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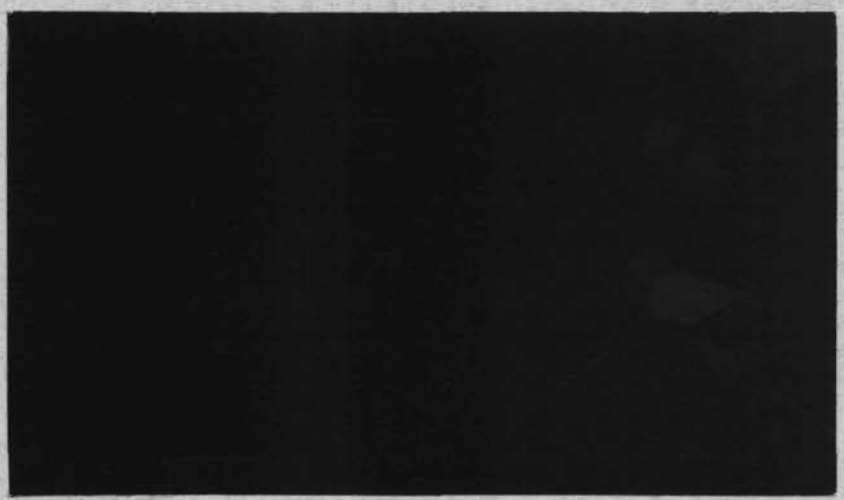

DISCUSSION PAPER

Native title and the petroleum industry: recent developments, options, risks and strategic choices

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No. 125/1996

ISSN 1036-1774
ISBN 0 7315 1799 7

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December 1996

ABSTRACT

The *Native Title Act 1993* (NTA) introduces a new dimension to Australia's land tenure systems; new property rights are established for native title parties via the creation of a 'right to negotiate' (RTN) with respect to future acts on land where native title might be determined. There is growing recognition that, legal uncertainties about the potential co-existence of native title on pastoral leases aside, there are elements of the NTA that are resulting in suboptimal outcomes for the petroleum industry. Within a Coasian analytical framework, it is demonstrated that, owing to unclear property rights, transactions costs for negotiating exploration and production with native title parties are high. Recognising this, the Commonwealth government has proposed a package of amendments that attempt to address industry concerns while balancing these against Indigenous interests. These recommendations include a once-only RTN, a higher threshold for registration of claims, automatic renewal of existing production leases and mandatory statutory functions for Native Title Representative Bodies that will require them to resolve competing native title claims and to sign off agreements with resource developers. Noting that strategic behaviour by industry, Indigenous parties and especially State governments have hampered effective operations of the NTA, the paper ends by considering the choices available to the petroleum industry to ensure that statutory amendments are in its best interests.

Acknowledgments

I would like to thank Dick Wells of Australian Petroleum, Production and Exploration Association (APPEA) Ltd, Canberra, and Danelle Baxter formerly of APPEA, for their assistance and comments on an earlier draft of this article; Hilary Bek, Centre for Aboriginal Economic Policy Research (CAEPR), for research assistance and comment; John Taylor and Diane Smith, CAEPR, for comments; and some staff of the Office of Indigenous Affairs, Department of Prime Minister and Cabinet who kindly checked an earlier draft for factual accuracy. This paper was delivered to the 1996 APPEA Conference and subsequently published in the APPEA Journal, (vol. 36, part 2, pps 139-45). It is reproduced in this series, with APPEA's permission, to ensure wider dissemination.

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This article focuses very specifically on economic aspects of the *Native Title Act 1993* (NTA) passed in the aftermath of the Mabo High Court judgment. This legislation introduces a new dimension to Australia's land tenure system and, to date, there has been considerable discussion about its potential, and actual, impacts on mineral exploration and mining. However, there has been a far more limited discussion about the impacts of this statutory framework on Australia's oil and gas exploration and production industry (referred to hereafter as the petroleum industry, including upstream production). It is argued here, from an economics perspective, that key changes are needed to the NTA framework to make it more workable for the petroleum industry; however, the specific needs of this industry are somewhat different from the mining sector more generally and these differences will be highlighted.

