

Economic Options in Mining Development Negotiations

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Introduction

I have been asked to address the subject of Economic Options in Mining Development Negotiations and in doing so I run the risk of presenting myself as a technical expert with a broad industry view. This is not the case; I am not an expert and I represent a very specific company view, that of Rio Tinto. What I am is an exploration geologist with 20 years experience across outback Australia, and I have an abiding interest in how people might resolve conflicting aspirations.

I share a platform today with Brett Medina, Principal Legal Officer with the Northern Land Council, and some inference may be drawn that we represent dichotomous views on the detail and implementation of Native Title rights. We do not. Rio Tinto and the Northern Land Council have a broadly convergent view on Native Title and we have broken new ground together in reaching agreement on exploration access to land, with and without the motivation of The NT Aboriginal Land Rights Act and the Commonwealth Native Title Act. I shall refer to this in more detail later on.

If I were a technical expert, I might tackle the subject by presenting a rather dry matrix of the economic options resolved, or possible, in past and future land access agreements. For a number of reasons that I shall outline soon, I will not attempt this; rather, I will step back from the detail and present an overview of the objectives of negotiation. I am also conscious that this forum is a “Representative Bodies Legal Conference” and people may be expecting tight contribution to the legal debate. I cannot contribute to this exacting discussion and, at the risk of slight offence to some people present, I must say I have found, on many occasions, the legal debate not particularly helpful.

Broad Principles

To begin, I would like to step right back from the detail of established agreements and discuss some of the broad principles that lie behind the need for negotiation. I will restrict the analysis to economic argument, because that is the constraint of my brief, but I could equally present compelling social and traditional arguments.

Wealth and returns from any development project anywhere in the world will generally be contested by different stakeholder groups. This is certainly true in the mining industry. Its primary assets are orebodies and most orebodies of any real value have, at some stage, been targets for appropriation by different parties. For instance, around the world this has frequently taken the form of nationalisation by sovereign governments, or a challenge to mineral title by industry opportunists. In jurisdictions where corporate mining is governed by a sovereign guarantee, the guarantee itself becomes a strategic asset and the sharing of returns to primary stakeholders, other than the operator, is by way of prescribed licencing, royalties and taxation. In this context, mine operators need skills in handling public policy and legal argument.

In any context a mining company, in order to manage the risk and maintain access to its strategic assets, must make some decisions about expenditure beyond the technical scope of the project. This may be restricted to well-defined taxation and royalty payments to sovereign government, but it may also involve payments to other stakeholders to gain their endorsement. Under such circumstance, it is only appropriate that benefits transferred through intermediaries, such as government taxes and royalties, reduce in favour of direct benefits.

Also, there is a point where other distinctive capabilities of the operator come to the fore; its technical competencies. Without them the ore would remain in the ground, or be mined less profitably, and benefits would not be maximised. Furthermore, it behoves the operating party to put together a set of relational contracts that maximises the added economic value of the venture to the greater benefit of all parties. It is established commercial practice, and law, that shareholders are the residual claimants of corporate cashflow. It goes without saying that the residual needs to be large enough to encourage the operator to carry the risk and go to the trouble of development.

The value that non-operating stakeholders bring to the agreement is much more difficult to gauge. Our whole economic tradition is based on reducing value to a monetary factor, and in this sense, negotiations with stakeholders often reduce to getting them to tender their value as a tradeable quotient. Government instrumentalities, trading partners and service providers can all do this because they have long been part of the economic paradigm. It is much more difficult to gauge the value traditional owners bring to an agreement, not the least reason being that much of the value they hold dear is not part of the economic paradigm. Nevertheless, that is ultimately what we are asking them to do; to reduce the value of their relationship with country to a monetary factor, or to otherwise provide value in terms the operator will understand. Many people find this offensive.

The Value of Relationship

What tradeable economic value can be placed on a relationship with country? What value can be placed any relationship? The answer is, of course, entirely context specific. It might be priceless, or it might be worthless. At the very least a new relationship must emerge that has equal value to the old, and that is about as much guidance as I can give. Not much help you may well say. But hear what I am saying; the parties must work at developing and valuing a relationship over and above developing a commercial agreement.

