'WE'RE FROM THE MINING INDUSTRY AND WE'RE HERE TO HELP': THE IMPACT OF THE RHETORIC OF CRISIS ON FUTURE ACT NEGOTIATIONS

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For many years, the dominant paradigm of Indigenous affairs has been one of crisis: 'a Hobbesian nightmare of violence, abuse and neglect'.[1] The rhetoric reached a crescendo in 2007 with the publication of the *Little Children are Sacred* Report[2] and the former Federal Government's 'intervention' in the Northern Territory.[3] The discourse of crisis locates the problem in Indigenous people themselves, such that they and their communities are seen as innately pathological. This diagnosis in turn legitimates the argument that 'self-determination' has failed: Indigenous people are unable to help themselves. Accordingly, they must relinquish their autonomy, submit to external intervention,[4] and accept that responsibilities must take precedence over rights.[5] Native title, as a product of what is now termed the 'rights agenda',[6] is at odds with the new discourse. The argument of this paper is that the rhetoric of crisis can influence negotiations that take place pursuant to the *Native Title Act 1993* (Cth) ('NTA'), implying the need for outcomes that may not coincide with the ambitions of native title claim groups. The implication that Indigenous people require external help of a 'top-down', interventionist nature undermines the agency of native title claimants as decision-makers and the holders of rights.[7] In particular, agreements negotiated under the future acts provisions of the NTA ('future act agreements') may be distorted by the logic of crisis, which implies that Indigenous groups must accept external solutions rather than using procedural rights strategically to achieve their own goals. Native title lawyers must be wary of the implicit invitation to offer their clients assistance based on the perception of a crisis, rather than giving the detached legal advice to which their clients are entitled.

I The Legal Framework

One of the stated objectives of the NTA is 'to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings'.[8] Accordingly, the NTA regulates the ways in which mining and other activities can take place on land and waters the subject of a registered native title claim.[9] Acts which affect native title are defined as 'future acts',[10] and registered claim groups are accorded procedural rights in respect of these acts.[11] A common example of a future act is the grant of a leasehold interest in land by the state. The party to whom the lease is to be granted is known as the 'grantee party', and the claim group whose registered claim covers the area of the proposed lease is the 'native title party'. Native title parties have no right of veto over a future act and are instead accorded rights which range from the very limited – such as the right to be notified and the right to comment – and reach their high water mark in the right to negotiate ('RTN').

The RTN requires that before a future act can be done all parties – governments (State, Territory and/or Commonwealth), the native title party and the grantee – must negotiate in good faith within a period of six months with a view to reaching an agreement about the doing of the act.[12] During the negotiation process, the National Native Title Tribunal ('NNTT'), a body established by the NTA,[13] performs both mediatory and arbitral roles. All parties can request assistance from the NNTT in mediating to reach agreement. Future act agreements will often bind claim groups to facilitate the proponent's overall mining project – for instance, by requiring that claim groups not object to any future tenements required for the project – in exchange for compensation or benefits.

The benefits offered by the RTN are limited. Firstly, following the Coalition Federal Government's 1998 amendments to the NTA,[14] the RTN only applies to a discrete category of future

acts. For instance, mining tenements sought for the sole purpose of infrastructure do not trigger the RTN but only the right to be consulted,[15] despite the fact that infrastructure may have severe impacts on a claim group's traditional lands and waters. Secondly, if the parties fail to come to an agreement within the six-month negotiation period, a determination can be sought from an arbitral body, including the NNTT in its arbitral role.[16] The arbitral body is empowered to rule on whether the act can be done, done subject to conditions to be complied with by any of the parties, or not done.[17] In determining any conditions subject to which a future act can be done, the body is obliged to have regard to, amongst other things, 'the economic or other significance of the act to Australia, the State or Territory concerned'.[18] The conditions that can be imposed on the doing of the future act are restricted: the arbitral body cannot make a decision which entitles native title parties to payments calculated by reference to the amount of profits made, any income derived, or any things produced by the grantee.[19] Significantly, the NNTT has never ruled against the doing of a future act in circumstances where the procedural requirements, such as negotiation in good faith, have been complied with.[20]

Agreements may also be made through the Indigenous land use agreement ('ILUA') process outlined in the NTA. An ILUA is an agreement entered into on a voluntary basis by one or more native title claim groups and representatives of other interests in the relevant land or waters, such as mining companies and pastoralists. ILUAs may provide for the doing of several different types of future act. There are three kinds of ILUAs: body corporate agreements,[21] area agreements,[22] and alternative procedure agreements.[23] The features of each vary in terms of the circumstances in which they can be made[24] and the kinds of future acts they can cover.[25] ILUAs are appealing to mining and pastoral interests because they provide certainty: an ILUA will validate the doing of a future act and, once registered, it binds all native title claimants and holders in the relevant area.

Professor Ciaran O'Faircheallaigh, who has written extensively on agreements between native title claim groups and mining companies, argues that the native title system severely curtails the ability of native title claim groups to exercise their commercial leverage, producing 'profoundly inequitable' outcomes 'in a society where markets play an increasingly dominant role in allocating resources'.[26] This underlying procedural unfairness is further exacerbated by the discourse of crisis.