With the election of the Howard Government in March 1996, there was a real prospect that the strategic behaviour demonstrated by all parties (including industry lobby groups, Indigenous parties and especially State governments) since 1994 would end and that constructive negotiations about amending the NTA would immediately occur. However, fine-tuning the NTA to make it workable has already proven, after a few short months, to be more complex than anticipated. This is partly a result of continuing legal uncertainty about property rights on pastoral leasehold land. But it is also a result of the complex interrelationships between many aspects of the NTA and the increased polarisation and fragmentation of interest groups that must be party to negotiations for change. Some matters may be decided soon by the High Court and the analysis here will not speculate on possible judicial outcomes. But there are other aspects of the NTA that require statutory amendment based on a logical framework and these will form the basis of discussion in this article.

The title of the 1996 Australian Petroleum Production and Exploration Association (APPEA) Conference was 'Frontiers of Opportunity'. Opportunity for the petroleum industry is predicated on clear definition of property rights that will provide greater certainty, lower transactions costs and a reasonable degree of predicability to allow well-informed commercial decision-making. In May 1996, the Howard Government released a discussion paper 'Towards a more workable native title act: an outline of proposed amendments' with written comment invited by 18 June 1996 (Commonwealth of Australia 1996). In terms of ensuring that a more workable NTA framework emerges, the petroleum industry, along with other interest groups, is at a frontier. The analysis here outlines some strategic options that the industry faces and canvasses risks associated with pursuing a minimalist and piecemeal, rather than maximalist and holistic, reform agenda. However, it is emphasised that the views expressed here are the author's only and in the current uncertain political environment it is

recognised, unfortunately, that expediency might hold sway over economic sense.

The NTA within an economics framework

The NTA has remained unchanged since December 1993 despite clear recognition that it is functioning suboptimally. Up until the federal election of March 1996, the Keating Government was committed to maintain the NTA fundamentally unchanged to provide opportunity for all parties to test the new law. In the lead-up to the election, however, there was bipartisan recognition that the NTA needed amendment to make it more workable.

The critical issue that is emerging for the petroleum industry, with respect to the NTA, is the potential difficulties in negotiating to undertake exploration, production and production-related activities (so-called 'future acts') on land (or onshore places) where native title may be extant. In short, property rights on all land, except freehold land where native title has been unquestionably extinguished, remain poorly defined. While all invalid past acts have been validated by the NTA, future renewal of exploration leases and production licences will require renegotiation under the statute.

As the native title debate has become increasingly politicised there has been a growing tendency to revisit the theoretical Coasian framework of welfare economics to seek to define, in an abstract manner, 'optimality' in resource allocation (see Altman 1995; McKenna 1995; Industry Commission 1996). After Coase (1960), it is hypothesised that to ensure efficient allocation of resources, property rights must be clearly assigned and legally enforceable. If property rights are poorly defined, the ensuing uncertainty will result in reduced investment owing to rational risk assessment and avoidance, given the ready availability of alternative investment options. Poorly defined property rights also raise what Coase (1960) termed 'transactions costs': the cost of finding native title parties with whom to negotiate; the cost of negotiation; and the cost of enforcing a contract. Even though in the real world transactions costs are never zero, as assumed in the 'Coase theorem', there is intuitive appeal to the proposition that efficient allocation of property rights can be achieved, irrespective of who owns them, if parties are able to privately bargain.

To date, there has been no native title determination under the NTA framework and there has been no substantive re-assignment of property rights. However, the NTA has introduced the new legal concept of a 'right to negotiate' (RTN) that native title parties (including claimants) have with respect to exploration and production (see Davie 1996). This RTN is a form of property because it can be traded away, much like a futures option; mechanisms exist in the NTA framework to expedite land use if private

agreements can be reached and, conversely, the RTN can greatly increase transactions costs if private deals cannot be struck and an arbitral body, the National Native Title Tribunal (NNTT), needs to make a future act determination.