Economic Options

Having said that, I will now address the content of negotiated mining agreements. However, as I have already said, I will not present a matrix of economic options. The reason is that the options are context-specific and potentially limitless; hence, they cannot be captured in such a simple way. Summaries of past deals are available and, whilst providing guidance, this kind of analysis also serves to constrain. For those of you who seek this kind of synopsis, I refer you to an excellent recent publication by Paul Kauffman, *Wik, Mining and Aborigines*, and to a stream of similarly excellent publications over the years by the Centre for Aboriginal Economic Policy Research (CAEPR) at ANU. A listing of these publications is provided as Appendix I.

I believe it is entirely appropriate that the options for negotiation are unlimited. I know that a large section of the mining industry, and many Aboriginal interests, seek simplicity in a limited menu of options in the negotiation process. The reasons for this are understandable; it is efficient, it helps take the heat out of the argument, it gives comfort that you are not going to be somehow ‘cheated’, and so on.

But this approach actually misses the point. Native Title and Aboriginal interest in land is not, primarily, about an economic imperative and not about productivity. As I have said, it seems to me that it is primarily about an Aboriginal relationship with country. Mining developers are seeking a relationship with country that is quite distinct to Aboriginal interest and, in order to earn that right, I believe they necessarily have to develop a relationship with the Aboriginal custodians. It is so important it is worth saying again. You cannot develop a relationship by running quickly down a list of menu items. There has to be a journey where people genuinely seek to learn something of each other’s view of the world. There has to be some pain, and hopefully, greater joy. In other words, the journey is all important and each agreement needs to be unique in its content and in the way it is reached.

In terms of economic options, there can certainly be common elements, and my experience has been that these may include:

- Sponsorship of pre-agreement costs such as baseline studies, advocacy, administration and logistics. These up-front costs help balance expectations and develop a sense of capacity equality for all parties in the negotiation.
- Cash upfront that largely compensates older folk who would not otherwise enjoy any benefit from an agreement.

- Some form of variable, but regularly delivered, life-of-mine payments that provide an on-going compensation stream linked to the fortunes of the mine.
- Land rent payments that provide a consistent regular compensation stream even during commodity downturn; I like to think of it as the fixed-cost element of the benefit stream.
- Education, training and employment programs that provide for equality of opportunity for Aboriginal people in the mine development.
- Business development programs that provide for economic options independent of mine employment, possibly linked to mine contracts, but ultimately seeking economic independence from the mine with its constraining commodity cycle and eventual closure.
- Commitments for managed mine closure, including environmental rehabilitation and post-mine monitoring.

Whilst containing any or all of these elements, the detail of commercial agreement may differ markedly, reflecting the particular Aboriginal community's aspirations and circumstance, and just as importantly, the capacity of the project and the operator to deliver.

On the subject of capacity, let me say it is vitally important that all parties in a negotiation really understand and manage expectation. All too often, promises are made in agreements, but it is clear that little thought has been given to the actual substance of delivery. Without equality of commercial capability and realistic expectations on both sides, great frustration, delay and even abandonment can be experienced. Representative Bodies and companies alike need to be able to deal in a commercially structured environment. This is why a preparedness by the operator to fund baseline studies and provide for equality of advocacy is so important. In this way, generally overlooked factors such as an operator's track record, a project's sustainability and each party's preparedness to undertake capacity building can be factored into decisions.

Other factors are also frequently overlooked. For instance, is the agreement strictly confined to commercial benefits that will flow from the mine development itself? If it is, and too much emphasis is placed on cash benefit during exploration or early development, this can significantly stifle the project by competing for scarce capital or adding extra hurdles. My belief is that an agreement should look further afield and provide for economic development independent of commodity cycle and beyond the life of the mine. Again, this requires commitment to capacity building rather than gratification.