II The Narrative of Failure

This paper does not seek to challenge the grim assessments of Indigenous health, housing, life expectancy and employment to which Australians have become accustomed. Indigenous people remain a severely disadvantaged group; the statistics are stark and undisputable.[27] However, the self-reinforcing 'narrative of failure'[28] that pervades public discourse on Indigenous people[29] can be misleading. Jon Altman of the Australian Centre for Aboriginal Economic Policy Research, referring to a 2008 report he had co-written with Nicholas Biddle and Boyd Hunter,[30] recently stated that '[u]sing key indicators to measure employment status, household size and home ownership, education and health status, we found that most socio-economic outcomes are better now than 35 years ago. These results are at odds with the narrative of failure around indigenous policy'.[31] The narrative persists nonetheless and has led to an increasing tendency to view Indigenous people in pathological terms.[32] Rather than experiencing economic and social disadvantage, Indigenous people are seen as suffering from endemic violence and a 'culture of poverty'. Thus, it is not poverty and distress themselves, but those suffering from these conditions, who are viewed as the 'problem' to be solved.[33]

Raimond Gaita has noted that the use of the descriptor 'dysfunctional' in the context of Indigenous affairs has become 'almost ubiquitous'[34] in recent years. As Gaita points out, such language is 'devoid of even human, let alone humane, resonance'.[35] Persons branded as 'dysfunctional' have difficulty asserting their autonomy to representatives of industry and government; they have been pre-judged and found wanting, and their opinions are unlikely to be taken seriously. The historian Inga Clendinnen wrote presciently in 2004 that non-Indigenous Australians 'have a mighty urge to intervene' when confronted with dismal conditions in Aboriginal communities.[36] The crisis paradigm names Indigenous people as objects of concern, giving outsiders a licence to intervene on the basis that Indigenous people are incapable of understanding what is best for them. As anthropologist Gillian Cowlishaw has noted with respect to the implementation of government policy, '[b]udding leaders are trapped into a mendicant stance by the national discourse of concern, and the insistent offers of "help" which are really coercive because there is little real negotiation.'[37]

III The Industry's 'Mandate'

In recent years, offers of 'help' to address the apparent crisis have increasingly come from the mining industry. The former Coalition Federal Government encouraged mining companies to form partnerships with Indigenous communities, sometimes in effect asking the companies to shoulder government responsibilities towards Indigenous people. In 2005, the Howard Government signed a Memorandum of Agreement with the Minerals Council of Australia ('MCA') 'to formalise a partnership' between the Commonwealth and the MCA to

> work together with indigenous people to build sustainable and prosperous communities in which individuals can create and take up social, employment, and business opportunities in mining regions.[38]

Native title representative bodies played no part in the discussions, which saw the Government give the mining industry a mandate to implement a certain vision of the good Indigenous society. A report by the Centre for Social Responsibility in Mining ('CSRM') concluded that within the minerals sector there was an 'emerging body of good practice in Indigenous employment and recruitment', with the 'most progressive mining companies ... taking a long-term view'.[39]

In addition to providing employment opportunities, these companies were 'participating in initiatives to address the root causes of Indigenous socio-economic disadvantage – poor education, poor health and poverty'.[40] Such initiatives are commendable, but the companies' mandate is highly specific: the focus expressed in the CSRM report presumes that Indigenous people must participate in the 'real economy' and enter that ambiguous entity, 'the mainstream'. This imperative dovetails neatly with the goals of government as well as industry. The CSRM report noted approvingly that there were 'sound policy and financial reasons for governments to promote partnerships with industry as a means of getting people into the mainstream workforce and becoming taxpayers'.[41] The 'partnership' approach is inherently problematic as it misleadingly implies that power is shared equally on both sides. In a native title context, the term 'partnership' can be highly manipulative; it exerts a subtle pressure on one negotiating party to accept the viewpoint of the other.

Further, Indigenous people generally have not been consulted about, and may not agree with, the 'solutions' embraced by government and industry. For instance, Indigenous aspirations may well include the reassertion of a distinct and separate culture, rather than an uncomplicated desire to become part of mainstream Australia.[42] The two goals are not necessarily incompatible. Much recent research has focused on the notion of the 'hybrid economy' created by Indigenous peoples' engagement both with the market and with the customary or traditional sectors of their own local economy.[43] Altman notes that the 'hybrid economy' framework is 'based on combining elements of the market, the state and the customary sectors to provide meaningful livelihood opportunities for people living on their remote ancestral lands'.[44] Altman suggests that such an approach is likelier to succeed than what he characterises as the former Howard Government's 'radical plan ... to transform kin-based societies to market-based ones'[45] via the federal intervention in the Northern Territory.

Hal Wootten, a lawyer, academic and public intellectual with a long history of involvement in Indigenous legal issues, has also been critical of the 'radical plan' described by Altman. In 2004, Wootten noted that 'self-determination' as the driving force in Indigenous affairs had been replaced by

> a narrative of the triumph of capitalist individualism ... the developing conservative narrative posits that Aboriginals must simply forget about culture and identity, which are irrelevant in the modern globalised world, and become individual market-driven consumers and entrepreneurs, like all other sensible people.[46]

This narrative sits within the rise of neo-liberalism in Australian society and is particularly convenient for the mining industry, coinciding as it does with the industry's desperate need for mine workers and its desire to be perceived as a good corporate citizen.[47] The CSRM report notes that a

> key business driver is the recognition by mining companies that robust relationships with Indigenous people based on recognition, respect, trust and honouring commitments are fundamental to maintaining the industry's 'social licence to operate'.[48]

The concept of the 'social licence' implies that industries rely on broad community support. Its use in this context suggests, perhaps optimistically, that the Australian public

will not support mining companies that do not deal fairly with Indigenous people.

Indigenous groups gain some leverage from a company's need to be perceived as a good corporate citizen, and negotiation strategies for traditional owners are often shaped by research on a company's corporate social responsibility ('CSR') approach. Further, mining companies are increasingly taking a holistic approach to their engagement with Indigenous groups, and are often several steps ahead of local, State and Federal governments in doing so. O'Faircheallaigh notes that while

> [s]ome companies essentially engage in symbolic activities or 'window dressing' to create an impression of a commitment to CSR ... [o]thers display a genuine commitment to CSR by expending substantial resources and through a willingness to go well beyond their legal obligations.[49]

The company's understanding of its 'social licence' may, however, mandate a certain set of outcomes. If claim groups or their representatives accept a company's approach, they lose the ability to set the agenda for negotiations.

