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Native title compensation: historic and policy perspectives for an effective and fair regime

J.C. Altman and D.P. Pollack

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Summary

The concept of paying Aboriginal people compensation based on royalties was first introduced in the early 1950s. Critical ambiguities now exist in this area of policy with respect to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and, more recently, to the future acts regime of the *Native Title Act 1993* (NTA).

This paper aims to:

- provide essential historical background to contemporary issues of compensation;
- explain the mining moneys and compensation regimes in the ALRA, providing illustrative examples from a number of agreements for major resource developments in the Northern Territory;
- briefly evaluate whether ALRA precedents have been incorporated in the right to negotiate processes in the NTA, using as an illustrative example the Century Mine Agreement; and
- discuss some principles that need to be incorporated in any framework that will provide effective and fair compensation for native title and to highlight some practical implementation issues for those providing expert input into the assessment of such compensation.

Mining payments to regional indigenous interests are very often confused with compensation and the compensatory components of these payments are rarely differentiated from the non-compensatory commercial payments. These problems have a long history in the land rights arena in the Northern Territory that are being addressed yet again in the current review of the ALRA. Unfortunately, many of these policy legacies have been replicated in the NTA and threaten to hamper its financial operations. A fundamental dilemma, then, is how to work within a suboptimal statutory regime. Issues which will need to be addressed in any practical implementation include:

- how can native title rights and interests that are potentially affected by a future act be documented?
- how can social impacts be documented, especially in the absence of baseline data?
- how can other impacts be documented?
- how can these impacts, if negative, be valued in monetary or other terms? and
- how should the appropriate beneficiaries of compensation be defined?

It will be crucial for both policy makers and those engaged in practical implementation of compensation regimes to understand both the principles that underpin compensation regimes and the ambiguity in the statute. It is likely that States and Territories will develop their own future act regimes in conjunction with the NTA, and these will use existing mining law to assess compensation. An

appendix discusses commonalities and differences in respect to compensation payments derived from mining in State and Territory statutes in Australia. While there exists a general theme of paying compensation for 'disturbance' by mining activity, this comparative exercise demonstrates a number of distinctions. These include:

- who is to receive compensation;
- the reason compensation is to be derived due to the impact of mining; and
- the factors to be considered in assessing compensation.

Since the enactment of the NTA, some States and Territories have amended their mining legislation by incorporating specific provisions relating to native title. These compensation provisions do not necessarily conform with the provisions for non-native title land owners and occupiers. This may lead to further ambiguity and complexity as compensation determining bodies such as the courts and the National Native Title Tribunal (NNTT) draw precedents from the relevant mining statute and yet apply a variation in criteria to native title claimants. The NNTT is likely to continue to draw on precedents within each State and Territory. As the criteria for the purpose and assessment of compensation varies from jurisdiction to jurisdiction, Aboriginal and Torres Strait Islander people can inevitably expect different outcomes within each State and Territory of Australia.

Finding the appropriate balance between working within a highly imperfect framework and striving to change that framework will not be easy. It is similarly difficult to find the right balance between national native title aspirations and regional concerns about limiting the impacts of a major resource development project or ensuring adequate economic benefit to disadvantaged indigenous stakeholders. Ultimately, getting the appropriate compensatory framework is important, and working within the existing law is currently unavoidable. It is important for policy makers and representative organisations to strike the appropriate trade-offs in ensuring effective and fair compensation regimes.

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Introduction

There is a perception that compensation issues under the *Native Title Act 1993* (NTA) are new, but this is not the case. There is already considerable debate in the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) literature about compensation which focuses generally, in NTA parlance, on 'permissible future acts',[1] and in the ALRA on mining on Aboriginal-owned land. This paper begins by tracing the history of the compensation issue back to the early 1950s. It focuses on the policy and empirical rather than legal precedent, and attempts to decipher some of the logic of compensation regimes using a Coasian (law/economics) property rights framework (Coase 1960). This framework is used because it can assist to clarify the enormous confusion in this area.

The ALRA and NTA frameworks have more commonalities than differences. Both have a tradeable de facto property right.[2] In other words, it can be provided quickly, with the right commercial inducements. This property right is probably less valuable under the NTA than the ALRA. Both Acts have recourse to arbitration, at which time the potential for trade declines and then eventually disappears. But in arbitration there is a requirement to tangibly and transparently assess compensation according to stipulated statutory guidelines. Neither use precedents to determine compensation.

The discussion here focuses on major resource development projects (rather than exploration activity) as a particular case where compensation issues are pertinent. This is primarily because major impacts on land or native title rights, with consequent requirement for just terms compensation,[3] is most likely in such scenarios. Nevertheless, it must be emphasised that such projects are only one of many potential future acts.

Historically the issue of compensation has not been systematically addressed by governments and policy makers; it has often been based on ad hoc and, at times, confused objectives. Furthermore, since the initial concept of actually paying Aboriginal people compensation based on royalties was first introduced in the early 1950s there has been considerable change in microeconomic understanding about the implications of differing royalty regimes and about the appropriate bases for paying compensation.

