

Creating Opportunities for Positive Engagement: Aboriginal People, Government and Resource Development in Australia

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Abstract

Much of the literature on community engagement assumes a willingness on the part of government to facilitate greater public participation in policy making and implementation. The literature consequently focuses on the precise nature of public participation, on obstacles to achieving it, and on its implications for traditional notions of representative democracy. However, in fact governments are not always willing to engage or to do so in a way that facilitates public participation and is regarded as positive by the relevant 'community'.

This paper documents and seeks to explain the reluctance of governments in Australia to engage positively in negotiations regarding mineral development on Aboriginal traditional lands. It argues that the absence of engagement by and with government involves significant loss of opportunity for Aboriginal people, government, developers and the wider community. To help explore the issues involved in more depth, it discusses two case studies of major mining projects in Queensland, and on this basis identifies what is required to achieve positive engagement by government.

Introduction

Aboriginal people in Australia have historically been excluded from decisions about mineral development on their traditional lands and from the economic and other benefits of such development, while at the same time incurring substantial economic, social and cultural costs as a result of mining activity (Dixon and Dillon 1990; Howitt 2003; Lane and Chase 1996; O'Faircheallaigh 1991). However in recent years the opportunities for Aboriginal involvement have increased substantially, in particular through the negotiation of agreements that govern the terms under which mining will occur on Aboriginal land. Many such agreements have been reached under provisions of the Commonwealth *Native Title Act 1993*, which followed from the Australian High Court's *Mabo* decision recognising, for the first time, that Indigenous rights in land survived the European settlement of Australia (Stephenson 1995). The *Native Title Act* establishes a 'Right to Negotiate' for registered native title claimants and native title holders, creating an opportunity for them to negotiate with developers in relation to proposed grants of certain interests in land, including mining leases. Other agreements have been reached as a result of mining company policy initiatives rather than a specific legal requirement for negotiations (O'Faircheallaigh and Kelly 2003). Though agreements vary widely in their origin and content, virtually all provide for Aboriginal consent to mining, for Aboriginal people to share to some degree in the economic benefits of

mining, and for protective measures designed to avoid or minimise the negative cultural, environmental or social impacts that can be associated with mineral development.

Government might be expected to play an active and substantial role in negotiation of agreements for mining on Aboriginal land. It disposes of mining rights and regulates mining activity; all Australian governments have committed themselves to promoting the economic and social development of their Aboriginal constituents;¹ and large mining projects have the potential to contribute to that development. However while most agreements are negotiated pursuant to government legislation, agreement making has been predominantly undertaken by Aboriginal people and mining companies. Government involvement has been very limited, and to the extent that it occurs has focused primarily on limiting government exposure to any compensation claims from Aboriginal people arising from the impact of mining interests on native title. With a few notable exceptions, one of which is discussed later in the paper, government has been reluctant to engage in positive ways in the negotiation of mining agreements or to contribute to the emerging relationships between developers and Aboriginal landowners.

The wider literature on community engagement generally assumes a willingness on the part of government (and indeed often a strong determination by government) to foster public participation (see for example Blakely 2002; Goodwin 2005; Klijn and Koppenjan 2002; Ministerial Council on Mineral and Petroleum Resources 2005; Reddell 2002). In summarising an international comparative study of community governance, McLaverty states: "There can be little doubt that 'public participation' has become a trend in many countries and is viewed as something that managers of public organisations should promote, and be seen to be promoting" (2002, p. 195). From this starting point, key issues for analysis are the relationship between direct forms of public participation and traditional concepts of representative democracy (Giddens 1998; Hindess 2002); conceptual frameworks for classifying and understanding different forms of public participation and assessing the extent to which they offer citizens and communities opportunities for 'real' participation (Thomas 1990; Shand and Arnberg 1996); appropriate approaches to participation in specific social or policy contexts (Bishop and Davis 2002; Peiet et al. 2000); and evaluation of government initiatives in relation to consultation and public participation (Ross 2001; Twyford Consulting 2000).

Where governments display a fundamental reluctance to engage, different issues arise. What explains this reluctance? What are its consequences for government, for the groups excluded from participation and for the wider society? If those consequences are negative, what can be done to

¹ For an overview, see <http://www.icc.gov.au/coag_initiative>; on Commonwealth policies and programs see <<http://www.oipc.gov.au/>>; for examples of state policies and programs see <<http://www.datsip.qld.gov.au/>> and <<http://www.dia.wa.gov.au/>>. All sites accessed on 8 March 2005

foster more positive attitudes to community government within government? The paper addresses these questions. The following section documents the reluctance of governments to engage in negotiations regarding mineral development, considers alternative explanations for this reluctance and then examines Aboriginal attitudes to government participation in this area. Two case studies are presented of situations where government has had a significant involvement, and these are used to highlight the potential benefits and costs associated with different forms of government engagement. The concluding section discusses ways of increasing government engagement and ensuring that its outcomes are positive.

Reluctance to engage

Government has contributed positively and substantially to only a handful of the scores of agreements negotiated in Australia during recent decades between resource developers and Aboriginal landowners. By contributing 'positively and substantially' we mean bringing to the negotiating table contributions that increase the prospects of achieving agreements that are acceptable to project proponents and Aboriginal people and that generate economic and social benefits for affected Aboriginal communities. The resources involved could be monetary, but they need not be. For instance a government's willingness to approve the transfer of interests in land to Aboriginal people or to facilitate Aboriginal involvement in environmental monitoring and regulation could facilitate conclusion of an agreement and/or maximise the benefits flowing from it.

