

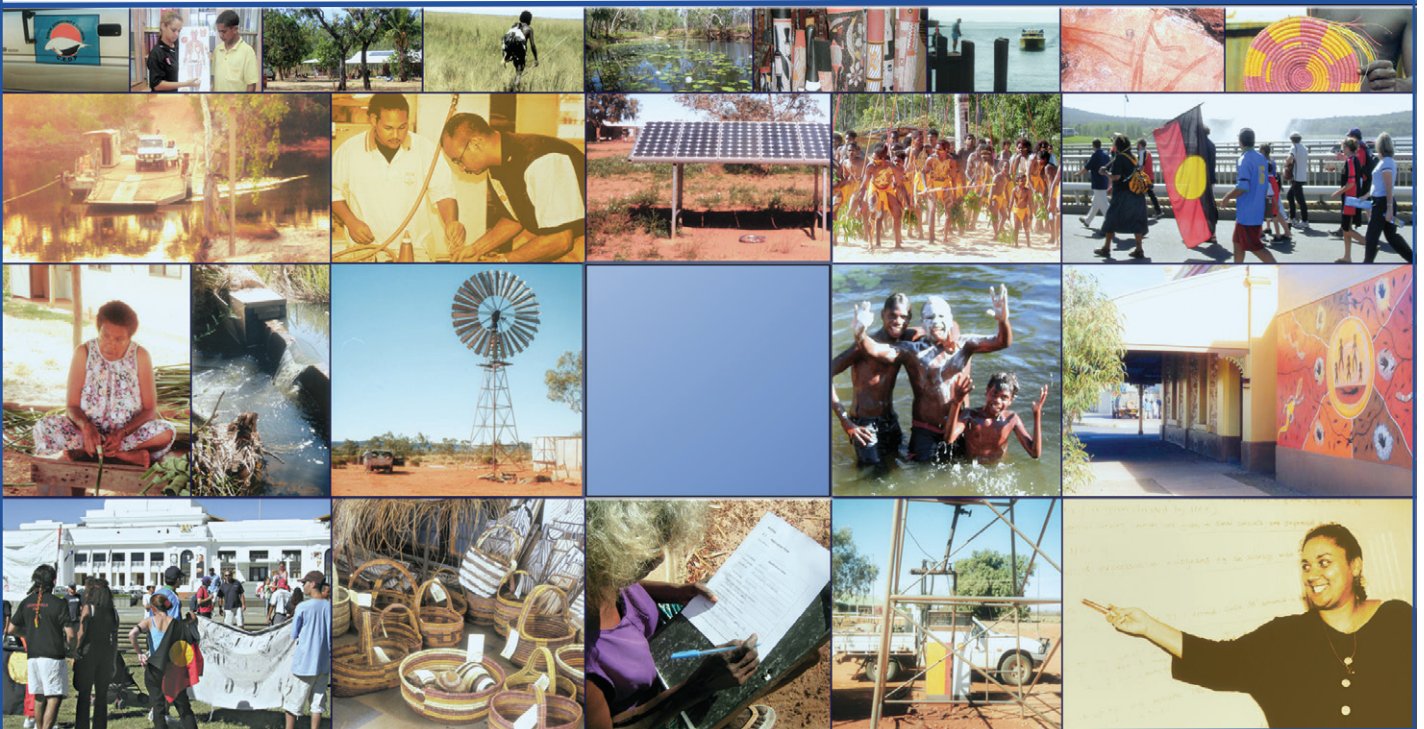
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Equitable Treatment of Native Title Compensation and Benefits

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A version of this Topical Issue was provided as a submission to the Australian Government's discussion paper *Leading Practice Agreements: Maximizing Outcomes from Native Title Benefits*.

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OPENING REMARKS

This Topical Issue is adapted from a submission in response to the Australian government's discussion paper *Leading Practice Agreements: Maximizing Outcomes from Native Title Benefits*.¹

By way of background this is my third submission to a package of reforms proposals circulated for discussion by the Rudd and now Gillard governments that seek to promote 'leading practice in the governance of native title payments and in agreement making'. These reform proposals have been progressively released by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the Treasury and now the Attorney-General's Department.

