



**ADI**  
ALFRED DEAKIN INSTITUTE FOR  
CITIZENSHIP AND GLOBALISATION



### **Re: Options Paper—Reforms to the *Native Title Act 1993* (Cth)**

- 1 Thank you for the invitation dated 29 November 2017 to provide submission on the Options Paper that outlines 66 recommendations/proposals for reform of the *Native Title Act 1993* (henceforth NTA).
- 2 As noted in the Options Paper these proposals derive from recommendations made in various reviews dating back to 2012 with some, like the report to Council of Australian Governments by an unnamed Senior Officers Working Group published in December 2015 in turn engaging with five earlier review processes.
- 3 It is my view that this proposed legislative reform process has a long way to run before we see a NTA amendment bill tabled in Parliament and then likely further legislative scrutiny of such a bill by a Senate Committee. There seems to be little urgency in this reform process that has already taken five years. Instead, governments of the day appear comfortable to paper over perceived problems with the NTA framework on an ad hoc and instrumental basis as they arise. This was evident in the perceived problems to area Indigenous Land Use Agreements (ILUAs) following the Federal Court finding in the *McGlade* judgment (*McGlade v Native Title Registrar* [2017] FCAFC 10) that were quickly addressed by amendment to the NTA last year.
- 4 Looking to respond strategically to your invitation, I do not propose to address all recommendations in the Options Paper covering six broad heads of proposed reform that summarise 66 proposals outlined in seven Appendixes A – G.
- 5 Rather, I want to focus on two broader interlinked issues, the underlying systemic and structural shortcomings of the NTA that the Options paper

does not look to address; and the nature of the review process that has at its foundation a particular form of discursive politics around the notion of economic development.

- 6 In focusing on these broader issues only, I need to make it clear that there are some recommendations/proposals that I believe will be detrimental to native title interests; and others that assert benefit from theoretical or ideological perspectives with no clear evidence or even cogent argument outlining how they might be beneficial to native title interests. History, particularly from the 1998 amendments to the NTA indicates that amending the law rarely results in strengthening native title rights and interests, but rather favours other interest groups.
- 7 In making this submission I reserve a right to make more detailed commentary on specifics if they are incorporated at some future date in an NTA amendment bill.

## **Background**

- 8 I am an academic researcher and policy adviser with a background in economics and anthropology. I have undertaken research and published on land rights in the Northern Territory since 1977 and on the Mabo High Court judgment and the subsequent *Native Title Act 1993* (NTA) since the time it was a Bill. In 1984 I chaired the first and only independent review of what was then the Aboriginals Benefit Trust Account (now the Aboriginals Benefit Account or ABA) and in 1995 was a member of a team that undertook the first government-sponsored review of Native Title Representative Bodies.
- 9 Over the last 25 years I have provided input to many parliamentary inquiries on native title matters, most recently to the Senate and Constitutional Affairs Committee on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 that I opposed; and as an expert witness on two native title legal cases.
- 10 My perspectives on native title matters are informed by my now 40 years of research on land rights issues in the Northern Territory and elsewhere in Australia. In particular I have been greatly influenced by some of the core principles articulated by Mr Justice Woodward in the *Final Report of the Aboriginal Land Rights Commission* (April 1974) in relation to the recognition of Aboriginal land rights: ‘the doing of simple justice to a people who have been deprived of their land without their consent and without compensation’ (para 3 (i)) and ‘the provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living’ (para 3 (iii)).

