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Reforming financial aspects of the *Native Title Act 1993*: an economics perspective

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ABSTRACT

This paper was delivered at a conference, 'Doing Business with Aboriginal Communities', organised by AIC Conferences and held at the Beaufort Hotel, Darwin during the week before the March 1996 federal election. The session in which the paper was presented was about effective negotiation between Indigenous groups and industry, inside and outside the Native Title Act framework. The paper identifies elements of the legislative framework that arguably result in suboptimal outcomes for both Indigenous parties and industry. These include: the lack of statutory clarity (income sharing, compensatory or incentives regimes) about financial provisions; the provision for a right to negotiate future acts at both exploration and production (that is, a disjunctive right to negotiate); and the potential for payments to be made to Indigenous parties at exploration, operating as a disincentive to industry. Some contrasts are made between the native title and statutory land rights frameworks. Two cases of agreements made outside the native title framework are assessed in the context of these identified shortcomings.

A number of possible reforms are then considered, including options to allow Indigenous parties access to statutory royalties paid to government from mines on land where native title has been determined; trading off a right to negotiate at exploration for guaranteed payments, if production occurs; and the potential to include such possibilities in regional or local agreements. The paper concludes that the existence of a right to negotiate at both the time of exploration and mining stages needs to be reassessed as its existence will be of limited benefit to Indigenous parties and a disincentive to industry. It is also argued in conclusion that a statutory framework for negotiation would be beneficial and that governments should consider the advantages of sharing royalties with all native title parties affected by a resource development project, not just land owners.

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This paper focuses very specifically on financial aspects of the *Native Title Act 1993* and the framework it has established for mining industry and Indigenous interests within which to negotiate. It is argued that, from an economics perspective, the Native Title Act framework has problems that require reform to make it operate more efficiently. These problems are demonstrated, in part, by parties stepping (or being forced) outside the statutory framework to complete exploration and mining agreements. Taking such steps may yield positive results for some groups in the short term but may also result in real losses for many native title parties in the longer term.

It has been argued previously that strategic behaviour by industry, State Governments and Indigenous interests is hampering accurate assessments of the workability of the Native Title Act (Altman 1995).[1] This strategic behaviour proved counter-productive in 1995 with a Federal Government committed to the maintenance of the Act. In the federal election campaign early in 1996, there was a bipartisan view that elements of the Act needed to be reviewed and amended. Some elements of the proposed reform agenda are examined in this paper. With a new Liberal/National Coalition Government elected in March 1996, the Native Title Act will come under close scrutiny. This will provide an opportunity for mining and Indigenous interests, assuming, as this paper does, that they both wish to negotiate commercial agreements, to consider how the Native Title Act may be incrementally fine-tuned to their mutual benefit. Some general issues and options for reform are provided in the paper.

Some initial assumptions

The discussion paper attempts to simplify complexity somewhat and begins by making some fundamental assumptions:

i Mining interests want to maximise exploration activity, which is not an end in itself but a prerequisite for mineral production to occur. Industry wants two things: to minimise transactions costs, that is delays, and to have certainty that, if exploration is successful, mining can proceed, normal environmental, heritage and other requirements aside. There is increasing evidence that industry interests are recognising that consideration of Indigenous social, cultural and economic concerns is a key means to further these aims.

ii Indigenous interests increasingly want a financial return from any land over which native title might be determined; many are pro-development. But they also want rights of consultation, particularly to protect sites of significance. Some native title parties may not want exploration and mining on their determined (or potentially

determined) land but the Native Title Act does not provide them with an explicit right to veto either. It is sometimes overlooked by Indigenous parties that mineral rent is generated by mining, not exploration.[2]

iii Governments want mining to occur to generate economic growth, export revenue and employment. State and Territory mining laws and Commonwealth and State environmental and heritage protection laws are in existence to ensure that when mining proceeds it does so in accordance with these protective umbrellas.

Policy intent and practical problems in the *Native Title Act 1993*

The future act provisions in the Native Title Act deliver, first and foremost, a principle: that native title parties will be treated at least the same as holders of freehold title. This is referred to as the 'freehold test'. The Native Title Act framework, in fact, provides more than to private land owners, with an initial 'right to negotiate' for monetary payments if permissible future acts (which include exploration or mining) proceed within stipulated time frames. Native title holders will generally be fundamentally different from private land owners because the latter are usually clearly defined individuals, whereas native title will usually be held by corporate groups, called prescribed bodies corporate, none of which have yet been determined.[3] The problem with native title determination is that, at present, native title interests are either at best unspecified or at worst unresolved. This is the case with pastoral leasehold land or a camping and water reserve with a historical extinguishing event, as in the Waanyi case. In some situations, as in Wellington, New South Wales, the State Government is the only party that refuses to sign off a mediated settlement.

