Mining and Aboriginal Land

Given the power of governments to extinguish indigenous title, it is imperative that the rights of indigenous communities be clearly delineated. The preceding section has shown that mining activity does not extinguish indigenous title, hence the mining industry must co-exist with indigenous title. However, the affect of mining tenements to restrict or suspend indigenous title rights highlights the power to control access to land as an integral part of traditional custodianship. This recognition is also imperative to the effective enjoyment of indigenous title. This section provides a detailed analysis of the aspects of indigenous title which directly affect mining access to land. Specifically, attention is focussed upon the alienability of title, custodianship of minerals and the right of exclusion.

The nature of indigenous title will determine the control which Aboriginal communities have over traditional lands. In Mabo, there is a clear distinction between proof of the existence of a title and its nature or content. Although indigenous title is recognised and protected by the common law, it's form and content are defined by the traditional laws and customs of the people. The content of those laws is a question of fact, specific in each instance. As such, the custodial nature of indigenous title and the specific rights to exclude access and restrict uses of land are protected by the common law.

Uncertainty has arisen in determining the scope of the title, in the context of contemporary land use. Laws and customs which define the content of the title are not crystallised at the time the territory was annexed. The traditions of a people can, and invariably will, change over time. In particular, Aboriginal society continues to be challenged by a colonising culture which at various stages in its development has sought to annihilate, subjugate, segregate, assimilate, integrate and conciliate with the indigenous people.

References:
111 Toohey J., pp. 184, 187; Brennan J., p. 58; Deane and Gaudron JJ., pp. 87, 88.
112 Deane and Gaudron JJ., pp. 87, 110; Toohey J., pp. 187; Brennan J., pp. 58, 60, 70.
113 Brennan J., p. 58; Deane and Gaudron JJ., p. 111; Toohey J., p. 187. Also, the Privy Council decision in Amodu Tijani v. Secretary, Southern Nigeria [1921] A.C. 399, 403.
The dynamic nature of Aboriginal cultures was recognised by the High Court in *Mabo*, specifically stating that such changes are irrelevant to the successful assertion of indigenous title.\textsuperscript{115} The evolution of the laws and customs of the groups will not impede the title unless the culture and laws of the group are abandoned, thus breaking the connection to the land to which the title attaches.\textsuperscript{116} Also, the extent of the title depends on the relationship between the group and the land as defined by the traditional laws and customs.\textsuperscript{117} Therefore, the indigenous title may resemble full ownership,\textsuperscript{118} or may resemble some limited right, for example, of access to perform spiritual ceremonies,\textsuperscript{119} or to forage, or pass over.\textsuperscript{120}

While the decisions of lower Courts in Canada have taken a restrictive approach to the degree to which indigenous laws and customs may change,\textsuperscript{121} it is generally acknowledged that the evolution of customs and laws under indigenous title includes contemporary resource development.\textsuperscript{122} Where the traditional customs extend to the full use of land, consistent with the mode of living, the mere fact that other uses may exist for the land should not limit the scope of the title.\textsuperscript{123} It is clear from the preponderance of authority that hunting, gathering, fishing and other uses of the land for the purpose of subsistence are a part of native title.\textsuperscript{124} However, where rights asserted under indigenous title begin to impinge on the state or other powerful groups, attempts are made to construe the law more restrictively. The significance of an expansive

\textsuperscript{115} Toohey J., pp. 192; Brennan J., pp. 61, 70; Deane and Gaudron JJ., p. 110.
\textsuperscript{116} Brennan J., p. 59, 70; Deane and Gaudron JJ., p. 110.
\textsuperscript{117} Deane and Gaudron JJ., p. 88; Brennan J., p. 60.
\textsuperscript{118} 'Ownership' in the European common law sense. See Deane and Gaudron JJ., p. 88; Brennan J., pp. 60, 70.
\textsuperscript{119} Toohey J., p. 189.
\textsuperscript{120} Deane and Gaudron JJ., p. 88.
\textsuperscript{121} See, for example *Delgamuukw et al v. The Queen* (1991) 3 W.W.R. 97 (British Columbia Supreme Court) and the earlier decision of *Attorney General of Ontario v. Bear Island Foundation* (1985) 49 O.R. (2d) 353, 391; [1985] 1 C.N.L.R. 1, 38 of the Ontario Supreme Court.
\textsuperscript{123} Bartlett, *Source Content and Proof*, *ibid.*, p. 11.
interpretation of these rights is obvious, with the most vocal opponents being the mining and exploration industries, timber and fishing industries.