IV The Rhetoric of Crisis and the New 'Solution'

The logic of the crisis discourse requires that future act agreements be vehicles for socio-economic uplift, if not major social change. This underlying logic shifts the balance in negotiations between mining companies and native title claim groups, to the extent that a balance can be said to exist. Mining companies may go further than their legal obligations, prolonging negotiations beyond the mandatory six-month period in an effort to ensure that a claim group gives informed consent to a proposal and that a workable relationship is built between the negotiating parties. Companies may even negotiate with claim groups absent any legal obligation – for instance, in the situation where a claim group has only infrastructure tenements on its traditional country. Owing to the lack of resources possessed by native title representative bodies,[50] it is also often the company that funds the negotiation process, including paying for meetings, travel, accommodation and sitting fees. The choice to embrace 'best practice', however, rests with the company. Claim groups' ability to compel a proponent to negotiate is limited, and they may be faced with the difficult choice of either accepting an unsatisfactory agreement or proceeding to a determination in the NNTT.

As noted above, the negotiation process is often funded by the proponent, and O'Faircheallaigh cautions that the increasing reliance by Indigenous people and their representatives on such funding 'can fundamentally affect the dynamic of negotiations'.[51] This lopsided dynamic is now exacerbated by the idea that mining companies can 'uplift' regional Indigenous communities,[52] such that the company assumes the role of benefactor. Many larger mining companies conceptualise future act agreements as one element in a broad strategy of engagement with Indigenous people,[53] with such strategies often more sophisticated than those developed by State and Federal governments. While such a focus is laudable, it obscures the nature of future act agreements: they are entered into by specific groups who have procedural rights under the NTA and companies who seek access to land the subject of those rights. Groups do not enter into such agreements on the basis of economic need or Indigeneity. If future act agreements are but one of a company's strategies for promoting some form of Indigenous empowerment, this overarching goal has the potential to shape negotiations and override claimants' specific ambitions. This may particularly be the case where the claim groups' ambitions do not fit within a company's predetermined plan.

In O'Faircheallaigh's analysis:

> [a] fundamental goal for Aboriginal people affected by large-scale mining projects is to use development to achieve a better life for themselves and their children and in doing so to determine their own direction and priorities.[54]

A major aim, then, is to have ownership and control over the negotiations, the final agreement and its implementation. The anthropologist Diane Smith has explored notions of compensation existing in Aboriginal cultures. She argues that:

> In accordance with their own social preferences and conceptualisations of cultural property, the *process* of negotiating compensation may itself be part of compensation for many native title groups. The period of negotiation may be the first time their rights and concerns ... are given a voice at the table.[55]

The rhetoric of crisis silences the claimants' voices, implicitly forcing them into the familiar stereotype of a beleaguered people in need of external assistance. Accordingly, their

collective designated role is that of grateful recipient rather than the holder of proprietary rights.

The nature of the available assistance is dictated by the rhetoric of crisis; mining companies respond with a tendency to focus heavily on employment, training, and community development during the course of negotiations, addressing needs that are arguably the role of government rather than industry. Such programs may, of course, be beneficial, and they may well be sought by claim groups. Rarely is it acknowledged, however, that one 'solution' will not fit all. Each claim group has different characteristics: not all native title claimants are poor or unemployed; not all live in remote areas; and not all wish to work for mining companies. Further, many claimants resent encroachments on their discretion in expenditure of compensation.

V Compensation and the Logic of Crisis

Native title is often confused with the broader imperative to improve the socio-economic status of Indigenous people.[56] For instance, the author has been told by more than one mining company representative that they wanted to help Aboriginal people in the Pilbara generally. These representatives expressed a naïve surprise when told that our clients were concerned with their own levels of compensation, not a broader good. There is a widespread perception that legitimate property rights under the NTA are a gratuity and should not be used to enrich individual claim groups. Accordingly, claim groups who use their procedural rights for their own benefit may be seen as selfish, particularly in the context of the parlous conditions in many Indigenous communities.

In contrast to the liberal orthodoxy which holds that people should be free to spend their money as they choose without external interference, some commentators presume to dictate the manner in which income generated through future act agreements should be spent.[57] In a recent article on gas processing in the Kimberley, journalist Nicolas Rothwell stated:

> remote area Aboriginal leaders ... rarely stop to ask the dark question that hides in the thickets of recent indigenous experience: can unearned money ever be beneficial to these societies? Does it ever lose the taint of morale-sapping, passive welfare?[58]

Such statements, which serve to delegitimate the interests of native title claim groups in compensation, are often made but seldom questioned. Native title is a set of unique property rights, which are imbued with an economic significance by virtue of the right to negotiate. One wonders how generating an income from property rights – as landlords and shareholders do – could be considered 'welfare'. Income is often generated passively, with the obvious examples being inherited wealth and increases in property prices, without the concern and moral judgment inherent in Rothwell's musings.