It can be argued that the RTN, while strictly differentiated in the NTA from a legal right of veto, is nonetheless a de facto right of veto in much the same way as the Industry Commission (1991) argued that the right of veto in the *Aboriginal Land Rights (Northern Territory) Act 1976* constitutes a de facto mineral right.

While it was never the intent of the Keating Government to codify such poor definition of property rights in the NTA, the RTN appears to fall mid-way between a full right of veto (preferred by Indigenous interests) and the normal recourse available to owners of freehold land to oppose exploration and production on their land. This so-called freehold test was also created in the NTA to ensure that native title parties are treated no worse than other owners of land; in practice, there is a diversity in Federal and State exploration and production statutory and regulatory regimes. The emerging problems with the NTA are not the existence of the RTN per se, but the fact that at present the RTN is disjunctive, that is, negotiations for a future act must be exercised at exploration and production stages, hence automatically raising both risk and transactions costs. This issue is being addressed variably; for example, in Western Australia, the government is issuing mining licences of 21 years duration for exploration and production purposes.

Of greater significance are problems in identifying which native title party holds the property right. In seeking appropriate parties with whom to negotiate, four options arise: the right parties may be identified; the wrong parties may make native title claim; no party may come forward (in response to a non-claimant application); or multiple claimants may emerge, some of whom are subsequently determined as native title holders, others who are not. The last possibility is the most difficult case that requires a creative policy solution.

The petroleum industry and the NTA

Most of the public debate, to date, about the workability of the NTA for resource developers has focused on mining (Ewing 1994; Altman 1995; Industry Commission 1996) rather than specifically on the petroleum industry (major exceptions being Wells 1994, 1995; Vickery 1995). This is due in large measure to the very different tactics of the two respective peak lobby groups: the Minerals Council of Australia (MCA) has maintained a high public profile on native title issues, while the APPEA has been more

circumspect. The reasons for this lower profile are primarily due to the special characteristics of the petroleum industry. The majority of industry exploration and production occurs offshore. For example, Wells (1994: 1) notes that 76 per cent of production occurs on the high seas, 11 per cent in 'territorial' waters and 13 per cent on land. Hence, only 13 per cent of production is undertaken in what is termed in the NTA an 'onshore place', with the majority occurring offshore where it is unlikely that native title property rights can be asserted and where there are no private property rights (hence the freehold test cannot be applied and there are no impermissible future acts). Similarly, industry trends indicate that onshore exploration was already in decline before the passage of the NTA (APEA 1995: 9).

There are other important differences between mining and the petroleum industry that are noteworthy and that, initially at least, appeared to simplify potential negotiations with native title parties. Firstly, industry exploration techniques are relatively low impact compared to mineral exploration, with some State mining laws allowing a range of activities up to bulk sampling that is little different from mineral production. (As noted above, in Western Australia, even mining leases, without an obligation to mine, are being provided for exploration purposes.) Aerial survey and seismic techniques used in petroleum exploration extend over large areas but have low environmental and social impacts; even exploration drilling has a low impact. Similarly, oil and gas production has a relatively low social impact: it invariably does not require population concentrations analogous to new mining towns. Consequently, in terms of compensatory regimes, it could be argued that companies need not bear a significant financial impost as their activities do not generate a major negative impact. (However, this needs to be differentiated from resource rent sharing which is often confused with compensation in both policy and practice; see Altman 1983, 1996.)