The Native Title Act framework for mineral exploration is intended to provide native title parties with at least the same rights as other holders of private land. It is important to recall that the Native Title Act notification procedures intend to 'flush out' native title interests so that issues of invalidity do not arise and parties with which to negotiate are clearly identified; an analysis of State-based mining statutes indicates that most require notification of, and consultation with, other land owners prior to proceeding with exploration or mining activity.

The Native Title Act though, in attempting to protect the right of native title parties (including claimants) to negotiate, introduces some criteria that can be regarded as 'distortions' from an economics perspective.

There is an assumption implicit in the Native Title Act that both exploration and mining can impair native title. Hence there is potential

under the Native Title Act framework for native title interests to receive a financial return from both. The impacts of exploration, in general, are lower than mining. Hence there is a possibility signalled in the Act (s.26(3)) for exploration to be excluded from the right to negotiate. Some exploration though, like bulk sampling (allowing extraction of up to 1,000 tonnes of material), trenching and drilling, is little different from mining. The overall lack of distinction between exploration and mining in the Act introduces two general problems.

First, it is not clear if the references in s.33 to profits, income and output sharing options available in private negotiations between industry and native title parties are intended as a form of compensation or rent sharing.[4] If the former is the policy intent, then financial provisions should be based on an assessment of negative impacts (rather than rents), as is possible if the arbitral body makes a determination (if negotiations are not completed within time frames specified in s.35). If rent sharing is the policy intent, then there are no rents at the exploration stage and there should be no reference to profits, income and so on in s.33 with respect to exploration.[5] Furthermore, if rent is the intent, it is unclear why reference to profits and income is excluded under s.38(2) if agreement time frames are not met.[6]

Second, it is unclear if the provision for profit or income sharing with miners is intended as implicit recognition that native title bestows certain rights in property (like land and minerals) that require an equitable return; that is, does native title provide a mineral right? Or are financial options merely included in the Native Title Act to provide incentives for native title parties to negotiate quickly with industry?[7]

In policy analysis terms, a spectrum existed: the Commonwealth government, at one end, was trying to craft an appropriate compensation regime, whereas Indigenous interests, at the other end, were keen to capture a fair share of rents appropriated from minerals that, from the Indigenous perspective, they should own.

The financial provisions in the Native Title Act end up providing compensatory income-sharing and incentives regimes. An emerging problem then is that, by failing to differentiate exploration from mining, the Native Title Act confuses the issue. Hence, for example, an almost identical right to negotiate framework is provided for exploration and mining.[8] The problem is clearest in the references in s.33 to profits, income or things produced. As a general rule, exploration activity is a loss-making, rather than a profit-making, activity. This is poorly understood from the Indigenous perspective, partly because mining companies have been willing to provide exploration sweeteners under statutory land rights regimes (especially in the Northern Territory) as inducements to trade away the right of veto (which does not exist in the *Native Title Act 1993*).

From the industry perspective more generally, incentives rather than disincentives to explore are required and payments to Indigenous parties are an impost.

The general problem from the Indigenous perspective is that with industry estimates that only one major mine results from 1,000 cases of prospecting, fossicking or exploration (Ewing 1994), prospects for generating income from land where native title has been determined will be limited, as significant financial returns will only accrue on those rare occasions that mining actually occurs.

The lottery nature of random distribution of mining moneys is recognised in other Australian Indigenous land rights laws that include redistributive statutory mechanisms. A further feature of all these statutory frameworks is that Commonwealth or State Governments forego either all, or a large part, of their statutory royalty income in favour of Indigenous interests. Three key examples are as follows.

In the Commonwealth's *Aboriginal Land Rights (Northern Territory Act) 1976*, under s.64(3) only 30 per cent of statutory royalty equivalents are earmarked for traditional owners of, or residents in, areas affected by a mine. Seventy per cent is distributed more widely to finance land council administration and to, or for, the benefit of Aboriginal people throughout the Northern Territory. This framework does not preclude the possibility of negotiating additional 'private' agreement payments either from exploration or mining. Precedents to date result in such payments providing an additional 1-2 per cent ad valorem royalty.