How much detail and how explicit should an agreement be? Again, it is highly context-specific. For instance, in an exploration access negotiation, there is nothing more difficult than trying to pull together a detailed agreement covering beneficial transfer for an orebody that is yet to be discovered. The hypothetical orebody has no known location, size, geometry, grade, metallurgical character and, in all likelihood, no known commodity mix. The economic potential of such a hypothetical orebody is hence unknown and its capacity to deliver wealth and returns is indeterminate. I have been through the exercise of trying to model beneficial transfer based on open-ended, multi-dimensional resource models. It all becomes terribly challenging and interesting but, with the exception of a resource target that is tightly defined (such as a gold

resource in a geological terrane where resource style precedent is well established), at the end of the day it is a fruitless exercise. Attempting detailed economic definition in an exploration access agreement is counter-productive and the negotiating parties need to resolve to reach an agreement based on broad principles.

Negotiation over a known resource, on the other hand, can be a different matter. Many technical and financial parameters can be defined and used in economic modelling. On this basis, the detail of beneficial transfer can become tighter and clearer as the value of each party's contribution to the venture emerges. Nevertheless, there is always some unknown quantity down the track for which flexibility must be preserved.

Rio Tinto Examples

I suspect that people unfamiliar with the mining industry assume that mining projects are always large in their scope and generate big profits, and therefore large benefits for anyone remotely affected. Tax, nature, economic cycles and other factors seem to always aggregate to a great leveller and mining operations rarely provide a bonanza, instant or otherwise. In fact, a wide range of eventualities can occur, including project termination, postponement, sale and development. Circumstance is all-important in determining the detail and ambit of negotiated agreement and I utterly reject the concept of commercial precedent, at least in the detail that is so appropriately fundamental to legal argument.

To illustrate this, I will describe some recently negotiated Rio Tinto agreements. A summary of non-confidential aspects of these agreements is provided in Appendix II.

Walgundu

In the Northern Territory in 1996, I had the pleasure of leading Rio Tinto into a breakthrough exploration access agreement over the St Vidgeons pastoral lease south of the Roper River. The local Aboriginal name for the area is Walgundu and it traditionally belongs to the Mara, Ngalakan, Wandaring and Alawa Peoples. At the time, Rio Tinto had an exploration licence application in place and, although there was no statutory requirement to reach access agreement, the company sought to do so. We wanted to develop our relationship with the local Aboriginal community and gain access to application areas north of Walgundu, within Arnhem Land. During the period of negotiation the government advised that it intended to grant the licence, resulting in a threat of legal action (against the government by the Northern Land Council) to prevent issue of the licence. A sign of developing good relations was that the NLC, acting on behalf of traditional custodians, accepted our assurance that we would enter into agreement despite abandonment of its last avenue of injunction. The subsequent accord became known as the Walgundu Exploration Agreement and it was somewhat prescient in being settled before Wik.

Rio Tinto subsequently has explored the area for two years without success and has now surrendered the tenement. Such is the way of the world in mineral exploration. For the sake of all stakeholders perhaps the company may have persisted longer, but in this case I doubt that it would have generated additional value and, in any event, far

greater benefits have been delivered as the exploration programme progressed northward into Arnhem Land where it continues today.

Century

Century is a deposit of 118 million tonnes of contained lead, zinc and silver and is one of the largest zinc deposits in the world. It is situated on Waanyi land five hours drive NW of Mt Isa and 90 kilometres south of the nearest community of Doomadgee in Queensland's Gulf region. Doomadgee is on Deed Of Grant In Trust (DOGIT) land; that is land held in trust pursuant to Queensland law for the benefit of Aboriginal people. Shortly after discovery in 1990, CRA (now Rio Tinto) started discussions with Doomadgee Community Council and other stakeholders in the Gulf.

Development options considered during the six years of economic definition drilling and feasibility study included various pipeline routes and port locations. The history of Century predates the decision of Mabo and the Native Title Act, and in a way CRA was ahead of its time. The aim was to achieve what is now being described as a 'regional agreement'. Both the land council and the company were inexperienced in putting together such an ambitious regional framework and undoubtedly mistakes were made. Technical problems caused significant delay; timing was a problem in itself as the project got caught up in the emergence of native title, first as a common law concept and then as a statutory hybrid. Ultimately, after much pain and difficulty, Rio Tinto negotiated a comprehensive development agreement within the formal processes of the Native Title Act. Nevertheless, the company retains a preference for negotiated agreements that do not require forced formal determination processes.

