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DISCUSSION PAPERS

THE CASE FOR ABORIGINAL ACCESS TO MINING ROYALTIES UNDER LAND RIGHTS LEGISLATION

J.C. Altman and N. Peterson

Discussion Paper No. 89

February 1984

P.O. Box 4, Canberra 2600, Australia
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THE CASE FOR ABORIGINAL ACCESS TO MINING ROYALTIES UNDER LAND RIGHTS LEGISLATION

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ABSTRACT

Since the passage of land rights legislation in the Northern Territory, there has been continuous opposition to three specific aspects of the Act: the transfer of mining royalties to Aboriginal interests; the Aboriginal right to veto mineral exploration on their land; and the Aboriginal right to negotiate royalty payments above statutory rates. This opposition has come from three quarters: the mining industry, economists and the N.T. government.

Initially, the current system for paying mining royalties to Aboriginals in the Northern Territory and its antecedents are examined. However the paper is not limited to the N.T. although it is only here that substantial mining payments are transferred to Aboriginal interests. Next, the range of arguments against the current system are spelt out, and their various shortcoming are elucidated. To end, we present arguments in favour of Aboriginal royalty rights, negotiating rights and the right to veto mineral exploration.

This discussion is particularly timely for a number of reasons. Firstly, the issues correlate closely with principles explicitly stated in the Federal Labor Government's Aboriginal Affairs policy. Secondly, Mr Justice Toohey has recently completed a review of the N.T. legislation. Finally, the Aboriginal Land Inquiry is currently underway in Western Australia. It is intended that this paper will contribute to the debate about mining on Aboriginal land.
# THE CASE FOR ABORIGINAL ACCESS TO MINING ROYALTIES

UNDER LAND RIGHTS LEGISLATION

DISCUSSION PAPER NO. 89

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THE CASE FOR ABORIGINAL ACCESS TO MINING ROYALTIES
UNDER LAND RIGHTS LEGISLATION*

Introduction

Since the passage of the Aboriginal Land Rights (Northern Territory) Act (henceforth the Act) in 1976, there has been continuous opposition to three specific aspects of the legislation: the transfer of statutory mining royalties to Aboriginal interests; the Aboriginal right to veto mineral exploration on their land; and the Aboriginal right to negotiate royalty payments above statutory rates. Not surprisingly, the Australian Mining Industry Council (AMIC, 1982) has been at the forefront of such opposition. Recently, AMIC has found allies among economists (Lloyd, 1983) and the NT government.

This paper begins with an examination of the current system for paying mining royalties to Aborigines in the Northern Territory. The discussion however is not limited to the NT, although it is only here that Aborigines currently receive substantial mining payments. Next, the range of arguments against the current system are spelt out, and their various shortcomings are elucidated. We then present arguments in favour of Aboriginal royalty rights, negotiating rights and exploration veto rights.

*We would like to thank Professor P. Gruen for his comments on an earlier draft of this paper.
An examination of these issues seems particularly timely on a number of counts. Firstly, these issues correlate closely with two of the five principles of the Federal Labor Government's Aboriginal Affairs policy, namely that:

A. Aborigines should be able to veto mining on their land.
B. Royalty equivalents should be paid for any mining.

These two principles are intended to be incorporated in federal legislation for Australia-wide Aboriginal land rights. Secondly, Mr Justice Toohey has recently completed a review of the Aboriginal Land Rights (Northern Territory) Act, 1976-92, with a view to amending the legislation where it is problematic. Finally, and of most immediate significance, an Aboriginal Land Inquiry is underway in Western Australia. It is hoped that this discussion paper will contribute to the debate about mining operations on Aboriginal land.

The current system in the NT and its antecedents

In the Northern Territory, Aboriginal reserves were opened to miners in 1952, by amendment to the NT Aboriginals Ordinance and Mining Ordinance and by insertion of S.21 in the (federal) Northern Territory (Administration) Act. This significant policy change has been discussed in more detail elsewhere (Altman, 1983:3-9). The key ramification for Aborigines was that while prior to 1952 they were insulated from resource development projects, after that date such projects could be established
within reserved land. The Commonwealth however doubled the standard royalty rate payable in the NT to 2 1/2% ad valorem for any miner operating on Aboriginal reserves. Furthermore, in what must be interpreted as a broadly compensatory gesture, the Commonwealth decided to forego these royalties in favour of Aboriginal interests, and these royalties were to be paid to the Aborigines Benefits Trust Fund (or ABTF).

In the period 1952-72 (that is in the period till the Whitlam Labor Government froze mining activity on Aboriginal reserves) only two large resource development projects were established on Aboriginal reserves: the manganese mine on Groote Eylandt (the GEMCO venture) and the bauxite mine on the Gove Peninsula (NABALCO). In the pre-land rights era, Aborigines had no rights to stop mining on reserves. This was clearly demonstrated in the opposition of Yirrkala Aborigines to the NABALCO development. Mr Justice Blackburn ruled against the plaintiffs in the case Milirrpum and Others v. NABALCO and the Commonwealth of Australia because under the law (as it then existed) Aborigines had no power to stop mining.