Some governments have been hostile to the whole principle of agreement making between resource developers and Aboriginal people. During the 1990s the Liberal/National Party Western Australian government passed legislation (subsequently found unconstitutional by the High Court) that would have negated the effect of the *Native Title Act (NTA)* in Western Australia, and refused as a matter of policy to negotiate with native title claimants in relation to proposals to grant mining leases (Bartlett 1996). Queensland's Labor Government is generally regarded as more favourable to negotiation-based approaches (see for example ATSIJC 2004), yet the first legislative enactment of the newly elected Beattie government in 1998 was to pass a *Confirmation and Validation Act* that extinguished any surviving native title over, and therefore removed the Right to Negotiate in relation to, some 13 per cent of the State. Most other state governments enacted similar legislation.

Governments in Western Australia have in fact been party to a large number of mining agreements, but in doing so their primary goal has been to isolate themselves from the effects of native title and minimise any potential effect of native title agreements on mining activity. Native title parties and developers must execute a 'State Deed' (in addition to any 'Ancillary Agreement' between themselves) before the State will issue a mining lease. The State Deed requires that if the State is found liable to compensate native title holders for impairment of their native title, any payments due to the native title holders from the developer will count towards the State's liability for compensation.

In addition, the terms of the Ancillary Agreement cannot be conditions of the lease, which means that the company can continue to mine legally if it is in breach of its agreement with the native title parties. A similar approach has been adopted in New South Wales.²

Two recent cases illustrate the general reluctance of governments to play a substantive and positive role. The projects involved are not named because of confidentiality requirements; they occurred in two different states. One concerned a large mining operation which generated state government royalties of some \$50 million per annum. The operator wished to negotiate an agreement with the Aboriginal traditional owners of its mine lease area, in part to meet policy commitments by its parent company and in part to provide a secure base for a major investment designed to prolong mine life. Both the operator and Aboriginal traditional owners approached senior ministers in the state government and senior departmental officials to seek government involvement. They argued that this would help achieve the government's policy commitments to promote Aboriginal social and economic development and also provide a firm basis for a major investment that would help maintain jobs and government revenues into the future. The government refused to make a contribution and is not a party to the agreement that eventually emerged. That agreement, it should be noted, fails to meet fundamental aspirations of the Aboriginal parties, which may reduce its capacity to provide positive and stable relations with the operator into the future.

The second case involved the expansion of a highly profitable gold mine. The expansion required the grant of a new mining lease, and this triggered the Right to Negotiate provisions of the *NTA*. The operator undertook negotiations with the native title claimants, who took the view that the benefits being offered by the company were entirely inadequate and well below those achieved under alternative legal regimes for projects with lower expected profits and higher levels of risk. They sought the participation of the state government in creating a package of benefits that would be acceptable to them, but the government was unwilling to contribute in any way other than by offering the claimants access to government services to which they were already entitled.

In the absence of a contribution by government, discussions were deadlocked at the end of the six-month negotiating period specified by the *NTA*, and the company referred the matter to the National Native Title Tribunal under the arbitration provisions of the *NTA*. These provisions are highly disadvantageous to native title parties. In setting conditions to be attached to any mining interests it determines can be granted, the Tribunal cannot have reference to the value of minerals taken from the lease or profits made from extracting those minerals. A negotiated agreement can include revenue- or profit-based payments, so any outcome from an arbitration process will be much less

² The state government requires a company applying for a mining lease and relevant native title parties sign an agreement that removes any ability on the part of the latter to separately pursue compensation claims against the state for impairment of native title, and indemnifies the State against any damages that might arise from grant of mining leases.

beneficial in economic terms than a negotiated outcome. In addition, the Tribunal has imposed onerous evidentiary and other requirements on native title parties, and the hearing processes involved in arbitration (especially cross examination) can be traumatic for Aboriginal participants, especially community elders (Choo 2002; Corbett 2004). The Aboriginal people involved in this particular case concluded they had no choice but to accept the company's offer rather than proceed with arbitration. As indicated above the benefits contained in this offer were limited, and disputes about their distribution quickly broke out in the Aboriginal community concerned.

Why are governments reluctant to engage? One simple explanation is that they are ideologically opposed to the recognition of Indigenous interests in land, and so refuse to engage as part of a general strategy to deny the right of Aboriginal people to be involved in decisions regarding mineral development. This would explain the actions of the Western Australian government in the 1990s, but not the reluctance of state Labor governments that support, in principle, negotiated agreements between Aboriginal people and mining companies (see for example Beattie 2003).

Another explanation is that governments have other funding priorities that prevent them from committing resources to agreements between Aborigines and developers. Aboriginal people have limited voting power, representing a proportion of the electorate that is small and widely scattered across many constituencies, and they play a significant role in determining electoral outcomes only in a handful of state electorates in Australia. Faced with limited resources, governments may choose to direct funds for the benefit of more powerful constituents. In addition, despite compelling empirical evidence regarding the disadvantaged position of Indigenous people in Australian society (ATSISJC 2004, p. 5; Bennett 1999, pp. 8-9), there has long been a powerful current in Australian public opinion that regards Aboriginal people as receiving preferential and unjustified favouritism from government (Bennett 1999, pp. 25-27; Cowlshaw 1988, pp. 208-9). In this situation politicians may fear that they will generate negative responses in the electorate by using public funds to support agreements intended to direct some of the benefits created by mining projects specifically to Aboriginal people. Both politicians and senior officials have, in meetings with Aboriginal people attended by the author, raised this justification for their reluctance to engage.

