Australian National University

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Jon Altman BA MA (Hons)
(Auckland) PhD (ANU),
FASSA, HFRSNZ
Research Professor

Centre for Aboriginal
Economic Policy Research

Professor Lee Godden
Commissioner Native Title Inquiry
Australian Law Reform Commission
Level 40, MLC Centre
19 Martin Place, Sydney, NSW, 2000
By email: lee.godden@alrc.gov.au

RE: Review of the Native Title Act 1993

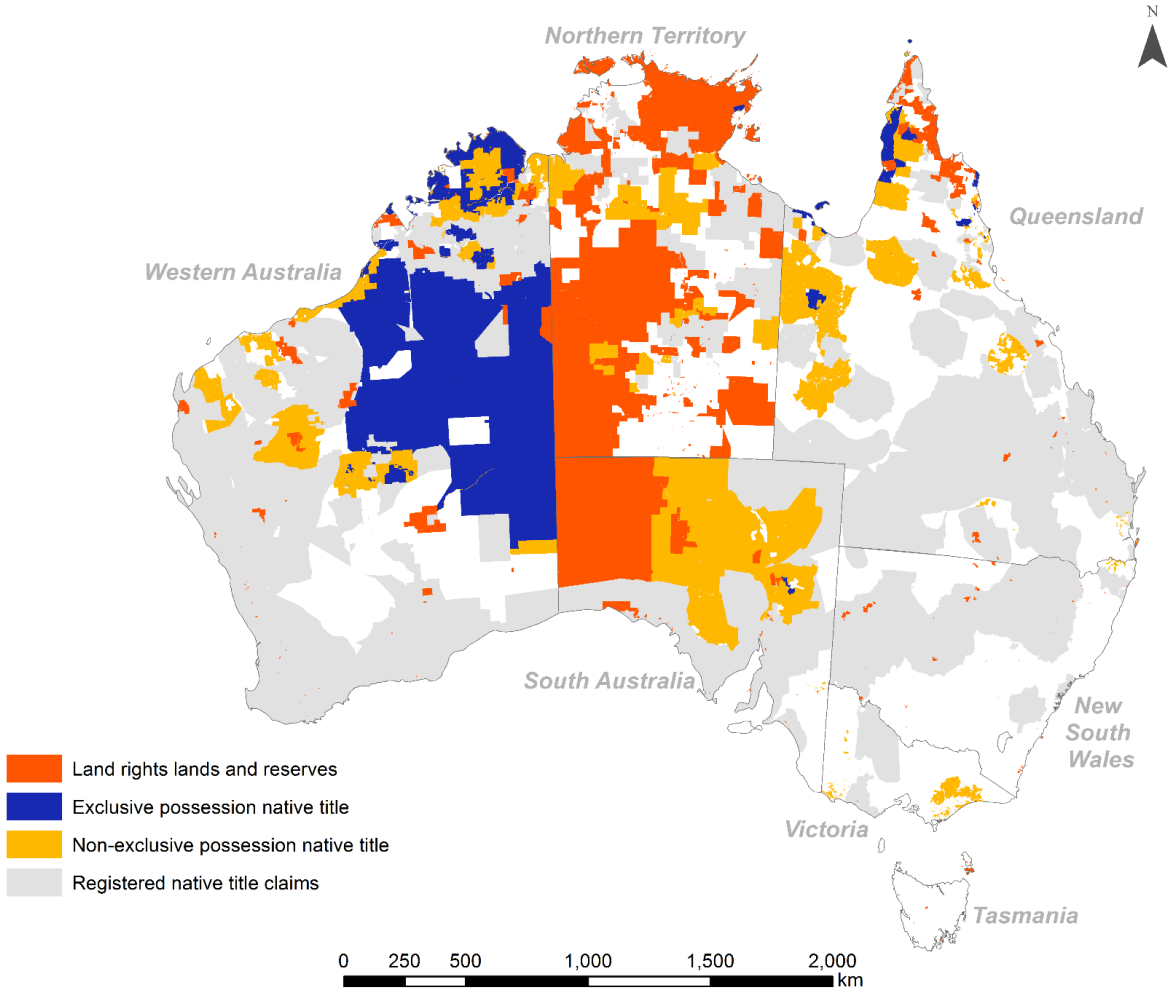
Dear Professor Godden

As discussed in our teleconference of 12 May 2014, I have been delayed in making a brief submission to the Australian Law Reform Commission review of the Native Title Act 1993 by fieldwork and conference commitments. I am keen to make a brief submission on your Issues Paper of March 2014. I understand that there will be a discussion paper released later this year and I would be keen to provide further submission at that time.

Since late 2011 I have made four submissions to parliamentary and departmental inquiries. These submissions include input to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment (Reform) Bill 2011; into the Treasury Inquiry into the Tax Treatment of Native Title Benefits; to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012 (with Francis Markham) and to the Joint Select Committee on Northern Australia's Inquiry into the Development of Northern Australia earlier this year (with Francis Markham). I mention these submissions because they contain material that may be pertinent to your inquiry. In particular the submission to the Senate Inquiry into the Native Title Amendment (Reform) Bill 2011 contains discussion about the Native Title Act and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the definition of 'traditional' and burden of proof, the future acts regime and good faith negotiations and commercial rights and interests that are all pertinent to your review (available at: http://caepr.anu.edu.au/publications/topical.php).

More recent research with Francis Markham has aimed to provide up to date mapping of the extent of Indigenous land holdings continentally, as well as various assessments of the resource and environmental values of these lands. I will not rehearse our findings here in detail except to note that by our estimation using official data sources and GIS mapping techniques Indigenous title of some form extends over 31 per cent of Australia (land rights 13 per cent, native title exclusive possession 9 per cent, native title non-exclusive possession 9 per cent). Furthermore, information provided by the National Native Title Tribunal indicates that a further 39 per cent of the continent is