In the second report of the Aboriginal Land Rights Commission, Mr Justice Woodward made three recommendations that are central to the issues discussed here:

1. Aborigines should have the power to prevent exploration for minerals on their land, with the proviso that this power of veto could be overridden if the national interest required it.
2. Aborigines should receive all statutory royalty and rental payments raised on Aboriginal land.

3. The Government should amend existing legislation so that royalties above the statutory rate can be negotiated (Woodward, 1974:127-8).

The first of these recommendations was included in S.40 and S.41 of the Liberal-National Country Party land rights legislation of 1976; the second in S.63(2) of the Act; and the third in S.43, S.44 and S.63(3). The principles of Woodward's recommendations were accepted, but there were divergences. In particular, in S.40, mining interests in Aboriginal land prior to June 1976 were explicitly recognised - the power of veto did not apply to these mining interests. Secondly, Ministerial approval (of the Minister for Aboriginal Affairs) was required before any royalties above the statutory rate could be paid to Aboriginal interests. Finally, after the passage of the Northern Territory (Self-Government) Act, 1978, royalty equivalents, rather than royalties, were paid to Aboriginal interests, particularly with respect to non-uranium mining. Royalties (non-uranium) from Aboriginal land were paid directly to the NT Government. Under S.63(6) the Consolidated Revenue Fund is appropriated for the purpose of making these payments to the ABTA. While this change is primarily a technicality, it has wider ramifications, for public rather than mining moneys are now paid to Aborigines.
Woodward also made recommendations regarding the distribution of mining moneys. Royalties paid between 1972 and 1976 going to the ABTA were divided according to a formula whereby 10% went to Aboriginal communities adjacent to resource development projects and 90% to wider Aboriginal interests in the Northern Territory (see Altman, 1983:27-37). Woodward recommended (1974:128) that 30% be paid to people residing in areas affected by a resource development project; 40% be paid to Land Councils; and 30% to Aborigines residing in the NT. This 30/40/30 formula was also incorporated in the legislation, but with two key changes. Firstly, Woodward recommended that royalties be paid initially to the Land Council in whose region a resource development project operated. Land Councils would be required to distribute these moneys to other Land Councils, areas affected, and a Trust Fund. Under S.63(2) of the Act, royalty equivalents are paid to the Aboriginal Benefits Trust Account (or ABTA) that is responsible for further distribution in accord with S.64. Secondly, Woodward recommended that a fixed 30% of royalties be distributed more generally to Aborigines in the NT. In S.64(4) of the Act, this has become a residual amount rather than a fixed proportion of statutory royalties. This has had subsequent negative ramifications for the redistribution operations of the Act (see Altman, 1983a).

The royalty-related functions of the Act became operational on 1 July 1978. Since then, about $36 million has been paid to the ABTA to the year ended 30 June 1985. Since 1978, six (prior interest) agreements for mining on Aboriginal land have been
completed: The Ranger Agreement (1978), the Queensland Mines Agreement (1979), the Mereenie Agreement (1981), the Pancontinental Agreement (1982), the Palm Valley Agreement (1982) and the North Flinders Agreement (1983). A further agreement for uranium mining at Koongarra has been initialised by the NLC and Denison Mines. Four of the six main mining operations in the NT are on Aboriginal land; and three out of four major proposed developments are also on Aboriginal land (Department of Mines and Energy, 1983:18).

A critique of the arguments against the NT legislation

The arguments against Aboriginal royalty rights, veto rights and negotiating rights come from three quarters: the mining industry, economists and the NT government. These arguments have two things in common. Firstly, they fail to accept or recognise the broad principles on which Woodward (1974:2) based his recommendations. These principles will be re-examined below. Secondly, they are all based on efficiency and equity criteria. We will argue later that these criteria are not appropriate in the case of Aboriginal land rights, for the Government in granting these rights accepts as given the genuine grievances of Aborigines against Euro-Australian society and their especially low economic status. Furthermore, the assimilationist assumption that Aborigines are like any Australian citizen has been rejected in official government policy since 1972 - Aborigines are 'special' citizens, at least for the foreseeable future.
a. The mining industry

The position of the mining industry (collectively) is stated by the Australian Mining Industry Council. Recently, the Chamber of Mines of Western Australia (1983) has also issued similar statements of its position regarding mining on Aboriginal land. In submissions to the Aboriginal Land Rights Commission, the mining industry made it clear that it did not support an Aboriginal right to veto exploration or negotiated royalties. The AMIC did however feel that Aborigines should be paid compensation for land surface disturbance and saw no harm in the continuing government practice of transferring statutory royalties and rents to Aboriginal interests (Woodward, 1974:106-107).

