the potential for moral hazard. Moral hazard arises out of an information asymmetry between the parties to a transaction. Because neither Aborigines nor miners can know the value of land to the other there arises incentives to conceal true valuations in order to extract some concession from the other party.

Property right: A property right is an exclusive right to the use, control and enjoyment of some resource. It confers the right to exclude others from the use of the resource unless they have the consent of the owner of the right.

Strict liability: If a rule of strict liability is adopted then any damage done to Aborigines' native title rights must be fully compensated by the miner, irrespective of whether Aborigines had the potential to mitigate that damage.

Transactions costs: Transactions costs can be defined as 'the costs of establishing and maintaining property rights' (Allen 1991).

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