The ultimate irony is that the Century project was subsequently sold for reasons of balancing the company's strategic portfolio, and the deposit was developed and brought into production last year by another company. An undoubted component of its sale value was its secure, negotiated pathway to development.

Yandicoogina

Yandicoogina is a large iron ore deposit in the Hamersley Ranges of the Pilbara region of WA. The region has a 40-year history of iron ore development and production and Rio Tinto's Hamersley Iron business has been there since the beginning. In 1995, Yandicoogina, located in an area traditionally owned by three Aboriginal groups (the Bunjima, Innawonga and Niapaili Peoples) was the next project in Hamersley's development plan.

A previous development, Marandoo, had gone ahead in the early 1990's only after legislative intervention by State Government with considerable cost to local relationships. Hamersley had learnt from this experience and was committed to gaining consultative approval for the development of Yandicoogina.

The WA Government consistently invokes the future act processes of the Native Title Act whenever a mining lease is requested over vacant Crown land or pastoral lease. Prior to asking the Government to give notice under the Act of its intention to issue leases at Yandicoogina, the Hamersley Aboriginal Relations team spent considerable time with the three language groups working out a mutually acceptable process for

negotiating an agreement. The result was the Gumula Aboriginal Corporation which represented all three language groups in negotiation with the company. Gumula and Hamersley entered into an “Memorandum of Understanding” outlining the process to be followed under the Native Title Act once the WA Government triggered the future act process. The agreement did not prevent Gumula from making a native title claim and, in fact, that was done with the encouragement of the company.

No other native title party “objected” in the two-month statutory notice period, meaning that Gumula and Hamersley were free to conclude the agreement provided for in the Memorandum of Understanding. The agreement was then annexed to a further tripartite agreement that included the WA Government, this being required by the Native Title Act to permit the grant of mining and other titles.

Yandicoogina did not receive the publicity of Century, but it was equally as comprehensive in its provision for Aboriginal people. It is an important example of how goodwill and commonsense can lead to an enduring relationship that provides for flexible outcomes. The mine is currently scaling up to full production and Aboriginal people are beneficiaries, perhaps most importantly in terms of capacity development and guaranteed future economic involvement in the region.

Hail Creek

Hail Creek is a coking coal deposit north of Nebo in Central Queensland. Prior to a development proposal by a Rio Tinto business unit, Pacific Coal, in 1997, no thought had been given by mining interests to an Aboriginal presence in the area. As it turned out, preliminary baseline research revealed that the Wirri Yuwi Burra People are the traditional owners in this part of Australia. Pacific Coal commissioned the Wirri Yuwiburra Touri Aboriginal Corporation to conduct a major survey of the lease area and, contrary to earlier beliefs, it contains significant evidence of sustained Aboriginal presence.

Negotiation was entered into and, in 1998, formal agreement on disturbance compensation was reached. In this particular case, one of the great benefits of the agreement was simply the hitherto unrecognised and unacknowledged Wirri Yuwi Burra connection to country.

Unfortunately, the subsequent economic downturn in Australia’s coal business has lead to a postponement of Hail Creek’s development, and Pacific Coal and the Wirri Yuwi Burra people are equally hopeful of resumption in the near future.

Conclusion

The Mabo and Wik decisions of the High Court and the Native Title Act are very recent events in Australia’s history. We are still at a stage where the new paradigm is less than mature. The Waanyi and Wik cases, for instance, were extremely expensive and from Rio Tinto’s viewpoint demonstrated the shortcomings of litigation.

The mining industry has to find new ways to resolve conflicting aspirations by seeking directly negotiated arrangements with Aboriginal people to gain land and

development access. The range of options for this, and the transfer of benefits, is potentially limitless and this is entirely appropriate given the span of context and the unique relationship that must be developed for each proposal.

Rio Tinto remains committed to dealing with Aboriginal people directly and through representative bodies. Formal agreements will result from this dealing. We recognise that negotiations may take time and that mistakes will be made, but it is the relationships that develop out of and during the nurturing of those agreements that really count.