A second feature of the industry is that a disproportionately large (36 per cent) share of its Australian expenditure of $2.3 billion per annum (five-year average 1990-91 to 1994-95) is invested in exploration and development assets (APPEA 1996a: 1). Furthermore, in the petroleum industry, decisions to undertake a seismic exploration program following preliminary reconnaissance (which may include gravity and magnetic aerial survey) are often commercially predicated on an estimate of potential size of discovery. A combination of these two factors has resulted in most legislative and regulatory regimes (which vary between States and Territories) entitling holders of exploration licences or assessment leases to a production lease if petroleum is discovered. More so than other resource developers, the petroleum industry requires certainty that successful exploration will result in production; upfront conjunctive agreements for onshore activity is the bottom line because a high proportion of total costs are in the form of upfront exploration and development expenditure.

Petroleum industry concerns about the impacts of native title clearly articulated by APPEA, the peak industry group, have escalated over the past year or so. This is partly because the industry has found that native title issues onshore are not being resolved as quickly as may have been anticipated in 1993. In particular, uncertainty about the possible co-existence of native title has made exploration activity on pastoral leasehold land risky. In Western Australia this potential problem is being circumvented, with private deals between industry and Indigenous interests being struck without government involvement; the potential risk is that if deals have been negotiated with the wrong native title interests, compensation will need to be paid by industry without government protection. While for the petroleum industry as a whole this disincentive to explore is not significant as yet, the impact of the absence of 'greenfields' options for individual small-scale onshore exploration companies could drive them overseas (see Industry Commission 1996).

More significantly, however, the industry has found that native title can impact indirectly on a number of major areas of operation. Of concern has been the establishment of onshore processing facilities for offshore fields and perhaps, more significantly, negotiating easements for low impact, but very long, gas pipelines that require site clearance negotiations with many different, and at times regionally competing, Indigenous groups. Options exist in the NTA to make regional agreements in such situations or for compulsory acquisition of easements; to date governments have been reluctant to use either because, prior to native title determination, it is unclear if compensation is required or to whom it should be paid.

Perhaps the worst-case instance of such difficulties, to date, was experienced by the petroleum industry with respect to the construction by Tenneco Gas International of a pipeline between Walumbilla and the Jackson Gas Field in south west Queensland. Some detailed focus on this negative example may be instructive in terms of the need for statutory reform that will be considered further below. This is especially the case because the pipeline agreement was reached within, rather than outside, the existing NTA framework.

In 1995 an agreement was signed between Tenneco Gas International, the proposed pipeline operator, and various gas customers for the construction of a $215 million, 750-kilometre gas pipeline. Prior to beginning construction of the pipeline or settling on its final route, Tenneco engaged Aboriginal people to undertake route clearance. Initially, the Nalingu Association comprising Gungarri people was contracted; subsequently, the Goolburri Land Council was determined under NTA provisions in April 1995 as the Native Title Representative Body (NTRB) for the region. After the establishment and funding by the Aboriginal and Torres Strait Islander Commission (ATSIC) of Goolburri, six 'land-owning' groups, the

Gungarri, Bidjara, Mandandanji, Mardigan Kullili and Wokanmarra were each funded to identify and locate people from their group so that a cultural heritage survey could be conducted along the proposed route. About $200,000 was provided by Tenneco and the Queensland Office of the Coordinator-General for this route clearance.

In February 1996, a boundary dispute developed between the Goolburri Land Council and the Gungarri with respect to who had traditional owner authority for a section of the pipeline; it was asserted that the Bidjara should be recognised as the correct spokespeople. Subsequently, Gungarri people camped across the pipeline route, thereby stopping construction and lodged an injunction in the Federal Court. In May 1996, after four months delay, Justice Drummond refused to grant the Gungarri an injunction to stop construction, ruling that there was no evidence to suggest that the building of a pipeline would impair Gungarri people's native title rights to the land ('Pipeline injunction denied', *Courier Mail*, 4 May 1996). In the meantime, and at some considerable financial cost, Tenneco Gas International had leapfrogged a 108-kilometre section of the pipeline to which it would return in August 1996 so as to comply with project requirements to complete pipeline construction by 1997.