The specific questions of the custodianship of minerals and the right to exclude others from the exploitation of minerals on traditional land were not considered in Mabo and are yet to be addressed in an Australian context. Yet they are central to the co-existence of indigenous title and mining rights. Some guidance is drawn from comparative cases, which were relied upon by the High Court in Mabo. The following discussion identifies the key issues which may arise in determining the content of native title which would be of particular interest in the context of mining. The issues of alienability, custodianship of minerals and rights of exclusion are central to the exploitation of resource because they go directly to the degree of control that indigenous title-holders have over their land.

Alienability

The rights of indigenous title-holders to alienate title outside the traditional system was expressly denied by the majority in Mabo, except by voluntary surrender to, or purchase by, the Crown. However, the indigenous title-holders' rights to surrender their title to the Crown is a legitimate extinguishment of title. Practical difficulties impede the effective use of surrender in negotiations for resource development on traditional lands. Determining who has the capacity to effect a surrender and who is bound by such an instrument, the laws which are to govern rights under the instrument, and the like, could be an obstacle to such agreements binding future generations.

However, if these difficulties could be overcome, agreement may be reached on a tripartite basis. Though unable to enter into similar agreements with private interests, an agreement or treaty could be reached with the Crown. The developer, or the Crown, would then provide consideration for the surrender of title to certain lands, or for the extinguishment or suspension of a parcel of rights in respect of certain lands, in the form of compensation, land

125 Brennan J., pp. 60 with whom Mason CJ., and McHugh J., agreed; Deane and Gaudron JJ., p. 88.
126 Deane and Gaudron JJ., p. 110; Brennan J., pp. 60, 70; Toohey J. did not discuss surrender. See also Commonwealth of Australia, Mabo: Outline of Proposed Legislation on Native Title, September 1993.
127 Brennan J., p. 60.
tenure, education, employment, training and the like.\textsuperscript{128} The extinguishment of a limited number of rights or their suspension for a limited period of time, for example in the case of development leases, would create a more secure environment for tripartite agreements where the title is not extinguished to the exclusion of future generations.

Negotiations with government and developers must be approached from a position of some bargaining power. That power will come from various sources. As we have seen, the Crown cannot extinguish title without the informed consent of the indigenous people. Whether the Crown is bound by fiduciary duty or simply restricted because of the legal remedies available for wrongful extinguishment, the indigenous title-holders are protected to some degree. The tools of the bargain will emanate from the necessity to afford compensation for any rights given up or suspended. The custodianship of minerals and the rights to exclude, restrict or regulate access, together with the right to refuse to surrender title, allow negotiations to be entered into from a position of independence.

\textit{Custodianship of Minerals}

In order to be successfully enforced, custodianship of minerals must be shown to exist as a customary right pursuant to indigenous title. Further, these rights, if found to exist, must not have been extinguished by valid legislation. Rather, they must have survived, to be asserted in the context of past and future mining activity on Aboriginal land. As such, they will burden the radical title of the Crown and enjoy the protection, against arbitrary divestiture, afforded by the common law.

Academic and professional opinion has tended to divide according to affiliation or not with the mining and exploration industries.\textsuperscript{129} For example, Michael Hunt has repeatedly stated that no right to minerals exists under indigenous title because he is not aware of any Aboriginal community ever

\textsuperscript{128} See P.C.S. van Hattem, \textit{op. cit.}.

\textsuperscript{129} Most notably, P.C.S. van Hattem, Barrister and Solicitor, Freehill Hollingdale and Page, Perth, which counts Dominion Mining; and Michael Hunt, Barrister and Solicitor, Blake Dawson and Waldron, Perth.
having carried on mining'. Moreover, Michael Hunt opines that rights of indigenous people should be frozen at the time of annexation relating to a lifestyle of traditional sustenance.

Similarly, another argument may assert that mineral rights exist under native title only by virtue of, or only to the extent of, the traditional use of rocks and ochres for tools, paints and ceremonial purposes. Such arguments seek to limit indigenous title to a recognition of circumstances which existed over 200 years ago. Such a view conflicts with comments by the majority in *Mabo* that native title is not static but reflects the rights and privileges of a dynamic culture to continue to enjoy their traditional customs, both historical and contemporary.

In asserting this argument, Michael Hunt rejects the hypothesis that a group of Aboriginal inhabitants could assert ownership if told of the presence of minerals or petroleum beneath the surface of their land. However, the association of Aboriginal peoples to the whole land must be respected. In particular, a spiritual connection, in many instances, will expressly include spirits which live beneath the ground. The territory, over which a community is custodian, includes the land and its gifts, both seen and unseen. Therefore, the association between indigenous peoples cannot be equated to non-indigenous notions of property, in this way.