- 11 Justice Woodward made two key progressive recommendations (among many) incorporated in the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).
- 12 The first was the right of veto: ‘I believe that to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights’ (para 568). This free prior informed consent right is missing in the NTA future acts framework.
- 13 The second was that all statutory payments to government for permits, leases and royalties be transferred to Aboriginal interests (para 609). This translated to the payment of mining royalty equivalents to Aboriginal interests divided between land owners, their representative organisations (land councils) and to or for the benefit of Aboriginal people in the NT more generally. This arrangement that empowered Aboriginal regional and local organisations and gave them some political jurisdiction is also absent in the NTA framework.
- 14 In relation to land rights law these provisions represent a favouring of Aboriginal land owner interests over others on clear social justice grounds. But while social justice considerations also preface the NTA, the practical mechanisms to deliver de facto property rights in minerals (in the form of right of consent provisions) and some political authority to Aboriginal land owners are missing in the NTA framework.
- 15 From an economic development perspective, bearing in mind as I will argue below that economic development does not necessarily equate with market capitalism for native title holders, I am interested in how native title rights and interests might benefit native title holders (and registered claimants) and so I adopt the overarching guiding principle that any proposed reform must pass a ‘native title interest test’; it must first and foremost be beneficial to native title interests over any other interests including state parties and commercial entities including Indigenous (non-land owner) entities.

### **Systemic and structural shortcomings in the NTA**

- 16 The last 25-years have seen the native title system deliver over 400 positive determinations of exclusive and non-exclusive possession to native title claimants. In my own research I have referred to this as a ‘land titling revolution’ as two broad forms of native title—exclusive and non-exclusive possession—have been spatially recognised over a massive 35 per cent of the Australian continent. When the current 200 registered claims are processed, it is possible that another 20 per cent of Australia will be under some form of native title determination.
- 17 This previously unimagined spatial recognition has not been matched by socioeconomic success, as evident using western social indicators and

- reported in annual Closing the Gap reports to Parliament since 2009. Indeed, there is evidence, especially in recent census statistics, that Indigenous people living in remote and very remote jurisdictions, the location of almost all successful native title determinations, have the poorest socioeconomic status and deepening poverty.
- 18 There are many ways that the failure of spatial recognition to generate socioeconomic outcomes can be interpreted, but this is not the occasion for such extensive discussion. Suffice to say that native title holders, if living on or near their lands, almost invariably reside in remote and very difficult circumstances with a deep colonial legacy of neglect in terms of individual human capital formation and community physical capital and communication infrastructure. One optimistic argument might be that with time hard-won native title rights and interests will make a difference. An alternative possibility is that Indigenous and other interests, including academic commentators like myself, have been blind-sided by the undeniable spatial success of native title without paying sufficient attention to its content.
- 19 Just as there is a willingness by the Australian government to acknowledge failure in Closing the Gap 10 years on, it might be timely to acknowledge some fundamental problem with the NTA and focus policy reform effort in this direction rather than push through an omnibus reform package that will likely require considerable horse-trading if to succeed and likely generate negative consequences (intended or unintended) for native title interests.
- 20 It might be timely to ask if the basic architecture of the NTA, 25 years after its passage, has fundamental systemic and structural shortcomings. It is worth recalling that the NTA itself was a result of considerable political negotiation and compromise over an 18 months period from June 1992 when the Mabo judgment was handed down by the High Court and December 1993 when the new law was passed. The resulting legal framework is very much a second-best (or worse) outcome from the perspective of native title interests because at that time there was a degree of legal uncertainty fuelled by discursive opportunism of vested interests with malintent. So, a second-best was accepted as better than nothing by all negotiating parties within and outside the parliament.
- 21 Over the last 25 years we have seen several political conflicts between the elected governments of the day and the Executives and the judiciary appointed by governments. The former both asserts parliamentary sovereignty and always keeps an eye on the perceived electoral tolerance of key interest groups, like the mining and pastoral industries. The latter has been less constrained by political considerations and more focused on developing a jurisprudence that meshes the NTA with broader legal principles and precedents.