There are also indications from Kevin Rudd's new Federal Labor Government that the NTA may be amended to restrict the uses to which money secured under future act agreements may be put. In May 2008, Jenny Macklin, the Minister for Families, Housing, Community Services and Indigenous Affairs, characterised such moneys as 'unprecedented financial benefits' which must be used to 'create employment and educational opportunities for individuals' and be 'invested for the long term benefit of communities'.[59] Such language elides the governmental responsibility to provide services and infrastructure to Indigenous people as for other Australian citizens. Further, Macklin implies that moneys flowing to Indigenous communities pursuant to the NTA do not belong to the communities themselves. As such, they can readily be appropriated; for Macklin, these moneys are 'resources' which are 'available' to government.[60] While the Minister praises 'the logic of *Mabo*',[61] her rhetoric undermines the recognition of Indigenous Australians as the holders of rights, renaming them as the passive recipients of 'money for nothing'. Accordingly, compensation as it is currently accrued is not viewed as moneys derived from property rights, but as 'irregular windfalls to be frittered away for no long term good'.[62]

It is clear that some Indigenous communities lack the formal structures, business acumen and experience necessary to effectively manage a sudden influx of money. Many claimants themselves are aware of this, and may request detailed financial advice.[63] Claim groups may also express broad agreement with the proposition that compensation should benefit future generations, given that future act agreements will bind and otherwise affect members of the group who are not yet born.[64] The notion that Indigenous people need to be prevented from enriching themselves – lest this encourage welfare dependency or profligacy – is, however, problematic. Underneath the seemingly benevolent

impulse is the pervasive idea that Indigenous people simply cannot be trusted with money, a concept that has recently been reinforced by the quarantining of welfare payments as part of the Northern Territory intervention.[65] The impetus to 'protect' Indigenous people from themselves has long been an aspect of white Australian discourse,[66] and is now conjured up by Noel Pearson's phrase 'welfare poison'.[67]

In the context of future act negotiations, a lawyer's efforts to secure his or her clients the highest possible amount of compensation – in such forms as annual payments, one-off payments or royalties[68] – is undermined by the silent assumption that such an outcome would not be beneficial. This is not to say that employment and training are not worthy goals, or that financial compensation is necessarily the most important outcome of agreements negotiated under the NTA. The point made here is that a muscular approach on the part of claimants and their lawyers to the use of procedural rights is at odds with the 'growing orthodoxy ... which assumes that what can be broadly described as a "rights based agenda" has failed Indigenous Australians'.[69] Claim groups who prioritise financial compensation swim against the ideological current and risk being branded as greedy or selfish.

VI The Impact of the Logic of Crisis on Native Title Negotiations

Andrew Forrest, the CEO of Fortescue Metals Group ('FMG'), was asked in a 2002 interview about the relationship between his former company Anaconda and the claimant groups with whom the company had negotiated agreements.[70] Forrest said approvingly of the claimants that 'the vast majority did not want to use the native title law as a get rich quick scheme'.[71] Forrest has since quickly risen in status himself, becoming – briefly – Australia's wealthiest individual[72] following the success of FMG. Hal Wootten's observation that Indigenous people are now expected to become 'individual market-driven consumers and entrepreneurs' takes on a certain irony in the context of future act agreements. There is an uneasy sense that Indigenous Australians may adapt *too* well to capitalism, with inappropriate results. Generally speaking, Australians are encouraged to derive wealth from mining activity: one financial publication advised its readers in 2006 that the 'best way to exploit the resources boom [was] to buy a house in Perth'.[73] Many sectors of society, including mine workers, shareholders and property developers, have benefited enormously from the current boom; Indigenous people are the only citizens singled out and criticised for seeking instant material wealth and tangible assets.

Forrest's seeming scepticism of Indigenous rights to land is matched by a well-documented enthusiasm for Indigenous employment. The mining magnate recently made headlines by initiating the 'Australian Employment Covenant' ('AEC') with the aim of encouraging Australian businesses to provide employment for 50 000 Indigenous people. The AEC – whose steering committee includes Warren Mundine and Noel Pearson – has received support from government and been well reported in the media. A press release from 30 October 2008 made explicit the ideology behind the AEC, encouraging 'every Australian employer to join [the AEC] in tackling Indigenous unemployment in a way that only the private sector can – with real jobs'.[74]

Yet Forrest's enthusiasm about Indigenous participation in the mainstream economy contrasts with his view of native title claimants. His reference to claimants getting 'rich quick' as a result of negotiations implicitly draws a distinction between 'good' and less prudent claim groups, the latter evoking the image of the greedy and opportunistic native title claimant. Claim groups are not immune from the public rhetoric of crisis, and are likely to be aware of the stigma that will attach to them if they can be seen to embody this stereotype.[75] Accordingly, claimants may adapt their language and skew their negotiation tactics so as to meet expectations, careful not to display an 'improper attitude of dependency and opportunism'.[76]

It is possible to be pragmatic, using the approved language of uplift and outcomes without accepting the industry's solutions, but claimants walk a fine line in negotiations. They may simply adopt a strategy of telling mining company representatives – and their own lawyers – what they think outsiders want to hear. The author has seen claimants talk enthusiastically of jobs and training in the presence of mining company representatives, while privately expressing an understandable preference for compensation to enable the purchase of tangible assets. Mining company representatives may be genuinely unaware that what the company is prepared to give to a group, in exchange for the expeditious grant of titles, does not coincide with the claimants' own desires. Negotiations thus proceed in an atmosphere of muffled comprehension, with one party concealing its own desires through strategy or a sense of shame. Such a dynamic can lead to complete disengagement with the negotiating

process. Claimants may lack a sense of ownership – or even an understanding – of the final agreement.[77] For example, a 2002 Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission) survey found that only 25 per cent of traditional owner respondents claimed to understand the ILUAs into which they had entered.[78] It is unsettling to note that 60 per cent of their representative bodies claimed that traditional owners *were* able to understand such agreements.[79]

Submission is not the only response open to claim groups. Claimants may rebel against a mining company's offers of succour by failing to demonstrate gratefulness and to accept the 'solutions' proffered by the negotiating partner. Claimants can also choose to play up to the familiar negative stereotype, jokingly telling company representatives to 'open their wallets' or asking their lawyers if they are able to 'screw some money' out of a company.[80] A claim group's failure to fulfil its prescribed role from the other party's perspective may derail or frustrate negotiations, and can also be judged in moral terms. Mining company representatives sometimes express hurt and bafflement when claimants reject their 'offers' of jobs, training and an ongoing relationship.