Further, Aboriginal culture has been affected by international, industrial cultures. What Aboriginal people now know about their land, and the ways they choose to use it will be different from those which existed at the time of annexation. Mineral rights are an integral part of indigenous title because they form part of a larger assertion of maintaining control over the land. As a part of indigenous peoples' fight for self determination and autonomy as a distinct culture, the right to ownership of the minerals of their land forms part of the dynamic culture recognised in the High Court judgement.

A second line of inquiry assesses the actions of the Crown that may have unilaterally diminished the control that indigenous people assert over their lands. For example, it is necessary to determine if legislation which reserves

131 *ibid.*. Also van Hattem, *op. cit.*, p. 2; Forbes *op. cit.*, p. 212.
minerals to the Crown extinguishes title rights. Generally, legislation pertaining
to minerals is founded on an assumption of absolute beneficial ownership and
does not extinguish indigenous title completely.\textsuperscript{134} In this respect, the legislation
should not be treated differently to Crown Lands legislation specifically referred to
in the \textit{Mabo} decision.\textsuperscript{135}

Unlike Crown Lands legislation, minerals legislation claims all sub-surface
minerals to be 'the property of the Crown'.\textsuperscript{136} The question becomes whether
this evinces a clear and plain intention on the part of the Crown, thus effectively
extinguishing the rights of indigenous title-holders. However, the legislation is
open to two alternative interpretations. One could argue that the provision
which claims all minerals to be the property of the Crown is an act of sovereign
power. However, the intention must be clear and unambiguous from the words
of the legislation. If this is so, the Crown's radical title would be expanded to
include the beneficial ownership of the minerals found on land subject to native
title, to the exclusion of the rights of the indigenous title-holders.\textsuperscript{137}

The alternative proposition interprets an assertion that minerals are the
property of the Crown to be merely a claim of 'proprietorship', not of
sovereignty. Thus, the provision is limited to lands over which the Crown can
assert beneficial title, or proprietorship. The existence of an alternative
interpretation, immediately casts doubt that an intention is sufficiently clear
given the serious consequences of finding that title rights are extinguished.

In contrast, gold and silver, in English common law are 'royal minerals'
and are reserved to the Crown as sovereign.\textsuperscript{138} It could be argued that this
interpretation should be extended to annexed territories. However, such an
argument would rely on the notion of \textit{terra nullius} to justify divesting the
indigenous peoples the pre-existing custodial rights. The High Court specifically
rejected the application of \textit{terra nullius} to Australia. Thus, the pre-existing
indigenous title burdens the sovereigns radical title.

Further, indigenous title is not granted by the Crown hence, the minerals
cannot be reserved in the same way as is possible with all other interests in

\textsuperscript{134} Bartlett, Aboriginal Land Claims at Common Law, \textit{op. cit.}, p. 279-80; contrast van Hattem, \textit{op.
cit.}, p. 8. See for example, \textit{Mining Act 1978} (WA); \textit{Petroleum Act 1967} (WA).
\textsuperscript{135} Toohey J., p. 196; Brennan J., pp. 65-6
\textsuperscript{136} For example, section 9 \textit{Mining Act 1978} (WA); section 9 \textit{Petroleum Act 1967} (WA).
\textsuperscript{137} van Hattem, \textit{op. cit.}, p. 8; Hunt, Legal Implications, \textit{op. cit.}, p. 26; Forbes, \textit{op. cit.}, p. 211.
\textsuperscript{138} See The Case of Mines (1658) 75 E.R. 472, 510; Woolley v Attorney General of Victoria [1877] 2
A.C. 163; Attorney General of NSW v. Great Cobar Copper Mining Co. [1900] 2 LR(NSW) 351.
land. Legislation reserving minerals to the Crown was based on the assumption that the Crown was the beneficial owner of all the land in the state, and as such, was within its right as proprietor to reserve the right to minerals from any grant or alienation from its *plenum dominium*. However, the same assumption was determined insufficient to encompass lands which are subject to indigenous title. Justice Brennan states:

Such provisions [which ostensibly apply to indigenous title lands but are repugnant to that title] should be construed as being directed to those who were or are in occupation under colour of a Crown grant or without any colour of right; they are not directed to indigenous inhabitants who were or are in occupation of land by right of their unextinguished title.

This argument is supported by North American authority in which a similar provision was found not to have extinguished rights because the intention did not exist on the proper construction of the provision, that is, an intention was not clearly and unambiguously incorporated. Thus, the legislation can be construed to apply to all land, whether alienated from the Crown or not, but to which the Crown's title is not burdened, or qualified by indigenous title.

Indigenous title protects pre-existing rights of custodianship and the customs and traditions associated with the land as they have developed since annexation. Custodianship of minerals is an integral part of many titles, particularly those which approach full ownership, in the sense that non-indigenous people understand it. The right to control minerals is not affected by general legislation which purports to reserve all minerals to the Crown, because indigenous title rights burden and qualify the Crown's radical title.