In addition, government may feel that the mining projects concerned will be established, expanded or maintained in the absence of any commitment of public resources. They may believe that commercial imperatives will be sufficient to generate the required investment and that, if agreements with Aboriginal landowners are necessary, mining companies will themselves provide whatever benefits are needed to secure these. In this situation it may seem preferable to allocate resources to industry sectors or projects where development may not occur in the absence of government funding. Such a perspective may, in combination with a political calculus regarding the relative electoral leverage to be obtained through alternative use of funds, make support for agreement making unattractive.

However the arguments just canvassed rest on a number of important assumptions. First, it is assumed that engagement will involve substantial monetary cost for government. In fact as noted earlier government may be able to contribute in ways that enhance negotiation outcomes for Aboriginal people and involve little or no additional expenditure, and so its engagement need not draw funds away from alternative uses. Second, it assumes that agreements with Aboriginal interests and investments in mining projects will proceed in the absence of government participation. In fact government may bring to the table capacities or resources that are critical to the success of negotiations, and that other parties cannot deliver; and if negotiations fail, projects may not proceed or may be significantly delayed. In such cases commitment of government funds could be entirely warranted even in narrow economic terms, given the additional government revenues and other benefits that will result from the conclusion of agreements and subsequent capital investments. We return to these points in discussing the case studies. Finally, it can be argued that governments have moral and political obligations to support the development aspirations of their Aboriginal constituents and should not be deterred from doing so by the presence of hostile or racist attitudes among their non-Aboriginal voters.

Another factor explaining government's reluctance to engage may involve the public profile (or lack thereof) of many mining projects. For every large project that has a high public profile and offers to generate hundreds of new jobs, such as the Century mine discussed below, there are scores of projects that do not register with the public and generate only modest employment opportunities. It is unlikely that such projects will even register on the 'political radar' of politicians and senior officials, and so it is difficult for the Aboriginal people concerned to gain the attention of decision makers, let alone persuade them to contribute to an agreement.

Other factors relate to the institutional configuration of state government agencies and the policy priorities or orientations of key agencies and bureaucratic actors. A major issue in this regard is that mineral development, agreement making and native title may be the responsibility of agencies that are quite separate from those responsible for Indigenous affairs policy more generally. The former are typically the responsibility of Departments of State or Regional Development or Mines and Natural Resources or of Crown Law Offices (the latter in relation to native title issues). Indigenous affairs policy more generally is typically the responsibility of specialist departments (such as 'Indigenous Affairs' or 'Aboriginal and Torres Strait Islander Policy') or of mainstream Health, Housing or Education Departments. There may be limited coordination between agencies in the first group and the second, with the result that the potential contribution of resource development agreements to the achievement of the broader goals of Indigenous affairs policy may not be realised. This could explain the conclusion of the Commonwealth Aboriginal and Torres Strait Islander Social Justice Commissioner that there is often an absence of any link between the states' native title policies and their more general social policy response to Aboriginal issues, and his view

that in many cases the issue of native title is 'patently absent' from the wider Aboriginal policy agenda (ATSISJC 2004, pp. 109-110).

In addition, individual agencies that advise on policy and practice in relation to native title and agreement making between resource companies and Aboriginal people may have priorities that run counter to positive engagement by state governments. For example Crown Law Offices tend to be legally conservative, directed towards minimising state governments' exposure to liability and concerned with the dangers of creating precedents that might result in additional state government obligations. A key priority for Queensland's Crown Law Office, for instance, is "assisting the State to avoid the risk of liability, by making sure risk is minimised and research is thorough".³ We do not suggest that this is an inappropriate goal for a Crown Law Office, but it is unlikely to foster a view of agreements as opportunities for the pursuit of wider policy goals. Another example involves the WA Government's Office of Native Title, which is responsible for providing advice on native title issues and for implementing native title policy. Its statement of objectives includes "Minimising the State's exposure to compensation liability" and ensuring that "the future act regime is administered efficiently and consistently", but does not even mention Aboriginal people, let alone the pursuit of any broader policy objectives related to them.⁴

Turning to Aboriginal attitudes to government involvement in mining negotiations, it is first necessary to appreciate the broader historical context of relations between state authorities and Aboriginal peoples and how this affects general attitudes towards government. Reflecting the nature of their experiences over many generations, Aboriginal peoples are often highly suspicious of, if not openly hostile towards, state authorities. Governments have alienated their lands, taken away their children, suppressed their culture, denied them access to rights and services available to other citizens, stolen their wages, and denied them the opportunity to share in the economic benefits created by exploitation of their ancestral lands (see for example Chesterman and Galligan 2000, Cowlishaw 1988).

In more recent decades governments have adopted policies designed to achieve a limited accommodation of Aboriginal interests. However the suspicion and hostility of Aboriginal people has been reinforced by the apparent willingness of government to abandon such policies once substantial commercial pressure has been exerted on them to do so. For example in the mid 1980s Australia's federal Labor government abandoned a proposal for limited national land rights legislation in the face of concerted pressure from the mining industry and its allies in state governments (Stokes 1987). In the 1990s the federal Liberal/National Party government

³ Viewed 1 March 2005 <<http://www.justice.qld.gov.au/lawyers/crownlaw.htm>>.