In the South Australian *Pitjantjatjara Land Rights Act 1981*, one-third of statutory royalties is earmarked to Anangu Pitjantjatjara the body corporate representing the regional Indigenous population, one-third to State-wide Indigenous benefit and one-third to the State Government. Again this does not preclude additional payments: under s.24(2) of the Act, a negotiated payment can be made by a mining company to Anangu Pitjantjatjara to compensate for disturbance to the land, the people and their way of life.

In accord with s.46 of the New South Wales *Aboriginal Land Rights Act 1983*, 60 per cent of any statutory royalties raised on Aboriginal land is returned to be invested by the Local Aboriginal Land Council, with the remaining 40 per cent being provided to the peak New South Wales Aboriginal Land Council.

It would be a mistake to suggest that any of these systems are working perfectly: the royalty provisions of the South Australian and New South Wales statutes are largely untested, while in the Northern Territory other problems with the statute outlined elsewhere (Altman 1994) can result in

suboptimal outcomes from the perspectives of both industry and Aborigines. These alternative statutory systems suggest two structural problems with the Native Title Act, that could result in poorer outcomes from the perspectives of industry and Indigenous land owners. This view is contrary to an economic analysis undertaken by McKenna (1995), which suggested that the Native Title Act framework would result in greater allocative efficiency than the Aboriginal Land Rights Act. Interestingly, the Industry Commission (1991) also recommended greater returns to traditional owners as a means to provide greater incentives to facilitate resource development.

First, to reiterate, the Native Title Act framework creates strong incentives for native title parties to seek financial returns from mineral exploration, as well as mineral production, because of low strike rates. This is because the current system only provides native title parties with a one-off chance to hit the jackpot: a prescribed body corporate might be economically fortunate and have a viable mineral deposit on land over which its native title is determined. But in the vast majority of cases this will not happen. This creates distortions: it places undue emphasis on seeking financial returns from exploration and ultimately creates disincentives (associated with cost imposts) for explorers.[9]

Second, all payments in the Native Title Act framework have to be provided by industry: the system, as it stands, is costless in direct terms to government. This has its logic, especially given that Indigenous interests have a weaker property right under the Native Title Act than under any statutory land rights regime. However, from the Indigenous perspective, precedents and expectations have been established, especially by the Northern Territory (see O'Faircheallaigh 1995). If these statutory and negotiated payments are regarded by Indigenous interests as current commercial reality, it is likely that financial provisions in the Native Title Act, as it is constituted, will rarely result in successful pre-arbitral negotiations between resource developers and native title parties. This is because the costs to industry are too high and are likely to be much lower after arbitration, because s.38(2) explicitly states that an arbitral body cannot refer to profits, income and so on in making a determination. In other words, under the Native Title Act framework, financial returns to native title parties are all to be provided by miners (if a negotiated agreement can be made) whereas under land rights law, governments contribute by foregoing royalty receipts.[10]

A third aspect of statutory land rights regimes is that they stipulate mandatory functions for land councils. In the Northern Territory and New South Wales, these bodies (that are now also Native Title Representative Bodies determined under s.202 of the Native Title Act) have evolved into statutory authorities that represent traditional owners of land. One of the

key concerns of industry under the Native Title Act future acts regime is that the right to negotiate may be bestowed on the wrong native title party, or new native title parties may emerge. This is a valid concern, which can largely be resolved by establishing a statutory framework under the Act whereby Representative Bodies are required to resolve disputes between native title parties, to fully consult with them and to both express their views and represent their interests in negotiations. This was recommended in a recently completed Aboriginal and Torres Strait Islander Commission (ATSIC) review of Native Title Representative Bodies: it was proposed that their establishment under a statutory framework would prove cost-effective and would provide institutional stability, transparency and accountability that will facilitate the efficient operation of the Native Title Act (ATSIC 1995: 95).

Responses to date

The responses to some of the inadequacies of the Act have seen industry and native title claimants (or Aboriginal parties) negotiate outside the Native Title Act framework. Two very different illustrative examples from the Northern Territory are instructive: one where native title was used as leverage, the other where it was not and could not be used as leverage.