The key argument in this paper is that critical ambiguities exist in this area of policy and hence in the practical implementation of compensation regimes. In particular, mining payments to regional indigenous interests are very often confused with compensation and, furthermore, the compensatory components of these payments are rarely differentiated from the non-compensatory commercial payments. These problems have a long history in the land rights arena in the Northern Territory that are being addressed yet again in the current review of the ALRA (see Reeves 1997; Aboriginal and Torres Strait Islander Commission (ATSIC) 1998; Northern Land Council (NLC) 1998). Unfortunately, many of these policy legacies have been replicated in the NTA and unless understood and addressed

soon, they will bedevil the financial operations of the NTA in much the same way as they have the ALRA.

The aims of this paper are fourfold:

- to provide essential historical background to contemporary issues of compensation;
- to explain the mining moneys and compensation regimes in the ALRA, providing illustrative examples from a number of agreements for major resource developments in the Northern Territory;
- to briefly evaluate whether ALRA precedents have been incorporated in the right to negotiate (RTN) processes in the NTA, using as an illustrative example the Century Mine Agreement; and
- to discuss some principles that need to be incorporated in any framework that will provide effective and fair compensation for native title and to highlight some practical implementation issues for anthropologists in providing expert input into the assessment of such compensation.

Some historical antecedents

It is easy, in the late 1990s with the benefit of hindsight, to find fault with the very enlightened, almost radical, Liberal Party policy of the early 1950s. That is when the issue of compensation to indigenous Australians first emerged. In 1951, there was a government proposal to mine bauxite on the Wessel Islands within the Arnhem Land reserve. At that time entry onto reserves was prohibited by both the Mining and Aboriginals Ordinances. The then Minister for Territories, Paul Hasluck, initially opposed this proposal and then provided an ingenious trade-off. If the national interest required mining on Aboriginal reserves, then this could proceed on the condition that statutory royalties[4] would be doubled and this entire double royalty would be reserved exclusively for Aboriginal interests. The policy intent from the outset was confused:

- the double royalty (at 2.5 per cent ad valorem rather than 1.25 per cent) was primarily intended as a disincentive to marginal developments on lands reserved for Aboriginal people;[5] and
- the payment of the double royalty to the Aborigines (Benefits from Mining) Trust Fund (ABTF) did not clearly stipulate that those affected by mining should benefit (or be compensated for loss of access to reserved lands). This, though, can be partially explained because the Wessel Islands were geographically remote, unpopulated, and a discrete area.

These confusions were based on two factors. First, these developments were concurrent with Hasluck's championing of the new policy of assimilation at the 1951 and 1952 Native Welfare Conferences. The potential for Aboriginal benefit from mining via earmarking royalties for them was regarded as a possible means to *generate* financial resources for their economic advancement and eventual

integration, especially if such mining occurred away from Aboriginal population concentrations. Second, Hasluck, as Minister for Territories, was responsible both for the development of the Northern Territory and for the welfare of Aboriginal people: he was keen to encourage the former, while protecting the latter. The 'national mood' and the 'national interest' also played a part then, as now: this was the immediate post-war period and nationalism was strong. A comment by the then Crown Law Officer in the Northern Territory Legislative Assembly reported in the *NT News* (4 September 1952) is illustrative: '... it would be a pity if natives who went to the Wessel Islands once a year to hunt turtles were protected at the cost of the Nation's ability to supply aluminium for aeroplanes'.

Bauxite was never mined in the Wessel Islands because the deposits were not commercially viable. Nevertheless statutory and policy precedents were established that continue to have ramifications today. Amendments to the Aboriginals and Mining Ordinances allowed mining on Aboriginal reserves; the ABTF was created; and the principle of earmarking statutory royalties as a potential resource (not compensation as such) for Aboriginal benefit was established.

In the pre-land rights era, two major resource developments occurred under this regime. But both varied from the Hasluck model and introduced additional ambiguity. A large manganese mine was established on Groote Eylandt in 1965; Gemco (Groote Eylandt Mining Company) paid the double royalty to the Commonwealth (which then paid it in to the ABTF), but also paid an additional royalty (of 1.25 per cent ad valorem), negotiated in a private deal with the Church Missionary Society (CMS), that had required CMS to surrender its prospecting rights. These moneys were paid by the CMS into the Groote Eylandt Aboriginal Trust (GEAT), established to benefit all Groote Eylandt Aboriginal people, irrespective of direct mine ownership or impact. Interestingly, initially (1965–72) all the income of the GEAT came from this private deal, not from the ABTF (as a share of statutory royalties) presumably because the CMS wanted to ensure compensation for regional interests.

In 1968, the Mining (Gove Peninsula Nabalco Agreement) Ordinance was passed. This agreement for bauxite mining at Gove was immediately challenged in the Northern Territory Supreme Court case *Milirrpum and others versus Nabalco and the Commonwealth*; the plaintiffs lost in 1971 and the mine proceeded. While not a central issue in the case, it is important to note that the royalty rate in this agreement did not comply with the Hasluck model: it was a special output-based rate that amounted to less than 1 per cent ad valorem. Furthermore, there was no mention in the Ordinance of loss of lands or social impact on Aboriginal people residing at Yirrkala. This was counter to specific recommendations for direct compensation made by a House of Representatives Select Committee in 1963 (House of Representatives 1963) with respect to an earlier proposal to mine at Gove by Gominco (Gove Mining and Industrial Corporation). It was only in 1971, after the Gove case, that Cabinet decided to earmark 10 per cent of the ABTF income from Nabalco for the immediate use of Yirrkala people. A year later 10 per

cent of Gemco statutory royalties paid to the ABTF were similarly earmarked for the GEAT.