⁴ <<http://www.dpc.wa.gov.au/AnnReport/2004/NativeTitlePolicyDevImplNegotiation.pdf>>.

substantially diluted the procedural rights available to native title holders under the *NTA*, partly in response to pressure from industry (Lavelle 2001).

Against this background it is hardly surprising that Aboriginal people would be reluctant to have government involved in their dealings with mining companies. Noel Pearson, a prominent national Aboriginal leader and then (1997) Executive Director of the Cape York Land Council, explains this reluctance:

“Even before native title became an issue, governments viewed Aboriginal interests in development proposals as a natural and inevitable impediment. Issues of sacred site protection and traditional ownership [of land] were seen as enemies of development ... Fundamentally, Aborigines believe there is an institutional ill will harbored by government against Aboriginal people. The bureaucrats and politicians not only refuse to support measures that might advantage Aboriginal people but they actively oppose them. For those who have no experience of this institutional antipathy to Aboriginal people and their rights and interests, this might sound unduly paranoid and unfair. My own experiences, however, lead me to a conviction that governments are the main cause of controversy about major project proposals ... The bureaucrats and their political bosses have agendas other than the facilitation of a project ... They have ideological hang-ups [and] political considerations [which] ... jeopardize prospects for establishing good relations with Aboriginal communities. ... Governments should be told by developers to stay out of their dealings with Aboriginal communities” (Pearson 1997).

Given that governments are reluctant to engage and Aboriginal leaders are hostile to their participation, is the prospect of productive engagement by the state in mining negotiations a lost cause? As mentioned above, government can in principle bring important capacities and resources to the negotiating table and the absence of government input can result in agreements that fail to meet the aspirations of Aboriginal traditional owners. In addition, as we shall see there have been some examples of positive outcomes resulting from government participation. This suggests that it is worth exploring further the factors that facilitate government engagement and determine whether it generates positive results. We do this by examining two sets of negotiations in which government played major but contrasting roles.

The Century Zinc Mine

The first of these involves the Century zinc mine, and in this case government appeared to define its role in promoting economic development as requiring it to override, rather than engage with, Aboriginal interests. The Century project involved development of a large zinc/lead ore body first identified in 1991 and located on the Lawn Hill pastoral lease, south of the Aboriginal community of Doomadgee and northwest of Mt Isa, in Queensland's Gulf country. It was planned to convey mineral concentrate by pipeline to a port in the southern Gulf of Carpentaria, barge it out to deeper

water and then load it onto large ships. Thus the project potentially affected a wide range of Aboriginal people, including the traditional owners of the mine site and of possible transport corridors and ports, and coastal and island communities that might be affected by any adverse environmental impacts associated with transshipment of concentrates.

Both the mine site and proposed infrastructure corridors were located on pastoral leases held by the developer, Century Zinc Ltd (CZL), which appeared to remove any legal requirement for CZL to negotiate with Aboriginal traditional owners. The company did initiate contact with some Aboriginal groups and communities in 1991, to provide them with information about the proposed project and to seek their cooperation in undertaking the cultural heritage clearances required under Queensland legislation. At this stage CZL was not prepared to consider any proposal for a written agreement with affected Aboriginal people, though it hoped that by providing information and undertaking consultations it could obtain their support for the project (Blowes and Trigger 1999, pp. 89-90).

Differences emerged between the CZL and a regional Aboriginal land organisation, the Carpentaria Land Council (CLC) regarding the scope and purpose of discussions between the company and Aboriginal landowners and communities. The CLC believed that the company needed to engage more widely in order to involve all potentially affected Aboriginal people, many of whom were in its view greatly concerned about Century's potential environmental impacts. The CLC also believed that the purpose of engagement was to determine whether the project should proceed and if so on what terms, not for CZL simply to inform people about its intentions (Cowell 1996). Led by Aboriginal activist Murandoo Yanner, the CLC undertook a concerted campaign to force CZL and the Queensland government to accord Aboriginal issues and concerns a central place, using environmental impact assessment processes, the Mining Warden's Court, federal cultural heritage legislation and the *Native Title Act* (Cowell 1996; Howlett 2005; Lane and Cowell 2001).

The Queensland government was unambiguously in favour of the Century project. It expected Century to become one of the largest zinc producers in the world, to generate some 700 new jobs directly and a substantial amount of additional employment indirectly, and to contribute substantially to Queensland's economic growth, an urgent priority given the depressed economic conditions then being experienced in Australia. In addition, the government saw Century as signalling the start of a major resources boom in what had for many decades been an economically depressed region of the state. A series of resource projects were expected to create up to 7000 jobs and billions of dollars in export revenues. To encourage their development the government created the Carpentaria – Mount Isa Minerals Province (CMIMP), designed to 'fast track' the assessment and approval processes applied to major projects through 'green and black tape'. It regarded recognition of or engagement with Aboriginal interests as part of this 'black tape' and so as a barrier to development (Cowell 1996, pp. 66-72; Lane and Cowell 2001). One specific and important aspect of this 'fast tracking' was that responsibility for the Century project was moved from the Department

of Minerals and Energy to the Office of the Coordinator General (OCG) and was dealt with under the *State Development and Public Works Organisation Act* (the '*State Development Act*'), which OCG administered, rather than in the standard manner through under the *Mineral Resources Act*. The preparation of an Impact Assessment Statement could be required under both *Acts*, but opportunities for public consultation and objection were considerably more restricted under the *State Development Act* than under the *Mineral Resources Act* (Cowell 1996, 85-86).