- 22 This creative tension sometimes sees the judiciary more progressive than the government. A significant example of this was the Wik High Court decision [1996 HCA 40] that found that statutory leases did not extinguish native title rights. This resulted in draconian amendments to the NTA after a protracted political conflict in 1997 and 1998 that cut back on the rights of native title holders in favour of other commercial interests. More recently, the *McGlade* judgment in relation to area ILUAs (*McGlade v Native Title Registrar* [2017] FCAFC 10) saw the NTA rapidly amended to render the court decision irrelevant, irrespective of diverse Indigenous viewpoints mainly opposed to the amendments.
- 23 From a broader social justice perspective applying, for example, a ‘scales of justice’ framework as proposed by political theorist Nancy Fraser, one might suggest that the spatial recognition of native title is evolving incrementally, but that mechanisms for representation and redistribution (also key elements of recognition) are deficient if not missing. Hence for example it can be readily argued that political institutions like Native Title Representative Bodies or Registered Native Title Bodies Corporate that must represent native title holders in complex negotiations are under-resourced and lack political power and capacity. Under such circumstances it is hardly surprising that they struggle to gain economic outcomes favourable to native title interests, either in relation to legislative reform or in negotiating complex land use agreements with redistributive potentiality.
- 24 In Australia there is ‘path dependency’ seeking a ‘frozen in time’ (the NTA of 1993 and then 1998 as amended) approach to reform. So, we see the continuing and stubborn attempts to band aid an architecture with evident structural flaws that favour a diversity of interest groups other than the holders of native title. Let me briefly outline some of these from just three perspectives.
- 25 First, as noted at the outset any comparison between the ALRA and the NTA frameworks shows that the earlier statutory regime is superior. It is unclear why traditional owners under ALRA can be granted a right of veto that amounts to what we now term free prior informed consent rights, while holders of exclusive possession native title have a form of title that does not allow them to exclude miners. Under ALRA, traditional owners of land that is mined are guaranteed a significant share of statutory royalties raised from extraction on their land, while under the NTA there is no such guarantee. It seems imperative that a fair proportion of profit (mineral rent) extracted from native title land is returned to land owners. Domestic equity demands that the NTA framework should be as empowering as the ALRA framework. This is a first-order issue that is deliberately excluded from the Options Paper.

- 26 Second, Australia seems out of step with other settler colonial contexts in terms of the content, not spatial coverage, of native title. In countries like the USA, Canada and New Zealand, land rights and treaty rights come with political jurisdiction, strong property rights and redress that at times amounts to a form of sovereignty that is not countenanced in Australia. Jurisprudence in these other settler society contexts, especially in Canada and New Zealand, is progressive.
- 27 Finally, and perhaps most significantly, the NTA framework is inconsistent with several articles on resource ownership, redress, self-determination and forms of economic development in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that was belatedly endorsed by the Australian government in April 2009.
- 28 Of special significance is Article 32 that states: ‘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’.
- 29 Also, of special significance is an issue that is rarely raised in Australia and that I am just beginning to research. UNDRIP refers to redress (remedy or compensation for a wrong or grievance) and compensation (something, usually money, awarded in recognition of loss) on several occasions in relation to resources and past compensable acts by states. Of special significance is Article 28 (1): ‘Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent’. Some of the redistribution that Nancy Fraser refers to might be payable in situations where there has been native title determination over lands that are either in degraded condition or that face postcolonial environmental threats, including ongoing lawful or unlawful vegetation clearing of land where there might be registered native title claims.
- 30 It is nearly a decade since UNDRIP was recognised as a set of principles to guide the Australian state in its interactions with politically marginalised and demographically miniscule native title and other Indigenous groups. In recent years, perhaps politically overawed by the spatial coverage of native title determinations, the Australian state has lost sight of the principles articulated in the preamble to the NTA that this new land tenure law is a

special measure intended to rectify, not perpetuate, the consequences of past injustices in relation to unlawful dispossession.

