# Reconciliation and Resources: Mineral Rights and Aboriginal Land Rights as Property Rights

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*Privatising Australia's Mineral Resources*

Several months after the passage of federal native title legislation, two years after the High Court's *Mabo* ruling, and nearly two decades after the implementation of Aboriginal land rights legislation in the resource-rich Northern Territory, the conflict between traditional land owners and the mining industry is as bitter as ever. Many Aborigines say that mining disrupts their traditional affiliation with the land and their way of life, and that they are excluded from the benefits of resource exploitation. The industry responds that special Aboriginal land rights have created massive uncertainty, giving a tiny percentage of the population unfair control over the nation's minerals and costing Australia wealth and jobs.

The differences between the two sides can seem insurmountable, the situation zero-sum. Either Aborigines gain legal recognition of their relationship with particular pieces of land, and so the ability to protect that land, or the mining industry has access to minerals and a stable, certain environment in which to work.

That appearance is largely correct. The problems *are* insurmountable, the situation *is* one in which at least one side must lose – *in the current legal environment.* As long as Australia's mineral rights are owned by the Crown, as long as land over which native title exists is politically managed and inalienable, as long as the vast majority of Australian land and minerals are kept separate from the ordinary laws of private, divisible, alienable property rights, the conflict between Aboriginal land rights and mining interests is irreconcilable. The happy inverse of that statement is that the problems *can* be solved by altering the legal environment, by privatising mineral ownership and by converting native title, wherever possible, into alienable freehold with full property rights.

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### Common Roots

The Australian mining industry and native title have, in an odd way, a common history. Both grow out of an abnormally great extension of Crown power, prerogative, and ownership.

That Australia is distinctive in the history of English interaction with aboriginal groups is, of course, well-known. Unlike Canada, the United States, and New Zealand, Australia was settled under the doctrine of *terra nullius*, asserting Crown ownership of all land on the continent upon settlement. It was thought that the apparent lack of native farming or political organisation meant that no particular group of Aborigines could be said to own any particular piece of land, and so the continent could be treated as unoccupied – *terra nullius.* There were no treaties between the Crown and Aboriginal groups; there was no purchase of land by the settlers. Indeed, the purchase of land from the natives was forbidden and such exchanges were not recognised, for they would imply Aboriginal rather than Crown ownership of as-yet uncolonised land (see Lumb 1993:8). The old feudal notion that the sovereign was the ultimate owner of all land in the dominion, and that all lesser titles, including freehold, were merely grants of the Crown, reached its high-water mark in Australia. For the first and only time, the Crown asserted sole ownership of an entire continent and the right to grant titles and leases as it saw fit.

A similar history can be told about minerals. Feudal tradition held that all gold and silver within a particular dominion was owned by the Crown; this notion became part of the common law of England. The common law also, however, held that whoever held title to a piece of land owned the ground beneath the land and

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the air above it. That is, absent some specific exception at law (like Crown ownership of gold and silver), someone who owned land owned any minerals that might happen to lie under it. This, generally, remains the law in countries whose legal systems derive from English common law, including the United States, Canada, and Ireland as well as the UK itself. Some important developments and changes have occurred: the assertion of Crown (or state) ownership of the sea beds and anything that lies beneath them, uranium and sometimes petroleum being added to the list of exceptions to the rule of private ownership, and the increasingly common division of title between surface ownership and mineral ownership, either of which can be sold while retaining the other. The principle, however, remains generally the same.

Australia, again, is the exception. Beginning in the late 19th century, the various colonies (soon to be states) passed laws declaring that no grants of land made by the Crown (embodied in the local legislatures) would henceforth include ownership of *any* minerals. A fair amount of mineral ownership had already passed into private hands by virtue of previous grants of land that did not make such exclusions. Some states left those prior grants untouched, and a very small number of those mineral deposits remain privately owned and exploitable to this day. The newer statutes, though, expanded the notion of Crown mineral ownership; no newly granted land was to include ownership of any of the minerals (as defined in the statutes) beneath the surface. Thanks to these laws, the Crown (through the states) became – and remains – owner of the minerals beneath most Australian land. The real but limited rule asserting Crown ownership of gold and silver was extended here to a degree unheard of elsewhere (see Lang and Crommelin 1979:11-17). Other idiosyncrasies of Australian law, including the fact that most Australian freeholders cannot prevent exploration and mining on their land, flow from these increases in Crown ownership.

Twice, then, the British Crown saw its power in Australia extended far beyond what it ever was elsewhere: the sovereign was ultimate owner of an entire continent, and owner of virtually all the wealth buried beneath it.