The main argument against the right of veto is that it may restrict access to minerals that are owned by the Crown. However it must be stressed that to date miners have not had to negotiate with Aborigines for consent to mine, as all agreements have been of a prior interest nature. Consent that has been required has been for the terms and conditions in mining agreements. The AMIC (1982) argues that this negotiation process is inefficient for two reasons. Firstly, negotiations are often prolonged. While this is an undesirable disadvantage to miners it is not clear whether it is mining companies, Aboriginal interests or the statutory requirements of the Act that cause such delays. What is significant is that in S.45 and S.46 of the Act, mining companies can request to go to independent arbitration if
agreement cannot be reached with a Land Council in respect of terms and conditions. No mining company has chosen this course to date. Secondly, the AMIC argues that there is a ratchet-effect evident in the amount of negotiated royalty or agreement payments. Data presented in Table 1 indicates that there is little evidence of an upward trend in negotiated payments (to Aboriginal interests). The efficiency argument here is that the higher the ad valorem royalty rate, the greater the misallocation of resources, for the marginal point where a mine becomes unprofitable comes earlier the higher the royalty rate.
<table>
<thead>
<tr>
<th>Company</th>
<th>Date signed</th>
<th>Statutory royalty (%)</th>
<th>Negotiated royalty (%)</th>
<th>Other* (%)</th>
<th>Total royalty (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>GEMCO</td>
<td>1963/65</td>
<td>2.4</td>
<td>1.25</td>
<td>-</td>
<td>3.75</td>
</tr>
<tr>
<td>NABALCO</td>
<td>1968</td>
<td>1.3**</td>
<td>0.0</td>
<td>-</td>
<td>1.3</td>
</tr>
<tr>
<td>ERA</td>
<td>1978</td>
<td>2.5</td>
<td>1.75</td>
<td>1.25</td>
<td>5.5</td>
</tr>
<tr>
<td>QML</td>
<td>1979</td>
<td>2.5</td>
<td>2.0</td>
<td>1.25</td>
<td>5.75</td>
</tr>
<tr>
<td>Magellan</td>
<td>1981</td>
<td>10.0</td>
<td>1.5</td>
<td>-</td>
<td>11.5</td>
</tr>
<tr>
<td>Pancontinental</td>
<td>1982</td>
<td>2.5</td>
<td>2.0</td>
<td>1.25</td>
<td>5.75</td>
</tr>
<tr>
<td>Magellan</td>
<td>1982</td>
<td>10.0</td>
<td>1.5</td>
<td>-</td>
<td>11.5</td>
</tr>
<tr>
<td>North Flinders</td>
<td>1983</td>
<td>N/A***</td>
<td>1.5</td>
<td>-</td>
<td>N/A***</td>
</tr>
</tbody>
</table>

*Negotiated with non-Aboriginal interests, in these cases, with the Commonwealth that maintains ownership of uranium.

**Royalties paid by NABALCO are stipulated in a special agreement with the Commonwealth (Mining (Gove Peninsula Nabalco Agreement) Ordinance, 1968). Emerson and Lloyd (1981:19) estimate that payments by the company approximate an ad valorem rate of 1.3%. Currently I estimate that the royalty rate is less than 1½ ad valorem. It is paid at the rate of 50 cents per ton for bauxite exported and 40 cents per ton for alumina produced.

***The North Flinders agreement was signed under the new N.T. Minerals Royalty Act, 1982. The statutory royalty rate in this act is 18% of profits. It is estimated that this rate will approximate an ad valorem rate of 6-10%. The profits-based royalty will be paid to the N.T. Department of Mines and Energy. Aboriginal interests are guaranteed a royalty-equivalent payment of 2.5% ad valorem from consolidated revenue.
In short, minerals are left in the ground, unexploited. This assumes of course that a mine shuts down at the point when marginal revenue equals marginal cost. However such a theoretical assumption may not hold. A mining company may continue to operate when marginal revenue is less than marginal cost if (for example): long term contracts have to be met or a condition of a mineral lease is that all resources must be utilised.

The NT Department of Mines and Energy (Green Paper, 1981) agreed with this efficiency argument when it introduced its profits royalty in the Minerals Royalty Bill, 1982. Initially it was intended that the profits royalty rate would be 35% but this was subsequently lowered to 18%.(1) What is of interest, is that in its representations to the NT Government, to lower this rate, the AMIC converted it to an ad valorem rate. Furthermore, while the Department of Mines and Energy regards ad valorem royalties inefficient, there has been no attempt to change this basis in the NT Petroleum (Prospecting and Mining) Act, where royalties are levied at the rate of 10% ad valorem.

What is significant here is that in the post-land rights era, individual mining companies have demonstrated that they are willing to negotiate (and bargain hard) with Aborigines via Land Councils. Particularly in the Alligator Rivers region, mining companies accept the added expenditure of negotiated royalties, just as they accept stringent environmental protection requirements, special employment programs for Aborigines, etc.
The highest total ad valorem royalty (see Table 1) paid to date has been 5.75%. This is still less than the estimated converted value (minimum 6%) of the 16% profits-based royalty. (2)

The AMIC's equity arguments are made at two levels. Firstly, there is the issue of equity between Aborigines (who can veto mining) and all other Australians (who cannot veto mining). In other words, Aborigines have a limited mineral right which other Australians do not share. (3) This position however begs the issue, to which we shall return, that Aboriginal land and Aborigines' relation to the land is and should be quite different from that of Euro-Australians. This was clearly recognised and explicitly stated in Woodward's reports (1973, 1974) and in the Fox Inquiry (Fox et al., 1977). (4)