covered by registered native title claims. This information is summarised in the following map produced in collaboration with Francis Markham:



In this submission I want to limit my comments to the topic of 'Native title and rights and interests of a commercial nature' that may be of some relevance to questions 12 to 15 in your issues paper. I have raised many of these issues before but have had little or no influence on policy reform. I make these comments from the disciplinary perspectives of economics and anthropology, with an action research focus on development options for Indigenous people with legally recognised rights and interests in land. I note in passing that in Australia we lack any register or even estimate of the number of Indigenous people that fall into this category; the only figure that I am aware of is an estimate made by Francis Markham and myself that less than 80,000 Indigenous people live on Indigenous lands based on a correlation of land holdings in 2013 with census population estimates from 2011. This number will undoubtedly rise when future native title determinations are made, but I note that these figures refer to residents not to traditional owners or members of Prescribed Bodies Corporate. Similarly using 2006 Community Housing and Infrastructure Needs Survey data (the latest available) we estimate that there are nearly 1000 discrete Indigenous communities (as defined by the Australian Bureau of Statistics) on or within one kilometre of Indigenous land.

Another area where we seem to have very poor information is about the rights and interests vested in native title determinations. Under statutory land rights law, the rights and interests of traditional owners are quite clearly defined in, for example, the *Aboriginal Land Rights (NT) Act*. But it is my understanding that rights and interests in native title determinations can vary considerably, not just between determinations of exclusive or non-exclusive possession, but also within each category and between States and Territories. Arguably there is a case for every determination to be defined and confined by the facts, but such an approach makes for a high degree of variability and potential inequity. As noted some analysis of the content of determinations is urgently required.

