‘UNREASONABLE AND EXTRAORDINARY RESTRAINTS’: NATIVE TITLE, MARKETS AND AUSTRALIA’S RESOURCES BOOM

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I Introduction

Australia, particularly Western Australia, is currently experiencing one of the most dramatic and sustained resource booms in its history. Individuals and institutions with the ability to provide factors of production needed by the mining industry (land, labour and minerals) are in a strong position to share in the economic benefits of the boom. Historically, Aboriginal people have had limited capacity to derive economic benefits from mineral development in Australia, reflecting their general economic marginalisation and in particular their inability to participate in markets for those factors of production. The legal recognition of Aboriginal rights in land and the introduction of cultural heritage legislation could potentially allow Aboriginal people to share in the benefits generated by the exploitation of Australia’s mineral resources. In particular, the recognition of native title in *Mabo v State of Queensland (No 2)*[1] and the *Native Title Act 1993* (Cth) (‘*NTA*’) ought to confer on Aboriginal people a degree of commercial leverage, defined here as a capacity to participate in markets in a way that secures economic benefits for the participant. This should enable them to share in the current boom in a manner that has not occurred in the past.[2] In addition, the control by Aboriginal people of their cultural knowledge can confer economic power on those groups. While it is unusual to perceive cultural knowledge in this way, since Aboriginal cultural knowledge is not itself a factor of production or commodity traded in the market, control of it can, de facto, confer commercial leverage.

I argue in this paper that for many Aboriginal people the recognition of native title and the significance of their culture is in fact failing to translate into economic power. Consequently, their ability to share in the benefits of the resources boom has been severely curtailed. This reflects the fact that policy, legislative and other institutional arrangements affecting Aboriginal peoples in Australia are imposing, to quote Adam Smith, ‘unreasonable and extraordinary restraints’ on their ability to exercise their potential commercial leverage.[3] These restraints arise from amendments to the *NTA* introduced by the Liberal/National Coalition Government in 1998; from the Right to Negotiate (‘RTN’) provisions of the *NTA*, and in particular the way they are being administered by the National Native Title Tribunal (‘NNTT’); from recent native title decisions by Australia’s Federal and High Courts; and from the operation of legislation that deals with Aboriginal cultural heritage.

I argue that these outcomes are profoundly inequitable in a society where markets play an increasingly dominant role in allocating resources. Substantial policy and legislative reform is required if the position of Aboriginal people is to change. While the political climate in Australia may not be conducive to such reform, I argue that the current situation offends the free market principles that underpin the policies of both major political parties in Australia; it also runs contrary to the current thrust of Commonwealth Indigenous policy which rests heavily on achieving greater Aboriginal participation in the ‘real economy’. Acceptance of this argument is critical if legislative and policy change is to occur.

II Markets and Native Title

The current resources boom has placed individuals and institutions that control access to factors of production required by the mining industry in a strong market position, allowing them to share in the benefits reaped by Australia’s mineral exporters. The extent of this increased commercial leverage is illustrated, for instance, by the rise in house rentals in Port Hedland, in the Pilbara iron ore region, over the last few years. By 2006 median rentals for a three bedroom house had risen to over twice the Australian average; between 2006 and 2007 this grew by an additional $200 a week, an increase equal to about 75 percent of the median figure for Australia.[4] Others with a proprietary interest in factors required to support the boom also shared in the benefits, including:

workers in the mining and related industries, with full-time wages in mining increasing by 22 percent in the last year;[5] house owners, with median prices in Perth rising by about $50,000 and those in Port Hedland by $100,000 between 2006 and 2007;[6] and the Western Australian Government, the owner of minerals in Western Australia, whose income from iron ore royalties alone grew from $300 million in 2003-04 to nearly $700 million in 2005-06.[7]

It is important to note that the ability of the owners of labour, capital and real estate to benefit from the resources boom has been enhanced by the removal of barriers to the free operation of markets by both of the major political parties across different levels of government. Relevant policies have included: dismantling restrictions on currency, trade and investment flows; deregulation of domestic labour and financial markets; and introduction of market competition into areas formerly controlled by monopolies, such as electricity, water and transport infrastructure.[8]

The High Court's *Mabo* decision recognised that Indigenous people possessed, at the time of colonisation, a proprietary interest in the lands and waters they occupied derived from their traditions, laws and customs.[9] That interest survives to the extent that it has not been extinguished by valid Crown grants of title and where the Aboriginal people concerned continue to practice those traditions, laws and customs.[10] Potentially, recognition of their native title confers on Aboriginal people a significant degree of commercial leverage in the context of a resources boom. The situation of native title holders is different in important ways from those of owners of houses, labour or minerals. Their interest in land is communal rather than individual in nature. It is also inalienable, meaning it is not available to be bought and sold through conventional market mechanisms. Notwithstanding, it holds substantial commercial potential.

To take advantage of a resources boom, mining companies require access to mineral resources and to the land that contains and surrounds them in order to extract, transport, process and sell the minerals that are currently in such high demand. Those who own or control access to land and the minerals it contains have the capacity to sell that access to companies who need it. In other words, a market exists in access to land and the minerals it contains, in the same way as markets exist for labour or houses. Those who control access have commercial leverage and can apply this to appropriate for themselves a portion of the wealth generated through the sale of mineral products. To the extent that native title confers such control on Aboriginal people, it creates potential commercial leverage regardless of the fact that native title land cannot be alienated and irrespective of whether native title brings with it explicit legal recognition of economic rights in mineral resources. This view is not universally held. Weir, for instance, argues that such recognition does not exist and that as a result native title lacks commercial value:

> Native title rights and interest are yet to be recognised in the common law with a commercial value. As determined by the NTA, native title holders have no rights to the minerals on their land, nor can they refuse mining on their lands, although they do have the right to negotiate. The government receives the royalties from the sale of minerals on native title land … Native title holders face similar issues with other natural resources, such as land and water.[11]

I take a different view. If native title holders can control the timing of mining company access to land and the conditions of that access, they possess leverage that can potentially be applied to secure a share of the wealth created by mining. In this sense native title may well have a very real 'commercial value', a point clearly illustrated by the position of Aboriginal traditional owners who hold inalienable freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*').[12] The *ALRA* does not confer mineral ownership on traditional owners. However, their ability to deny developers access to mineral resources has enabled them to negotiate agreements that include, for instance, royalty payments at levels comparable to those payable to state governments in Australia.[13]