More dangerously, native title lawyers can succumb to an anxiety that their clients may be perceived as attempting to 'get rich quick', and be embarrassed by repeated demands on the part of claimants that do not accord with what they are 'supposed' to want. Embarrassment, anxiety and sympathy can contribute to lawyers feeling pressured to persuade their clients that what they want is not what is best for them.[81] The sense of crisis surrounding Indigenous affairs, which has normalised the idea that individuals require such persuasion, is rarely mentioned in the course of negotiations, but is ever-present. For instance, a native title lawyer known to the author recently suggested to one mining company representative that a particular claimant group was interested in establishing a homestead on an old pastoral station with which many members of the group had a historical connection. The representative dismissed the idea by saying that the company did not want to create a socially dysfunctional environment.

The rhetoric of crisis can thus perform an 'agenda-setting' function: claimants and their lawyers are invited to agree that Indigenous people are inherently dysfunctional and cannot be trusted to know what they need. As O'Faircheallaigh notes, while native title claimants may prioritise 'being able to enjoy the pleasures of being "on country"' and 'the ability to re-establish themselves on traditional lands',[82] aims such as these do not necessarily fit within a framework of mainstream economic development and may be difficult to 'sell' to a mining company intent on renewing its social licence to operate.

VII Conclusion

The native title system is not played out in a vacuum. At a certain level, negotiations that take place under the NTA are influenced by shifts in the marketplace of ideas. Currently, 'rights-based' approaches are declining in favour, with potentially harmful consequences to the proprietary rights claimed and possessed pursuant to traditional laws and customs. The pervasive images of crisis that currently characterise commentary on Indigenous affairs undermine the capacity of native title lawyers to represent their clients as individual groups, rather than as members of an undifferentiated 'community' that has been branded dysfunctional. The author is sympathetic to the powerful feeling that, in the context of Indigenous affairs, 'something must be done'.[83] The argument made here is that this sentiment must not intrude upon the negotiations that take place under the NTA. Native title claimants are entitled to use negotiations to maximise the benefits that can be derived from their procedural rights, regardless of how such strategies might be viewed in the context of the crisis doctrine. It is the native title lawyer's responsibility to be aware of the ideological undercurrents that may influence future act negotiations and to give our clients the benefit of our best possible advice so that they can make their own informed decisions.

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1 John Howard, 'Little Children are Sacred' (Speech delivered to the Sydney Institute, Sydney, 25 June 2007), cited in Melissa Johns, 'In Their Own Words', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 325, 327.

2 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle – 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

3 See Melinda Hinkson, 'Introduction: In the Name of the Child', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 1. The federal Labor Party has consistently supported the intervention, although its stance has differed slightly from that of the previous Government. During debate on the relevant legislation, Kevin Rudd, then Leader of the Opposition, stated: 'Let us be blunt: this emergency plan is far from perfect. We are, however, prepared ... to give it a go': see Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 2007, 72 (Kevin Rudd, Opposition Leader), cited in Johns, above n 1, 333.

4 Individuals and groups will more readily surrender their autonomy in the context of a real or perceived crisis. See generally Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (2007).

5 Megan Davis argues that the 'in-vogue yet obtuse antipodean notion of rights and responsibilities came about because of conservative antipathy to rights rather than to any real intellectual justification for the suddenly crucial qualifier "and responsibilities" in rights discourse': Megan Davis, 'Arguing Over Indigenous Rights: Australia and the United Nations', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 97, 102.

6 Robert Manne notes: 'In 2001, public interest in Aboriginal reconciliation or native title or questions of injustice bequeathed by history quickly died away. It was replaced by (necessary) discussions about the breakdown of life in the remote Aboriginal communities and the (undeniable) failings of the current leadership of the Aboriginal representative body, ATSIC'. See Robert Manne, 'Windschuttle I', in Robert Manne, *Left Right Left: Political Essays 1977–2005* (2005) 309.

7 There is also some evidence suggesting that a 'top-down' approach is counterproductive. A recent report concluded that community involvement in program design and decision-making contributed to the successful delivery of services and programs to Indigenous communities: see Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007: Overview*, Productivity Commision (2007) 11 <http://www.pc.gov.au/__data/assets/pdf_file/0005/85046/keyindicators2007overview.pdf> at 22 January 2009.

8 NTA, s 3(b).

9 A native title claim group will only be accorded procedural rights under the NTA if it passes the 'registration test'. An application for registration made by a claim group will be considered by the Registrar of the NNTT. Among other things, the Registrar must be satisfied that there is a factual basis for the existence of the following assertions: that the native title claim group has, and their predecessors had, an association with the claimed area; that traditional laws acknowledged by, and traditional customs observed by, the native title claim group exist and give rise to the claim to native title rights and interests; and that the claim group has continued to hold the native title in accordance with those traditional laws and customs. The Registrar must also be satisfied that there is a prima facie case for the establishment of at least some of the claimed rights and interests. See NTA, ss 190B(5)(a)–(c), 190B(6).

10 NTA, s 233.

11 Non-compliance with the procedural rights established by the NTA does not necessarily result in a future act's invalidity. See *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* [2001] FCA 414.

12 NTA, s 31(1)(b).

13 NTA, pt 6.

14 *Native Title Amendment Act 1998* (Cth).