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139 1882 Land Regulations issued under (Imp) *Australian Waste Lands Act* 1855, sch 2. Other minerals reserved under the *Land Act* 1898 (WA), section 15. The *Mining Act* 1904, section 138 declared that all minerals, except gold and silver, not alienated by the Crown before 1 January 1899, were 'the property of the Crown'. The *Mining Act* 1978 (WA) section 9 and the *Petroleum Act* 1967 (WA) section 9 are of similar effect.


141 *U.S. v Northern Paiute Nation* (1968) 393 F 2d 786; see also Bartlett, Aboriginal Land Claims at Common Law, op. cit., p. 281-2.
Right of Exclusion

The right to determine use and entry upon the land is integral to the control of the land and to community self reliance. Also, the right of exclusion, or the right to deny access to traditional territories is a feature of most traditional tenure systems. The responsibility for or custodianship of a particular area requires careful management of the use of land. Thus, a right to exclude others from the land, or restrict the use of land for any particular purpose exists as a concomitant of native title in two ways — by the nature of the title and by it's content.

While the nature of indigenous title is not precisely defined in the Mabo decision it was generally held to be determined by reference to the traditional laws and customs of the group to whom title attaches. The order of the court described some of the legal characteristics of the title, as a right to occupation, use and enjoyment of land, 'as against all the world'. There have been attempts in other jurisdictions to categorise native title as either a proprietary estate, a personal right, or a communal usufruct, and even as a permissive occupancy.

In contrast, the majority of the High Court took care to avoid categorising the nature of the title. Rather they viewed indigenous title as sui generis, thus, defined by traditional laws and customs, and by the extent of the pre-existing interest. In this context, the title may equate to 'full ownership' or may be limited to a special use. Though the title may be a personal right, and limitations may distinguish it from freehold title, the right of occupation or use under common law native title constitutes valuable property which is

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143 Brennan J., p. 58, 60, 70; Deane and Gaudron JJ., p. 87, 110; Toohey J., 187.
144 Order of the High Court of Australia, p. 217.
145 *St Catherine’s Milling and Lumber Company v. The Queen, ex parte Attorney-General for Ontario* (1888) 14 App. Cas. 46, p. 58.
147 The latter category was clearly rejected by the Court, which afforded more general law protection to the title: Deane and Gaudron JJ., p. 92.
enforceable in law and in equity.\textsuperscript{149} The nature and content of the title must be determined with reference to the circumstances of each individual case. Thus, where traditional custodial rights include the right to exclude or restrict access, that right will be reflected in the nature of the title and will be enforceable.

Alternatively, the privileges of freehold owners, with specific regard to the right to deny access to minerals, may necessarily extend to indigenous title-holders. The \textit{Racial Discrimination Act} 1975 (Cth) requires all legislation be applied equally to all Australian citizens regardless of race or ethnicity.\textsuperscript{150} This provides a basis for an argument that the right of veto under section 29(2) of the \textit{Mining Act} to be extended to indigenous title-holders. The provision provides for a veto over mining on land which is under valuable land use. It could be argued that no distinction should be made between Aboriginal land use and cultivation to determine what is valuable land use for the purposes of the Act. Distinguishing Aboriginal land use from what is considered valuable settler practice would, arguably, be based on race.

The right to exclude others and to determine the use of and access to traditional land is protected by the common law, where that right exists as a constituent of indigenous title. Further, such a right is integral to the nature of indigenous title in that it reflects a traditional custodianship of the land. These rights and traditional uses should be respected in the way that other land uses are revered under the law. This requires that legislative protection of proprietary interest must extend to indigenous title-holders. The common law protection of indigenous title rights must be reflected in other, more general, legislation.

In sum, this section has established a model of indigenous title which forms a regime of controls over the use and access to land. In particular, custodianship of the land includes the responsibility to determine the exploitation of resources. The right to control the exploitation of minerals is not extinguished by regulatory legislation, nor by the common law rules regarding 'royal minerals'. In addition, the nature of the custodial title and the rights pursuant to the title confer a power to exclude, restrict or regulate access. Moreover, the custodianship of minerals and the right to exclude or restrict use of land enables indigenous title-holders to negotiate resource use and exploitation. These rights are enforceable and, hence

\textsuperscript{149} Deane and Gaudron JJ., p. 112-3.
\textsuperscript{150} Sections 9 and 10.
protected by the common law. The power of the Crown to extinguish these rights under certain circumstances makes the title vulnerable. However, the common law provides further safeguards against the arbitrary divestiture of the rights associated with indigenous title.