### Modern Conflicts

Recent decades have seen state and federal governments recognise (or create, depending on who one asks) Aborigines' rights to their traditional land. Often these rights are usufructuary or 'use' rights; they do not imply Aboriginal ownership, but allow Aborigines to do certain things on the land (hunt, fish, pass over, etc.) even while it is owned by someone else. Beginning with the 1976 *Aboriginal Land Rights (Northern Territory) Act* (the NT Land Rights Act) the federal government and some states created mechanisms for the transfer to Aboriginal groups of ungranted Crown land of which they could prove traditional occupation. While Aborigines had previously protested mining developments which disrupted their lifestyles or traditional lands, these Acts put the conflict between mining interests and Aborigines into the form they essentially still hold today.

The NT Land Rights Act gave Aborigines who successfully established claims to land something few other Australian land owners have: the right to deny permission for mineral exploration or mining. Land Councils – newly-created political bodies, which effectively controlled the land 'on behalf of' the Aborigines who occupied it and their local land trusts – had to consent before any mineral exploration could take place on the land under their jurisdictions. When such permission was given, mining companies ordinarily had to pay a royalty to the Land Council for the benefit of all Northern Territory Aborigines (in addition to other royalties owed to government).

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This, it should be noted, is similar to the rights an ordinary landowner would have in most common law countries, like the United Kingdom, Canada, the United States, and Ireland, but key differences existed as well. Landowners in other countries can typically refuse to allow any mining (subject to some exceptions, like gold and silver), and those who wish to explore or extract have to reach some mutually acceptable agreement with the landowner, assuming that no previous landowner has divided the title and sold the mineral rights. That agreement may involve the simple sale of mineral rights; it may be a lease of some kind to the miner; or it may be a royalty arrangement. The three important differences are that the miner or mining company would negotiate *directly* with the owner, not with a distant Council which was said to represent the owner; that the owner would directly and solely receive the financial benefits of whatever agreement was reached; and that ordinarily there was not a royalty to pay to the government in addition to the cost of buying or leasing the mineral rights.

As simple economics would predict, these differences meant that traditional landowners were more unwilling than they would otherwise have been to allow mining and that the mining companies would have to pay more in order to secure mineral rights. Mining that would have been economical if the company and owner were the only parties involved became

uneconomical because of the payments that had to go to others. There was less mining, and fewer of the potentially lucrative deals that Aboriginal landowners might have struck with mining companies.

As T.G. Bergstrom (1984) showed, slightly more sophisticated economics predicts that, on average, both revenue to the mining company and revenue to the original resource owner will be lower in a royalty system than in a system that involves the sale or lease of mineral rights for a fixed sum. This effect was presumably exacerbated under what amounted to a double-royalty system.

In short, the NT Land Rights Act gave some Aborigines rights resembling those of ordinary freeholders in other countries, but created a structure that made it less likely that Aborigines and mining companies would come to mutually beneficial agreements. The need to negotiate with Land Councils rather than the owners themselves, the royalty system, and the fact that financial benefits from the mining were dispersed across the Territory rather than focused on the owners combined to make everyone worse off. Amendments to the NT Land Rights Act in 1987 only partially alleviated these problems.

**Mabo**

The 1992 High Court ruling in *Mabo* v *Queensland (No.2)* and the 1993 *Native Title Act* brought warnings from the mining industry that the Northern Territory experience is about to be repeated on a nationwide scale. *Terra nullius* has been rejected, and Aborigines can claim native title over previously ungranted Crown land. That does not include land to which a pastoral lease has been granted, but does include land on which a mining lease is held. As under the original NT Land Rights Act, successful native title claimants will have more rights than other Australian landowners to inhibit future mining on their land, or to gain financially from mining that does occur.

Also as with the NT Land Rights Act, the negotiations between mining companies and native titleholders are more bureaucratic than the equivalent negotiations between freeholders and miners would be in other countries, and the financial incentives the two sides face are skewed. When a mining company applies for a lease on land held under native title, the titleholders have two months to decide whether they object to the application (or want compensation above and beyond that to which ordinary landholders are entitled). If they do, the two sides have either four or six months to negotiate an agreement, depending on whether the lease would allow only exploration or would allow excavation. If the two sides do not agree, they go before either a state or a Commonwealth arbitration board, which has either four or six months to render a judgment (again, four months if only exploration would occur, six months otherwise). The process could therefore take up to fourteen months. The same schedule potentially applies to bids for mining leases on Crown land; the initial two month wait, in this case, is to see whether any native title claim is made. There would, of course, be powerful incentive to make such a claim once it was known that a mining company was interested in the land.