Much of my research over the past 37 years has focused on forms of economic development in remote Indigenous Australia. Initially this work focused on diverse forms of economy that I have recalibrated since 2001 using the notion of economic hybridity. The concept of economic hybridity that depicts market, state and customary sectors delivering livelihood; and acknowledges the mix of capitalist (or western) and non-capitalist (or customary) relations of production in many contemporary Indigenous contexts. Economic hybridity is pertinent to the issues your review examines because it proposes that where people have new found legal rights in land based on custom and connection it is likely that custom and connection loom large and will be influential in everyday decisions about livelihood. The hybrid economy involves a productive broadening of the economic base beyond the narrower notion of the 'real' or mainstream economy which is relatively small in much of remote Australia where Indigenous people have rights and interests in land. This is emerging as an important issue of political, if not legal, importance as there are expectations that land claimed largely for social justice reasons will now deliver economic development to remote Indigenous communities. If it is to do so then in my view three things will need to happen. First the notion of land rights and so called native title exclusive possession should include the right to exclude. Second de facto, if not de jure, property rights will need to be vested with land owning groups. Third, the murky nature of property rights will need to be clarified if we are to see sensible allocation of natural resources. I will say just a little about these three issues.

The first and second issues are interlinked. It is worth recalling that in 1973 in the letters patent that established the Woodward Land Rights Commission the then Prime Minister Gough Whitlam sought the vesting of rights in Aboriginal reserved lands with traditional owners 'including rights in minerals and timber'. It was Woodward who recommended that rights in minerals and petroleum on Aboriginal land should remain the property of the Crown, a decision not unlike the one in *Ward* nearly 30 years later made for very different politically pragmatic reasons. However knowingly or not Woodward did confer a de facto mineral right on traditional owners when he famously noted that 'to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights'. Subsequently consent provisions (negatively referred to as the power of veto) were incorporated in the Commonwealth *Aboriginal Land Rights (NT) Act 1976*, a precursor of what are now termed free, prior and informed consent (FPIC) rights. These are the most powerful rights to exclude in Australia today and they were introduced in law passed nearly 40 years ago.

Unfortunately mainly for reasons of political expediency no such FPIC rights were included in the *Native Title Act 1993*. Indeed there is today a gradation of rights in land varying from the strongest land rights to the weakest non-exclusive native title determination. And rights and interests have a similar gradient although it is unclear, as noted earlier, what rights and interests are conferred across all determinations; procedural rights are limited as a general rule to a right to negotiate where determinations are of exclusive possession and rights to be consulted or informed as other land owners where determinations are of non-exclusive possession. Interestingly with growing opposition to hydraulic fracturing (fracking) in areas where there is shared Indigenous and non-Indigenous 'ownership' (non-exclusive possession) there are cases as in NSW where informal consent provisions have been provided to land owners by exploration and mining companies, not the state.

It is sometimes overlooked that just as implementation of the Woodward recommendation conferred de facto mineral rights with Aboriginal traditional owners, so two decades earlier a form of de facto royalty right was conferred on Aboriginal interests in the Northern Territory by the Minister for Territories Paul Hasluck in 1952. Hasluck came upon the novel idea of hypothecating all royalties raised on what were then Aboriginal reserves in the Northern Territory (over which as Minister of Territories he had control) for Aboriginal use. Surprisingly though, in Hasluck's scheme these royalties were earmarked, at double the normal statutory rate, for all Aboriginal people in the Northern Territory—not those affected and not those on whose lands mining occurred, now called traditional owners. This set an important precedent that clearly influenced Woodward's thinking so that he recommended that a similar scheme be introduced into land rights law with 30 per cent of statutory royalties reserved for the traditional owners and residents of areas directly affected by mining with the balanced reserved for the operational costs of land councils and for wider distribution to, or for, the benefit of Aboriginal people throughout the NT. This schema was incorporated in the Aboriginal Land Rights (NT) Act 1976. Subsequently there have been modifications with self-government in the NT royalties were paid to the Crown in the right of the NT with royalty equivalents paid to Aboriginal interests via what is known today as the Aboriginals Benefit Account. It is noteworthy that there are provisions for mining payments to be negotiated above this minimum statutory royalty equivalent amount and such additional negotiated payments have featured in every mining agreement since land rights.