This case is replete with implications. On the one hand, it must be emphasised that Tenneco Gas International's willingness to operate within the framework of the NTA and negotiate with the determined NTRB is laudable. The dispute between sections of the Goolburri Land Council that resulted in delay reflects in part the fact that this NTRB is in an early establishment phase and will take time to fully develop into an efficient, professional and fully-representative body. More importantly, it demonstrates the risks for the industry of dealing with NTRBs that do not currently have mandatory statutory functions to identify all potential native title claimants to a future act (in this case the pipeline easement) nor the statutory requirement to sign off an agreement. It demonstrates that the pivotal role of NTRBs was not clearly understood when the NTA was originally passed. Resistance by both industry and State governments to their establishment as statutory bodies charged with ensuring an orderly claims and RTN process have contributed to current difficulties, especially in situations of multiple claims.

Tenneco worked inside the current NTA framework, but the framework proved inefficient. This, however, is not an argument to work outside the framework, because such an approach is fraught with even greater risk, especially the risk of future invalidity of title and associated high compensation costs. Rather, it provides evidence of the need to modify the law. Interestingly, the Queensland State government has not been willing to intervene to compulsorily acquire the pipeline easement (as allowed under the NTA) because it does not want to bear the cost of providing

compensation to both native title claimants and, more significantly, to a very large number of pastoralists.

To summarise, in terms of the above analytical framework, the petroleum industry, like other resource developers, wants predicability in the negotiation framework so as to limit transactions costs; to minimise risk of future invalidity; and to be able to ensure certainty of title. In short, the industry is seeking clarification of property rights. The major difference between the petroleum industry and miners is that the industry needs conjunctive exploration and production agreements; this is a valid desire because a great deal of exploration expenditure is upfront. This is the reversal of the process for miners; that is, the RTN needs to be exercised by native title parties at the exploration rather than at the production stage. This, in turn, implies that any rent sharing between a company and Indigenous interests will need to be agreed upfront.

The government proposal: trade-offs for outcomes

At face value, the Howard Government's proposals for changes in the NTA outlined in the discussion paper 'towards a more workable native title act' (Commonwealth of Australia 1996) are a very comprehensive response to industry concerns. This is evident when, for example, the petroleum industry's concerns, as outlined in APPEA's 'Position Paper on the *Native Title Act 1993'* (APPEA 1996b) is compared to the discussion paper.

The overall package implicitly attempts to provide a balance between industry and Indigenous interests. The amendments have a pragmatic focus on both statutory and administrative workability. Unfortunately, the proposed package has not been viewed, or clearly presented, in this manner and subsequent negotiations and modifications may result in future unworkability.

Within the Government's discussion paper four conceptual trade-offs can be identified from an economics perspective that could balance perceived competing industry and Indigenous interests.

The first trade-off proposes to modify the future acts procedure by eliminating the RTN at exploration, but maintaining it at the production stage, and reducing the time frame for negotiation and arbitration, thus potentially reducing transactions costs considerably (Commonwealth of Australia 1996: 13-19). This can be seen as very positive from an industry perspective, with the time frame for the RTN being reduced from a current period of a maximum 20 months to eight months. This industry concession is targeted primarily at the mining industry rather than the petroleum industry, which would need the RTN at exploration, with conjunctivity to

production (Commonwealth of Australia 1996: 14). In exchange, provision is made for the payment of a share of profits to native title parties, both in private agreements and in arbitration (Commonwealth of Australia 1996: 2). From the industry perspective, an unintended disjunctivity is removed; from the Indigenous perspective, an unintended incentive for industry to seek arbitration (where reference to profits is not allowed in making a determination) is removed. For both, transactions costs are reduced and an incentive structure is created to encourage parties to reach agreement.