Worse, even if native title is held by a small group of individuals and not held in trust by one of the 'bodies corporate' (apparently more like the Northern Territory's local land trusts than like the Land Councils), one of those bodies corporate will be appointed by the Federal Court or by the Native Title Tribunal 'to act as agent or representative of the common law holders in respect of matters relating to the native title' [s58(a)]. Once that has occurred, the body corporate in question becomes a 'native title party', entitled to claim a seat at the negotiating table. That is, mining companies do not only have to negotiate agreements with the landowners. If the land is held outside a trust, then the companies also have to negotiate with the body that *would* have owned the land had it been placed in trust. Even if the native titleholder reaches a quick agreement with the mining company, one or more 'representative bodies' could demand additional compensation and delay the process for a year [s29(2)(a), s30(b), ss31-44]. This raises the effective price of the mineral rights to the company, without any necessary financial benefit to the title holder. Like the Land Councils under the NT Land Rights Act, these bodies could raise the asking price beyond what mining companies are able or willing to pay, thereby preventing agreements that otherwise could have occurred betwen titleholders and the industry.

Native title is both more and less than ordinary freehold title. It is more in that native titleholders have rights vis-a-vis, for example, mining, that other landowners do not. It is less in that it cannot be sold, leased, or mortgaged, and in the rights third parties like the bodies corporate have to interfere in exchanges involving the land. One improvement that the Native Title Act made over the rights recognised in *Mabo* is that Parliament gave native titleholders the right to surrender native title to the Crown in exchange for a guarantee that their subsequent application for freehold over the same land will be granted – in effect letting them swap native title for freehold. They thereby lose their special rights to the land, but gain the right to sell it, mortgage it, subdivide it, and so on. This little-known provision of the Act (s. 21(1-3)), along with a Senate amendment that gives native titleholders the choice of whether to have the land held in trust by Land Councils, points the way to a possible resolution of the apparent conflict between land rights and mining.

**Property Rights**

The solution to these problems is as straightforward as it is far-reaching: vest ownership of minerals in the freeholders beneath whose land they lie, and award successful native title claimants freehold title. Both of the increases in Crown power will be reversed: Aborigines

will have recognised ownership of their land, not merely the attenuated 'native title' which can only be relinquished to the Crown, and Australian mining companies, like their peers in other common law countries, will buy mineral rights from landowners. Landowners, including Aborigines, who do not wish mining to occur on their land can refuse to sell – a simple 'no,' with none of the delays and uncertainty associated with the present grants and arbitration systems. Minerals beneath unalienated Crown land – that is, land subject to neither native title nor Crown-granted title – would remain state owned, but instead of being leased out and subjected to special taxes and royalties mineral rights could be gradually sold at competitive auction. Like a private homeowner, the government could simply refuse to sell the mineral rights beneath developed land it owned (e.g. Parliament House). Australia could even advance farther than other common law countries have done and eliminate the outdated exception for gold and silver – originally reserved to Crown ownership so that there was a guaranteed supply for minting coins.

The Australian mining industry is inordinately fond of the argument that mineral wealth belongs to all the people and should therefore not be monopolised by a small portion of the population (see, for example, AMIC 1993, McIntosh 1993, and Atkinson 1993). If outsiders heard some industry statements on collective ownership without realising that 'public ownership' was being implicitly contrasted with 'Aboriginal ownership,' they would certainly think that the industry was demanding its own nationalisation.

In fact it is not clear that *anyone* benefits from Crown ownership of mineral resources. Bergstrom (1984) and Nellor (1984) show that, on average, governments receive less revenue from royalty systems than they would from a stable system of competitive auctioning of mining leases; it is presumably also true that royalties generate less revenue than would simple competitive auctions of mineral property rights. Certainly landowners do not benefit from having the resources beneath their feet extracted without their consent and without any payment besides compensation for inconvenience. The mining industry does receive an implicit subsidy by not having to buy subsurface or surface property rights, but it must also forgo marginal production because of royalty payments to the minerals' ultimate 'owner,' the state and territory governments. Mining companies are also at the mercy of ministerial discretion; grant of an exploration licence does not necessarily imply grant of an excavation licence, and (the industry claims) neither are issued in a particularly timely fashion. Surely mining companies would prefer to be able to buy mineral rights and then know that, subject to *previously-announced* environmental or land-use rules, they can explore or mine at will.

The mining industry uses the rhetoric of common ownership to attack any transfer of ownership to Aborigines. Experiences in the Northern Territory and elsewhere have taught miners to equate Aboriginal ownership with cumbersome, bureaucratic processes that delay mining and increase its cost. Aboriginal ownership and those delays, however, have gone hand-in-hand only because of the odd kind of title which Aborigines have been given. In turn, the only advantage Aborigines gained from this strange title is more control over mining than freeholders get. If mineral rights were privately owned, and all freeholders had the same rights over minerals that they have in other common law countries, Aborigines would have no reason not to exchange their native title for ordinary divisible, alienable freehold. The link between Aboriginal ownership on one hand and royalties, Land Councils, bodies corporate, and long arbitration processes on the other would be broken. Indeed, mining companies would *gain* in certainty and speed, since they would gain access to minerals through simple business transactions rather than through the discretionary licensing process.