The pre-land rights context can perhaps best be summarised as initially well-intentioned and relatively generous, but poorly formulated, policy ad hocery that paid little attention to issues of impact, on whom, and so on; by the early 1970s this regime seemed ungenerous and somewhat malevolent. In compensation terms, the Crown levied a double statutory royalty placing an impost on developers that it reserved for Aboriginal people on their behalf: hence, private deals aside, 'compensation' was provided, half by the state and half by the developer. But these mining payments were only broadly compensatory rather than specifically focused on providing recompense to those directly or indirectly affected. And in any case, the basis for calculating these payments was the value of minerals rather than on any evaluation of the extent of physical, economic, social or cultural damage. From the outset the statute only provided that Aboriginal interests broadly defined receive a share of the mineral revenues generated from their reserve lands; from the outset this was termed 'compensation'.

From reserved lands to land ownership

Mr Justice Woodward was appointed to head the Aboriginal Land Rights Commission in February 1973; he had acted as junior counsel to Yirrkala Aborigines in the Gove case and very early in his consultations he visited Yirrkala to hear the grievances of Aboriginal people with the existing 'compensation regime'. Woodward is perceived as the doyen of the land rights movement, but the compensation regime that he recommended, and that was largely incorporated in the ALRA had, and has, a number of ambiguities and shortcomings. These can be broadly explained by two factors. First, in policy terms, Woodward did not adequately assess the statutory and policy precedents and certainly did not acknowledge the extent to which he was constrained by these precedents.

Second, and more importantly, in terms of a property rights framework, Woodward recommended that appropriately-determined Aboriginal people be vested with corporate land ownership, but that as with most other Australian land owners, this land ownership should not extend to sub-surface minerals. However, Woodward did recommend that Aboriginal land owners, as a group, should be able to veto exploration (but not mining) on their land. When right of consent provisions were incorporated in the ALRA, this gave Aboriginal interests what is now generally referred to (see Industry Commission 1991) as a de facto (rather than de jure) mineral right: they cannot trade the minerals but they can trade the right of access to them, national interest provisions aside.

Woodward's mining moneys recommendations were influenced by factors other than a desire to differentiate land ownership from mineral ownership: he also wanted to provide a mechanism to fund land councils that was independent of government. Hence he recommended an admittedly arbitrary formula

(Woodward 1974: 114) whereby statutory royalties (then still at the double rate) from each resource development project would be divided as follows: 30 per cent (up from 10 per cent) would be paid to communities of traditional owners and others affected (with affectedness being geographically defined); 40 per cent to land councils; and the balance to, or for, the benefit of all Aboriginal people in the Northern Territory.

The intent of these three categories of payments can be variably interpreted: the 30 per cent to areas affected was clearly intended to be directly compensatory: Woodward (1974: 111) envisaged that these moneys would go to the community or communities affected by mining and not to individual land owners; provided these moneys were spent on community purposes they would be 'compensation for disturbance'. In marked contrast, Woodward recommended that statutory permit or licence fees (that is exploration licence or mining tenement payments) should 'go to the clans, for equal distribution among adult clan members, as a recognition of clan ownership of the area' (Woodward 1974: 111). These latter payments were intended as compensation for land disturbance. The proposed payment of 40 per cent to land councils could be regarded as broadly and indirectly compensatory as these moneys could be used to fund additional land claims; while the remaining 30 per cent was again broadly compensatory in the Hasluckian sense.

Woodward's formula was incorporated in the ALRA, but not without several additional complicating modifications. For example, the spatial definition of areas affected was not included in the Act and immediately a tension arose between the de facto mineral right of those traditional owners who were required to consent to development (traditional owners) and others who might be affected by the development. Similarly, the ALRA at s.35 was very imprecise about defining areas affected. There was no clear stipulation about how direct compensation payments (areas affected moneys) should be used and no requirement that they be earmarked for communities, with incorporated groups also being potential beneficiaries. Not surprisingly, this imprecision has frequently resulted in regional disputation (see Altman 1997; Kakadu Regional Social Impact Study (KRSIS) 1997).

Because the right of consent is tradeable, the ALRA also provided opportunity for additional payments beyond statutory royalties equivalents in negotiations to consent. All post-land rights mining agreements have included such additional payments paid in a variety of ways (as an ad valorem calculation, as a flat rental payment or as a rental calculated with reference to land used) to beneficiaries, defined precisely or imprecisely in agreements.

From the perspective of those in the general vicinity of a resource development project at least four forms of compensatory payments are possible under the ALRA:

- access to a share (30 per cent) of royalty equivalents;

- access to statutory permit and licence fees (reserved for traditional owners who may or may not live in the vicinity of the project);
- access to negotiated agreement payments (sometimes paid up front) that may include anything from cash to employment, training and housing, and may be payable to anyone stipulated in the agreement irrespective of residence location; and
- access to a share of the statutory royalty equivalents that are granted by the Aboriginals Benefit Trust Account (previously the ABTF, and now called the Aboriginals Benefit Reserve or ABR) to or for the benefit of Aboriginal people in the Northern Territory.

These financial (and at times non-monetary) flows can be variably interpreted in the following four ways:

- as compensation paid as a highly variable share of royalties and other benefits;
- as a share of mineral rent, that is a means to profit share both with the resource developer and government;
- as a convenient mechanism to transfer resources from Commonwealth consolidated revenue to Aboriginal interests; and
- as some combination of the above.