The Walgundu Agreement

The Walgundu Agreement was officially signed in November 1995 by native title claimants to the St Vidgeons pastoral lease near Ngukurr in the Northern Territory and mining transnational Conzinc Riotinto of Australia (CRA). This agreement, while outside the Native Title Act framework, nevertheless used potential native title as leverage: it largely came about after the Northern Territory Government refused to follow normal future act procedures (notification and right to negotiate for native title claimants) because the threshold issue of whether pastoral leasehold (with reservation) had extinguished native title had not been resolved by the courts. While the Department of Mines and Energy was willing to issue CRA an exploration licence, the company was not willing to exercise its rights under the licence until an agreement was reached with native title claimants. The agreement is comprehensive and confidential, but the following significant features are in the public domain[11] and have been summarised by the Northern Land Council:

i it provides for sacred site protection and employment for Aboriginal people, even at the exploration stage;

ii it guarantees compensation payable at the rate of 5 per cent of exploration expenses per annum (the benchmark achieved under the Aboriginal Land Rights Act);

iii it covers the present exploration licence held by CRA and any other exploration licence that might be granted to CRA to the claimed area in the next 25 years;

iv it commits the parties to enter into negotiations if mining occurs in the future as a result of exploration, referring to confidential criteria to be included in the mining agreement and an arbitration clause in case of disagreement; and

v it will be valid irrespective of whether the applicants succeed in their native title claims; the claimants undertake not to litigate against CRA because of potential invalidity due to the failure of the Northern Territory Government to follow appropriate future act procedures and CRA guarantees not to oppose the native title claim.

The Wandie Agreement

The Wandie Agreement is a joint venture agreement between Dominion Gold Operations (DGO), the Barnjarn Mining Company (BMC), a company established specifically for the joint venture and Barnjarn Aboriginal Corporation (BAC) which holds freehold title to Northern Territory portion 3469 (provided to the Jawoyn people by the Northern Territory Government as compensation for the surrender of native title under the Mt Todd Agreement). Dominion held exploration licences over 1,150 sq kms of Northern Territory portion 3469 but, as this is freehold land, the Jawoyn do not have a right of veto nor a right to negotiate under the Native Title Act. The joint venture option was first proposed in October 1993 and agreement was reached in April 1994; the company saw this as a means to include the Jawoyn land owners as stakeholders in the exploration (and possibly mining) process, thus reducing any risk of opposition to the project. The Dominion interest in the project has now been purchased by Territory Goldfields. The key features of the Agreement are as follows:

i the percentage interests of the joint venturers are 90 per cent DGO and 10 per cent BMC, with BMC participating in all management meetings and being registered as a beneficial owner of the tenements;

ii BMC's interest is free-carried by DGO until a decision to mine has been made. At that stage, BMC can either become a mining participant and pay its share of development costs and 10 per cent of earlier expenditure or assign its interest;

iii in consideration of DGO carrying BMC's interest, BAC agreed to carry out all necessary Aboriginal site clearance activities to stipulated deadlines, with the joint venture paying for such activities;

iv the joint venture pays BAC compensation in respect of activities on BAC land, with the rate of compensation related to project expenditure. However, compensation is only payable in the event that there is a decision to mine; it is not paid in cash, but is deducted from BMC's carried expenditure and accrued interest thereon; and

v the joint venturers aim to maximise employment of people of Jawoyn descent who are reasonably qualified for the positions they seek.

Assessment
These two agreements have been completed in very different circumstances; the former with respect to a former pastoral station that is the subject of a native title claim; the latter on freehold land where Jawoyn owners have no right of veto or negotiation. The positive political feature of both agreements is that they demonstrate that Indigenous interests are pro-development. Both agreements ensure certainty to mining companies, transactions costs were low (the agreements only took short periods of three or four months to negotiate) and Indigenous interests are assured of financial returns.

There are some key differences between the two agreements. A negative aspect of the Walgundu Agreement, at least in terms of the analysis undertaken here, is that exploration payments are made up front. Because the agreement provides local traditional owners with 5 per cent of exploration expenditure, an impost is levied on the mining company. Such an impost can be borne by large companies like CRA that have potential for tax write-offs and can see such upfront payments as generating important public relations spin-offs, possibly for developments elsewhere. But such an approach has costs: smaller exploration companies will have difficulty in bearing such additional costs and the wrong signal is sent to both industry and Indigenous interests. In economic terms, the Wandie Agreement appears superior to the Walgundu Agreement. On the other hand, the Walgundu Agreement, which was brokered by the Northern Land Council, will obviously be of huge strategic benefit to the traditional owners of St Vidgeons if the High Court rules that pastoral leasehold extinguishes native title. Like the earlier Mt Todd Agreement (see Altman 1994), this agreement uses a window of opportunity (current uncertainty of the native title status of pastoral stations and recent CRA goodwill) as leverage.