Secondly, there is the issue of equity between Aborigines who are affected by mining operations and Aborigines who are not affected. In short, the AMIC (1982) suggests that it is concerned by evidence of emerging wealth differentials in Aboriginal society in the Northern Territory. This position seems rather ironic for it is interesting that AMIC does not take such a moral position with respect to havevs and have nots in the wider Euro-Australian society. Presumably, the concern of the AMIC is with the poorer sections of NT Aboriginal population. This concern is somewhat misplaced on a number of counts. It ignores the fact that 70% of statutory royalties are paid to wider Aboriginal interests and not to people residing in areas affected. The poorest sections of NT Aboriginal population are
those without land, and to some extent royalties are used to finance land claims on behalf of these people. It is important to recall here that the AMIC does not question the principle that Aborigines can share mineral rent raised on Aboriginal land, if government wants to pay these moneys over to Aboriginal interests. As yet, there is little evidence that the economic status of Aborigines residing in areas affected has improved. If this is in fact occurring, it is countered by the social cost of having mines and mining towns adjacent to Aboriginal communities. What this arguments fails to recognise is that royalties are not intended to substitute for government expenditure on Aborigines. This principle was recognised as long ago as 1952 (Altman, 1963:5). If there is genuine concern about the welfare needs of Aborigines, this may require greater redistribution from the wider Australian society, via increased budget expenditure (see Lloyd, 1983). But it should not require redistribution from Aborigines who may be improving their economic status. In other words, Aboriginal economic status does not have to be reduced to a lowest common denominator.

b. Economists

To date, the position of economists is represented only by the views of Lloyd (1983). His position is somewhat different from that of the mining industry lobby. Lloyd like the AMIC argues that as mineral rights have been vested in the Crown, royalty rights should also be with the Crown and no proportion of mineral rent should accrue to Aborigines. On the other hand,
Lloyd (1983:2) does accept that mines and mineral processing activities cause substantial harm to Aboriginal communities which is counter to the mining industry that only recognises land surface disturbance.

What Lloyd fails to recognise is that royalties have both compensatory and revenue components in the NT legislation. This was not explicitly stated in the Act, but has been explained elsewhere (Altman, 1983a). In the Pitjantjatjara Land Rights Act 1981, statutory royalties (or a share of mineral rent) are explicitly differentiated from compensation payments. Under S.22 of this Act, statutory royalties raised on Pitjantjatjara land are paid into a special fund. These royalties are divided according to a non-discretionary formula, with one third going to Anangu Pitjantjatjaraku, one third to the (State) Minister of Aboriginal Affairs (to be applied to the health, welfare and advancement of Aboriginal inhabitants of the State generally) and one third to the general revenue of South Australia. These payments are at the statutory rate - there is no room for negotiation. However under S.24(2) of the Pitjantjatjara Act, a negotiated payment can be made by a mining company to Anangu Pitjantjatjaraku to compensate for disturbance to the land, the Pitjantjatjara people and their way of life (our underlining).

While no resource development project has been established on Pitjantjatjara land, Lloyd's position can be most clearly understood with reference to the South Australian legislation. Lloyd suggests (1983:24) that one objective of government policy
is the improvement of the real incomes and welfare of Aborigines. He suggests that this objective should be funded from the general consolidated revenue of the Commonwealth. Like the mining lobby, Lloyd (1983:25) suggests that under current arrangements (in the NT) 'some Aborigines will be worse off... those who are not presently receiving payments from the mining companies, that is the great majority of the Aboriginal population'. In our opinion this argument is fraught with shortcomings for Lloyd fails to take into account the redistributive function of channeling 70% of royalties to Aborigines outside the areas affected. Furthermore, it is not at all clear why some Aborigines will be worse off. Surely Lloyd means that they will be relatively worse off vis-a-vis other Aborigines. Even if this were the case, we argue above that this is hardly justification for depriving Aborigines in areas affected of compensatory royalty payments. This position also fails to take into account a central tenet of Woodward's recommendations. Royalties, particularly ad valorem royalties, may be an unstable source of revenue. Nevertheless, they are payments that are quite independent of annual budget appropriations. The automatic payment of royalty-equivalents to Aborigines relieves them of the burden of becoming annual petitioners for funds from the Commonwealth. This argument will be expanded below. We would argue furthermore, that royalties should be independent of normal appropriations by the Department of Aboriginal Affairs; and that 60% of royalties (those paid to areas affected and granted by the ASTA) should require different accountability criteria.
A second policy objective that Lloyd (1983:24) identifies is the avoidance of harm being inflicted by mines on Aboriginal groups. Lloyd is quite correct in his assertion that ad valorem royalties need not correspond to the damages (social and environmental) experienced by Aboriginal communities adjacent to resource development projects. What Lloyd proposes (1983:20-21) is that a damages tax be levied on mining companies. He states that if payments equal to the value of damages actually done were paid in all circumstances the Aboriginal groups would be compensated. This is tautological. However the crucial question that Lloyd begs is how damages taxes may be assessed. As already noted, Lloyd recognises that damages in the Aboriginal case extend beyond land surface damage: they include the social disruption of white population concentrations on remote Aboriginal communities; possible spiritual and religious damage resulting from desecration of sacred sites or sites of significance; etc. As Lloyd himself notes (1983:2-3) this leaves open the difficult question of assessing the extent or value of such harm. We would argue that it is impossible to assess such damages. Later, Lloyd (1983:20) does speculate on the value of such damages, for he states that ad valorem royalty payments are more likely to overcompensate Aboriginal groups than to undercompensate them. This assertion is not explained.