My first submission was lodged on 13 February 2009 and commented on the Australian government Discussion Paper 'Optimising Benefits from Native Title Agreements' and 'the Report of the Native Title Payments Working Group'. That submission was not made public by FaHCSIA but has been electronically published as *CAEPR Topical Issue 3/2009*.²

My second submission was lodged on 2 July 2010 with Treasury and made comment on the Australian government's Consultation Paper 'Native Title, Indigenous Economic Development and Tax'. This submission will be made public, but the consultation was suspended owing to the August election and so I append to this submission my recommendation to the earlier consultation paper. Impatient at the slowness of the process I have also made a version of my submission publicly available as 'Native Title and taxation reform' *CAEPR Topical Issue 4/2010*.³

The reference to these earlier submissions is provided because they raise a number of issues of relevance to the current discussion paper, most especially in relation to the historical lack of clarity, since the 1950s, about the nature of payments made in benefit sharing agreements with Indigenous Australians. I will not revisit these issues in any great detail here but merely draw attention to them in case the inter-departmental process that is currently under way overlooks my attempts to provide some 'whole-of-issues' perspective on payments under both land rights and native title laws.

1. Available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms>.

2. Available at <<http://caepr.anu.edu.au/Publications/topical/2009T13.php>>.

3. Available at <<http://caepr.anu.edu.au/Publications/topical/2010T14.php>>.

By way of personal background, I have researched these issues domestically since 1982 and so seek to provide some historical perspective on a number of complex issues about which current policy making seeks somewhat ahistorical and technical solutions. My academic perspective is that of anthropology of development and political economy so I focus on Indigenous perspectives on property rights and on how the powerful in Australian society, members of political and bureaucratic classes, exercise control over the less powerful such as native title groups. I am also interested in global comparative perspectives on such issues having been retained as a collaborative researcher by the United Nations Research Institute for Social Development on a project Identity, Power and the Rights of Indigenous Peoples (2006–2008). I provide this background because this submission draws largely on my own research publications since 1982⁴ that in the interests of readability I will not fully reference. Readers though might be interested in a recently completed monograph *Power, Culture, Economy: Indigenous Australians and Mining* (J.C. Altman and D.F. Martin editors) published by ANU E Press in 2009.⁵

I provide my submission in good faith, but it would be disingenuous if I did not raise one concern I harbour about the current policy-making processes managed by the Australian Public Service. Much of the Discussion Paper focuses on the issue of transparency, but it seems to me that while the process is nominally transparent, in that submissions will be made public, it is effectively very opaque because no explanation is provided on how submissions might be assessed for policy-making input. This seems to me to be an emerging wider issue when reviews are managed within the Australian Public Service rather than through more transparent parliamentary inquiry processes where at least the use that is made of submissions is clearly acknowledged and where written submissions are generally supplemented by verbal evidence published in Hansard. I make this point to at least encourage a clearer reference to policy development processes in response to this Discussion Paper and submissions lodged.

In my submission I do not specifically address the Discussion Paper's 35 consultation questions but rather focus on the following five key 'big picture' issues and end with a brief conclusion and six recommendations. The key issues are:

1. What is the nature of payments received in agreements by native title groups?
2. Does the Australian government, or its agents, have the moral authority to play a role in regulating the use of such payments?
3. Why should such payments deliver sustainable financial benefits and why should the Australian government promote such a strategy?
4. Should the Australian government consider other means to ensure that native title groups receive equitable agreement payments?
5. Is it equitable to use the tax system to discipline entities that receive native title payments?

4. See in particular Altman, J.C. 1983. *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra.

5. See <<http://caepr.anu.edu.au/Publications/mono/2009RM30.php>>.

1. WHAT IS THE NATURE OF NATIVE TITLE BENEFITS RECEIVED IN AGREEMENTS BY NATIVE TITLE GROUPS?

The Discussion Paper notes at the outset (p.4) that the Australian government regards native title agreement-making and resulting benefit sharing agreements as playing a potential role in its overarching policy goal to Close the Gap. This is not a surprising government objective, but it needs to be recognised as the government's objective and not one that is necessarily shared by native title groups who have signed benefit sharing agreements. Similarly, it is noted that native title agreements can be highly variable, and so the Discussion Paper appears to have a dual focus: first, to ensure that recipients of the growing number of individual agreements that deliver many millions of dollars each year should ensure that 'benefits are deployed for the benefit of both current and future generations'; and second, to provide information to facilitate better agreement outcomes for native title groups. The main focus of the Discussion Paper is understandably on situations where the results generated by large monetary payments from agreements generally with resource developers are regarded as poor. The Discussion Paper refers in a very general sense to stakeholders raising concerns about poor outcomes, yet simultaneously it is noted that there is a lack of information about 'the quantity and quality of native title agreements which can lead to differing perceptions about the nature and use of benefits obtained through them, and lead to concerns'.