The interests of Aboriginal landowners would be similarly well-served by a general privatisation of mineral ownership, which would allow them to take freehold title without losing their mineral rights. There is nothing inherent in the idea of legal recognition of traditional ownership that requires that such ownership be different in kind from ordinary freehold. Upon successful proof of traditional ownership, the appropriate Aboriginal individual, family, or group should be granted freehold title to the land.

It may well be that many Aborigines consider themselves to have a close relationship with their land not adequately captured by the western idea of land as exchangeable property. If so, freehold does them no harm; a landowner can simply refuse to sell the land. If, in fact, a freeholding Aboriginal family or group thinks that its land should *never* be alienated and should be collectively held, then they would be free to donate the land in trust to a local body like a land trust or a regional one like the Land Councils; but it would be their choice. The Keating government wanted to vest *all* native title in bodies corporate holding the land in trust; only Senate amendments gave native titleholders the choice to own the land themselves.

The legal rationale for inalienability is that native title is based on Aboriginal traditions and customs, which do not include the sale of land. That idea, formulated by the High Court, is undermined elsewhere in the *Mabo* decision when the Court rejects the idea that a change in customs or traditions since 1788 would result in the loss of native title. Room is explicitly made for the 'evolution' of Aboriginal societies. As Stephenson (1992:107) argues, the logic of the court's decision provides an argument against complete inalienability.

A more plausible objection – probably the most plausible objection – to native title *qua* freehold involves the typically communal nature of Aboriginal relationships with the land. The economic value of

land, gained through alienability, would surely be lost again by the need for any would-be buyer to make an offer acceptable to each of dozens or even hundreds of joint owners (so this objection would go); and negotiations for mineral rights would be all but impossible, since a small minority of a landowning group could block development entirely or hold out for exorbitant amounts of money. This is an important difficulty – although, it should be noted, one which is not absent under the current system. At least all of the joint owners of the land would have an economic incentive to be at least a little responsible in their negotiations; they have a financial stake in a beneficial outcome. Land Councils, bodies corporate, and so on increase the number of seats at the negotiating table without even the minimal discipline provided by partial ownership.

Still, it may well be that many native titleholding groups would find it helpful to create local corporations or trusts so as to allow efficient and effective decision making about land and mineral deals. If so, those corporations and trusts should be created by the native titleholders themselves, without political interference, ministerial appointees, or the division of responsibility between local land trusts and massive regional Land Councils. Those titleholding groups which choose not to create local trusts or corporations may be awkward negotiating partners; but they need not be any more awkward than business partnerships with a large number of partners.

### Who benefits?

Once ordinary freehold title included mineral ownership, Aboriginal freeholders would actually have *more* control over mineral disposition than they do as native titleholders under the Native Title Act. No third parties would be able to interfere in their agreements with mining companies. They would receive the full value of any mineral rights being sold, unlike the current situation in which they are likely to share that value with outside bodies.

Aborigines would then have title to their traditional lands and the right to use them or allow them to be used as they saw fit. Strict traditionalists could refuse to sell surface or mineral rights at any price, or could have the land held in trust. Others could find mutually beneficial accommodation with those who wanted to develop or mine their land; they could sell a portion of the surface or mineral rights for funds to preserve the more important sections of the land; they could sell mineral rights at a discount in exchange for more expensive but less disruptive methods of mining; or they could decide that the market value of their land or minerals was high enough to sell it all and buy new land or migrate to the cities.

Non-Aboriginal landowners in resource rich areas would also gain the ability to choose how the resources should be used, whether left in the ground to keep the surface undisturbed or mined on financial terms they find acceptable.

Mining companies would lose their ability to mine without the consent of the landowner and would have to purchase mineral rights; but they would also no longer pay inefficient royalties. The certainty of mineral rights ownership would replace the uncertainty of ministerial discretion in the grants and applications process. Their ability to negotiate mutually beneficial arrangements with native titleholders would be far greater than under either the NT Land Rights Act or the Native Title Act, since they could negotiate directly with titleholders, with no interference or additional demands from outside organisations.

'The people,' represented by the Crown in the states, would lose some amount of mineral wealth which would be transferred to private ownership; but they do not benefit from their theoretical ownership in the current system, any more than they would benefit from their collective ownership of the mining companies if the latter were nationalised. Reforms to Australian property law that would benefit Australians in their private capacities as landowners, stockholders or employees of mining companies, or traditional guardians of the land should not be prevented because Australians in their public capacity as citizens would lose something they cannot use and from which they do not benefit. ■

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