There is no doubt that in a scenario where there are two identical projects, and damages taxes are higher in project b than project a, then a company may choose project a ahead of project b. If:
(where TR = total revenue, TC = total cost and T = a variable damages tax)

then project a would be preferable. The more realistic equation is whether:

\[ TR_a - TC_a - Ta > 0 \]

(where TC includes the opportunity cost of capital)

If this equation holds, then a mining project will proceed.

Lloyd's position is predicated on the assumption that damages taxes would substitute for consent provisions (1983:24). The argument here is confused, partly we believe because Lloyd does not recognize the difference between the right to veto mineral exploration (which can only be overruled by the national interest) and the requirement that Aboriginals consent to the terms and conditions in a mining agreement. As already noted, no mining agreement signed to date has required Aboriginal consent to mine, as all mining operations have been of a prior interest type. Aboriginal consent to terms and conditions has been required, but if Aboriginals will not negotiate, terms and conditions can be set via independent arbitration.

The Aboriginal right to veto exploration provides them with their only bargaining position in negotiations with mining companies. O'Faircheallaigh (1982) has demonstrated that the bargaining power of host countries increases the greater the
investment of a multinational in a resource development project. In the Aboriginal case, their bargaining power is greatest prior to exploration. In the future, Aborigines may veto exploration and then remove a veto in exchange for a negotiated payment. Alternatively though, Aborigines may decide that the damages from a project are so great that they will not withdraw the veto irrespective of monetary inducements offered.

Irrespective of the fact that we do not believe that damages can be assessed, the only way that a damages tax may replace consent provisions (or the right of veto) is if Aborigines affected by a project have complete discretion to set the damages tax rate. Then if Aborigines do not want a project to proceed, they can set the damages tax so that:

\[ T_{D} = T_{C} - T_{A} \]

In short, damages taxes could only substitute for the right of veto if Aborigines are free to set the rate so high as to preclude mining. It seems to us that the current arrangements are more realistic, given the problem of assessing damages.

There is certainly intuitive appeal about Lloyd's assertion (1983:21) that the levying of damages taxation may provide an incentive for mining companies to minimise social impacts and environmental damages. However this depends entirely on the tax rate. As far as environmental damage goes, one is led to believe that the Environmental Protection (Impact of Proposals) Act, 1974 should minimise such damage; furthermore, environmental
safeguards are generally stipulated in mining leases although they are difficult to monitor.

The final policy objective that Lloyd identifies is the maximisation of government revenues from mines. This issue is quite independent from the other two policy objectives identified by Lloyd (1983:24). It is linked to a complex debate about optimal systems for taxing mining companies, whether on Aboriginal or non-Aboriginal land in which economists, mining companies and governments are currently engaged (see Emerson and Lloyd, 1981; Department of Mines and Energy, 1981; Garnaut, 1982 inter alia). This issue is only peripherally linked to that of Aboriginal royalty rights and veto rights.

Overall, we disagree with Lloyd's position on three broad points. Firstly, we do not believe that the search for optimal royalty systems should be kept separate from the issue of Aboriginal land rights. Secondly, while we accept that royalties are a sub-optimal basis for compensation, we believe that ideal forms of taxation like damages taxes cannot be accurately assessed. Finally, we do not believe that instruments can be assigned to policy problems in an economically rational manner that fails to recognise the political and social context within which this assignment problem takes place.
c. The NT government

The position of the NT government has been most explicitly stated in press statements in the N.T. News (for some of these see Budden, 1982) and by the Chief Minister Paul Eberingham (see Eberingham, 1982). Discussions one of us (Altman) had with the Hon. Ian Turwhorth, then Minister for Mines and Energy and senior officers of the Department of Mines and Energy in 1982 elucidated this position. The view was expressed that Aborigines should not have a right of veto, should not be able to negotiate royalties and should not have a royalty right. The Department of Mines and Energy takes the view though that as the land rights act is federal legislation, royalty provisions in it must be financed by the Commonwealth. This is in fact what happens. The NT Department of Mines and Energy does perform royalty accounting functions (with respect to uranium mining) for the Commonwealth, for which it is reimbursed.

The position of the NT government that as Aborigines do not own the minerals they should not have royalty rights seems rather inconsistent. For the Memorandum of Understanding (Commonwealth of Australia, 1978) states that the ownership of uranium is vested in the Crown in the right of the Commonwealth. Yet the NT Treasury receives payments (at the rate of 1.25% ad valorem) from the Commonwealth in lieu of uranium royalties. In short, the NT has no uranium mineral rights, yet has a limited royalty right - in a manner analogous to Aboriginal royalty rights. For Aborigines do not have full royalty rights in the NT. For
example, in uranium mining agreements, Aborigines do not receive royalty-equivalent payments from consolidated revenue that are equal to total royalties paid. In the case of the Ranger project (see Table 1), the ABTA is paid 4.25% ad valorem of a total royalty of 5.5% paid by ERA. This amounts to 77% of the total royalty raised. In the Nabarlek project, Aboriginal interests receive 76% of royalties raised on Aboriginal land.