A The RTN

Neither the *Mabo* decision nor the *NTA* spelt out in detail the extent or nature of the proprietary rights or interests held by Indigenous native holders. These matters were instead left to be defined over time by the development of the common law.[14] However, the *NTA* created a key mechanism through which native title rights might be converted into commercial leverage: the RTN.[15] Under subdivision P of the *NTA*, state authorities intending to issue interests in minerals, such as mining leases, are required to notify native title parties of their intention. This notification triggers a six-month negotiation period, during which the mining companies seeking interests, the State in question and relevant

Aboriginal groups must negotiate in good faith to agree terms on which the native title parties will consent to the grant of the interests. The negotiations can cover any matter agreed by the parties and the *NTA* is explicit in stating that any agreement can include payments related to the value of minerals produced, or profits won, from the affected land.[16] If agreement is not reached at the end of six months, either party may refer the matter to arbitration by the NNTT. The NNTT determines whether the lease concerned may be issued, issued with conditions, or denied. Importantly, if the NNTT determines that a lease may be issued, it cannot impose as a condition payments related to the value of minerals produced from, or profits won from, the affected land.[17] Any decision by the NNTT can be overruled by the relevant government Minister acting in the national or state interest.[18] Native title parties can argue before the NNTT that mining companies or the state have not negotiated in good faith and, if the NNTT rules in their favour, the six month RTN must commence again.[19]

The *NTA* does not confer commercial leverage on native title parties by giving them a veto over access to native title land, which would in effect allow them to stop development unless a mining company offered terms they found acceptable. In addition, the fact that native title parties cannot secure royalty-type payments through the NNTT arbitration process places substantial pressure on them to reach agreement during the RTN period, further weakening their bargaining position.[20] Nevertheless the *NTA* does confer two things on native title parties. The first is a RTN with potential developers. The commercial benefit of this right for Indigenous people depends, in turn, on two inter-related factors. The first is the range of activity and interests to which it applies. The larger the range, the greater the utility. For example, a RTN that applied to a wide range of interests required by a mining company to establish a project, including for instance the right to construct railways, ports, power lines and roads, would have greater utility than a RTN that only applied to the grant of mining leases. The second factor involves the nature of the alternative to a negotiated outcome. If this alternative is unpalatable to mining companies, for example if there is a high likelihood that the NNTT will reject mining lease applications if a matter goes to arbitration, companies will be under pressure to reach agreement with native title parties. The more unpalatable the alternative for companies, the greater the commercial leverage enjoyed by native title parties and the greater their capacity to gain significant benefits from mineral development.

The second thing the NTA confers on native title parties is the potential to cause delays in the development of mining projects. If an agreement is not reached, the matter goes to arbitration, which can take up to eight months in the case of a mining lease. If the native title parties succeed in persuading the NNTT that another party has not negotiated in good faith, the process must commence again, imposing further delays. Particularly in a resources boom, the prospect of such delays is likely to be unpalatable to mining companies and the ability to help avoid them can confer significant commercial leverage on native title parties.

In *Wik Peoples v State of Queensland*,[21] in which it was determined that native title can coexist with the pastoral leases that cover much of northern Australia, the High Court greatly extended the scope of the RTN and so increased the number of Aboriginal groups that can potentially derive commercial leverage from its operation.

The following sections argue that changes to native title legislation and policy, the way in which the *NTA* is administered by the NNTT, and recent Federal and High Court cases have substantially weakened the utility of the RTN. Federal and High Court decisions have also, at a more fundamental level, diminished the commercial leverage potentially associated with native title rights. These changes have in turn substantially reduced the economic power of native title parties.

III Legislative and Policy Changes

The *Native Title Amendment Act 1998* (Cth) (‘*NTAA*’) fundamentally affected the commercial leverage potentially available to native title holders.[22] At a general level, the *NTAA* introduced a more stringent registration test and so made it harder for some Aboriginal groups to access the potential commercial leverage represented by recognition of their native title rights.[23] The *NTAA* also removed a number of areas from the ambit of the RTN. Of particular importance were changes in relation to the treatment of mine infrastructure. The current resources boom has necessitated the expansion of ports, railways, pipelines, and power lines to facilitate mine expansions, new project developments and removal of what would otherwise have been crippling bottlenecks in transport systems. Prior to 1998, such developments would have attracted the RTN, but they no longer do so.[24] This change has in effect destroyed the commercial leverage of many native title groups whose country is often quite

extensively impacted by the resources boom, but who do not have mining operations located on their traditional lands.

While certain companies in Australia do not rely solely on their legal rights when dealing with native title groups and seek, instead, to engage with all groups affected by their operations, be they mining activities or infrastructure projects, such companies are the exception. In the Pilbara and in other regions major companies have rejected the requests of native title groups to negotiate in relation to infrastructure development, with company officials insisting that the groups enjoy only a right to be consulted under the amended *NTA*.[25] More generally, all major resource regions in Australia provide examples of native title groups that experience major impacts from mine infrastructure but are denied any benefits from the resources boom.[26]

Another major change initiated by the *NTAA* was the removal of the renewal of mining leases granted prior to 1994 from the ambit of the RTN.[27] This is also significant for the ability of native title groups to capture benefits from the resources boom. A number of major mines established prior to 1994 are still operating and, as their original leases expire, application of the RTN to their renewal would, especially in a period of when mining companies are particularly keen to keep existing mines operating at full capacity, have afforded native title holders valuable commercial leverage.