I am concerned that the Discussion Paper itself makes no attempt to clarify such diverse perceptions. And so as in my earlier submission on native title taxation,⁶ I sought to raise the issue of whether native title agreement payments are compensatory (for loss or impairment of native title) or a form of commercially negotiated revenue provided to real property owners or claimants who are using the right to negotiate as a lever to capture a share of (usually) mineral rent? In reality payments usually incorporate elements of both with the agreements struck either through negotiation or legal arbitration and/or assessment.

A first order issue then that I revisit is what is the nature of native title benefits? While the Discussion Paper focuses on its vision for native title that effectively came into operation in 1994, this is an issue of a longer history that goes back to 1952 when the Commonwealth was directly administering the Northern Territory. Up until 1978, all statutory royalties raised on Aboriginal reserves were earmarked for Aboriginal use and were deemed broadly compensatory. Subsequently with passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), a diversity of payments could be negotiated in the NT mainly because free prior informed consent rights (sometimes referred to as veto rights) constituted a de facto mineral right and so provided negotiation leverage. The resulting benefit sharing regime is complex because not only did the Australian government guarantee all or most statutory mining royalty equivalents (SMREs) to Aboriginal interests (with 30% reserved for the owners or residents of areas affected), but land owners and others could negotiate additional monetary and non-monetary benefits above this compensatory base, while land owners could also receive any statutory and negotiated development lease payments.

The NT situation, which is not mentioned in the Discussion Paper, has created a precedent whereby the Australian government has adopted a somewhat paternalistic regulatory role in relation to agreement benefits. This is partly because the statutory land rights architecture has provided considerable oversighting and controlling powers to the federal Minister for Indigenous Affairs especially in relation to the financial activities and performance of the Aboriginals Benefit Account. It is also because the Australian government has always asserted that SMREs are public moneys and so it has an interest in ensuring appropriate outcomes from their use. It should be noted that Aboriginal land owners and their representative land councils have not shared this governmental view at least since the early 1980s.

6. Available at <<http://caepr.anu.edu.au/Publications/topical/2010T14.php>>.

ALRA:
Aboriginal Land Rights (Northern Territory) Act 1976

SMREs:
statutory mining royalty equivalents

Native title agreements are different because in general agreements are struck with private sector interests and the amounts are not directly linked to statutory payments like royalties paid to the crown (governments), although they might be influenced by a development's profitability and/or the amount of statutory payment. At times, there might be a mix of payments from private and public sources. An example of such an agreement is the Century Mine Agreement signed in 1997 that included a twenty-year benefits package made up of \$60 million from Pasminco (subsequently Zinifex, then OZ Minerals, now China Minmetals) and \$30 million from the Queensland State government.

There is also the issue, raised by legal tax academic Fiona Martin in a recent article⁷ that some payments or part of payments may be non-taxable—therefore falling outside the tax regime altogether. This is because they are capital payments for loss or permanent damage to the native title which is a pre-capital gains tax (CGT) asset. In tax law terminology, these payments are compensation for loss of a capital asset and therefore not income. As the capital asset is pre-1985 (CGT) it is not caught by the CGT regime which is part of the income tax assessment act.

The key issue that I am raising here is that the Discussion Paper fails to address whether payments are compensation or a form of revenue (mineral rent sharing); and whether they are public or private; and whether they are compensation for loss of capital (and non taxable) or income? There is an emerging literature on these issues that needs to be considered.

2. DOES THE AUSTRALIAN GOVERNMENT, OR ITS AGENTS, HAVE THE MORAL AUTHORITY TO PLAY A ROLE IN ADVISING ON AGREEMENT MAKING OR REGULATING THE USE OF NATIVE TITLE PAYMENTS?

If we assume that native title agreements are agreements between native title groups and commercial interests then surely payments are of a private nature and so no more subject to government regulation than a similar payment to any other land owner.

In any case, it could be argued that the Australian government, or its direct agents, could be conflicted on three counts that would undermine its moral authority to play a role either in advising on agreement making or in regulating the use of native title payments.

First, and most directly, as noted above, there is a risk that what is determined to be appropriate outcomes will be set by the Australian government and its Closing the Gap framework (as measured by available statistics) rather than by the priorities of native title groups. Examples might be decisions to invest in forms of employment, housing, health services or education by native title groups that do not match the Australian government's normalisation goals.

Second, and related, there is a risk that the Australian government will cost shift its responsibilities to native title groups, and associated financial implications, onto native title agreements. In so far as payments are compensatory this would offset any likely net benefits.