The anti-thetical position of the NT government to Aboriginal royalty rights is evidenced in the NT Minerals Royalty Act, 1982. In this act, Aborigines are only referred to once when it is stated that payments made to Aborigines cannot be regarded as deductions in calculating profits. The purpose of this section, rather obviously, is to discourage mining companies from making negotiated payments to Aborigines. Furthermore, the Minerals Royalty Act with its 16% profits-based royalties is quite incompatible with the ad valorem system incorporated in 3.6% of the land rights legislation.

The position of the NT government is in our opinion counter to the best interests of the NT, for the payment of grants in lieu of royalties to Aboriginal interests results in an increased total royalty inflow to the Territory.

In the Memorandum of Understanding, the Commonwealth made a once and for all deduction from the NT's tax sharing entitlement that was equivalent to the royalties raised on Aboriginal land in 1979/80 of about $2 million. Since then, the value of royalties has increased rapidly. The total and marginal benefit to the NT
economy from current agreements to mine on Aboriginal land is demonstrated in ad valorem terms in Table 2. In Table 3, data for the period 1978/79 to 1982/83 on royalties cash flow to the NT are presented. Particularly with respect to uranium royalties, there is no reason to believe that the NT government would receive royalties greater than 1.25% ad valorem if royalty-equivalent payments were not made to Aboriginal interests.

The current system then results in increased cash inflow to the NT. When the Mereenie and Palm Valley projects become fully operational in 1985 the marginal benefit of payments from consolidated revenue to Aborigines will become particularly significant. Furthermore, the multiplier effect of Aboriginal receipts to the NT economy will be high, as Aborigines tend to spend or invest in the Northern Territory.
Table 2
Total royalty benefit to the NT economy (ad valorem)

<table>
<thead>
<tr>
<th>Company</th>
<th>Royalty to NT</th>
<th>Negotiated royalty (to Aborigines)</th>
<th>CRF-equiv. to ABTA</th>
<th>Total to economy to NT</th>
<th>Marginal benefit to NT</th>
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</thead>
<tbody>
<tr>
<td>GeoCo</td>
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<td>1.25</td>
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<td>0.0</td>
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<td>5.5</td>
<td>4.25</td>
</tr>
<tr>
<td>QML</td>
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<td>2.0</td>
<td>2.5</td>
<td>5.75</td>
<td>4.5</td>
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<tr>
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<td>1.5</td>
<td>10.0</td>
<td>21.5</td>
<td>11.5</td>
</tr>
<tr>
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<td>4.5</td>
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<tr>
<td>Magellan</td>
<td>10.0</td>
<td>1.5</td>
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</tr>
<tr>
<td>N. Flinders 6-10.0**</td>
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<td>2.5</td>
<td>10-14.0</td>
<td>4.0</td>
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</tr>
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</table>

*estimated ad valorem rate (see Table 1).

**The North Flinders gold mining venture in the Granites is the first resource development project to operate under the N.T. Minerals Royalty Act, 1982. It is assumed that the 18% profits royalty is equivalent to an ad valorem rate of between 6 and 10 per cent.
Table 3

Statutory royalties paid to Northern Territory interests

<table>
<thead>
<tr>
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<td>($m)</td>
<td>($m)</td>
<td>($m)</td>
<td>($m)</td>
<td>($m)</td>
</tr>
<tr>
<td>Royalties paid to the NT govt.</td>
<td>1.256</td>
<td>2.095</td>
<td>5.666*</td>
<td>3.020*</td>
<td>2.93*</td>
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<tr>
<td>Commonwealth grants in lieu of uranium royalties paid to NT govt.</td>
<td>0.917</td>
<td>1.175</td>
<td>3.72</td>
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<td>Commonwealth grants in lieu of royalties raised on Aboriginal land paid to ADTA</td>
<td>1.135</td>
<td>2.084</td>
<td>4.097</td>
<td>5.785</td>
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<tr>
<td>Total</td>
<td>2.391</td>
<td>4.179</td>
<td>10.680</td>
<td>9.980</td>
<td>24.27</td>
</tr>
</tbody>
</table>

*including some royalties not raised on Aboriginal land.
The case for royalty payments

Woodward, in making his recommendation that Aborigines in the Territory should have rights to statutory royalties, to veto prospecting and to negotiate additional payments from activity on Aboriginal land was partly bound by the consequences of Hasluck's 1952 decisions. By the time of the Commission these were already resulting in the payment of considerable sums to the Aboriginal communities adjacent to the mines as well as to the ABTF for the benefit of Aborigines Territory wide. But there were two more important reasons of principle. He argued that to deny Aborigines the right to prevent mining on their land was to deny the reality of land rights since it was in the context of the influx of miners that land rights became an issue (1974:103-104). The Yirrkala people who took NABALCO to court were concerned to keep Europeans out of their area because of the disruptive impact of a large influx of people and the potential damage to sacred places. Since only large scale tourism, forestry and wood-chipping would be likely to produce an even remotely similar impact and since these would be regulated by the recommendation to give Aborigines control over entry to their lands, only mining remained to be regulated. He also argued that in providing land to Aborigines one aim was to give people who are poor, an economic base (1974:2). He believed that in granting Aborigines the right to veto prospecting, economic development would be slowed up but that in the longer term it was likely that Aboriginal people would
generally consent to mining (1974:104). These three reasons do not, however, exhaust the case for paying royalties.