15 NTA, s 24MD(6B)(b).

16 NTA, ss 35(1), 38

17 NTA, s 38(1).

18 NTA, s 39(1)(c).

19 NTA, 38(2)(a)–(c).

20 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; Ciaran O'Faircheallaigh, '"Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom' (2007) 11(3) *Australian Indigenous Law Review* 28, 32. For a response to O'Faircheallaigh's criticism of the NNTT, see Chris Sumner, 'Getting the Most Out of the Future Act Process' (Paper presented at the AIATSIS Native Title Conference, 7 June 2007) <http://www.nntt.gov.au/News-and-Communications/Speeches-and-

Papers/Pages/Getting_the_most_out_of_the_future_act_process.aspx> at 22 January 2009.

21 NTA, pt 2, div 3, subdiv B.

22 NTA, pt 2, div 3, subdiv C.

23 NTA, pt 2, div 3, subdiv D.

24 For example, body corporate agreements can only be made if there are registered native title bodies corporate in relation to the entirety of the relevant area of land (NTA, s 24BC), and all of these bodies corporate must be party to the agreement (NTA, s 24BD(1)). When the Federal Court or High Court of Australia makes a positive determination of native title, the determined native title holders must establish a body corporate to hold the native title rights and interests, either as a trustee or as an agent for the native title holding group: NTA, s 55–60.

25 For example, alternative procedure agreements must not provide for the extinguishment of native title rights or interests: NTA, s 24DC.

26 O'Faircheallaigh, '"Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom', above n 20, 28.

27 The most commonly cited statistic is the 17 year gap in life expectancy between Indigenous and non-Indigenous Australians: see Brian Pink and Penny Allbon, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Australian Bureau of Statistics and Australian Institute of Health and Welfare (2008) xxii; but see Brian Pink, *Discussion Paper: Assessment of Methods for Developing Life Tables for Aboriginal and Torres Strait Islander Australians*, Australian Bureau of Statistics (2008). See generally Brian Pink and Penny Allbon, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Australian Bureau of Statistics and Australian Institute of Health and Welfare (2008); Australian Institute of Health and Welfare, *Australia's Health 2008* (2008) <http://www.aihw.gov.au/publications/aus/ah08/ah08.pdf> at 12 December 2008; Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Productivity Commission (2007).

28 Alexander Symonds, '"Narrative of Failure" Not Quite Right: Report', *The Australian Financial Review* (Sydney), 18 April 2008, 29.

29 Professor Ian Anderson, a medical researcher, argued that the grounds for the Federal Government's 2007 intervention in the Northern Territory were 'long established in the neo-liberal representation of remote Aboriginal Australia as a social dystopia'. He notes that '[i]n this discourse, which has been promoted by the neo-liberal commentators in the opinion pages of leading newspapers like *The Australian*, as well as in the conservative think tanks, violence, abuse and alcohol have become the over-determined features of Aboriginal social life ... Reading such commentary, one is left with the impression that remote Australia is a drunken, lawless place with no social norms'; see Ian Anderson, 'Health Policy for a Crisis or a Crisis in Policy?', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 133, 134–5.

30 Jon Altman, Nicholas Biddle and Boyd Hunter, *How Realistic are the Prospects for 'Closing the Gaps' in Socioeconomic Outcomes for Indigenous Australians?*, Centre for Aboriginal Economic Policy Research ('CAEPR') Discussion Paper No 287 (2008) <http://www.anu.edu.au/caepr/Publications/DP/2008_DP287.pdf> at 22 January 2009.

31 Symonds, above n 28. See also J C Altman, *Alleviating Poverty in Remote Indigenous Australia: The Role of the Hybrid Economy*, CAEPR Topical Issue No 10 (2007) 2 <http://www.anu.edu.au/caepr/Publications/topical/Altman_Poverty.pdf> at 22 January 2009.

32 Guy Rundle argues that the *Little Children are Sacred* report in particular has 'triggered ... the right to portray Aboriginal society as implicitly pathological': Guy Rundle, 'Military Humanitarianism in Australia's North', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 37, 42.

33 Robert Manne has noted that the Right in Australia 'has begun to argue that the "solution" to the "problem" of the remote Aborigines is the destruction of the communities and a return to the "good old days" of assimilation': Robert Manne, 'Noel Pearson', in Robert Manne, *Left Right Left: Political Essays 1977–2005* (2005) 327.

34 Raymond Gaita, 'The Moral Force of Reconciliation', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 295.

35 Ibid.

36 Inga Clendinnen, 'Plenty Humbug', in Inga Clendinnen, *Agamemnon's Kiss: Selected Essays* (2006) 145.

37 Gillian Cowlishaw, 'Diagnosing Distress in Aboriginal Communities' (2006) 103 *The Australian Anthropological Newsletter* 2, 3. The anthropologist Toni Bauman has written critically of government consultations with Indigenous people, stating that '[t]he modus operandi of "consultation" has mostly been one-way communication in "meetings" in which talking heads drone on, poorly explaining complex information and concluding by asking: "Everyone agree?"'. Toni Bauman, '"You Mob All Agree?": The Chronic Emergency of Culturally Competent Engaged Indigenous Problem Solving' (2007) 6(29) *Indigenous Law Bulletin* 13, 13

38 Federal Government and Minerals Council of Australia,

Memorandum of Understanding Between the Commonwealth of Australia and the Minerals Council of Australia, 2 <http://www.csrm.uq.edu.au/docs/MOU_final.pdf> at 22 January 2009.

39 Tony Tiplady and Mary Anne Barclay, *Indigenous Employment in the Australian Minerals Industry*, Centre for Social Responsibility in Mining (2007) 2 <http://www.csrm.uq.edu.au/docs/CSRM%20Report_FINAL%20TO%20PRINT_singles.pdf> at 22 January 2009. The report was a collaborative research project between the CSRM at the University of Queensland and several mining companies, including Rio Tinto.