The second trade-off maintains the once-only RTN for claimants, as well as determined native title holders, but a longer time frame (increased from two to three months) for lodgment of claims in response to a future act notification is introduced as a plus for Indigenous parties (Commonwealth of Australia 1996: 2). But the higher threshold for the registration test for native title claims (which will ultimately reduce the number of claims) is a plus for industry (Commonwealth of Australia 1996: 16-28). Both measures reduce the risk for industry of potentially invalid future acts. Some pragmatic Indigenous interests recognise the need for a threshold for registration, but others oppose such amendment because it will place the onus back on native title parties to prove association with an area rather than accepting that native title exists because it has not been extinguished.

The third trade-off provides automatic renewal of pre-1994 mining and production leases (Commonwealth of Australia 1996: 15) as intended in the NTA and this again removes a degree of uncertainty and provides a degree of predictability for industry and must be regarded as an important win. A possible trade-off is that there will be no legislated extinguishment of native title on pastoral leases, with or without the reservation (Commonwealth of Australia 1996: 11-13). This is an immediate plus for Indigenous parties, but could be of limited significance if the High Court finds in favour of pastoral interests and governments in the Wik appeal (and in subsequent cases in other States).

The final trade-off recommends the establishment of a mandatory statutory framework for NTRBs that would require them to undertake a range of activities including acting as a conduit for native title claims to the NNTT, as a mediator of conflict between competing native title interests and as a negotiator on behalf of appropriate native title interests with respect to future acts (Commonwealth of Australia 1996: 28-32). This could be regarded as an important plus for Indigenous interest especially if the Commonwealth realistically resources NTRBs to undertake these additional mandatory functions.

The quasi-monopoly status proposed for NTRBs that will require them to lodge all claims and to signoff agreements on behalf of native title parties will provide industry with the degree of certainty that is currently evident

in agreements negotiated by Aboriginal land councils in the Northern Territory. Realism suggests that a statutory role for NTRBs, as recommended in the ATSIC-sponsored review of last year, will provide the only cost-effective means for government to finance and administer native title representation, in contrast to the option of funding hundreds of individual claimant groups (ATSIC 1995: 95). Some industry interests regard this as a negative proposal because they want to deal directly with traditional owners (native title parties). However, given the above-mentioned risks associated with the possibility of multiple claimants, such a view has many disadvantages (see Altman 1996).

In summary, an NTA framework amended in accordance with government proposals will deliver important outcomes for the petroleum industry. First, more streamlined future act notification and negotiation procedures will greatly reduce transactions costs. Second, there will be assurance of a once-only RTN. Third, there will be more information about cost parameters via the provision for rent sharing with native title parties at the production stage. And finally, a statutory framework with mandatory functions for NTRBs will deliver a higher degree of certainty that industry interests are dealing with the correct native title parties.

Industry strategic choices: some options

Given that the Government's proposals for reform focus heavily on ensuring positive outcomes for industry, how can the industry itself facilitate their implementation?

The industry (and the Howard Government) needs to provide strong incentives to Indigenous parties to actively participate in the reform process, because earlier experience has indicated their acumen in mobilising political opposition (in this case the Senate) to unpalatable reform. In any negotiations for change, it must be recognised that experience with Aboriginal land rights law indicates that Indigenous interests oppose the view that a change in Federal government means that the law can change, especially when the existing statute has resulted from earlier substantial concessions. To further proposed amendment to the NTA, the petroleum industry needs to recognise that Indigenous interests perceive that they made important concessions in 1993 when negotiating the NTA; Indigenous leaders are therefore understandably very reluctant to make further concessions from the 1993 benchmarks incorporated in existing law.

In particular, it must not be overlooked that the RTN is a far weaker form of property right than the right of veto which remains the preferred Indigenous position. Unfortunately, from an economics perspective, the additional leverage provided by the right of veto actually provides greater

incentives for Indigenous interests to be pro-development (see Industry Commission 1991). Furthermore, in the Northern Territory there is provision in land rights law for Indigenous parties not just to negotiate a share of rents with industry (as is now proposed for the NTA), but also to share rents with the government (Altman 1996).