In 1993 and 1994 CZL applied for mining leases and in 1994 released its Draft Impact Assessment Study (DIAS) for the project, the first step towards completion of the Impact Assessment Statement. The DIAS extended to three volumes, but had just two columns of text addressing project impacts on Aboriginal people and communities (Dames and Moore 1994). The DIAS was strongly criticised by CLC, environmental organisations and state government agencies for its inadequate treatment of both Aboriginal and environmental issues. Under pressure from the CLC and the Department of Environment, CZL compiled a number of supplementary reports dealing with Aboriginal issues, and also agreed that the CLC would commission an additional and more substantial social impact assessment report. CZL was also required to further address a range of environmental issues.

In the meantime CLC had lodged a native title claim on behalf of the Waanyi people in relation to a camping and water reserve located on one of CZL's leases, the site of an initiation ground of considerable historical importance. The National Native Title Tribunal rejected this application, a decision that the CLC appealed to the Federal Court. The Queensland government took the view that because the reserve was located on pastoral lease native title was extinguished, and it could proceed with issuing mining leases without going through the Right to Negotiate procedure of the *Native Title Act*. However CZL was not prepared to commit a large investment until any certainty about title was resolved, and it requested the government to initiate the Right to Negotiate process. The government refused on the basis that native title had been extinguished (Howlett 2005, p. 11).

The CLC also lodged objections to the grant of CZL's leases in the Mining Warden's Court, in part on the basis of Century's potential environmental and social impacts and because the Draft Impact Assessment Statement had yet to be completed. The necessity to lodge objections before the Statement was completed reflected, in turn, the fact that the *State Development Act* had a shorter time frame for lodging objections than did the *Mineral Resources Act*. In response to CLC's concerns that as a result its objections had to be prepared in the absence of relevant information, the Minister for Mines and Energy, Tony McGrady, stated in a letter to CLC in October 1994 that "irrespective of the recommendation of the Mining Warden he would not make a final decision on the lease until the findings of the IAS ... are known and all relevant issues have been addressed" (cited in Cowell 1996, p. 97).

In March 1995 CZL released its *Supplementary Report* responding to issues raised in relation to its DIAS. A number of Queensland government agencies provided critical responses. The Department of Heritage, for instance, argued that key environmental issues remained unresolved with "the potential to cause serious environmental harm to significant natural resources" (cited in Cowell 1996, 94), while the Social Impact Assessment Unit claimed that CZL had not addressed the Impact Assessment Statement guidelines and that its consultation processes had been inadequate. Despite these criticisms and the fact that the social impact studies commissioned by the CLC were not due to be released until August 1995, the OCG wrote to the CLC in March 1995 saying that the Impact Assessment Statement process was now complete and that the opportunity for public comment was concluded. CZL's mining leases were issued in the same month, despite Minister McGrady's commitment to the CLC that this would not occur until "all issues had been addressed".

The government's efforts at 'fast tracking' and CZL's failure to adequately address Aboriginal issues generated cynicism among Aboriginal people in the region and provided ammunition to those opposing the project. For its part CZL believed that the CLC was 'anti-mining' and unwilling to allow the company to engage with the substantial number of Aboriginal people which CZL believed supported its project, while not all Aboriginal people in the region accepted the CLC as representing their interests (Blowes and Trigger 1999, p. 98; Howlett 2005, pp. 10-12). Relations between CZL and CLC and its constituents reached a low ebb. The CLC had lodged an application for protection of the initiation site located on the camping and water reserve under the Commonwealth *Heritage Protection Act 1984*, and in response the Commonwealth government appointed Mr Hal Wootten to mediate between the parties. With Wootten's assistance negotiations resumed between the company and the Aboriginal communities, through an umbrella body called the United Gulf Regional Aboriginal Corporation (UGRAC). In August 1995 CZL tabled a proposed agreement including annual cash payments, an interest in certain pastoral leases and employment and training initiatives which it valued at some \$60 million over 20 years. After a series of meetings with UGRAC during late 1995 the company believed that agreement was close.

In the meantime the CLC's appeal against the NNTT's rejection of the Waanyi native title claim failed in front of the full bench of the Federal Court, but was appealed to the High Court. In February 1996 the High Court ruled in favour of the Waanyi and directed the National Native Title Tribunal to register the native title claim. CZL was now faced with the prospect of entering a Right to Negotiate (RTN) process that might, if it proceeded to arbitration, take at least twelve months. Regarding this as inconsistent with project timeframes and convinced that agreement with UGRAC was close, CZL canvassed with the Queensland and federal governments the possibility of enacting specific legislation that would validate an agreement and so avoid the need to initiate the RTN.

Negotiations continued during the first half of 1996, with the Queensland Premier threatening to legislate to bypass the *NTA* if agreement was not reached. A draft agreement was concluded by

negotiators in mid 1996, and approved by a vote of 12 to 11 at a UGRAC meeting in July 1996. CZL requested the Queensland and federal governments to consider special legislation to ratify the agreement and bypass the *NTA*, but asked that they not make public its request for the legislation until further consultations had occurred with Aboriginal leaders. Shortly afterwards CZL withdrew its request, reportedly on the basis that it would have been divisive and seen as an attack on the Right to Negotiate process. However in its eagerness to demonstrate that it could speed up Century's development, the Queensland government had publicly announced that it intended to enact legislation to secure the project. The response in the Aboriginal communities was extremely hostile, as the government's proposal was seen as a direct attack on the *NTA* and the Right to Negotiate. UGRAC was reconvened and another vote taken on the proposed agreement, resulting in its rejection by 25 to 0 (Howlett 2005, pp. 15-16).