40 Ibid.

41 Ibid. 9.

42 The Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) undertook a national survey of Australian traditional owners in 2006, asking questions about land use agreements and economic development. One of the survey participants stated: 'Economic development is an important tool in which to gain self determination and independence, but it should not come at the expense of the collective identity and responsibilities to your traditions, nor the decline in health of your country': see Fabienne Balsamo, 'Is Economic Development Possible on Indigenous Land?' (Speech delivered at the Collaborative Indigenous Policy Development Forum, IQPC 6th Annual Conference, 2 May 2007) <http://www.hreoc.gov.au/about/media/speeches/social_justice/2007/IQPC_2may_2007.html> at 22 January 2009.

43 Jon Altman, 'In the Name of the Market?', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (2007) 307, 316. See also Altman, *Alleviating Poverty in Remote Indigenous Australia*, above n 31; J C Altman, *The Indigenous Hybrid Economy: A Realistic Sustainable Option for Remote Communities?*, CAEPR Topical Issue No 2 (2006) <http://www.anu.edu.au/caepr/Publications/topical/Altman_hybrid.pdf> at 14 December 2008.

44 Altman, 'In the Name of the Market?', above n 43, 308.

45 Ibid.

46 Hal Wootten, 'Self-Determination After ATSIC' (2004) 2 *Academy of the Social Sciences* 16, 18–9 <http://www.assa.edu.au/publications/Dialogue/dial22004.pdf> at 22 January 2009.

47 The Minerals Council of Australia states on its website that the industry is 'uniquely placed to make *the* most significant contribution to the socio-economic development of remote Indigenous communities'. See Minerals Council of Australia, *Indigenous Relations Strategic Framework* (2004) 7 <http://www.minerals.org.au/__data/assets/pdf_file/0015/11823/IndigenousRelationsStratFrame.pdf> at 22 January 2009.

48 Tiplady and Barclay, above n 39, 2.

49 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* 1, 6.

50 See, eg, O'Faircheallaigh, '"Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom', above n 20, 31–2.

51 O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia', above n 49, 5. O'Faircheallaigh also notes (at 8) that the company's financial control 'represents a powerful weapon and one whose application can be observed with increasing regularity'.

52 See, eg, the BHP *2007 Reconciliation Action Plan* (2007) Reconciliation Australia <http://www.reconciliation.org.au/downloads/3/BHP_RAP1007.pdf> at 22 January 2009.

53 The website for Rio Tinto Iron Ore, for instance, notes that 'Rio Tinto establishes agreements with Aboriginal traditional owners and groups affected by its operations to gain access for exploration (land access agreements) and to develop mining operations (mine regional development agreements). Rio Tinto's policy of increasing opportunities for Indigenous Australians is reflected in its agreement making'. See Rio Tinto, *Rio Tinto Aboriginal Relations* <http://www.aboriginalfund.riotinto.com/relations.aspx?ID=8> at 22 January 2009.

54 O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia', above n 49, 3.

55 Diane Smith, *Valuing Native Title: Aboriginal, Statutory and Policy Discourses About Compensation*, Discussion Paper 222 (2001) 47 <http://www.anu.edu/caepr/Publications/DP/2001_DP222.pdf> at 22 January 2009.

56 Graeme Neate, the President of the NNTT, has 'often expressed the view that far too great a weight of expectation has been put on native title to deliver what it was not capable of delivering. Native title was never going to provide extensive outcomes for all Indigenous Australians.' Graeme Neate, 'Native Title: Is it a Means of Overcoming Indigenous Disadvantage?' (Speech delivered at the Rotary District Conference, Phillip Island, Victoria, 24 March 2007) 22 <http://www.nntt.gov.au> at 22 January 2009.

57 Diane Smith has noted that while there is 'considerable public and policy attention paid to the accountability of native title parties for their receipt of compensation ... there seems to be little attention given to monitoring the compliance and accountability of other parties (including governments) with the terms of compensation agreements'. Smith, above n 55, 45.

58 Nicholas Rothwell, 'On the Brink', *The Australian Magazine*, *The Australian* (Sydney), 14–15 March 2008, 24.

59 Jenny Macklin (Speech delivered at the Sustainable Indigenous Communities Forum, Minerals Council of Australia, 27 May 2008) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.

nsf/content/sustainable_indig_comm_27may08.htm> at 22 January 2009.

60 Ibid.

61 Ibid.

62 Ibid.

63 This knowledge is drawn from the author's professional experience working with claimants.

64 For discussion of ways in which compensation or benefits from future act agreements may be managed, see Adam Levin, *Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts: Discussion Paper*, Jackson McDonald Lawyers (2007) <http://ntru.aiatsis.gov.au/major_projects/tax_pdfs/levin_discussion%20paper.pdf> at 22 January 2009; Fiona Martin, *Entities that Manage and Maintain Native Title: Can they be Exempt from Tax as Charitable Trusts?*, University of New South Wales Faculty of Law Research Series No 40 (2007) <http://law.bepress.com/unswwps/flrps/art40> at 22 January 2009.

65 See 'Macklin Defends Welfare Quarantining Amid Business Criticism', *ABC News* (online), 29 February 2008 <http://www.abc.net.au/news/stories/2008/02/29/2176846.htm> at 22 January 2009.

66 With respect to the early 20th century State policies that made the Chief Protector of Aborigines responsible for Aboriginal people, Gillian Cowlishaw has written that it was 'apparent, though unstated, that Aborigines were to be protected, not just from white men, but from themselves'. Gillian Cowlishaw, *Rednecks, Eggheads and Blackfellas: A Study of Racial Power and Intimacy in Australia* (1999) 86.