A Native Title Representative Bodies ('NTRBs')

In terms of native title policy, a key issue involves federal funding of NTRBs. The *NTA* states that NTRBs 'may assist [individuals or groups from among Aboriginal peoples or Torres Strait Islanders] by representing them, if requested to do so, in negotiations'.[28] In fact, NTRBs play a critical role in supporting native title parties in their negotiations with mining companies and so in assisting those parties to realise the commercial leverage potentially attached to native title. Many native title holders have little experience in commercial negotiations or in assessing the economic potential of proposed projects. They are not aware of the sorts of agreements that other native title groups have been able to achieve and do not have the information, access to resources or institutional machinery required to locate and retain specialist expertise. Without the assistance of NTRBs they are in a position similar to any asset owner who lacks the capacity to properly assess the value of the asset they hold or have limited knowledge of how markets operate. They are at risk of disposing of the asset at less than its full market value. The risk involved is apparent from the fact that Aboriginal groups in Australia have, when left without technical and institutional support, signed agreements relating to multi-million dollar projects and received very little in return.[29]

The ability of NTRBs to assist native title groups to correctly assess and effectively apply their market power depends on their access to resources to fund meetings of traditional owner groups, retain specialist expertise and maintain a robust and sustained engagement with mining companies during a negotiation process. However, with a few exceptions involving the now-defunct Aboriginal and Torres Strait Islander Commission, successive federal governments have failed to fund NTRBs specifically to allow them to support negotiations. In addition, during a period when the demands on NTRBs have been growing exponentially because of an explosion of future act work, general funding for NTRBs has fallen in real terms. It is sobering to note that is from a base which, in 1998, federal government consultants determined was only half of the funding required for them to meet their core, statutory responsibilities.[30] The result is that in nearly all cases in Australia native title parties must rely on mining companies to fund negotiations. The danger is that companies may, at critical points in the negotiations, withdraw funding or threaten to do so, placing enormous pressure on the native title parties to accept whatever offer the company currently has on the table.[31] In effect, the absence of an independent source of funding can seriously erode the commercial leverage of native title holders. In contrast it should be noted that in Canada, for instance, dedicated federal funding of Aboriginal groups exists for the purpose of supporting Indigenous peoples' negotiations with mining companies.[32]

Agreements for major mining projects in Australia have the potential to generate millions of dollars in annual revenue for Aboriginal groups; they also carry the potential to provide those groups with extensive opportunities to engage in project employment and in contracting.[33] In other words, mining agreements provide very significant opportunities for Aboriginal groups to become substantially involved in the 'real economy'. However, the capacity of such groups to grasp these opportunities depends in large measure on their ability to negotiate effectively with mining companies. In light of the emphasis placed by both major political parties on reducing Aboriginal peoples' dependence on welfare and increasing their presence in the 'real economy',[34] the failure of successive federal governments to properly fund NTRBs

to support native title holders is counterproductive and indeed perverse.

IV Application of the Arbitration Provisions of the *NTA*

As noted above, where native title holders or claimants and applicants for mining leases are unable to reach agreement within the six month RTN period, either party can refer the matter for arbitration by the NNTT. The NNTT determines whether the lease concerned may be issued, issued with conditions, or not issued.[35] The way in which the NNTT exercises its arbitration function has important implications for the commercial leverage of native title parties. Where the NNTT is likely to reject an application or impose stringent conditions on it, the incentive for the applicant to negotiate an agreement with the native title parties is increased. On the other hand, if applicants are confident of obtaining leases without conditions or subject to conditions that are not onerous, this weakens the commercial leverage of native title parties because it reduces the incentive for companies to reach agreements with them.

Also important is the general manner in which the NNTT carries out its arbitration function. If it does so in a way that is even-handed as between the parties involved in arbitration then it is unlikely to affect the relative bargaining power of native title and developer interests. If, on the other hand, it is biased in favour of one side or the other, the negotiating position of the party it favours will be correspondingly improved.

It is critical to note that the manner in which the NNTT applies the arbitration provisions of the *NTA* does not just affect the relative negotiating positions of companies and native title parties that enter into arbitration. The motivations and incentives facing all parties participating in RTN negotiations are likely to be influenced by their understanding of what is likely to happen in the arbitration process if they fail to reach agreement.

A recent analysis of all mining lease applications referred to arbitration over the period 1995-2005[36] illustrates that the NNTT has in fact applied the *NTA*'s arbitration provisions in a way that undermines the commercial leverage of native title parties. In none of the 17 applications referred to arbitration did the NNTT determine that a lease should not be granted. It has been reluctant to impose substantive conditions on the grant of leases and has shown a particular reluctance to impose conditions requested by native title parties.[37] In the conduct of arbitration processes it has shown a consistent bias towards developer interests, for instance, demanding more stringent standards of proof from native title groups than from companies, and tending to accept particular types of evidence when this favours companies but to reject the same sort of evidence when it would favour native title groups.[38]

The approach of the NNTT is, I would argue, contrary to the overall thrust of public policy in Australia under both Labor and Liberal/National Party Coalition Governments since the early 1980s. The dominant theme of policy has been to allow markets to operate as freely as possible and to avoid situations in which intervention by government systematically favours particular players in the market.[39] Yet this is precisely what the NNTT has done and continues to do through its application of arbitration provisions of the *NTA*.

V The Courts, Native Title and Commercial Leverage

As noted above, the High Court's decisions in *Mabo* and *Wik* created new and important opportunities for Aboriginal peoples to exercise commercial leverage in relation to mineral developments on their traditional lands. However, the Court's more recent decisions serve to undermine the potential economic power associated with native title in a number of important ways.

First, the High Court's decision in *Members of the Yorta Yorta Aboriginal Community v State of Victoria*[40] potentially creates significant difficulties for Aboriginal peoples, especially in more densely settled parts of Australia, in winning recognition of their native title. The High Court found that the Yorta Yorta people had failed to maintain a connection to their land under their traditional laws and customs because they had effectively ceased to practice those laws and customs in the late 19th century.[41] Two additional and specific aspects of the Court's decision had wider and potentially more troubling implications for other native title applicants. The first was the Court's failure to question the trial judge's decision to privilege the evidence of contemporary settlers and discount the oral history of the native title applicants regarding the maintenance of Aboriginal law and custom.[42] The second was the Court's failure to attach weight to the continued occupation of their traditional territories by the Yorta Yorta, an approach it also adopted in *State of Western Australia v*

Ward.[43] As Noel Pearson has argued, occupation is in other legal contexts, including jurisprudence on Indigenous rights in other common law countries, regarded as critical in establishing proprietary interests in land. In *Yorta Yorta* the High Court chose to ignore this aspect of common law tradition, to the serious detriment of native title interests in Australia. According to Pearson:

> the High Court … proceeded without grappling with the host of Canadian authorities which emphasise occupation at the time of sovereignty as the foundation of native title [and] without grappling with what our own [High] court said in *Mabo (No 2)* about the role that occupation plays in the foundation of native title … This has profound implications for the way in which one conceptualises native title and ultimately, how one deals with its proof. This is why the High Court's error in relation to this issue was so prejudicial to the way in which they understood and approached the Yorta Yorta appeal.[44]

If *Yorta Yorta* raised serious concerns about the ability of Aboriginal groups to secure recognition of their native title, other Federal and High Court decisions[45] have tended to reduce the commercial leverage associated with native title where its existence is recognised. In the suite of litigation initiated by the Yarmirr people[46] the Federal Court, and the High Court on appeal, held that native title can exist offshore. However, they denied the arguments of the native title claimants that their traditional laws and customs had included engagement in commercial activities, including in trade with Macassan trepangers and other seafaring peoples, and denied that the recognition of native title rights should include the right to control access to and use of the sea and sea-bed, or a right or interest to trade in the resources of the sea.[47] Langton, Mazal and Palmer argue that in so doing the Federal Court and High Court ignored substantial evidence regarding 'the existence of a thriving indigenous economy, past and present', including the trading of Macassan goods such as cloth, tobacco, knives, rice and alcohol both in exchange for the right to harvest trepang, and in return for goods including bailer shells, turtle shells, seed pearl, pearl shells and, from the late 19th century, buffalo horns.[48] At a more fundamental level, they argue that the majority findings also ignored the reality that 'customary rights to trade are inherent in Aboriginal laws and thus native title rights because trade and economic relations within a diverse indigenous economy have been, and continue to be, essential to the full functioning of Aboriginal politics'.[49] The end result is that 'the commercial rights of native title holders in property and resources … have been severely circumscribed'.[50]

More generally, the Federal and High Courts have tended, for example in *Ward* and *Yorta Yorta*, to read down the extent to which native title involves 'a fundamental, well defined and underlying title to land upon which other rights are dependent',[51] similar to that enjoyed by other title holders in Australia. Rather, justices of the Federal Court and High Court have tended to define native title rather as a 'bundle' of distinct rights, a collection of 'free standing parts' that can be separately identified and extinguished by the grant of titles that are inconsistent with any or all of those parts.[52] This approach to native title renders it more like an authorisation to conduct certain activities, as long as their conduct is not inconsistent with the rights of non-Indigenous title holders. To the extent that such inconsistency arises, native title is permanently extinguished.[53] Thus, native title is being defined as 'a right different from and lesser than any other common law right, and it is a fragile divisible interest which can be extinguished piece by piece'.[54] This approach is in contrast to that which underlies legislative recognition of Aboriginal land rights in the Northern Territory and South Australia where, for instance, Aboriginal people are granted inalienable freehold of their lands without having to identify specific rights and interests in relation to that land.[55] It is also in contrast to the approach taken to native title in the Canadian courts. In *Delgamuukw v British Columbia*,[56] for instance, Canada's Supreme Court found that 'Aboriginal title is a right in land, and as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights'.[57]

Of critical importance in the current context is the High Court's finding in *Yorta Yorta* that the composition of the 'bundle' of rights and interests that constitutes native title depends on its composition at the time sovereignty was asserted. The majority took the view that 'only those rights and interests that existed at the time of the assertion of sovereignty may be recognised; those arising after sovereignty may not'.[58] As Glaskin notes, this implies a 'frozen in time' approach to native title and a denial of the legal recognition of such rights as they evolve over time, rendering it more likely that commercial utilisation of resources over which native title holders have rights is precluded.[59] Again, Canada's Supreme Court has taken a different view, accepting that because Aboriginal title is a right in the land itself it cannot be limited to use only for activities which are traditional

Aboriginal activities and, more specifically, that 'aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one'.[60]

The implications of the High Court's approach are evident from its treatment of the issue of native title and minerals in *Ward*. The High Court found that 'no relevant native title right or interest [in minerals or petroleum] was established' because of the absence of 'evidence of any traditional Aboriginal law, custom or use relating to *any* of the substances dealt with in either the *Mining Act 1904* or the WA Mining Act'.[61] As Glaskin notes, 'this view does not allow for the evolution of the exercise of rights in country, an evolution which … was inevitable in a post-contact situation as Aborigines gained access to new technology and became incorporated into a Western capitalist system'.[62] The High Court's decision in *Ward* certainly has major implications for the commercial leverage of native title holders and for their ability to share in the benefits of the resources boom. If native title did include an interest in minerals, Aboriginal people would be in a much stronger position to demand a substantial price for allowing developers access to minerals on native title land.

In combination, recent Federal and High Court decisions imply that, where native title is recognised, its content is likely both to be defined in a way that reduces its potential to confer commercial leverage, and that this potential is more likely to be subject to attrition over time as a succession of subsequent grants of interests in land whittle away the native title 'bundle of rights'. The approach of the Australian courts is not an inevitable consequence of certain inherent characteristics of Aboriginal title, a point evident from the quite different approaches that underlie legislative recognition of Aboriginal land rights in Australia and native title jurisprudence in Canada.

Underlying the aforementioned judicial decisions has been a tendency to assume a separation between spiritual and cultural aspects of native title, on the one hand, and economic aspects on the other, and to downplay the latter. In a number of their judgments, both the Federal Court and High Court have defined native title as comprising 'social, cultural, and spiritual' dimensions. They have tended to ignore or downplay the economic dimension of native title, denying the possibility that a spiritual link to land can create rights in relation to that land.[63] In *Ward*, for example, the majority asserted that the relationship between Aboriginal people and their land is 'essentially spiritual'.[64] This approach bears little relationship to the way in which Aboriginal people themselves understand their relationship to land, an understanding that tends to stress the intertwined and inseparable nature of economic, social, cultural and spiritual activities and relationships associated with land and with use of its resources.[65] Aboriginal perspectives reflect 'a holistic view of the connections between people and land, between ritual and rights in country' – a view far removed from the bundle of rights approach to native title.[66] Thus, while native title is supposedly predicated on Aboriginal traditions, laws and customs, in reality the courts are defining it on a basis that is inconsistent with such traditions, laws and customs.[67]