The petroleum industry itself faces a broad trade-off, in my opinion, with respect to its response to the proposed package of amendments. One option is to aim for minimalist and piecemeal reform that will only operate as a short-term stopgap. The other is to seek maximalist and workable amendments, a comprehensive approach to workability of the NTA framework. The risks associated with the former approach are that future unworkability will, in itself, generate ongoing uncertainty linked to strategic behaviour by all parties seeking additional amendment. Unworkability might also force industry parties to operate outside the NTA framework, with associated high risks of delay, disputation and possible future invalidity. Possible problems with the latter approach are that it will take time to achieve consensus between all parties (including bipartisan political support) and industry interests might need to make financial concessions, within statutory parameters, to gain support for proposed reform.

The strategic choice facing the petroleum industry is to ensure that amendments to the NTA are the best possible for the industry as a whole, rather than for individual companies. What is best for longer-term certainty, and associated economic gain, is for the industry to recognise commonalities with Indigenous interests and to form a strategic alliance to ensure rational amendments of the statute. After all, it is becoming patently clear that the current framework is hardly working optimally for Indigenous interests.

At the same time, there are continuing indications that the two key resource-rich States of Western Australia and Queensland remain committed to (behaving strategically with the aim of) demonstrating that the NTA is unworkable, irrespective of proposed amendments. Indeed, it could be questioned whether, as government parties, they are negotiating in good faith with both native title parties and industry as required under section 31 of the NTA. The petroleum industry needs to consider options for forming a strategic alliance with the Commonwealth to demonstrate to the States that it will work within the NTA framework.

Three issues might be considered by the petroleum industry to demonstrate goodwill and a strategic positioning on the moral high ground.

First is the issue of negotiations between industry and native title parties. It is important that industry associations, like APPEA, facilitate the

establishment of, and compliance with, industry standards for negotiations with native title parties. In particular, all industry members should work within, rather than outside, an amended NTA framework. Ensuring a consistent industry approach will be difficult because of diversity within the industry. In particular, some industry members, such as small exploration companies operating onshore, have competitive advantage from long-term relationships with particular traditional owners that amounts to a form of business goodwill. There will be continual pressure from such companies to negotiate directly with native title parties rather than via NTRBs. This pressure is increased because some NTRBs, such as the New South Wales Aboriginal Land Council, do not want a mandatory role and currently encourage industry and native title parties to negotiate direct (as in the case of the proposed Moomba Pipeline). This demonstrates that Indigenous interests themselves are not united, which makes the role of industry associations in negotiations more difficult. Industry standards can also be extended to include the establishment of, and compliance with, codes of conduct for negotiations with native title parties and the lobbying for amendments to petroleum statutes at State level to ensure strict site protection and appropriate negotiation procedures where the RTN is not applied. The widened scope and additional flexibility for agreements under section 21 of the NTA proposed by the Howard Government (Commonwealth of Australia 1996: 19-20) should be supported by the petroleum industry because pipelines traverse large regions.

Second, it is important that proposals to strengthen the statutory framework for NTRBs are supported by industry because experience elsewhere, and especially in the Northern Territory, indicates that statutory authorities (land councils) provide industry with the greatest certainty. After all, even a once-only RTN can generate considerable transactions costs if a company needs to deal with a number of different claimant groups, with each one possibly taking a different negotiating position. While providing little solace to companies that are experiencing difficulties with NTRBs as currently constituted, it must be recognised that these organisations will need time to evolve into professional and effective representative bodies; a price is already being paid for earlier opposition to establish these bodies with mandatory functions. The Howard Government's proposals to make NTRBs more accountable both to their constituencies and to government will hasten their development. But it is essential that, with any expanded mandatory functions, NTRBs are adequately resourced. Industry, as well as native title parties, will benefit; any reduction in financial support to NTRBs in the current fiscal climate will have ramifications for industry.