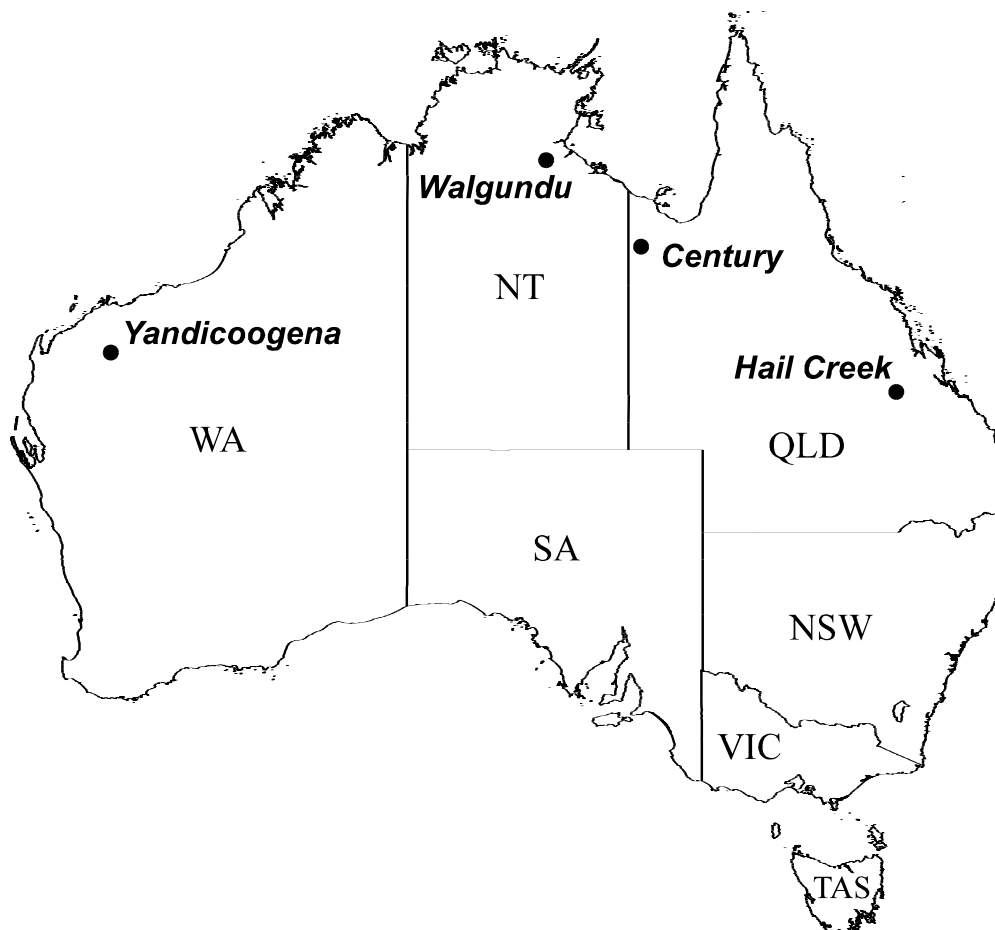


Figure 1 : Location Plan

Appendix I – Publication List

Wik, Mining and Aborigines. Paul Kauffman (1998), Allen & Unwin, St Leonards, NSW.

The economic impact of mining money: the Nabarlek case, Western Arnhem Land, J.C. Altman and D.E. Smith (June 1994).

Implementing native title: economic lessons from the Northern Territory, J.C. Altman (June 1994).

Assessing the relative allocative efficiency of the Native Title Act 1993 and the Aboriginal Land Rights (Northern Territory) Act 1976, S.L. McKenna (April 1995).

Mineral development agreements negotiated by Aboriginal communities in the 1990's, C. O'Faircheallaigh (July 1995).

Negotiations between mining companies and Aboriginal communities: process and structure, C. O'Faircheallaigh (July 1995).

Reforming financial aspects of the Native Title Act 1993: an economics perspective, J.C. Altman (May 1996).