Having such a multi-faceted compensation package is not unusual in the international context. What is unusual in the Australian land rights context is that there is no explicit reference to what payments are intended for what purpose: areas affected are never well defined, intended beneficiaries are rarely comprehensively listed, and beneficial agreements are rarely adequately monitored to ensure compliance.

The land rights framework and its problematic compensation regime

Sometimes in examining the compensation regime in the ALRA it is overlooked that such regimes have a policy intent to ameliorate the assumed negative impacts of mining. The possibility that mining may have a positive impact in terms of access to amenities, employment options and enterprise opportunities is rarely countenanced in negotiations and, if it is, there is never a suggestion that those who benefit should compensate the provider on some user-benefits basis. Having said that, the empirical evidence available to date suggests that the mechanisms available in the ALRA to provide compensation to people who are either owners of land directly affected or who are economically, socially, or culturally impacted upon by resource development projects are ineffective. The following five issues, many of which can be presented as dilemmas, are apparent.

First, from the regional perspective of the impacted, the negotiable basis of agreements means that there is enormous variability in mining payments. For example, members of the GEAT receive over 3 per cent ad valorem in contrast say to those in the Kakadu region who only receive 1.3 per cent of Ranger royalties (owing to the fact that the additional 1.75 per cent negotiated was treated as a statutory royalty). Such inconsistency in revenue calculations, let alone revenue received, has created regional resentment about the fact that 70 per cent of royalty equivalents are earmarked for land councils and the ABR. In any early review of the ALRA, Rowland (1980) queried why people residing in areas affected should be taxed 40 per cent to meet the administrative expenses of land councils, which are Commonwealth statutory authorities that could legitimately be directly funded from consolidated revenue. Similarly, the Industry Commission (1991) raised the same question, but erroneously cast it with reference to traditional owners rather than people in areas affected.

Second, there has been considerable debate whether mining moneys paid to those affected are public or private moneys. The key issue is that public moneys require regular accountability to government while private moneys do not, but do require regional accountability. In reality, most fiscal flows to areas affected include elements of both: the proportion negotiated with the resource developer direct as agreement payments is arguably private, while the proportion of statutory royalty equivalents are arguably public. In assessing the financial performance of so-called 'royalty associations' it is usually impossible to differentiate between these two types of money, as Altman and Smith (1994) found in their review of the Nabarlek Traditional Owners Association.

Third, as a general rule, traditional owners argue that all mining moneys are private and that they should not be accountable for their expenditure any more than other (non-indigenous) land owners receiving compensation payments. While such a perspective is persuasive, as Turnbull (1980) noted in his very early assessment of the ALRA's financial provisions, there are no guarantees in the Act that traditional owners will receive any compensation, especially if they reside outside areas affected (although they might receive a share of lease and licence payments). Conversely, in the Gove region there are disputes about internal accountability (see Palmer 1984; Martin 1995). Here, all compensatory payments are technically public (being in the form of a share of royalty equivalents), but there are concerns that traditional owners receive a disproportionate share of these moneys and some residents of the area affected receive nothing. This raises an important issue for compensation: just how far does an impact spread?

Fourth, there is an ongoing tension in the ALRA between the policy intent and statutory provision of a right to veto development on Aboriginal land and the politically expedient desire to provide an incentive structure that will encourage traditional owners to trade away this veto. Consequently, the provisions in the ALRA for a Mining Commissioner to arbitrate and assess compensation payments at exploration, or fair and reasonable terms and conditions at mining, have never been used because all the signals for miners and for Aboriginal interests are to avoid them and to press ahead with trying to negotiate direct.

Finally, there is very little transparency either in the activities of regional incorporated organisations that receive compensation payments or in the financial relations that governments have with them. A fundamental issue is that compensatory payments are meant to be supplementary to the normal entitlements of Aboriginal people in areas affected as Australian citizens. However, there are indications that these payments were intended to be, and have been, fiscal substitutes for legitimate government expenditure (see Woodward 1985 on policy; Altman 1996; KRSIS 1997 on practice). This suggests that there may be no net financial benefit from mining to offset negative impacts; Aboriginal regional interests may have unstrategically used compensation payments to finance services that government would have provided anyway or governments may have used mining as an excuse not to meet their obligations.

This is a very significant issue that has recently received considerable attention in the Kakadu region. A recent review of the Gagudju Association, that received nearly $38 million between 1980 and 1996, indicated that the Association used these moneys for service delivery, payments to individuals and to invest in commercial activities (see Altman 1996). Yet the recent KRSIS report indicated that there was little in official statistics to differentiate the standard of living in the Kakadu region from elsewhere despite these considerable financial flows over the past 15 years (see KRSIS 1997). This may indicate that compensation payments have been ineffectively utilised or that official statistics are inaccurate: nevertheless, concern remains that many so called 'royalty associations' have neither objectives nor actions that effectively ameliorate the negative impacts of mining, nor appropriate checks and balances to their membership including the issue of non-members residing in areas affected.