- 31 It is important to note that some of these issues have been raised by the Expert Indigenous Working Group ‘Statement of Intent’ in the Senior Officers Working Group Report to COAG in December 2015. While it is unclear on what basis the seven-member working group chaired by Wayne Bergman was selected by Minister Scullion, the Working group outlined a set of principles that emphasised in accord with articles 19 and 32 of UNDRIP that any reform must be based on the principle (and I would add practice) of free prior and informed consent. Very significantly, buried in the report to COAG and unaddressed in the Options Paper is the Expert Indigenous Working Group emphasis that ‘consent should mean more than the ability to agree to development – it should include the right to say ‘no’ to development as well, particularly for high impact activities such as exploration and mining’ (p.43).

### **What form of development, and for whom?: Process issues**

- 32 The Options Paper is framed at the outset in a manner that it is in uncritical lockstep with the broad governmental policy agenda of the past decade to deliver socioeconomic improvement to Indigenous Australians, inclusive of holders of native title mainly living in remote Australia, via the adoption of liberal democratic decision-making processes and rapidly accelerated integration into market capitalism. This is hardly surprising given that this reform process is bureaucratically-driven and so responding to the priorities of recent governments.
- 33 Consequently, the ‘development question’ that is raised at the beginning of the Options Paper is couched in a very particular way: The Australian government is seeking ‘to enable native title holders to unlock the economic development opportunities that accompany the recognition of native title and to provide certainty for all actors in the native title system’ (p.3). At the same time, it is noted that the Government is looking to finalise all native title claims existing at 30 June 2015 by 2025, replacing one failed 10-year plan (Closing the Gap) with another potential failure—judicial processes cannot be straightjacketed as shown both in Australia and other settler societies. This need for claims resolution, it is suggested, is to promote connection with land and culture for native title holders—a connection that forms of economic development, like mineral extraction, will inevitably break. So, the notion of economic development articulated needs critical unpacking, especially as mineral extraction is the one form of development, even on exclusive possession native title lands, that holders cannot veto, while other non-market forms of development like

- wildlife harvesting for domestic use are legally entrenched in the NTA property rights framework.
- 34 To some extent, the Options Paper reads as a rational state attempt to intervene to provide certainty to all actors, including multinational corporations for whom risk must be minimised. But such an approach overlooks that the NTA is a special measure to deliver social and economic justice and benefit first and foremost to native title holders and claimants.
- 35 It is not difficult to interpret the Options Paper as advocating for mineral extraction business to proceed as usual, what geographer David Harvey refers to as accumulation by dispossession, irrespective of land owner wishes. Connection to land and culture is articulated as a secondary consideration, but not represented as a form of economic development which it often is, indeed such connection is not represented as economic at all.
- 36 In making this observation, I am not taking some extreme ‘anti-development’ position, but rather challenging the notion that on native titled lands market capitalism is the only option. I say this for two reasons.
- 37 First, my long-term research experience indicates that land owners are looking for a range of development alternatives, a plurality that is inclusive of non-market production as well as market capitalism. This is hardly surprising: where ‘continuity of rights and interests under traditional laws acknowledged and traditional customs observed’ need to be demonstrated. Such continuities are likely inclusive of elements of customary economy. Indeed, one member of the Expert Indigenous Working Group Marandoo Yanner was the subject of an important High Court decision in 1999 that confirmed the native title right to hunt for domestic use without a licence.
- 38 Second, as noted earlier, government attempts to integrate remote-living Indigenous land owners into market capitalism have largely failed, not at the individual level as some have clearly found employment and business opportunity. But rather at a more general community level where statistics show that employment and income gaps have grown rather than declined, especially in very remote Australia.
- 39 Information from the last three five-yearly censuses (kindly provided by Dr Danielle Venn from the ANU) shows that while Indigenous employment in mining more than doubled from 2006 to 2016 to 6,650 jobs this figure represents less than 4 per cent of total mine employment. However, such information does not tell us how many employed are land owners or what such numbers mean in regional contexts. For example, Andrew Burrell has recently reported (*The Australian*, 8 November 2017) that claims by BHP, Rio Tinto and Fortescue Metals Group of employment might be twice as high as actual numbers at the Pilbara regional level. And in relation to the highly-contested Adani coal mine prospect there have been reports of 10,000 potential direct and indirect jobs (quoted by