The tendency of the Federal Court and High Court to downplay the economic content of native title is critical. This is because of its obvious relevance to the commercial content of native title. It is also important because of the manner in which it underlies or is associated with both the tendency to downplay the importance of occupation as a basis for establishing native title and the adoption of the view that native title is a bundle of separate (and separable) rights and interests. It can in fact be argued that, contrary to the view adopted by the courts, a *primary* component of native title at the time sovereignty was asserted was the right to gain from the land the requirements of *material* welfare, that is, to engage in economic production. The evidence certainly suggests that an overwhelming proportion of Aboriginal peoples' lives were spent on economic production.[68] This is not to downplay the importance of cultural and spiritual factors. It is no accident that much of Aboriginal ceremonial activity, for example, is intimately associated with the renewal and health of the land and the creatures that inhabit it, and so the capacity of those people who live on the land to maintain *economic production*.[69] The practice of Aboriginal culture on a daily basis in areas such as the Kimberley region is today inextricably entwined with economic production;[70] it is suggested that there is no reason to think matters were any different two centuries ago. In this context it seems perverse to suggest that economic rights are not at the heart of native title, particularly when at the same time the courts demand that native title can only be established by demonstrating continuity in the character of an Aboriginal community at the time sovereignty was asserted and in the current period.[71]

Contemporary Australian society is increasingly organised around the operation of markets. As a result, it is primarily and increasingly through the exercise of economic rights that

other rights (for example, rights to health and education) are exercised.[72] In this context the tendency of the courts to play down the commercial and economic content of native title profoundly undermines its capacity to confer substantive benefits on Aboriginal people.

VI Cultural Heritage Legislation

Another potential source of commercial leverage for Aboriginal people dealing with mineral development is the legislation existing in all Australian jurisdictions that, at least in theory, seeks to protect Aboriginal cultural heritage. Cultural heritage in this context includes both material manifestations of Aboriginal occupation during earlier periods of time, and places, areas or landscapes that are of spiritual significance to living Aboriginal people. For example, Western Australia's *Aboriginal Heritage Act 1972* (WA) makes it an offence to 'excavate, destroy, damage, conceal or in any way alter' an 'Aboriginal site'. This latter term includes 'any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object … connected with the traditional cultural life of the Aboriginal people, past or present' and 'any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent'.[73]

Developers who fail to adequately protect Aboriginal heritage risk breaking the law. They are also likely to attract unfavourable publicity, adversely affecting their capacity to develop projects in a timely manner. Aboriginal people hold knowledge required to correctly identify and assess the significance of Aboriginal cultural heritage and in relation to sites of contemporary significance have a monopoly over such knowledge. This potentially provides them with significant commercial leverage. It is not that places of significance might be 'auctioned off', with Aboriginal custodians allowing their destruction in return for financial or economic gain. Rather, the knowledge of Aboriginal people is essential in order to ensure the effective protection of cultural heritage; this in itself provides the group in question with a bargaining tool that can be used to extract benefits from resource development activity, in four distinct ways:

1. Groups can negotiate to ensure that the process of cultural heritage identification and protection appropriately rewards Aboriginal holders of cultural knowledge, for instance in the form of wages paid to individuals participating in cultural heritage work and/or in the form of payments to the community of native title holders.[74]

2. Cultural heritage work associated with exploration or mining can create opportunities for Aboriginal custodians to achieve cultural and social objectives, for instance allowing them to visit country they normally find difficult to access and providing opportunities to pass on cultural knowledge to younger people.

3. As in any negotiation, the nature of the ongoing cultural heritage protection system is one of a number of issues to be considered and traditional owners have an opportunity to effect trade-offs and so secure gains on other issues. For instance, companies are often anxious to minimise the timeframes associated with the identification of cultural heritage sites and the 'clearing' of land for exploration and mining. Traditional owners may accept the additional burden of work created by shorter time frames in order, for instance, to secure additional benefits in areas such as employment opportunities or participation in environmental management.

4. Traditional owners may be willing to sacrifice some element of their enjoyment of cultural heritage, for instance, limitations on their access to sites to facilitate exploration or the operation of mine infrastructure, in return for gains in other areas. They may also be able to negotiate economic or social benefits in return for accepting damage to sites that are of minor significance, for instance, archaeological sites that are remnants of mundane life in earlier periods and are not seen as possessing particular cultural or spiritual importance.

Raising the prospect that they might trade off preservation or enjoyment of aspects of their cultural heritage could be seen as opening Aboriginal people to criticism. Any such criticism would certainly involve a double standard. In non-Indigenous contexts in Australia, local and State governments constantly make trade-offs between the preservation of cultural heritage and/or its continued enjoyment by citizens and the pursuit of other goals such as the economic and social benefits associated with urban redevelopment or provision of enhanced public infrastructure that requires destruction or removal of heritage buildings or artefacts. Aboriginal people can justifiably demand the support of non-Indigenous Australia in making similar trade-offs in relation

to their cultural heritage, particularly given the serious social and economic disadvantages they face and the consequent necessity of pursuing available opportunities for economic and social development.

The capacity of Aboriginal people to negotiate such trade-offs and to pursue specific options of the sort discussed above depends on their ability to control or at least influence decisions regarding the significance, disposition and management of their cultural heritage. However, cultural heritage legislation in Australia substantially reduces or removes their ability to do so. Final decisions regarding the significance and protection of cultural heritage are often vested in state authorities rather than in Aboriginal traditional owners. For instance, under Queensland's *Aboriginal Cultural Heritage Act 2003* (Qld) decisions as to whether certain types of developments are likely to have a 'significant impact' on Aboriginal cultural heritage and as to whether they require a Cultural Heritage Management Plan ('CHMP') rest with the relevant Minister or Chief Executive.[75] In addition, where a developer and Aboriginal custodians have been unable to agree on a CHMP, the developer can submit its proposed plan to Queensland's Land and Resources Tribunal. The Tribunal assesses whether the plan is likely to avoid or minimise damage to Aboriginal cultural heritage and makes a recommendation to the Minister as to whether or not the proponent's plan, or a modified version of it, should be accepted.[76]