There followed a highly public, contentious and divisive period of negotiations that involved CZL and a wide range of actors from the Gulf communities, the state and federal governments and the Aboriginal and Torres Strait Islander Commission. As time passed and the consequences of further delay for CZL grew more serious, external intervention increased and divisions grew within the Aboriginal community between supporters and opponents of the mine (Blowes and Trigger 1999, Howlett 2005, Trigger 2000).

Towards the end of 1996 the Queensland government expressed a willingness to make certain contributions towards the agreement in an attempt to win the support of native title claimants who were refusing to sign the proposed agreement. However its participation involved little active engagement with the Aboriginal parties. In the words of two people closely involved in the negotiations (Blowes and Trigger 1999, p. 126):

“Queensland's offer was made publicly before it was announced in the negotiations. There was very little consultation or negotiation before the announcement of the offer and few concession or additions were made after it. [Queensland] negotiated from a distance and came to the table often with quite rigid notions that seemed to be formulated in places quite remote and distant from the aspirations and concerns expressed by the [native title] claimants. There was little real engagement with the claimants' perspectives on issues ...”

Much of the government's contribution consisted of expenditure on infrastructure that was required for the Century project itself and on services that are routinely provided by state governments. For example it undertook to upgrade road access to the mine site, to fund two Aboriginal birthing services at Doomadgee and Mornington Island, and committed funds to a training and employment plan designed to support employment outcomes for the Aboriginal communities. However the government did undertake to fund a number of items that are not part of standard service provision, for example an outstation project, a regional Social Impact Assessment (SIA) and government initiatives designed to implement recommendations resulting from this SIA. The Queensland

government rejected outright requests from Aboriginal negotiators that it direct a proportion of the statutory royalties generated by the Century project to native title groups and Aboriginal communities (Blowes and Trigger 1999, p. 127; Howlett 2005, pp. 23-24).

The Century agreement was concluded in February 1997 and had been signed by all of the native title claimants three months later. Events over the six years leading up to its signing illustrate the reluctance of government to engage with Aboriginal interests and its willingness to circumvent those interests in an attempt to facilitate rapid project development. They also illustrate that such attempts at circumvention are futile in the face of organised Aboriginal resistance and that they in fact *add* to project timeframes and costs. In addition, a failure to engage openly and fully tends to leave a legacy of bitterness and distrust, not just between Aboriginal people and government but also within Aboriginal communities, a legacy that continued to affect the Century project as it moved into production (see for example Waanyi National Aboriginal Corporation 2003; Trigger 2000, pp. 199-203).

The Western Cape Communities Co-existence Agreement

During the early 1960s Comalco Ltd developed what became one of the world's largest bauxite mines on a lease that covered a substantial portion of Western Cape York. The land concerned had previously been reserved for the exclusive use of its Aboriginal traditional owners, with its reserve status being revoked by the Queensland government in 1957 in order to grant Comalco its mining lease. By the early 1960s most Aboriginal people in the area were resident at mission settlements at Aurukun, Napranum and Mapoon. Over the period 1957–1963 the Queensland government sought to close the Mapoon mission, according to Mapoon people in order to make way for construction of a second port for Comalco at nearby Port Musgrave (Holden 1996a). In 1963 the Queensland government forcibly moved the remaining Mapoon residents to a location hundreds of kilometres away at the tip of Cape York, called New Mapoon. In 1974 some former residents and their families returned to Mapoon and re-established the community.

The Queensland government's actions severely disrupted the social, cultural and economic lives of Mapoon residents (Holden 1996a, 1996b). Comalco's operations had negative cultural and social effects on Napranum, the community nearest to its mine (Howitt 1996), and less direct but still significant effects on Aurukun, further to the south (O'Faircheallaigh 1996). At the same time Aboriginal people received only a small share of the economic benefits generated by Comalco's operations, primarily through limited employment opportunities available to residents of Napranum and through a community assistance program (the Weipa Aborigines Society) established by Comalco in the 1970s and 1980s (Howitt 1996).

The largest shareholder in Comalco's parent company, CRA Ltd, was the international mining company Rio Tinto. In 1995 Rio Tinto merged with CRA Ltd, and in that year also publicly declared

that it accepted the reality of native title and stated its determination to establish positive relationships with Aboriginal communities adjacent to its major mining operations (Davis 1995)⁵. In late 1995 Comalco approached the Cape York Land Council (CYLC), the regional land organisation for Cape York, and asked it to facilitate discussions with the traditional owners of its mine lease area and the communities of Aurukun, Mapoon, Napranum and New Mapoon, which by now were governed by elected councils. Agreement to commence discussions was reached in November 1995, with Comalco making a substantial commitment towards the cost of undertaking community consultations and subsequent negotiations.

In addition to Rio Tinto's policy commitment, other factors presumably played a part in Comalco's desire to undertake negotiations.⁶ Native title claims had been lodged over parts of its mining leases in the wake of the High Court's *Mabo* decision, and while the terms of that decision and of the *Native Title Act* made it clear that recognition of native title would not interfere with existing mining leases, a negotiated resolution of those claims was desirable. More broadly, Comalco held large bauxite reserves south of the Embley river which it would need to exploit at some stage to maintain its existing operations. This would require substantial investment, as would any decision to further expand the company's bauxite output. Dealing comprehensively with native title issues and establishing a positive and ongoing relationship with traditional owners and local communities would provide a sound basis for the long-term development of Comalco's operations.