ALRA-related compensation issues in the NTA future acts regime

Compensation payments under the NTA have fundamental similarities and differences with the ALRA. The focus here is on one form of compensation regime in the NTA: that established for future acts. Because the RTN is a weaker form of property than the consent provisions in the ALRA it is perhaps not surprising that it might not have the veto's commercial worth. The key differences between the two regimes are as follows:

- native title parties (NTPs) are not provided any automatic access to any royalties raised on their land (if determined), unlike the access of people in areas affected under the ALRA to 30 per cent of royalty equivalents and the access of traditional owners to statutory lease and licence payments. In the ALRA there is a relatively generous bottom line which is potentially much lower in the NTA;
- under the NTA future acts regime any negotiated mining payments, that may take the form of compensation, are reserved for NTPs (including

registered claimants). Native title representative bodies (NTRBs) are not funded from these payments and there is no State-wide distribution of such moneys as from statutory royalty equivalents in the Northern Territory; and

- under the NTA all negotiated payments are earmarked for NTPs in marked contrast to the payment of a share of statutory royalty equivalents to residents of areas affected in the ALRA. In a sense, negotiated payments in the NTA represent more of a mineral rental than a compensation payment, but this changes completely in arbitration.

Interestingly, both the ALRA and the NTA allow open-ended negotiations about terms and conditions for a time, but then have arbitration provisions that in the case of the NTA do not allow reference to the value or profitability of the mine by the arbitral body (although significant rental-type payments as in the Queensland Mines Agreement may be possible): in short, in both, an incentive structure is provided to indigenous interests to hasten deal making, but the opposite perverse signal is provided to resource developers and governments (unless an early determined compensation clearly exceeds a negotiated outcome). In the NTA, this incentive for NTPs is strengthened by the fact that in negotiated outcomes completed within stipulated time frames, claimants can maintain access to mining payments even if subsequently not determined to be native title holders. In arbitration, however, such payments are held in trust until after determination and are not payable to unsuccessful claimants whether impacted on or not.

At present, the RTN is disjunctive in much the same way as consent provisions were disjunctive prior to the amendment of the ALRA in 1987. Proposed amendments to the NTA in the extant Wik-precipitated ten-point package will make the RTN once-only and hence conjunctive. Already in Western Australia where mining leases are issued for exploration purposes, all future act financial negotiations must presumably be agreed at the exploration stage unless a bilateral voluntary agreement specified otherwise. In arbitration of such cases a compensation determination could be made for both exploration and mining prior to the discovery of a viable deposit, hardly a sound basis for assessing compensation. However, in both the NTA and the ALRA a compensable interest requirement means that 'just terms compensation' must be provided as stipulated in mining laws for other land owners, although in the ALRA such compensation would be on top of royalty equivalents. However, what constitutes the common law principles of native title in various States (see Appendix A) is an entirely new area for consideration.

The only very public resource development agreement negotiated under provisions of the NTA is the Century Mine Agreement. Its financial and other compensatory provisions are purported to be confidential, although they have received considerable media coverage. The compensatory package includes the following, which are to be provided by both the company, Century Zinc Ltd, and the Queensland Government:

- direct cash payments to the Gulf Aboriginal Development Corporation (GADC) to be distributed to native title negotiating parties for actual compulsory acquisition of the Century mine to Karumba pipeline corridor and port facilities;
- compensation for a bulk sampling pit in the form of cash and offsetting land grants and licences to occupy;
- cash payments to NTPs that are unrelated to any direct impacts;
- provision of enterprise funds and employment and training opportunities to 'local' Aboriginal community members (local being regionally-defined but excluding Mt Isa) and members of registered native title claimant groups irrespective of current residence location; and
- provision of roads, infrastructure and a range of community services by the Queensland State Government (valued at $30 million) many of which are, arguably, provision of normal services to indigenous communities (as well as non-indigenous beneficiaries and the Century project itself) in a remote and historically neglected region.

This agreement replicates all the ambiguities evident in the ALRA 'compensation' regime and more: direct payments are made via the GADC to land owners (irrespective of residence); there is little correlation between social impact and compensation; there is government substitution funding under the guise of compensation; and it is unclear how much of the company's contribution will generate spin-offs for the company as well as indigenous employees. What is perhaps different and innovative in this case is that the GADC, a regional organisation, is created by the Century Mine Agreement to directly represent the interests of agreement beneficiaries (people affected?). This organisation represents a larger group and region than most ALRA-induced 'royalty' associations. It is not a representative body and is potentially more likely to be accountable to agreement beneficiaries because it directly represents their interests. Time will tell how effectively this new institution functions in the Century post-agreement phase.

Policy implications

The issues raised in this paper are complex and present some fundamental dilemmas. In particular, it is already clear that the compensation regime in the NTA framework is suboptimal at the very least. The reasons for this can be debated: it is partly due to the weakness of the RTN as a form of property; it is partly due to the positive legislative intent to ensure equal treatment of NTPs and other Australians (via the compensable interest test); and it is partly due to statutory inconsistency resulting from political expediency and too much compromise in fine-tuning the initial Native Title Bill. What is unarguable and daunting is that similar shortcomings have existed in the ALRA's compensation regime for some twenty years now yet there has been little concerted effort to

amend this statute appropriately. A fundamental dilemma then is how to work within a highly imperfect statutory regime? In particular:

- how can native title rights and interests that are potentially affected by a future act be documented?
- how can social impacts be documented, especially in the absence of baseline data?
- how can other impacts be documented?
- how can these impacts, if negative, be valued in monetary or other terms? and
- how should the appropriate beneficiaries of compensation be defined?