Native title and the petroleum industry: recent developments, options, risks and strategic choices, J.C. Altman (December 1996).

Aboriginal economic development and land rights in the Northern Territory: past performance, current issues and strategic options, J.C. Altman (December 1996).

Indigenous land use agreements: the opportunities, challenges and policy implications of provisions under the Native Title Amendment Bill 1997, D.E. Smith (August 1998).

Financial aspects of Aboriginal land rights in the Northern Territory, J.C. Altman and D.P. Pollack (October 1998).

The Ngurratjuta Aboriginal Corporation: a model for understanding Northern Territory royalty associations, J.C. Altman and D.E. Smith (August 1999).

The allocation and management of royalties under the Aboriginal Land Rights (Northern Territory Act): options for reform, J.C. Altman and R.I. Levitus (November 1999).

Appendix II – Rio Tinto Agreements

Walgundu

Parties	Mara, Ngalakan, Wandaring and Alawa Peoples; Northern Land Council; Rio Tinto Exploration
Date	1995
Duration	25 years
Project Type	Mineral Exploration
Land Status	Native Title Claim and Pastoral Lease
Negotiated Benefits	Community compensation as a % of exploration expenditure; training and employment for two people
Provisions	Liaison Committee; environmental and Aboriginal site protection; reimbursement of Rep. Body expenses
Special Factors	Rio Tinto agreed not to take action detrimental to Native Title claim. Claimants agreed not to challenge the validity of any future grant of Exploration Licences. Claimants agreed to compensate Rio Tinto for any future loss, damage, expense or cost arising out of any action by claimants inconsistent with the Agreement.

Century

Parties	Waanyi, Minggindi, Gkuthaarn and Kukatji Peoples; The State of Queensland; Century Zinc Limited
Date	1997
Duration	Life of mine; ~20 years
Project Type	Large lead/zinc mine and pipeline to the Gulf of Carpentaria
Land Status	Native Title Claim and Pastoral Lease
Negotiated Benefits	Community compensation as a range of benefits worth some \$60m over 20 years, including; training and employment; payments to business, education, community infrastructure and training trusts. \$30m infrastructure from the State of Queensland.
Provisions	Liaison Committee; environmental and Aboriginal site protection; reimbursement of negotiation and baseline survey costs; provision to hand over some pastoral leases and increase equity in others over time; significant education funding.
Special Factors	Queensland State funding and support for a wide range of regional strategic research, planning, infrastructure development and land acquisition.

Yandicoogina

Parties	Bunjima, Innawonga, and Niapaili Peoples; Gumula Aboriginal Corporation; Hamersley Iron
Date	1997
Duration	Life of mine ~ 30 years
Project Type	Large iron ore mine
Land Status	Pastoral Lease
Negotiated Benefits	Community compensation as a range of benefits worth some \$60m over 20 years, including; training and employment, payments to business, education, community infrastructure and training trusts.
Provisions	Liaison Committee; environmental and Aboriginal site protection; reimbursement of mediation expenses, Pastoral Lease access and provision for pastoral training and management; in-kind community assistance with earthworks, financial advice etc.; business contracts.
Special Factors	Hamersley will receive all necessary security for development and mining. Hamersley agreed to minimise operating effects on Native title rights and interests.

Hail Creek

Parties	Wirri Yuwi Burra Traditional Owners Group, Pacific Coal
Date	1998
Duration	Life of mine; ~20+ years
Project Type	Open cut coal mine
Land Status	Granted Mining Lease and Special Lease
Negotiated Benefits	Trust payments for business development assistance.
Provisions	Liaison Committee; environmental and Aboriginal site protection; establishment of a corporation for the purpose of carrying out business development; guaranteed minimum % of contracts for land clearing, fencing and rehabilitation; provision of business development officer and assistance in establishing commercial structures to attract Commonwealth and Queensland business development funding.
Special Factors	The Wirri guarantee full co-operation with mine development, future acts, lease renewals, cultural surveys etc. Pacific Coal will make special provision for surveying and preserving cultural heritage materials. Pacific Coal gives full access to the site, with provision for denial or escort for safety reasons, to the Wirri.