67 On the program *Australian Story* on 11 November 2002, Noel Pearson stated: 'this welfare situation, where the surplus of the wider society is able to sustain people out on the margins on a perpetual drip feed is a poisonous situation, completely poisonous situation. But it's deceptive, of course. It's sweet, you know. Work-free income is sweet water, you know? But what happens when you're living on the sugar water for two decades? It starts to have an effect on your outlook as a person. It starts to have an effect on your drive. It starts to have an effect on your values and your relationships and your expectations of other people and so on, and of yourself.' ABC Television, 'The Cape Crusade', *Australian Story*, 11 November 2002 <http://www.abc.net.au/austory/transcripts/s723570.htm> at 22 January. See also D F Martin, *Is Welfare Dependency 'Welfare Poison'?: An Assessment of Noel Pearson's Proposals for Aboriginal Welfare Reform*, CAEPR Discussion Paper No 213 (2001) <http://www.anu.edu.au/caepr/Publications/DP/2001_DP213.pdf> at 22 January 2009.

68 See Ciaran O'Faircheallaigh, *Financial Models for Agreements Between Indigenous Peoples and Mining Companies*, Aboriginal Politics and Public Sector Management Research Paper No 12 <http://www.griffith.edu.au/business/griffith-business-school/pdf/research-paper-2003-financial-models.pdf> at 22 January 2009.

69 Stuart Bradfield, 'Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC' (2006) 52(1) *Australian Journal of Politics and History* 80, 80.

70 Forrest was CEO of Anaconda Resources from 1995 to 2001.

71 ABC Television, 'Interview with Andrew Forrest', *Four Corners*, 12 August 2002 <http://www.abc.net.au/4corners/stories/s646583.htm> at 22 January 2002. In full, Forrest stated: 'I grew with and amongst Aboriginal people and for most years of my early life counted them amongst my best friends. It was easy for me when confronted by a range of political and legal issues which were divisive to Aboriginal people, not so much where the media concentrates which is the division between the Aboriginal community and the mining industry but it was terribly divisive amongst the Aboriginal people. I quite literally move my family up into the goldfields and we sat down and we talked and we got to know all the Aboriginal participants on a personal basis and I still count them as friends and then it was from that point quite easy to determine what they wanted and the vast majority did not want to use the native title law as a get rich quick scheme, most Aboriginal people wanted to work with the mining community and if it took the native title law to help companies see the huge sense in that, then that's a good thing but we as Anaconda had already resolved we are going to work with the Aboriginal community, its chief executive spoke some Yamigee language, I had a team of people with me who were very compassionate, who were determined to work with the community and it really was not a difficult exercise to then become friends with the Aboriginal community and hear from them what they wanted and wherever we could deliver it for them'.

72 See Trevor Chappell, 'Andrew Forrest Tops Rich Exec List', *AAP* (online), 26 March 2008 <http://www.news.com.au/business/story/0,27753,23434445-31037,00.html> at 22 January 2009

73 'Mining the Boom', *Money Magazine* (online), July 2006 <http://money.ninemsn.com.au/article.aspx?id=110345> at 22 January 2009.

74 AEC (Press Release, 30 October 2008) <http://www.fiftythousandjobs.com.au/files/Press-Release-Launch.pdf> at 22 January 2009. See also Workplace.gov.au, *The Australian Employment Covenant*, Australian Government <http://www.workplace.gov.au/workplace/Individual/IndigenousAustraliars/TheAustralianEmploymentCovenant.htm> at 22 January 2009.

75 Cowlishaw writes that in her experience Aboriginal people are 'overwhelmed by the fact that they are already known to others, not as they experience themselves, but in the images, sterectypes

and discourses which have made them known in the public domain.' Gillian Cowlishaw, 'Euphemism, Banality, Propaganda: Anthropology, Public Debate and Indigenous Communities' (2003) 1 *Australian Aboriginal Studies* 2, 3. For a critique of this paper, and of Cowlishaw's focus more generally, see Peter Sutton, 'Rage, Reason and the Honourable Cause: A Reply to Cowlishaw' (2005) 2 *Australian Aboriginal Studies* 35. See also Maia Ponsonnet, 'Recognising Victims without Blaming them: A Moral Contest?' (2007) 1 *Australian Aboriginal Studies* 43.

76 Gillian Cowlishaw, 'Erasing Culture and Race: Practising "Self-Determination"' (1998) 68(3) *Oceania* 145, 158. In this paper, Cowlishaw discusses the frustrated attempts of government officials in the 1970s to bring 'self-determination' to the Rembarrnga community at Bulman in Southern Arnhem Land.

77 Bauman notes generally that an inappropriate negotiation process 'can result in increasing tensions and hostilities between and amongst Indigenous families and individuals. It can also mean that the implications of decisions are not understood, that the decisions are not owned and that agreements are consequently not sustainable.' Toni Bauman, *Final Report on the Indigenous Facilitation and Mediation Project July 2003–June 2006: Research Findings, Recommendations and Implementation*, Native Title Research Unit, AIATSIS (2006) 9 <http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf> at 22 January 2009.

78 Balsamo, above n 42.

79 Ibid.

80 Phrases such as these have been heard by the author during future act negotiations.

81 Cowlishaw has noted that an 'ethnographer's own sense of anxiety, fear and sympathy may temporarily block access to local meanings', and the same is true of lawyers. See Cowlishaw, 'Euphemism, Banality, Propaganda', above n 75, 13.

82 O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia', above n 49, 3.

83 Robert Manne wrote of the Federal Government's intervention in the Northern Territory that '[l]ike the majority of Australians, I was relieved that a decision for action had finally been taken' as he was 'absolutely convinced that the crisis in the communities is real'. R Manne, 'Pearson's Gamble, Stanner's Dream: The Past and Future of Remote Australia' (August 2007) 26 *The Monthly* <http://www.themonthly.com.au/tm/node/590> at 22 January 2009.