Third, it is important that appropriate rent sharing parameters are established in the NTA to provide incentives for native title parties to be pro-development. However, these incentives, as argued elsewhere (Altman 1996), should not extend to rentsharing at the exploration stage because no

mineral rent is generated at this stage. Furthermore, it is difficult for the industry to argue that it bears a heavy tax and royalty burden when individual companies break ranks and continue to provide exploration sweeteners. Instead, it would be preferable for rent sharing with native title parties to be allowed within statutorily imposed limits. It is suggested that a negotiated royalty of between 1-3 per cent *ad valorem*, on a sliding scale depending on level of production, be incorporated in the statute or regulations. Alternatives that could be considered would include equity options at the production stage and provision of jobs and training. Both would allow companies to assess commercial risk within stipulated limits.

The recent agreement between Naylor Ingram Pty Limited and Anangu Pitjantjatjara for petroleum exploration and production in the north of South Australia is indicative of current industry deals. Payments in this agreement are made on a sliding scale of 1.5 to 2.5 per cent *ad valorem* on all exploration costs, a financial impost that must represent a disincentive to explorers unless made a legal tax deduction. A negotiated royalty on a sliding scale of between 1 per cent and 3 per cent *ad valorem* at production has been negotiated. As well, a risk-free buy-in option for Anangu Pitjantjatjaraku is available that will allow the purchase of up to 10 per cent of a production joint venture on payment, pro rata, of exploration expenditure ('Aboriginal council in SA oil deal', *The Australian Financial Review*, 28 February 1996).

Finally, in terms of creating incentive structures for native title parties to facilitate petroleum exploration and production, a strong case can be made to the Commonwealth that it, as well as the petroleum industry, needs to share rent with Indigenous interests. In the Northern Territory, under the *Aboriginal Land Rights (Northern Territory) Act 1976*, the equivalent of all onshore petroleum royalties paid to the Territory government at a rate of 10 per cent *ad valorem* are paid to Aboriginal interests by the Commonwealth. Similarly, in South Australia under the State *Pitjantjatjara Land Rights Act 1981* two-thirds of statutory royalties are payable to Indigenous interests. Most returns from the Naylor Ingram Agreement, at production, will result from the State government foregoing most of its statutory royalties in favour of Indigenous interests. The Commonwealth receives considerable revenue from offshore petroleum resource rentals (APEA 1995: 23) where no native title property rights exist. The Commonwealth needs to consider options for hypothecating an equivalent of a proportion of statutory royalties raised by State governments onshore as a means of establishing an incentives regime for native title parties to support petroleum industry activity. Alternatively, State governments could pay a share of their statutory royalties from onshore production to native title parties and the Commonwealth could allow the Commonwealth Grants Commission to regard this as a revenue-raising disability in its fiscal-equalisation calculations.

Conclusion

It has been argued previously that it is very difficult to test the workability of the NTA framework because of the past strategic behaviour of all parties, especially State and Territory governments (Altman 1995). Some two and a half years after passage of native title law, this is still the case, although there is growing recognition by most parties that the NTA needs amendment.

Under these circumstances, it is important that peak bodies such as APPEA take a leadership role in strategically representing industry participants. Despite industry diversity, peak bodies can present a united front for the accepted benefit of the industry as a whole. This is a potential advantage in negotiations that both Indigenous interests and governments may not share.

Attaining workability of the NTA will take time, recognition of the concerns of Indigenous interests, and careful consideration and implementation of proposed amendments to the statutory framework. Piecemeal and hasty reform will prove unworkable and will itself generate future strategic behaviour that will increase transactions costs and uncertainty for the petroleum industry. It is suggested here that it is important that the very particular requirements of the petroleum industry are catered for in reform, especially of the RTN. The industry could facilitate this reform process by building alliances with both Indigenous interests and the Commonwealth. But it remains essential that whatever reforms are introduced represent a cohesive and comprehensive package that makes the NTA more workable for all parties.

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