Extensive community consultations occurred during 1996, and the community presented Comalco with a comprehensive negotiating position in December 1996. This included a range of economic, social and cultural issues, including recognition of Aboriginal title, monetary payments, employment and training, and cultural heritage and environmental protection. Negotiations commenced in 1997, and continued over a number of years. By 2000 a substantial number of issues had been agreed, but significant obstacles remained. These related in particular to the financial payments proposed by Comalco, which the Aboriginal parties regarded as inadequate; to native title; and to the way in which proposed provisions on land surrenders and transfers could be given effect.

On a number of occasions during the negotiations both Comalco and the CYLC had approached the Queensland government and proposed that it join the negotiations and contribute to an agreement, but without success. However by 2000 broader political agendas came into play. The Queensland Labor government was increasingly concerned about alcohol abuse, violence and other social issues in Cape York Aboriginal communities. It was engaged in discussions on these matters with Cape York leaders, and in particular with Noel Pearson, who as Executive Director of

⁵ Rio's acceptance of native title was not then shared by much of Australia's mining industry.

⁶ I am not privy to Comalco's motives in initiating and pursuing the negotiations. What follows is based on the matters that Comalco sought to have dealt with by the WCACCA, and on observations by a senior Comalco official involved in the negotiations (Crooke et al. 2004)

the Cape York Land Council was leading the team negotiating with Comalco. Pearson suggested to the Premier, Peter Beattie, that Queensland could make a positive and concrete contribution to economic and social development in Western Cape York communities by participating in agreement between Comalco and the Aboriginal communities and in particular by contributing a portion of the statutory royalty paid by Comalco to Queensland on its bauxite production. Beattie agreed. Queensland officials joined the negotiations and Queensland became a party to the Western Cape Communities Co-Existence Agreement (WCCCA), signed in March 2001.

At 2001 production levels, Queensland's contribution was worth about \$1.5 million per annum, and would grow if Comalco's output increased (Cape York Land Council/Comalco 2001). This assisted considerably in bridging the gap between Comalco and the Aboriginal parties on financial issues, and so helped achieve a positive outcome to the negotiations. Queensland's involvement was important in other ways, especially in allowing certain dealings in land to occur that would form a key component of any agreement. It was proposed that most of the Aboriginal traditional owners would be able to exercise their native title rights once Comalco's operations were completed. However the traditional owners of the town established by Comalco, Weipa, had permanently lost the parts of their land that had been used for physical and social infrastructure. It was proposed to transfer some areas of land with potential commercial value to these traditional owners as part of a package that would recognise their specific situation. Queensland's involvement and cooperation was essential to allow this to happen. Similarly, one component of the Aboriginal negotiating position was that Comalco should surrender from its mining lease and transfer to Aboriginal ownership certain areas of land that were of high cultural and ecological significance to the traditional owners but not required for Comalco's operations. Comalco was willing to do this, but in fact could only surrender the land to the Queensland government. The government's involvement was critical to ensure that the land would then be transferred to its Aboriginal owners. Queensland also undertook to facilitate the participation of traditional owners in determining the criteria for rehabilitating areas where mining had been completed.

In sum, the Queensland government's contribution was critical and indeed indispensable to the negotiation of a successful agreement between Comalco and the Aboriginal communities and traditional owners. Its financial contribution was vital, but so also was its role in allowing Comalco and the traditional owners to achieve desired outcomes in relation to land, outcomes that also represented a key component of the agreement.

During the process of reaching an agreement the Aboriginal traditional owners and communities reached important decisions about the way in which they would use revenues flowing to them under the WCCCA. Over half of all revenues will be invested in a long-term capital fund, and the resultant income reinvested in the fund, for a period of 20 years. At the end of the 20 years the capital in the fund will be preserved but the income will become available to be spent by traditional owner groups

and communities. This will generate for the Aboriginal people affected by Comalco's operations a long-term source of revenue that is both sustainable and, particularly given the expansion of Comalco's operations (see below), very substantial. Most of the remaining annual revenue stream generated by the WCCCA is utilised for economic, social and cultural initiatives developed by the traditional owner groups and communities.

It is important to note that Comalco has substantially expanded its bauxite output since the agreement was signed, from about 11.5 million tonnes in 2001 to an expected 15 million tonnes in 2005. This will increase the Queensland government's royalty revenues by an amount considerably larger than the royalty revenue it has forgone by contributing to the Agreement. In making this point it is not suggested that the WCCCA is the *cause* of Comalco's expansion. As with any major investment a range of factors will have been involved, including Comalco's decision to construct a new bauxite-processing alumina refinery at Gladstone, assessments of trends in global markets for alumina and aluminium, and Rio Tinto's wider corporate strategies. However the WCCCA did provide a crucial underpinning for long-term investment in Comalco's Weipa operations, and in this regard the Queensland government's financial contribution can be justified even in narrow economic terms. This is quite apart from its role in facilitating an agreement that will generate significant long-term economic and social benefit for Aboriginal traditional owners and communities, in line with the Queensland government's Indigenous policy goals.