In South Australia the responsible Minister is required to consult with interested Aboriginal traditional owners and organisations in the exercise of key powers and functions under the *Aboriginal Heritage Act 1988* (SA). However, ultimately it is the Minister who determines, for instance, whether a site or object is an 'Aboriginal site or object' and so entitled to protection under that Act, and whether access to sites or the areas surrounding sites or activities in relation to sites must be restricted to ensure their protection.[77] Even in the Northern Territory, where much of the administration of cultural heritage legislation is in the hands of an Authority consisting largely of Aboriginal traditional owners, a developer denied approval by the Authority to carry out work on land may apply to the Minister to have the Authority's decision reviewed. On the basis of such a review the Minister may 'issue to the applicant … a certificate [allowing work to be undertaken] in relation to the land or any part of the land comprised a sacred site or on which a sacred site is situated'.[78]

Section 18 of Western Australia's *Aboriginal Heritage Act 1972* (WA) permits a developer to apply to the relevant government Minister to alter the use of registered Aboriginal sites.[79] In the context of exploration and mining this constitutes an application for permission to damage or destroy the site. Developers have in the past been granted the right to damage or destroy sites. Examples include part of the development of the Argyle diamond mine[80] and oil drilling on Noonkanbah station.[81] Section 18 applications are still routinely employed by the exploration and mining industries in Western Australia.[82] Similarly, in New South Wales a developer can seek the consent of the Director General of the Department of Environment and Conservation to 'destroy, deface or damage' cultural heritage objects or places. If that consent is refused, the applicant may appeal to the Minister, who can approve destruction or damage of objects or sites without any statutory right of consultation with affected Aboriginal people.[83]

When utilised in this manner, cultural heritage legislation completely removes control of their heritage from Aboriginal people. Developers can avoid negotiating with Indigenous groups and instead seek an administrative intervention that allows development to proceed in the absence of any benefit-sharing with Aboriginal traditional owners. The end result is that the commercial leverage potentially associated with cultural heritage legislation is effectively rendered nugatory.[84]

VII Aboriginal Responses: Alternative Sources of Commercial Leverage

Existing legislative, policy and institutional frameworks create major constraints on use of the commercial leverage potentially associated with native title and Aboriginal control over cultural heritage. However, other sources of leverage exist. Some of these may not be exclusively or indeed primarily focused on achieving economic benefits; nevertheless, they may allow Aboriginal people to achieve commercial advantage while also pursuing social, environmental or cultural goals.

One approach involves the use of legal and regulatory avenues outside the native title and cultural heritage arenas. These can involve environmental impact assessment or planning legislation, administrative law, and mining legislation and regulation. For example, all jurisdictions provide for environmental impact assessments of major projects and for

public rights of objection and review, for instance, in relation to the level of assessment required, the scope of assessment and the conditions to be imposed on the operator once a project is approved. Aboriginal groups may seek to intervene in environmental impact procedures in order to directly achieve certain goals, for instance, protection of important heritage sites or more stringent conditions on waste emission from a project.[85] At a more strategic level, they may have the capacity to either facilitate or delay the smooth progression of a project through the environmental assessment process. This ability can represent a source of commercial leverage.

Another approach involves developing political alliances and building political support in the non-Indigenous community in order to influence the conditions under which mineral development is allowed to proceed, and to ensure that those conditions include a sharing of economic benefits with Aboriginal people (this could also include requirements for effective cultural heritage protection and ongoing Aboriginal participation in environmental management of resource projects). Alliances could be developed with environmental, trade union or community groups that may have common interests in relation to resource projects. This strategy is long-term, time consuming, and must be carefully managed, given that in few cases will the interests of Aboriginal and other groups precisely coincide. For example, Aboriginal and environmental groups both have an interest in minimising adverse environmental impacts from a project. For many Aboriginal groups this goal must be balanced against a strong imperative to secure economic opportunities offered by a new mine, whereas environmental groups may oppose a development in principle.

Aboriginal groups can also lobby government agencies that play key roles in project appraisal and approval processes. In this area long-term strategies are also required. It is not usually effective to approach an agency on a one-off basis late in the project approval process and seek to influence its decisions. It is essential to build links with both bureaucratic and political decision-makers over time, providing them with information on Aboriginal positions, raising issues or problems in relation to a project, and suggesting responses or solutions that allow government goals to be achieved while also addressing Aboriginal concerns and aspirations.

In addition, native title groups can engage at a political level with key corporate decision-makers. Senior NTRB personnel and senior members of native title groups play a critical role in this area. The individuals who run mining companies tend to take the view that they should engage with their 'equals' on the Aboriginal side, which usually limits the ability of professional non-Indigenous staff employed by native title groups or NTRBs to engage with them. It is part of the art of negotiation to efficiently and sparingly employ the 'resource' represented by Aboriginal leaders to engage with senior executives at key points, and thus move engagement away from legal frameworks that can be highly limiting and into an arena where agreements can be reached on the basis of underlying commercial and policy considerations.

Finally, native title groups can seek to use the media to promote their perspectives and to place pressure on government and company decision-makers. In this area time is also required to build relationships with journalists, to familiarise them with Aboriginal interests and concerns, and to develop a coherent media strategy. This last point is critical. The media may respond to an issue or a 'story' in ways that do not reflect native title interests and may indeed be damaging to them. While it is never possible to exclude this possibility, implementation of a coherent media strategy can minimise the risk of it occurring.

At a more fundamental level, some Aboriginal groups are working to ensure acceptance by governments and corporations of evolving international norms regarding the rights of Indigenous peoples. In recent years there have been numerous efforts, both within United Nations forums and more broadly, to achieve recognition of the right of Indigenous peoples to control development on their ancestral lands, particularly through the principle of Indigenous free, prior and informed consent. This requires that Indigenous people should have the right, free from duress and in possession of full information regarding proposed developments on their ancestral lands, to provide or withhold their consent to those developments prior to any authorisation of development activity by state authorities or developers.[86] The commercial advantage secured if development can only proceed with the consent of Aboriginal people ensures that those groups can share in the economic benefits associated with mineral development.

The principle of Indigenous free, prior and informed consent has won increasing recognition from regional organisations, including the Organization of African States and the Inter-American Court of Human Rights; it has also gained a footing in international declarations, including the *Declaration on the*

Rights of Indigenous Peoples,[87] adopted by the United Nations General Assembly in September 2007. Non-government organisations have also given increased attention to the principle, as have certain commercial enterprises.[88] While many national governments, including Australia's, refuse to accept the principle,[89] some Indigenous groups in Australia have succeeded in gaining acceptance of it by developers and state governments and have used this acceptance to enhance their role in mineral development and to share in its economic benefits.