The major reservation about the Walgundu Agreement is its objective to raise revenue at the exploration stage. This can be contrasted with the Wandie Agreement that provides no such upfront payments but rather potentially incorporates Jawoyn as stakeholders in any mining development on their land by establishing a joint venture.

Options for reform

There are problems evident in the Native Title Act that will see rapid moves to amend it in 1996. To a great extent these problems have not eventuated from government policy but from Federal and High Court rulings that interpret the Act in ways that appear at variance from government intent. One problem that has loomed recently is the period of time between registration of a native title interest in land and its acceptance by the National Native Title Tribunal; this time frame potentially provides native title claimants an opportunity to act strategically, assert their attachment to land and have a right to negotiate prior to acceptance of claims.[12] Another problem with the Native Title Act is that State and Territory Governments continue to behave strategically, still aiming to demonstrate that the new law is unworkable.

The argument here is that there are structural problems with the Native Title Act framework that can be constructively addressed when the Act is reviewed. Shortcomings in the framework, and the unwillingness of State Governments to work within it, have resulted in some industry and Indigenous interests, mediated by Native Title Representative Bodies, negotiating outside the existing framework. There is nothing wrong with this, if mutually beneficial agreement is reached with the appropriate native title holders. My concern is that such agreements risk inducing counter-productive amendment of the statutory framework, with the consequence that the leverage provided within the current statutory framework to undertake private deals will be eroded. For example, the time frames in s.35 of the Act, when private deals with reference to profits and incomes are allowed, may be shortened or reference to rent sharing may be deleted. There are four broad principles that need to be incorporated in the Native Title Act:

i a recognition that exploration is not an end in itself but only a means to mining and that it is only at the production stage that financially-significant sharing of profits or income can occur;

ii a recognition that precedents established under land rights law indicate that governments (Commonwealth or State) need to consider sharing statutory royalties with native title parties and communities affected by mining;

iii a recognition of the positive spin-offs, in terms of risk sharing, from structural provisions in those land rights laws that require wider distribution of royalties or their equivalents; and

iv a statutory recognition of the roles and responsibilities of Native Title Representative Bodies to fully consult with native title claimants and represent them in the right to negotiate process.

For both Indigenous interests and industry, incorporating such principles in the Native Title Act could see improvements in the legislation that make it more efficient and equitable. The challenge for Indigenous interests is to proactively seek avenues that will expedite exploration but that will guarantee significant returns if mining occurs. The challenge for industry is to ensure that governments also share royalties with Indigenous interests to provide additional cost-free (to industry) and appropriate low-risk incentives for native title parties (who would be guaranteed a proportion of royalties) to support mining. Three options for such reform, among many, are as follows.

First, there is a need to include provisions in the Native Title Act that guarantee Indigenous interests access to a share of, or all, statutory royalties raised by government from mining on their land. Access to a share of, or all, royalties would provide incentives for native title parties to allow mining. Payments could be made either by the Commonwealth or on a shared basis with the States. If such non-negotiable financial returns from mining were stipulated as a financial benchmark, Indigenous and industry parties would be encouraged to behave less strategically.

Second, exclusions from the right to negotiate at the exploration stage (possible under s.26(3) of the Native Title Act) could be traded for guaranteed (and more significant) financial returns from mining. To date, exclusion regimes have not been established, primarily because under State mining laws the distinction between some forms of exploration and production are negligible. State-based future act regimes could be developed, in negotiation with Native Title Representative Bodies and industry, that excluded exploration from the right to negotiate but that guaranteed profit sharing (with the resource developer) and royalty sharing (with government) at the mining stage. As indicated above, similar arrangements already exist in State land rights laws in South Australia and New South Wales. Such an approach may well require the inclusion of a statutory mechanism to ensure revenue sharing that extends beyond the determined landholding group (or individuals) where a mine is located. It would also require amendment to State mining laws and establishment of strictly monitored national and regional exploration codes of conduct which guaranteed site protection and clearance.