Third, and indirectly, the Australian government itself is highly dependent on revenues from commercial development, especially mineral extraction, on native title lands. Recent debates about the now defunct Resource Super Profits Tax and the still currently proposed Mineral Resource Rent Tax indicate that the Australian government is looking to expand the share of mineral rent that is paid to consolidated revenue. This goal could be in direct competition with the goal of native title groups to maximise their share of

7. Martin, F. 2010. 'Native Title payments and their tax consequences: Is the Federal Government's recommendation of a withholding tax the best approach?', *The University of New South Wales Law Journal*, 33 (3): 685-713.

mineral rents in compensatory and/or commercial agreements. Given that the Australian government provides licence to operate to miners, in such contests over rents clear power imbalances make it possible that native title groups will receive less as governments receive more.

This suggests to me that the Australian government must be at arms-length in advisory or regulatory roles on such matters where there might be actual or perceived conflict of interest.

3. WHY SHOULD SUCH PAYMENTS DELIVER SUSTAINABLE FINANCIAL BENEFITS AND WHY SHOULD THE AUSTRALIAN GOVERNMENT PROMOTE SUCH A STRATEGY?

The sound principle of a sustainable stream of financial benefit from native title agreements cannot be questioned and has similarities to the principle of sovereign wealth funds more generally. But the implementation of such principles in practice requires judgments to be made about the relative merits of current versus future needs. In research and consultancy work that I have undertaken with boards of Aboriginal incorporated organisations in a number of jurisdictions this issue of financial policy trade-off arises regularly; and getting the right balance especially when working with groups that are often extremely poor and with urgent immediate need is no easy task.

I am strongly in favour of any strategy that will empower native title groups to enjoy a sustainable benefit stream from a native title agreement, if that is their aspiration. But I do not believe that such a requirement can be either mandated or imposed, especially when successive Australian governments have shown no leadership on this front. Nor am I sure that recent or current Australian governments are well placed to promulgate such a strategy given their track record during the current mining boom and the current state of the nation's budget. Interestingly, there are very well-known models that Australian governments could have aimed to replicate like the Norwegian sovereign wealth fund known as the Government Pension Fund. Presumably they have chosen not to for reasons of political expediency rather than absence of information or institutional barriers.

The language of sustainability is very much in vogue at present. But again we need to ask what is the purpose of native title agreement payments. If the purpose is compensatory then offsetting immediate negative impacts for the current generation might be more important than building a sustainable income stream for future generations. In the above-mentioned monograph *Power, Culture, Economy: Indigenous Australians and Mining* contributors Sarah Holcombe and Benedict Scamby both refer to the Aboriginal-articulation view that 'we have the richest trusts but are the poorest people' to illustrate local perspectives that the balance between current and future priority is wrong. The need to adopt Intergenerational equity arguments depends on the nature of the impact—the more short-term the impact the less grounds for concerns about financial sustainability.

It is also noteworthy that a focus on financial sustainability can divert attention from the efficacy of expenditures and investment policies. As an example, the Aboriginals Benefit Account has had little trouble building up its corpus to over \$300 million by maintaining a low granting to assets ratio, but this performance has perhaps diverted attention from whether the rate of return on investments is adequate and whether grants made have either been in accord with Aboriginal aspirations or have delivered desired outcomes from the perspective of Aboriginal people? It is noteworthy that the Commonwealth Minister for Indigenous Affairs rather than Aboriginal stakeholders in the NT has the final say on both savings ratio for the Aboriginals Benefit Account and all disbursements.

4. SHOULD THE AUSTRALIAN GOVERNMENT CONSIDER OTHER MEANS TO ENSURE THAT NATIVE TITLE GROUPS RECEIVE EQUITABLE AGREEMENT PAYMENTS?

The Discussion Paper looks to empower native title groups to be in a position to accrue better native title agreement outcomes with information and associated capacity; and then to ensure better agreement outcomes through the improvement of governance arrangements. It is undeniable that such enhanced capacity will assist.

What is most likely to generate more equitable agreements is equity between the ALRA agreement negotiation regime and that available to native title groups under the Native Title Act future acts and agreement making frameworks. As already noted, under ALRA, the Australian government shares its royalty take with Aboriginal interests (in relation to the prescribed substance uranium) or provides the equivalent of royalties raised by the Northern Territory government under its Minerals Royalty Act (that is a 20% profits based royalty) or its Petroleum Royalty Act (that is 10% ad valorem based). And the free prior informed consent provisions under ALRA are recognised as being a powerful lever that constitutes a de facto mineral right.

So the Australian government could amend the NTA to provide similar free prior informed consent rights (and associated leverage) to native title groups and it could either pay SMREs (either 100% or on some proportional basis) in relation to mining on native title lands and/or hypothecate a portion of resource rents for native title groups assuming the new law is passed.