- Malcolm Turnbull as ‘tens of thousands’) which ignores a much lower estimate in legal proceedings of 1,464 direct and indirect jobs.
- 40 I am not looking to debate the veracity of these data here. What I do want to highlight is the need for rigorous analysis of whether claimed benefits from native title reform have or will eventuate. Not to do so exposes government to potential charges of boosterism and reforming the law in bad faith. By referring to the economic benefits of native title in mainstream terms only, there is a real danger that there will yet again be a failure to deliver in unusual non-mainstream circumstances.
- 41 The Options Paper deploys the term ‘development’ with a very particular discursive meaning as articulated in the *White Paper on Developing Northern Australia* to which it refers (p.3). I have previously criticised the White Paper for making scant mention of the fact that most of northern Australia is under Indigenous forms of land title. This raises the important issue of developing whose northern Australia for whom? And no mention is made of the reality that especially in remote Australia, Indigenous notions of development, wellbeing and the good life can be very different from those based on western norms and values.
- 42 The particular ‘developmental’ tenor of the Options Paper needs to be rapidly altered if it is to comply with Prime Minister Turnbull’s recent pronouncement of 12 February 2018 that ‘We [the Turnbull government] are committed to doing things with, not to, Indigenous people’.
- 43 Such an aspiration might require serious engagement, as already noted, with the views of the Expert Indigenous Working Group appointed by the previous Abbott government that is advocating for an Indigenous right to veto exploration and mining. It might also require compliance with Article 19 of UNDRIP: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them’.
- 44 The Options Paper looks to address an extraordinary and diverse backlog of native title matters that have emerged over time, some owing to judicial decisions, some to perceived technical problems and some because there is a perception that ‘transaction costs’ in some areas are too high and a theoretical (not evidence-based) expectations that legislative reform will reduce these costs.
- 45 But the framing of the development ‘problem’ in a particular manner jeopardises the entire reform process, in my opinion, and raises the spectre that reform is biased in favour of commercial interests and the state rather than native title interests. Indeed, there is the prospect that the reform process will just be viewed as the exercise of power by state and corporate interests where native title holders and their representative corporations are

- at a distinct disadvantage owing to impoverishment and lack of adequate economic leverage and legal representation.
- 46 The Options Paper makes it clear at the outset (p.3) that it is privileging certain issues over others and that it is not considering some of the key concepts of the law including the content of native title that I refer to earlier as systemic and structural issues. But just to assert that government has decided what the most pressing ‘needs of the system’ constitute is hardly a transparent or adequate response to the series of reviews of the NTA from which recommendations are taken.
- 47 For example, the comprehensive Australian Law Reform Commission Report *Connection to Country* completed in 2015 makes 29 recommendations, but only seven are included in the Options Paper. If the Options Paper is serious about enhancing development outcomes, even in the narrow sense that is envisioned by the government, how can important discussion about the nature and content of native title be eschewed. This is especially the case as the ongoing developments in case law (evident in *Akiba v Commonwealth* [2013] HCA 33; *Pilki People v State of WA* [2014] FCA 714; *Rrumburriya Borroloola Claim Group v Northern Territory of Australia* [2016] FCA 776) see the court system interpreting the NTA in a manner that is strengthening the property rights of native title holders to be inclusive of commercial rights in natural resources and possibly minerals.
- 48 At the other end of the spectrum are 29 (of 66) reform proposals submitted by states and territories listed at Appendix G (pps 35–38). These proposals are all unsourced and while making proposals and recommendations for change and describing practice under the current legal framework, they do not provide any information of potential ‘benefits of proposal’. Stakeholder views on these proposals are invited, but surely as so superficially presented they cannot be seriously countenanced.
- 49 Nowhere is the bias that is introduced by the developmental framing of the reform process clearer than in the reference to ‘transaction costs’ that appears in the Options Paper on ten occasions without being defined. At its simplest a transaction cost refers to the cost of making a deal that economic theory tells us will be higher wherever property rights are poorly defined. Presumably the transaction costs referred to are the cost of negotiating a future act. A key element of transaction costs that is not referred to in the Options Paper is what Douglass North refers to as the ideological attitudes, perceptions and values of different actors that influence their perception of the world. In negotiations about future acts between developers and native title holders or registered claimants these are likely to diverge significantly.
- 50 In the Options Paper it is noted that ‘Some stakeholders consider that transaction costs associated with negotiating future acts are too high, and would like simpler agreement-making processes’ (p.10). This is a very