Third, there is potential for such arrangements to be negotiated as part of a regional or local agreement (as allowed under s.21(4) of the Native Title Act). Such an agreement might include exclusion of exploration from the right to negotiate, with appropriate safeguards protecting native title rights but a stronger right to negotiate and potential financial returns to regional, as well as local, interests at the mining stage. Such a regional approach to facilitating negotiations between industry and Indigenous interests would require State government willingness to share royalties, at least at the

regional level, to be effective. It would also require that Native Title Representative Bodies have the statutory capacity to represent the regional views and interests of native title parties. It would be especially appropriate for regions like the Goldfields in Western Australia where large numbers of future act notifications are lodged every week.

Conclusion

Mining and financial provisions in the Native Title Act framework appear to have been less well thought out than under land rights regimes. This was partly because of the political climate in which the Act was developed and partly because it attempted to create a national framework to set standards for highly variable mining activity (owing to different State and Territory laws) in one statute.

This paper sets out some issues for consideration in reform. Three central arguments could be considered in assessing the efficacy of the Native Title Act framework. First, to be workable, the law needs to be clear about its intent. The provision of a right to negotiate at exploration and mining stages, with potential financial implications for both mining and Indigenous interests, is a weak form of property right that will generate transaction costs, poor incentive structures and uncertainty for all parties.

Second, the establishment of a statutory framework for Native Title Representative Bodies would benefit industry, Indigenous interests and government. A statutory framework could include a mandatory requirement that these bodies identify correct native title parties, resolve disputes, negotiate on behalf of native title parties, represent them in future act negotiations and sign off agreements.

Third, there is a need to bring governments back into the Native Title Act framework, in terms of its financial provisions. Commonwealth, State and Territory governments need to consider the benefits that might accrue from sharing royalties either with native title parties or larger regional populations affected by resource development projects.

The challenge for Indigenous interests is to ensure that any modifications to the Native Title Act do not limit their returns from mining; this could happen, for example, with legislated changes deleting any reference to royalty-type payments at the production stage. The strategic choice is whether to maintain a right to negotiate for both exploration and mining, with associated risk that there will be delays and uncertainty, or whether to forego financial returns at exploration but seek guarantees for financially significant returns, from industry and government, if mining occurs.

Notes

1. The term strategic behaviour is used in this paper in the welfare economics sense that people reveal false valuations in the short term, anticipating long-term future gain (McKenna 1995).

2. Mineral rent is used in the economics sense to define the profits paid to owners of natural resources for their use.

3. Native title may also be held by a person or persons (s.224 and s.56(2)(c) of the Act).

4. For a discussion of this distinction in the land rights context, see Altman (1983).

5. Of course exploration is undertaken with an expectation that a viable mineral deposit will be discovered. Indigenous interests are seeking to access a share of the expected rents from mineral production prior to discovery.

6. The four and six-month time frames are flexible but, if not met, any negotiating party may apply to the arbitral body for a determination under s.35 of the Act. However, in terms of transaction costs arbitration will itself create delays, currently of unknown duration, even though the arbitral body is required to take 'all reasonable steps' to make a determination within four months for exploration and six months for mining (s.36(1)). Hence, seeking arbitration also entails risk.

7. The two issues of mineral rights and uncertainty are linked, because the possibility that native title property rights extend sub-surface has not been legally explored or resolved.

8. The difference being that under s.35 and s.36 the right to negotiate for exploration is four months prior to arbitration and then, if possible, four months for arbitration and for mining six months prior to arbitration and then, if possible, six months for arbitration.

9. Indigenous interests, of course, can also behave strategically as noted by Altman (1995). For example, in Western Australia over 90 per cent of future act notifications attracting expedited procedures (s.29(4)) have not been objected to by native title parties. This is partly a strategy not to clog up the National Native Title Tribunal at the exploration stage, partly a decision to delay exercising the right to negotiate till the production stage and partly a result of past under-resourcing of Native Title Representative Bodies.

10. The incentives for native title parties to reach pre-arbitral agreements with resource developers will obviously be based on their own calculations of the trade-off between the benefits of a private deal versus the cost of delay to arbitration. It is generally assumed that small exploration and mining companies will find pre-arbitral deals more appealing than large companies with diverse national and international interests (see Altman 1995).

11. See evidence by Mr Paul Wand, CRA Ltd to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on 27 October 1995 (Commonwealth of Australia 1995: 1491-2).

12. The Keating Government had clearly signalled its intent with the drafting of the *Native Title Amendment Bill 1995* that sought automatic lodgement (registration) with the Federal Court, with the acceptance test to be subsequently applied by the National Native Title Tribunal, with the proviso that claimants only became native title parties on acceptance.

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