It will be crucial for both policy makers and those engaged in practical implementation of compensation regimes to understand both the principles that underpin compensation regimes (that compensation is provided for loss or damage) and the ambiguity in the statute. With time, it is likely that States and Territories will develop their own future act regimes and these will use existing mining law to assess compensation (a synopsis of references to compensation in State mining and other law is appended). Such provisions are very different from the open-ended mining payments that can result from commercial negotiations prior to arbitration or court action.

It is instructive to examine some of the mine-specific agreements that have been negotiated overseas. In nearby Papua New Guinea (PNG), for example, recent agreements completed at Misima (Arme and Illaia 1997) and Porgera (Banks 1996) clearly differentiate direct compensation payments (usually for loss of lands and livelihood) that are rigorously assessed to agreed formulae from other mine-related payments for relocation or to facilitate economic development. Lessons have been learnt in PNG from the Bougainville experience: agreements must not only be fair in principle, but outcomes must be effective from the perspective of those people impacted upon.

In Australia, those representing indigenous interests continually strive for higher compensatory benchmarks, but there is a failure at all levels (governmental, indigenous representative and regional) to ensure appropriate compensatory outcomes. At present, there is also inadequate documentation and supporting evidence on the nature of impacts on native title that might require compensation. This might be partly because of a preoccupation with legal processes and insufficient attention to intended outcomes. There is also a lack of rigour in differentiating and defining inter-related economic, social and cultural components of loss experienced by indigenous land owners and affected communities (rarely as distinct entities). There is certainly a failure to learn from domestic and international precedent and to transport these across State or national borders as indicated by the brief description of the Century Mine Agreement above.

Native title parties must be prepared to enter a very fraught arena where they may be required not only to translate their culture to courts, lawyers, mining

companies and governments, but also to place a value on loss or damage to this culture. What value should be placed on native title? And when compensation is received how should it be managed and distributed so as to ensure effective outcomes and minimise the social impact of contestation over mining moneys?

Finding the appropriate balance between working within a highly imperfect framework and striving to change that framework will not be easy. It is similarly difficult to find the right balance between national native title aspirations and regional concerns about limiting the impacts of a major resource development project or ensuring adequate economic benefit to disadvantaged indigenous stakeholders. Ultimately, getting the appropriate compensatory framework is important, and working within the existing law is currently unavoidable. It is important for policy makers and representative organisations to strike the appropriate trade-offs in ensuring effective and fair compensation regimes. In particular, it is important to get appropriate checks and balances and guarantees enshrined in legally-binding agreements, to monitor these agreements and to set up workable and accountable regional structures.

Appendix A. Compensation Regimes in Mining Statutes in Australian States and Territories

This synopsis is limited to the statutory mining regimes in New South Wales (NSW), Victoria (VIC), South Australia (SA), Western Australia (WA), Queensland (QLD) and the Northern Territory (NT). The following statutes have been compared:

- NSW – Mining Act 1992 and Mining (General) Regulations 1992
- VIC – Mineral Resource Development Act 1990
- SA – Mining Act 1971
- WA – Mining Act 1978
- QLD – Mineral Resources Act 1989
- NT – Mining Act 1978

This synopsis is prepared to provide information about the commonalities and differences in respect to compensation payments derived from mining in State and Territory statutes in Australia. While there exists a general theme of paying compensation for 'disturbance' by mining activity, this comparative exercise demonstrates a number of distinctions. These include who is to receive compensation, the reason compensation is to be derived due to the impact of mining, and the factors to be considered in assessing compensation. The synopsis therefore suggests that when examining the detail of the statutes it cannot be assumed that the practices and purposes for paying compensation for mining are standard in State and Territory law.

It should be noted that since the enactment of the *Native Title Act 1993* (NTA), some States and Territories have amended their mining legislation by incorporating specific provisions relating to native title through the inclusion of new sections (see NT Mining Act) or new parts (see SA Mining Act). These compensation provisions do not necessarily conform with the provisions for non-native title land owners and occupiers. This may lead to even further ambiguity and complexity as, on the one hand, compensation determining bodies such as the courts and the National Native Title Tribunal (NNTT) can draw precedents from the relevant mining statute and yet apply a variation in criteria to native title claimants on the other.

The NNTT has already demonstrated that it will utilise compensation criteria in State and Territory mining regimes as the basis for assessing compensation for native title claimants. In its Future Act Determination *State of WA, R v Thomas and others (Waljen), and Austwhim Resources NL and Aurora Gold*, the NNTT referred to the WA Mining Act to assess compensation. However, the NNTT did not accept the WA Government submission that the amount of compensation payable under the Mining Act was limited to the amount that would be paid for the compulsory acquisition of the freehold. The NNTT concluded that it could exceed

this amount and, in a native title case, could take into account any special or unique aspects of the native title parties' links to the land.

Who is to receive compensation?

Generally speaking, compensation is available in most State and Territory statutes for the 'owner ' and 'occupier' of 'private land'. The amount of compensation is determined by their respective interests. Notably the SA and QLD statutes limit compensation to the owner of land. Both the SA and WA statutes provide for compensation for 'any land' rather than private land only. This presumably means that the Crown, or an agency of the Crown, may be entitled to compensation.