loaded statement with the ‘some’ one assumes being business interests not native title interests. From a business perspective delay and uncertainty might be a cost, but from a native title perspective they might be a benefit that will allow careful consideration of a proposal in accord with customary forms of consensus decision making. There is a great deal of reference to the reduction of transaction costs in the Options Paper and even suggestion that reduction of such costs would only be permitted ‘if the rights and interests of native title holders continue to be appropriately protected’ (p.11). This suggests that those rights and interests are currently appropriately protected, even though there are no free prior and informed consent rights under the NTA framework.

- 51 Similarly, there are proposals for decision making to be hastened and certainty guaranteed by majority decision-making, even though there are potential social and political costs of majoritarian democracy that could leave up to 49 per cent of native title holders oppositional and disaffected. It is far from clear why customary forms of decision-making that are likely to favour the views of native title holders who live on and live off their country invariably must yield, presumably for the benefit of commercial interests operating on native titled lands.

## **Conclusion**

- 52 In this submission I argue that rather than undertake piecemeal reform of the NTA framework consideration should be given to addressing major systemic and structural limitations in native title law. Unless such fundamentals are addressed to ‘modernise’ the NTA framework 25 years after its passage then the interests of native title holders will not be properly served.
- 53 I am concerned that the 66 recommendations/proposals for reform are framed by a hegemonic idea about what development, in the form of market capitalism, should look like with resource extraction being the most commercially attractive, but often environmentally most destructive option for remote Australia. This resonates with 1998 amendments to the NTA that privileged the interests of leaseholders over native title parties.
- 54 No compelling evidence is provided that this dominant view of development concurs with that of native title holders. As a matter of principle, there is a need for native title holders to have free prior and informed consent rights and better resourced representation so that their views can be heard via their corporations and representative bodies.
- 55 It would be unproductive to address the 66 recommendations that have been selected for inclusion in this Options Paper in a piecemeal fashion. But if the government chose to technically address the specifics of each recommendation, then a ‘native title party interest test’ should be applied to each proposal addressing the question ‘will reform be of unambiguous

benefit to the determined holders of native title rights and interests in lands and waters?’.

- 56 In my view, it would be more productive to address systemic weaknesses in the NTA framework beginning with the need to introduce provisions for free, prior and informed consent rights. Without such provision, the current future act framework and associated arbitration system makes equitable rent sharing impossible, even if native title groups were to welcome mineral extraction on their lands.
- 57 There is an urgent need to empower well-resourced native title organisations to represent the interests of native title holders and registered claimants. Such organisations would be better positioned to articulate the range of development options that accord with land owner aspirations.
- 58 Consideration should be given to attenuate redress to successful native title determinations where the land and natural resources are either degraded or facing threatening processes. Consideration should also be given to calling for a moratorium on deforestation and associated species loss on lands where there has been successful determination or where there is a registered claim unless approved by native title interests.
- 59 Given the failure of the status quo Closing the Gap framework it might be timely to consider alternate approaches to enhance the wellbeing of the holders of native title in all their diversity.

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