Conclusion: Fostering positive engagement

The case studies provide ample evidence of the reluctance of government to engage in a positive way with Aboriginal communities, a reluctance by no means confined to Australia (see for example Caruso et al. 2003; Kunanayagam and Young 1998). The Century case illustrates that when government does engage the outcome may be negative for both Aboriginal parties and for developers in the short term, and reinforce Aboriginal distrust of government in the longer term. Against this background the reluctance of Aboriginal leaders to have government involved in their dealings with resource developers is understandable. As mentioned earlier the wider literature on community engagement pays insufficient attention to government failure to engage, to the ill effects of government engagement that is designed to marginalise rather than incorporate certain groups, or to strategies for dealing with such behaviours.

On the other hand the WCCCA highlights the benefits that arise when government does engage with Aboriginal people in a positive way. The contribution Queensland brought to the negotiating table helped Aboriginal traditional owners to achieve key goals in relation to land ownership, environmental management and development of a capital base, and by doing so helped implement government Indigenous policy goals. By allowing Comalco and the Aboriginal parties to reach agreement, Queensland's contribution also provided a key precondition for a major new investment, adding to government revenues and to economic activity generally and so providing wider benefits

for Queensland and Australia. This raises a critical point. Both case studies illustrate that government's reluctance or inability to engage in a positive way can create significant costs for government itself and for the wider non-Indigenous community, by delaying projects and potentially by denying companies the certainty they require before undertaking major investments.

How can positive engagement be fostered? Perhaps the most important requirement is a fundamental change in attitude within government, in two ways in particular. The first involves an acceptance that in contemporary Australia it is simply not possible to circumvent Aboriginal people and organisations. As the Century case illustrates so well, multiple avenues are now open to Aboriginal people to resist governments that try to marginalise them, including impact assessment and project approval procedures, cultural heritage protection legislation and exercise of procedural rights under the *NTA*. In this situation attempts at 'fast tracking' are likely to result in projects actually being on a 'slow track'. Given that government will have to engage with Aboriginal people at some stage, it is much preferable to do so early and willingly rather than later and reluctantly. In addition to saving time and resources, such an approach can help to counter Aboriginal cynicism and hostility towards government. This will both reduce Aboriginal reluctance to engage, and increase the prospects that engagement will be positive when it does occur.

The second and related change involves an acceptance that Aboriginal people are not an impediment to orderly resource development. While in some circumstances Aboriginal people may oppose a major resource project in principle, in most cases they are supportive of development as long as it happens in a way that acknowledges their rights as traditional landowners and allows them to share in the benefits of development. This is evident from the ability of Aboriginal groups to work with developers to facilitate timely project development (see for example Pearson 1997; O'Faircheallaigh 2000). If Aboriginal people can work in this way with developers, they can also do so with government as long as government seeks positive engagement, rather than trying to marginalise Aboriginal interests. Government should not therefore view engagement with Aboriginal communities as a burden of 'black tape', or as a necessary evil that cannot be avoided and so must be endured. Rather it should be seen as an opportunity to draw on the knowledge and experience of Aboriginal people in considering and dealing with possible adverse consequences of major projects, and in identifying the opportunities these projects generate for achieving wider government (as well as Aboriginal) goals.

But what if governments remain reluctant to engage or, perhaps a more common issue for the future, to bring a substantial contribution to the negotiating table? Aboriginal resistance will usually bring government to the table eventually, but the cost of this resistance can be high, in part as a result of the divisions it can create within Aboriginal communities as government places pressure on specific individuals or groups to cooperate. On a more positive note, the WCCCA case study indicates that the linking of a particular negotiation or project to a government's wider policy agenda

can be highly effective. Even governments that have generally been reluctant to negotiate with Aboriginal people have engaged with them in response to broader policy imperatives. The WA government, for example, negotiated agreements with native title claimants when it wished to grant interests in land as part of a package that would attract potential developers for the large-scale gas-related industrial development planned for the Burrup Peninsula (Flanagan 2003).

Any strategy to achieve positive engagement by a government must involve an analysis of its policy priorities and political sensitivities, and of ways in which the contributions sought from government can be linked to those priorities and sensitivities. Also important are strategies to gain greater public attention for the positive outcomes that accrue to the wider community when government does engage with Aboriginal people. The media features a regular stream of stories regarding the supposed opposition of Aboriginal people to development and the supposed adverse consequences for the broader community arising from recognition of Indigenous rights in land.⁷ Analysis of the wider economic benefits generated by agreements such as the WCCCA are almost entirely absent, in part because of the fact that those benefits often materialise long after the media attention generated by the signing of an agreement itself. It is clearly important for Aboriginal interests and sympathetic governments to undertake and publicise this sort of analysis.

The WCCCA case study indicates that the timing of engagement with government is also significant. Comalco and the Aboriginal communities had negotiated for some time and achieved a clear understanding of what they could achieve alone and of what specific contributions should be sought from government and were within the power of government to provide. This allowed them to be targeted in their approach to government, increasing the chances of success and also reducing the likelihood that government might use the opportunity to pursue other agendas.

Given the legacy of history and events surrounding recent high-profile projects such as Century, the difficulties involved in fostering a positive engagement between government, Aboriginal people and resource developers should certainly not be underestimated. However the effort involved in seeking such engagement is justified given the potentially large benefits it can bring to all concerned.

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⁷ See for example '\$1.7bn CRA projects face axe over Mabo', *Australian*, 21 February 1993; 'Death Knell for Gladstone: Projects may be axed, says Mayor', *The Courier-Mail*, 22 July 1993.

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