In most statutes compensation is also payable due to disturbance by mining activity to adjoining properties. Conceivably, native title holders could be caught under such provisions. Compensation payments for adjoining properties are not specified in the SA legislation.

The form of compensation payments

The form of the compensation is usually restricted to financial payments. For example, the WA Mining Act (ss123 (1)) excludes payments other than monetary payments. However, the NT Mining Act (ss174DA) provides for compensation, other than money, in the event that compensation is payable to native title holders. The sub-section does not specify what 'other than money' actually is and therefore provides for a broad ambit of compensatory measures within the negotiation process. The NT statute therefore conforms with s51(6) of the NTA which enables the NNTT to fix non-monetary forms of compensation.

When is compensation payable and how is it assessed?

VIC: Mineral Resources Development Act 1990

Ss85(1) provides that:

> compensation is payable by the licensee to the owner or occupier of private land, for any loss or damage that has been or will be sustained as a direct, natural and reasonable consequence of the approval of the work plan or the doing of work under the licence including—
>
> (a) deprivation of possession of the whole or any part of the surface of the land; and
>
> (b) damage to the surface of the land; and
>
> (c) damage to any improvements on the land; and
>
> (d) severance of the land from other land of the owner or occupier; and
>
> (e) loss of amenity, including recreation and conservation values; and

(f) loss of opportunity to make any planned improvement on the land; and

(g) decrease in the market value of the owner or occupier's interest in the land.

NT: Mines Act 1978

Ss174B (1) provides for the owner and occupier of private land comprised in a mining tenement to be paid compensation for:

- being deprived of the use of the surface or part of the surface of the land,
- damage to the surface of the land through mining activities,
- being deprived the use of improvements on the land,
- the severance of the land from other land owned or occupied by them, and
- all other damage to the land or improvements on the land arising out of mining or other work under the mining tenement.

NSW: Mining Act 1992

S262 defines 'compensable loss' as: loss caused, or likely to be caused, by:

(a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting of mining operations, or

(b) deprivation of the possession or of the use of the surface of land or any part of the surface, or

(c) severance of land from other land of the owner or occupier of that land, or

(d) surface rights of way and easements, or

(e) destruction or loss of, or injury to, disturbance of or interference with, stock, or

(f) damage consequential on any matter referred to in paragraph (a) – (e),

but does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961*.

NSW: Mining (General) Regulation of 1992

S282 prescribes the factors for the assessment of compensation:

- the nature, quality, area and particular characteristics of the land concerned,

- the proximity of the land to any building, structure, road, track or other facility,
- the purpose for which the land is normally used.

SA: Mining Act 1971

Ss61(1) states that:

> the owner of any land upon which mining operations are carried out are entitled to compensation for any economic loss, hardship and inconvenience suffered due to the consequence of mining.

Ss61 (2) states that in determining compensation consideration is given to:

- any damage caused to the land by the mining operations;
- any loss of productivity or profits as a result of the mining operations;
- any other relevant matters.

WA: Mining Act 1978

s123 (2) provides that :

> the owner or occupier of any land where mining takes place are entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining.

Ss123 (4) allows for compensation payments when the owner or occupier suffers:

(a) deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;

(b) damage to the natural surface of the land or any part of the land;

(c) severance of the land or any part of the land from other land of, or used by, that person;

(d) any loss or restriction of a right of way or other easement or right;

(e) the loss of, or damage to, improvements;

(f) social disruption;

(g) in the case of private land that is land under cultivation, any substantial loss of earnings, delay, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agricultural holding, the failure on the part of a person concerned in the mining to observe the same laws or requirements in relation to that land as regards the spread of weeds, pests, disease, fire or erosion, or as to soil conservation practices, as are observed by the owner or occupier of that land; and

(h) any reasonable expense properly arising from the need to reduce or control damage resulting or arising from the mining.

QLD: Mineral Resources Act 1989

S279 states that a mining lease shall not be granted or renewed unless compensation has been determined (whether by agreement or by determination of the Wardens Court) between the applicant and each person who is the owner of land.

Ss281 (3) provides for the amount of compensation to which an owner of land is entitled, having regard to:

(a) deprivation of possession of the surface of land of the owner;

(b) diminution of the value of the land of the owner or any improvements thereon;

(c) diminution of the use made or which may be made of the land of the owner or any improvements thereon;

(d) severance of any part of the land from other parts thereof or from other land of the owner;

(e) any surface rights of access;

(f) all loss or expenses that arises;

as a consequence of the grant or renewal of the mining claim.

The variations in the language used in the statutes are self evident and give rise to broad interpretations. Some statutes are more prescriptive and detailed than others. Furthermore, some statutes are based on comparatively restrictive compensation criteria which limits compensation to disturbance of land (for example see QLD Mineral Resources Act) rather than disturbance to people. While this would appear to be the general case, the WA Mining Act provides for compensation due to 'social disruption' and the SA Mining Act mentions 'hardship' and 'inconvenience' thus providing the potential for claims of compensation for disturbance of human social patterns.

One can also observe a notion of nineteenth century Eurocentrism in most statutes. The WA legislation contains specific provisions for agricultural holdings and does not cater for aboriginal economic systems. The meaning of 'economic loss' and loss of 'productivity' used in the SA statute is not clarified. No doubt its intent is to pay compensation for 'economic loss' in the European sense, but perhaps it could be applied to other economic systems based on, for example, subsistence and commercial utilisation of wildlife.