Lloyd and the mining industry, identify the problems of Aborigines as a welfare issue to be dealt with by increased government spending. This is a fundamental error. It ignores the fact that the source of many of their problems arises from the nature of their relationship with the wider Australian society. Because many Aboriginal people live in areas that are remote, not just geographically but economically, socially and culturally from Euro-Australia, and because they are without wealth, their ability to alter the relationship, or to take an active role in changing their circumstances, is extraordinarily circumscribed. Almost all income and capital expenditure in remote communities derives from government with the inevitable over concentration of control and complex annual petitioning and accounting for funds. They are in a position where they can only request or seek to influence the wider society on matters that affect their lives, rather than enter discussions on a basis of equality that allows them to negotiate and bargain. As Rowley (1973) has long emphasised this structural dependency can only be broken when Aboriginal people have something to make decisions about. Only property rights can draw Euro-Australians into negotiating with Aborigines on equal terms. But to do so the rights have to make a difference. Given Aboriginal land is inalienable and largely only of economic interest to mining companies any rights that do not
give at least some control over, and interest in, mining would make no significant difference at all. Further, meaningful transformation of the relationship of Aborigines to Australian society has to include the transfer of assets, which inalienable land is not, in any ordinary sense. As an extractive economic activity involved in non-renewable resource exploitation, the mining industry poses the problem of how to turn short term local activity into long term local development. Royalty payments offer an opportunity to achieve this end.

One mining industry view which has obvious merit, is that the benefits it brings to remote Australia include the provision of employment and the imparting of skills. Undoubtedly this is true but Aboriginal people are apparently uninterested in selling their labour to mining ventures on any substantial scale, not so much because they are mining ventures as because most European working regimes are unattractive and cultural factors often prevent employees fully enjoying the returns from their labour. Further, individual selling of labour is unlikely to result in structural change in the community's regional position but only, at best, to improve the physical circumstances of those few people employed. While some skills acquired may be usable in the community when the mines are no longer functioning, many may not and it is certain that the assumption that people will follow the jobs does not apply when there are such strong ties to kin and land.
Assets can be transferred to Aborigines without impinging on the mining industry, simply by giving them rights in statutory royalties or by some such mechanism as the Aboriginal Development Corporation. Both are obviously important. The weakness of the former is that it bears no direct relationship to what the particular project can bear and with the latter that funds are allocated bureaucratically for particular projects which have to compete with each other Australia-wide. To grant Aborigines the right to exclude prospectors without the right to royalties in any form, would be a much less desirable arrangement for the mining industry than the current Territory arrangements, since it would be most unlikely that Aboriginal people would ever agree to prospecting. Thus, in the view of some, the right to royalties is disadvantageous to Aborigines, although advantageous from a public point of view, since it is a powerful incentive to people who are poor to agree to mining, as current events demonstrate. Royalties are the counterbalance to the right of veto.

Rights to royalties may be seen as disadvantageous to Aborigines in other ways too, although beneficial from the public interest point of view. To the extent that royalties are seen as compensation, it is a form of compensation with definite limitations for Aborigines. Commodity prices fluctuate and the limited life of mines mean that the amount of compensation is both uncertain and finite. From a public point of view it could be argued that these factors will act
as a powerful incentive to husband the resources and ensure asset formation in a way that more open ended compensation would not. Further, by granting a right to negotiate, the difficult problem of at what level to set compensation is resolved in the market place. Finally, as commentators in both Australia and America have noted (see Edwards 1983; Feit 1983; Hunt 1983) the process of negotiation is itself a most important and educational one for the people involved for which there is no substitute. Through involvement in the negotiating process people begin to get a better idea of the nature of the economic and political world in which they live. It draws them into seeking professional advice on which to base their decisions; underwrites their right to control the decision making process; provides motivation to become informed about what they might otherwise ignore; and draws them into creating their own social and economic priorities.