Unfortunately from an Indigenous perspective, so such provisions for de facto mineral rights or de jure royalty rights were incorporated in the Native Title Act. This is arguably because the States were unwilling to share their royalty income with native title interests and because the Commonwealth was unwilling to provide the royalty equivalent that it pays in the NT from consolidated revenue. The Native Title system might have operated very differently indeed if an NT land rights-style system had been introduced with native title parties and prescribed bodies corporate, Native Title Representative Bodies and Indigenous development more generally funded either from mining royalty equivalents paid by the Commonwealth or from a hypothecated proportion of State mining revenues. Instead native title parties are left in negotiation situations where they are competing for a share of mineral rents (or profits) that are the residual after all other parties, except shareholders, have been guaranteed their share. Almost by definition this and the tight time frame for future act negotiations places them in a structurally inferior bargaining position that can limit their prospects for either fair compensation or an equitable share of mineral rents

extracted from beneath their lands, or in the case of strip mining from the surface of their lands.

These statutory variations and historic precedents mean that at one extreme traditional owners of land that spans any two jurisdictions that abut the NT will be subject to two very different forms of property and negotiation rights in relation to sub-surface minerals. In my view this inequity can be addressed in two ways. The first is to provide all Indigenous interests with exclusive possession FPIC rights in relation to any resource development on their land. The second is to consider some form of division of royalties of sub-surface minerals currently owned by the crown (the Australian state) with native title parties. Paradoxically, as the Industry Commission (now Productivity Commission) noted over 20 years ago a strengthening of property rights is likely to provide greater incentive for native title groups to agree to mining as their negotiation rights and likelihood of higher return increases. Conversely, if groups are willing to forego increased potential returns then just as land rights law respects the wishes of traditional owners, so native title law should respect the wishes of native title groups. The issue of non-exclusive native title will result in the vesting of an inferior form of mineral and royalty right, but at least this is defensible so long as native title groups are afforded the same procedural rights as other lease or land owners.

There are two puzzling aspects of the Native Title Act in relation to commercial rights and interests.

The first is that while customary (non-commercial) rights are recognized under S211 of the Native Title Act, commercial rights in resources were excluded at least until the High Court judgment in *Akiba* ([2013] HCA 33). This might make sense if one were to interpret native title as frozen in some imagined precolonial fiction and so commercial rights, especially to subsurface minerals, are viewed as too modern to encompass tradition. Or else as in *Ward* Crown ownership of statutory minerals are confirmed as a political compromise between European and Indigenous assertions of sovereignty that invariably benefits settler colonial interests over native title interests.

The second is the legal view that property rights can be neatly divided between customary and commercial. This is clearly not the case, as I have demonstrated in research in relation to fresh water property rights. If there are competing customary and commercial interests in fresh water (surface or ground) it is obviously the case that, not only is the competition over the same water, but that customary use might impact on commercial use and vice versa. A similar issue arises with sub-surface minerals when the mineral is on the surface as in much strip mining. It is currently assumed that the miner's right takes precedent and the loss of native title amenity is compensable. In the interests of clarifying property rights to reduce potential for legal disputation (and associated transaction costs that might arise from litigation) over which rights take primacy it is probably sensible not to make distinctions based on the nature of use over the same resource, between production for use and production for exchange.

I want to make two brief observations here cognisant of your terms of reference that refer to 'the importance of certainty to the relationship between native title and other interests in land and waters'.

First economists highlight that such a blurred distinction between customary and commercial rights in a resource like water will result in sub-optimal, potentially wasteful use. For example, if a native title group holds an unlimited right over fresh water for customary use, then there is no incentive to use this resource efficiently. This in turn may impact on the amount available for commercial allocation especially in situations of water shortage. And unless there is reservation of commercial allocation for the native title group there is possibility that they will enjoy unlimited access to water for customary purposes and zero allocation for commercial purposes or for trade. So in the interest of efficient allocation of resources it would make sense to allocate a customary and tradable commercial right in fresh water with native title groups.