One example is that of a proposed bauxite project on the traditional lands of the Wik and Wik Waya peoples in Western Cape York. The bauxite resources concerned were identified some decades ago by a multinational mining company but had not been developed. Frustrated at the company's inaction, Queensland revoked its mining lease and invited expressions of interest from potential developers. As part of the process of inviting tenders, the Government developed a Draft Sustainability Development Plan ('DSDP') that all companies tendering for the project would have to accept. Queensland agreed to a proposal by negotiators for the Aurukun community and the Wik and Wik Waya peoples that the DSDP principles should include acceptance by the project developer of the principle that:

> the Wik and Wik Waya Peoples have ultimate responsibility for the land [on which the project will be constructed.] The developer will respect the right of the Wik and Wik Waya people to exercise the principle of free, prior and informed consent in relation to matters that potentially impact on them.[90]

Building on this principle, Aurukun and the Wik and Wik Waya people have negotiated an Indigenous land use agreement that affords them significant involvement in, and allows them to derive substantial benefits from, the feasibility stage of the Aurukun Bauxite Project.[91] This represents an important innovation in the Australian and international contexts, as Indigenous peoples have not previously had an opportunity to participate in processes designed to establish the feasibility of projects on their land, or to benefit from the very substantial expenditures involved in determining the feasibility of major projects.

Another approach available to Aboriginal groups is to seek a direct role in shaping the way in which resource development occurs. In this case the goal is not simply to negotiate a share of the economic benefits created by resource projects, but to play an active part in determining who will develop resources, when they will be developed, and what form development will take. The exploitation of natural gas off the Kimberley coast provides a case in point. The Kimberley Land Council ('KLC') and the coastal native title groups it represents have become increasingly concerned that the discovery of extensive offshore natural gas reserves will result in multiple onshore gas processing facilities, threatening the integrity of coastal ecosystems and the ability of native title holders to sustain their existing marine-based economic and cultural activities. The KLC has been pushing for coordinated development that would see gas processing facilities limited to a small number of carefully selected sites, minimising their cultural and environmental impacts.[92] In July 2007 the KLC took an initiative that went well beyond the traditional role of Aboriginal land councils of pressing governments to undertake development in a way that protects the interests of the Aboriginal people they represent. It advertised in the national press seeking expressions of interest from

> suitably qualified LNG operators, LNG infrastructure providers, and financiers, to submit an expression of interest to work with the KLC and Aboriginal traditional owners, in implementing a world best practice *responsible development* approach in relation to proposed onshore LNG development in the Kimberley region of Western Australia.[93]

It stated that the KLC is currently engaging in discussions with government and a number of proponents in relation to possible onshore development options for an LNG processing plant, and that

> the KLC and traditional owners have an interest to ensure that any development occurs in a sustainable, responsible and co-ordinated manner that protects the environment, sustains the Kimberley way of life and provides significant community benefits to the Aboriginal traditional owners and the broader Kimberley community. A central theme is that any site selection and development option must occur in a culturally appropriate manner in accordance with traditional law and custom.[94]

The KLC received a substantial number of responses to its advertisement, and in December 2007 a number were being assessed. It remains to be seen what the outcome of the process will be, but it is clearly an attempt by the KLC and traditional owners to carve out for themselves a role as active economic

players in gas development, rather than simply negotiating a share of the benefits generated by developments initiated by others. They are also seeking to play a role in determining which corporate interests should become involved in resource development, a choice traditionally monopolised by State and (where foreign investors are involved) federal governments. Finally, the KLC is not only attempting gain benefits for the native title groups it represents through individual projects on their land (a role traditionally played by land councils in Australia) but also to actively and directly shape the overall pattern of development across the natural gas industry. It is seeking to do this not only in terms of the final outcomes of development but also in relation to decision-making processes involved in the choice of development options and sites.

In summary, native title groups have available to them a range of political strategies that can assist in providing them with commercial leverage over resource development. All of them require considerable political skill and substantial organisational and financial resources to pursue effectively. In contemporary Australia, some native title groups, and in particular those supported by well-established and experienced NTRBs, have access to such skills and resources. Unfortunately, many do not,[95] meaning they must rely on the legal rights available to them under native title and cultural heritage legislation.

VIII Policy Implications

In examining the broader policy implications of the analysis offered in this paper, two considerations are central. The first involves the general policy stance of Australia's major political parties in relation to the appropriate role for market forces in shaping Australia's economy and society. During the last two decades, federal governments in Australia have assigned to market forces a central and expanding role in organising Australia's economy and in determining allocations of goods and services. Indeed, Australia's newly-elected Prime Minister, Kevin Rudd, campaigned on the basis of his economic conservatism.[96] There is a profound inconsistency between this approach and a policy and legislative regime that undermines the ability of Australia's Aboriginal citizens to participate in markets, and so extract substantial economic benefit from Australia's mining boom.

Second, the Indigenous affairs policies of the former Liberal/National Coalition Government, the current Labor Government and Australia's State governments, rest on the fundamental assumption that Indigenous economic and social disadvantage cannot be overcome unless Indigenous Australians reduce their dependence on 'passive welfare' and increase their engagement in the 'real economy' by gaining access to employment and business development opportunities.[97] An obvious and important way in which Indigenous Australians can start building their presence in the 'real economy' is by participating more actively in Australia's resources boom and, more generally, in mineral development on their traditional lands. Current policy, legislative and administrative arrangements in relation to native title and Aboriginal cultural heritage militate against such an outcome.

Some Aboriginal organisations are utilising political strategies at a number of levels to help counter this adverse policy and legal environment. Utilising the increasing recognition of Indigenous rights in the international sphere and a growing capacity to directly engage with government and industry, they are seeking to carve out for themselves a substantial role in setting the terms under which mineral development will occur and to win for themselves a substantial share of the benefits generated by mining. However, they face an uphill battle in the absence of major policy, legislative and administrative changes designed to ensure that the content and administration of native title legislation creates a more equitable negotiating arena for native title holders and mining companies; that traditional owners and their representative organisations are properly funded to engage in negotiations; that greater legal recognition is afforded to the economic component of native title; and that the control of Aboriginal people over their cultural heritage is increased.