Granting Aborigines rights to royalties may appear to fly in the face of the welfare state’s concern with equity, but it has to be noted that the property right granted under land rights legislation is usually an inferior one, in terms of wider community values. Not only is it inalienable but also the rights in it are collective, not individual. As long as royalty moneys are constrained to be used for collective benefit rather than individual enrichment, then the basic equity principles are not compromised.
Royalties are not an unmixed blessing for Aboriginal people. They are an inducement to the acceptance of mining and a possible limit to the compensation they may receive but they offer the chance for asset formation substantially free of government control with all its possibilities for independent action. The monetary costs to the mining industry have been relatively trivial, not rising above 2% ad valorem in the Territory so far, although there have certainly been, and will continue to be increased delays because of the need to negotiate. The financial cost is largely to the federal government. The danger here is that governments (federal or state) will subvert the potential royalties for creating structural change by withdrawing the levels of financial support to communities in proportion to the royalties they receive. Royalties should be the icing on the collective cake, with the government providing the cake. Even with these additional funds the chances of Aborigines in outback Australia achieving economic equality (in the statistical sense) seem remote. (5)

Conclusion

The nation is committing itself to the granting of land rights for a complex of reasons. While the demands of natural justice and the protection of Aboriginal ties to the land have received most emphasis in public debate there is no doubt that there is also a general expectation among both Aborigines and non-Aborigines that the granting of rights
will make some difference to the place of Aboriginal people in Australian society. For many Aborigines remoteness alone rules out the likelihood of any radical change in their economic circumstances and seems certain to continue the complete dependence on government for income and economic activity in their communities. No matter how active the mining industry the possibility of major mining projects near each remote community is small and even if possible, undesirable in the eyes of many. Further, even with developed mining activity on Aboriginal land, as in the Northern Territory, the amounts of money flowing to Aborigines on a per capita basis are small, running at about $35 per capita for each million dollars of royalties. Given that the money is not distributed on a per capita basis and that a very substantial percentage of it goes on administration of land councils in the Territory, the possibilities of mining royalties creating economic equality, let alone a privileged minority, are remote. But if land rights cannot create economic equality it can create greatly increased opportunities for Aboriginal people to exercise control over their lives.

The most obvious way in which this can be achieved is through the right to control the activity on Aboriginal land. But there is a second important way in which the possibility for Aboriginal people gaining control over their lives can be enhanced by land rights. If the land can generate income independently of government it can be used to extend control
over those regional aspects of Australian society and economy that impinge on them directly. Used to purchase enterprises much of whose business is conducted with Aborigines or impinges on them, like tourism, the funds can begin to create some control over the practices and charges of business and more directly influence municipal councils. Royalties are an obvious source of such funds.

There are certain pre-conditions necessary for these possibilities to be realised and for the public expectation that land rights will make a difference to be met. The principal one is that constraints are placed on the way funds are distributed and used. In particular that per capita distributions, for which there are bound to be pressures from people who are poor, are severely limited so capital accumulation can take place. And that there is some statutory break-up of the allocation of funds much as in the Northern Territory but with certain modifications. First the day to day administration of land rights should not be funded out of royalties, since this creates undue pressure to enter mining agreements, but from some alternative source such as a capital fund established through the allocation of a percentage of some tax for a finite period. Second that a percentage of royalties be set aside as a capital accumulation and stabilisation fund to create the wealth to invest with an eye to social, as well as economic, objectives. Income from the fund could be used for project and recurrent expenditure when not reinvested. The rest of
the royalties could then be divided between affected communities and state wide interests.

Some might object that to constrain the use of royalties in this way is an undue interference. This, however, is to ignore that these moneys are derived from foregone public moneys and are provided by the creation of a racially based right that could be seen to be at odds with the equity concerns of the welfare state. Clearly, in providing these moneys, the state has a purpose and it needs to be recognised that the primary purpose is not as rent or compensation but as an instrument of social policy. As such there is a public interest in seeing that the funds are directed to the ends for which they are allocated.
Footnotes

1. It is of passing interest that the initial Territory proposal has some considerable similarities to the principles put forward in the original Northern Land Council's proposed Ranger mining agreement. This sought among other things a 36% share of gross profits. At the time this proposal was made both the mining industry and the N.T. government protested most vigorously (see Bambrick, 1979).

2. Although it is impossible to convert ad valorem royalty rates to a profits-based rate _ex post facto_, this estimate was made by the Department of Mines and Energy in 1982. The AMIC argued in a submission to the Department that the rate would be higher in _ad valorem_ terms. Obviously though the conversion would be very different for different projects. Furthermore, while the profits-based royalty replaces the _ad valorem_ type in the Minerals Royalty Act, 1982, there is still the possibility of additional _ad valorem_ royalties being negotiated with Aboriginal interests as in the North Flinders agreement (see Table 1).

3. There are a few minor qualifications to this generalisation in New South Wales, Victoria and Western Australia relating to certain kinds of farm land and some old freehold title which gave rights to minerals. Kambalda nickel mine in Western Australia is one example
of a mine where the deposit is privately owned. Also in parts of Victoria, brown coal deposits are privately owned (see Lang and Crommelin, 1979). Furthermore in Western Australia under S.29(2) of the Mining Act, 1972/81, the majority of the population enjoys a power of veto over mining on their land.

4. For a recent and comprehensive review of the issues see Maddock (1983).

5. The possibility of Aborigines preferring equity interest in mining companies over royalties has not been discussed here. It is worth noting though that even if 51% equity was donated to Aborigines, the likelihood of Aboriginal shareholders in the N.T. being able to exercise control over management is remote, if the Third World experience is anything to go by (see Hankea, 1983:49-53). Furthermore, cash accumulation would be slowest at the outset when the social impacts of a project are greatest.
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