Second, at a time when there is growing political pressure for holders of land rights and native title to make these assets work for their development benefit it is difficult to see how this will occur without access to commercial rights in resources. While it is recognised that sub-surface mineral rights might still require 'political compromise', there are many other old and new and potential forms of property including forestry, fisheries, fresh water, carbon, biodiversity that could be vested with native title groups to ensure that land and waters are potential economic assets.

Finally, your terms of reference require regard for Australia's statement of support for UNDRIP. The Native Title Act was passed in 1993, 14 years before the adoption of UNDRIP by the General Assembly on 13 September 2007. 144 states voted in favour of UNDRIP, with Australia being one of only four nations who voted against. On 3 April 2009 Australia reversed its position making a statement of support. As a General Assembly Declaration UNDRIP is not a legally binding instrument under international law, but clearly in now supporting UNDRIP Australian governments are keen to see its principles reflected in Australian domestic law dealing with Indigenous Australians. This is reflected in part, I would have thought, by the passage of the Human Rights (Parliamentary Scrutiny) Act 2011.

In relation to the issues that I address there are two UNDRIP articles of key import, 26 (2) and 32.

Article 26
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

It is paradoxical indeed that Aboriginal land rights law passed in 1976 accords more closely with these articles in relation to property rights and commercial interests than the Native Title Act. It seems to me that the work of your review must look to more closely align

Australia's native title law with UNDRIP principles that themselves seek to embody recognition and implementation of international human rights. One can but wonder what the Native Title Act 1993 (not to mention the Native Title Amendment Act 1998) might have looked like if it had been subjected to the principles of UNDRIP and the Human Rights (Parliamentary Scrutiny) Act 2011.

In this regard and given that your report is to be tabled with the Australian Parliament early in 2015 it is instructive to consider the content and debate about the Wild Rivers (Environmental Management) Bill 2010 proposed by the then Leader of the Opposition, now Prime Minister, Tony Abbott. In this Bill, direct use was made of the above-mentioned articles in UNDRIP that refer to the right of Indigenous peoples to own, use, develop and control their lands while also guaranteeing that Indigenous land owners have a right of consent over any decision that might affect their lands. This reference by the then Opposition Leader to UNDRIP was surprising at that time given the earlier Howard government's opposition to the Declaration.

In my view it is quite appropriate for the Native Title Act to be updated to comply as closely as possible with key 'property and procedural rights' principles in UNDRIP. This might present domestic political challenges, as all sound policy making seems to these days, but it would accord well with international human rights standards as encapsulated in key articles in UNDRIP. I note additionally that Indigenous groups are invoking articles in UNDRIP to highlight their relative disadvantage in benefitting economically from their lands and in having more equitable leverage for negotiating with powerful economic actors over development where native title interests have been recognised.

I end by noting that progressive High Court judgments such as in *Blue Mud Bay* ([2008] HCA 19), *Akiba* ([2013] HCA 33) and *Karpeny* ([2013 HCA 47) are further obfuscating the distinction between customary and commercial rights in resources. If Australia as a nation want to see productive use of Indigenous lands and seas and close the socio-economic gaps between Indigenous and other Australians, there is need to find ways to vest free, prior and informed consent rights and tradable property rights with Indigenous land owners. Addressing such legal challenges in the Native Title Act will be challenging and I look forward to seeing the forthcoming discussion paper that will provide some indication of the avenues that the Australian Law Reform Commission will take in addressing them.

If further information is needed do not hesitate to get in touch; two colleagues at the ANU are currently preparing an annotated bibliography of my research with a section on land rights and native title; I would be happy to provide this material if of potential use.

Yours sincerely