At the same time, there exist a number of land rights regimes across Australia each with their own specific compensation regimes. These land rights regimes have jurisdictions that are state-wide (NSW, NT) or specific regions (Pitjantjatjara Lands in SA, Lake Condah and Framlingham Forest in VIC). There is also site or project specific legislation, such as the *McArthur River Project Agreement Ratification Act 1993* (NT), which include specific compensatory measures for particular sites.

Examples of land rights statutes which address compensation issues include:

- Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) (Commonwealth)
- Pitjantjatjara Land Rights Act 1981 (SA)
- Maralinga Tjarutja Land Rights Act 1984 (SA)
- Aboriginal Land Act 1991 (QLD)
- Aboriginal Land Rights Act 1983 (NSW)

The ALRA is often described as the 'high water mark' of land rights law in Australia as it provides the right for Aboriginal traditional owners to veto mining. The NSW Aboriginal Land Rights Act is unique in that ownership of certain minerals are vested in the Aboriginal owners, who have absolute powers to refuse exploration and recovery of those minerals. Significantly, gold, silver, coal and petroleum are exempt from the provisions of the Act and therefore any compensatory measures accrued to Aboriginal people due to the mining of these commodities would be dealt with under the NSW mining regime.

A common feature of the ALRA, Pitjantjatjara Land Rights Act, the NSW Aboriginal Land Rights Act and the QLD Aboriginal Land Act is that compensation, in the form of royalty payments (or equivalents), are distributed across the jurisdiction rather than making all payments to those Aboriginal people immediately affected by mining. As outlined above, the ALRA provides for mining royalty equivalents derived from mining on Aboriginal land to be paid from the Commonwealth's Consolidated Revenue Fund into the Aboriginals Benefit Reserve (ABR). Of the moneys paid into the ABR only 30 per cent are distributed to the traditional owners and other Aboriginal residents affected by mining. The Land Councils receive 40 per cent for administrative purposes and the remaining 30 per cent is held and invested by the ABR. The ALRA provides that those funds held in the ABR can be utilised to make grants for the benefit of Aboriginal people in the Northern Territory.

The Pitjantjatjara Land Rights Act stipulates that royalties accrued from mineral extraction within its jurisdiction shall be paid into a fund maintained by the Minister for Mines and Energy. These funds are to be disbursed equally to three entities: one-third is paid to Anangu Pitjantjatjara; one-third to the Minister for Aboriginal Affairs to be applied towards the health, welfare and advancement of the Aboriginal inhabitants of the State generally; and one-third to the General Revenue of the State.

Pursuant to s46(4) of the NSW Aboriginal Land Rights Act, monies credited to the Mining Royalties Account, which is administered by the NSW Aboriginal Land Council (NSWALC), is distributed to the NSWALC (30 per cent), to Regional Aboriginal Land Councils (RALC) in NSW based on a proportional distribution calculated by population (40 per cent); and to the RALC or Local Aboriginal Land Council in the area where the fees and royalties accrued (30 per cent). Similarly, s88 of the QLD Aboriginal Land Act provides for a percentage of royalties, which

are in fact moneys appropriated by the Parliament, to be applied for the benefit of the Aboriginal people affected by the mining activity; and a proportion is paid to the chief executive of the relevant department (as determined by the Parliament) which is to be applied for the benefit of the Aboriginal people of QLD.

What becomes apparent within States and Territories with broad allocative compensation regimes for Aboriginal people, is the prospect that native title claimants may accrue compensation for disturbance due to mining in relation to their native title land and also receive benefits accrued from the broad allocative regime. The compensation derived from mining on native title land accrued through the compensation regime of either the NTA or the State or Territory is not prescribed to be distributed other than to those parties immediately affected by the mining disturbance.

The variety of compensation regimes relating to disturbance by mining across Australia presents many dilemmas and perhaps unexpected outcomes. The NNTT is likely to continue to draw on legislative precedents within each State and Territory under the 'similar compensable interest test' prescribed in s240 of the NTA. Yet at the same time the Federal Court has encouraged the NNTT to seek a broader interpretation of compensation as a result of Justice Nicholson's findings in the Koara case. Nevertheless, when the NNTT utilise State and Territory mining statutes as the criteria for the assessment of compensation, it can inevitably be expected that there will be different outcomes for Aboriginal and Torres Strait Islander people in each State and Territory as a result of the variations in assessment of compensation from jurisdiction to jurisdiction.

Notes

1. 'Future acts' refers to a range of future government actions defined by the NTA, in which there is a presumption of effect upon native title. 'Permissible future acts' are government actions which may proceed on claimed native title land on the basis of a form of 'freehold equivalent test'. This operates on the basis that if the act could be done by governments of freehold title land, then it can also be done on native title land (Smith 1996).
2. The tradeable element of the property right is the commercial worth of consenting to provide rapid land access to resources which are owned by the Crown, not by indigenous interests.
3. The monetary value of impairing or extinguishing (in whole or in part) native title rights, such as access to hunting grounds or ceremonial sites, which will need to be assessed on a case-by-case basis.
4. Statutory royalties are payments made by miners to government for extracting minerals owned by the Crown.
5. We now know that it is the profitability of the mine not ad valorem royalties that will determine its overall viability.

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