Many other Aboriginal groups in Australia lack the political capacity to counter an adverse policy and legislative environment. In the absence of major policy, legislative and administrative reform, they will fail to share in the benefits of Australia's next resources boom, as they are failing to share in the current one.

Endnotes

* Department of Politics and Public Policy, Griffith Business School, Griffith University. The author wishes to thank the Agreements, Treaties and Negotiated Settlements Project (www.atns.net.au) for an invitation to present an earlier version of this paper at its Mining, Petroleum, Oil and Gas Symposium in Broome in July

2007. He also wishes to thank an anonymous referee for detailed and insightful comments.

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12 Jon Altman, *Aborigines and Mining Royalties in the Northern Territory* (1983).

13 Ibid.

14 Lisa Strelein, ‘Conceptualising Native Title’ (2001) 23(95) *Sydney Law Review* 95, 98-100.

15 *Native Title Act 1993* (Cth) subdivision P.

16 *Native Title Act 1993* (Cth) ss 29, 31, 33.

17 *Native Title Act 1993* (Cth) s 38.

18 *Native Title Act 1993* (Cth) s 42.

19 *Native Title Act 1993* (Cth) s 36(2).

20 For a detailed discussion of these points see Tony Corbett and Ciaran O’Faircheallaigh, ‘Unmasking Native Title: The National Native Title Tribunal’s Application of the NTA’s Arbitration Provisions’ (2006) 33(1) *University of Western Australia Law Review* 153, 154-58.

21 *Wik Peoples v State of Queensland* (1996) 187 CLR 1 (‘*Wik*’).

22 Richard Bartlett, *Native Title in Australia: Second Edition* (2004) 52-64.

23 Ibid 176-77.

24 Ibid 61.

25 The author has witnessed such responses by mining companies in a number of meetings he has attended as a negotiator for native title groups.

26 The inequitable outcomes for native title groups is especially evident in the Pilbara region, where the massive growth of the iron ore industry has resulted in major expansions of port facilities and extensions of railways, pipelines, powerlines and roads, with little or no benefit flowing to native title parties as a result.

27 Bartlett, above n 22, 60.

28 *Native Title Act 1993* (Cth) s 202(4)(c).

29 Will Christensen, ‘Aborigines and the Argyle Diamond Project’ in R Dixon and M Dillon (eds) *Aborigines and Diamond Mining: the politics of resource development in the East Kimberley* (1990) 29-39; Corbett and O’Faircheallaigh, above n 20, 173.

30 Ciaran O’Faircheallaigh , ‘Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or “Business as Usual”?’ (2006) 41(1) *Australian Journal of Political Science* 11.

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38 Ibid 166-72.

39 Curran and Van Acker, above n 8.

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41 Lisa Strelein, *Compromised Jurisprudence: Native title cases since Mabo* (2006) 84-91.

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43 (2002) 213 CLR 1 ('*Ward*').

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45 See especially *Ward* (2002) 213 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Commonwealth v Yarmirr and Others* (2001) 208 CLR 1 ('*Yarmirr*').

46 *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533; *Commonwealth v Yarmirr* (1999) 101 FCR 171; *Yarmirr* (2001) 208 CLR 1. For a detailed discussion of the implications of these cases for the relationship between commercial and non-commercial aspects of native title rights see Marcia Langton, Odette Mazal and Lisa Palmer, 'The "Spirit" of the Thing: The Boundaries of Aboriginal Economic Relations at Australian Common Law' (2006) 17(3) *Australian Journal of Anthropology* 307.

47 Langton, Mazal and Palmer, above n 46, 310.

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49 Ibid 310.

50 Ibid.

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52 Strelein, above n 14, 99-111; Strelein, above n 41, 40-46, 66-68; Brennan, above n 44; Pearson, above n 44; Glaskin, above n 51, 71; Katy Barnett, 'Western Australia v Ward: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis' 2000 24(2) *Melbourne University Law Review* 464, 474; Robert French, 'Western Australia v Ward: Devils (and Angels) in the Detail' 2002 7(3) *Australian Indigenous Law Reporter* 7.

53 Glaskin, above n 51, 73, 76; Barnett, above n 52, 464, 474; French, above n 52.

54 Barnett, above n 52, 464.

55 Glaskin, above n 51, 73-74.

56 (1997) 3 SCR 1010 ('*Delgamuukw*').

57 Justice Lee, the trial judge in *Ward v Western Australia* (1998) 159 ALR 483, relied upon *Delgamuukw*, but the majority in the appeal to the Full Bench of the Federal Court and the corresponding appeal to the High Court expressly rejected this view: Barnett, above n 52, 465.

58 Glaskin, above n 51, 82.

59 Ibid 68, 73.

60 *Delgamuukw* (1997) 3 SCR 1010 [111], [117], [118].

61 *Ward* (2002) 213 CLR 1 185. Ochre, which Aboriginal people in the Kimberley extracted from subsurface deposits and traded prior to the assertion of sovereignty, is not defined as a mineral under the relevant legislation.

62 Glaskin, above n 51, 81.

63 *Yanner v Eaton* (1999) 201 CLR 373; *Western Australia v Ward and Others* (2000) 99 FCR 316; *Ward* (2002) 213 CLR 1.

64 *Ward* (2002) 213 CLR 1 64. On similar views expressed by the Federal and High Courts in other cases see Glaskin, above n 51, 78; Strelein, above n 41, 49, 95.

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73 *Aboriginal Heritage Act 1972* (WA) s 5.

74 For instance, in a number of parts of north Australia cultural heritage agreements with exploration companies provide for payments equivalent to a nominated percentage of on-ground exploration work to affected native title groups.

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77 *Aboriginal Heritage Act 1988* (SA) ss 9, 12, 13, 24.

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83 *National Parks and Wildlife Act 1974* (NSW) s 90.

84 The impact of cultural heritage legislation in disempowering Aboriginal people goes well beyond its impact on their commercial leverage, a point discussed in detail in Ciaran O'Faircheallaigh, 'Negotiating Protection of the Sacred? Aboriginal-Mining Company Agreements in Australia' (2008) 39 (1) *Development and Change* (forthcoming). However, it is the impact on commercial leverage that is of specific interest in the current context.

85 See, eg, *Anderson v Ballina Shire Council* [2006] NSWLEC 76.

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