To date, the Australian government has used the High Court decision in *Western Australia v Ward* that property rights in subsurface minerals are vested in the crown to deny native title groups' access to SMREs. Lisa Strelein in *Compromised Jurisprudence* (2009: 63) has referred to this decision as a problematic fiction that has to be seen as a political compromise, and I concur. At least if the Australian government hypothecated a share of SMREs or resource rents for native title groups it would have greater moral authority to influence their expenditures because it could argue that it has a legitimate role in monitoring the use of public money.

5. IS IT EQUITABLE TO USE THE TAX SYSTEM TO DISCIPLINE ENTITIES THAT RECEIVE NATIVE TITLE PAYMENTS ?

It seems a little pre-emptive to suggest that either tax concessions or new tax liabilities will be used by government to discipline entities that receive native title payments but expend them in a manner that is not acceptable to the Australian government or some independent statutory watchdog. I say this for two reasons.

First, is the question of whether to exempt native title payments from a Native Title Withholding Tax given the historical experience of inequity and inefficiency and lack of transparency associated with the Mining Withholding Tax introduced in 1979 to recoup a proportion of SMREs paid under ALRA. Experience suggests that purpose-designing a tax based effectively on statute-based exceptionalism can be highly problematic. These issues are currently under consideration by the Treasury in its inquiry 'Native Title, Indigenous Economic Development and Tax. This proposal seems to me to be a little pre-emptive, and possibly provocative, given that the Treasury Consultation Paper canvasses income tax exemption for native title payments as one of three possible approaches.

Second, and returning to the issue of compensation (or revenue?), there is no comparable treatment of any other individual or group in Australian society in such a way. Others land owners are at liberty to expend their compensation payments as they see fit. At a time when the nation is considering constitutional amendment so as to be more inclusive of Indigenous Australians and to delete any negative race-based exceptionalism from the Australian Constitution, such an approach has the distinct appearance of being race-based because native title groups can only be Aboriginal or Torres Strait Islanders.

6. RECOMMENDATIONS

The Discussion Paper considered here has as its sub-title 'maximising outcomes from native title benefits' but much of it also focuses on maximising benefits from native title agreements. In my view there is a more important role for the Australian government in the latter focus. While I concur that sound governance, better information and enhanced capacity will all improve the likelihood that native title groups will accrue better outcomes from agreements I am less convinced that there is a regulatory role for government here.

I conclude with the following recommendations and commentary:

1. If the Australian government wants to improve the leverage power of native title groups so that they can achieve better financial outcomes in agreements then it should take steps to make the Native Title Act agreement negotiation framework as powerful as that in ALRA. This essentially means providing free prior informed consent rights to native title groups rather than just right to negotiate or right to consultation or to be informed.
2. If the Australian government wants to exercise a legitimate regulatory role over the expenditure of agreement payments (or a portion of agreement payments) then it should earmark a proportion of its royalties income for native title groups. Then at least it could argue that its regulatory role is justified by the provision of public moneys.
3. If the Australian government genuinely believes that agreements should generate a sustainable income stream for future generations then it should demonstrate leadership by establishing a sustainable Australian Sovereign Wealth Fund based on the Norwegian precedent. Such leadership would be preferable to attempts to force the relatively poor and powerless to adopt such a principle.
4. The Australian government should empower Prescribed Bodies Corporate, Registered Native Title Body Corporates and Native Title Representatives by ensuring that they are well resourced to engage independent and high quality commercial advice funded by corporate sector or from the public purse. An alternative that could be considered is to commit a proportion of SMREs to such activity, as has occurred with Aboriginal land councils in the Northern Territory since 1978.
5. It is important that the potentially conflicted position of the Australian government in this arena is recognised. It is in a complex triangulated relationship with major corporations on one hand and native title groups on the other. The Australian government has a vested interest, for example, in mineral extraction as this is a source not just of government revenue but also employment and regional development. Consequently it is in a difficult position as regulator of another interest group that is also seeking revenue in relation to mineral extraction on native title lands.
6. In *Globalisation and its Discontents* Joseph Stiglitz implores governments to seek ideology free or at least ideologically consistent solutions to complex and diverse challenges. Such lofty goals might be difficult to achieve, although not long ago the Rudd government was committed to evidence-based policy making, a commitment that the Gillard government has arguably affirmed in accepting all recommendation of the Moran Review's recommendations in *Ahead of the Game: Blueprint for Reform of Australian Government Administration*.
7. It is my view that as soon as Closing the Gap becomes the foundation of policy it becomes ideology-laden. It is important in any policy reform of native title agreement making and implementation that the government maintains Australia's liberal democratic commitment to pluralism that should allow native title groups to use their compensation payments in the manner they see fit.

