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Rio Tinto and Indigenous Community Agreement Making in Australia

By Bruce Harvey and Simon Nish*

*The common law and statutory recognition of Aboriginal land rights and native title in Australia have had a profound impact on the minerals industry. In particular, the High Court's recognition of native title in *Mabo v Queensland (No 2)*¹ has changed the social landscape for mining company/indigenous agreement making in Australia. At the same time Rio Tinto has undertaken a programme of internal cultural change focused on improving community engagement, exemplified in its direct agreement-making with indigenous communities. The Argyle Participation Agreement, signed in September 2004 between Argyle Diamond Mine, local Aboriginal people and the Kimberley Land Council, and registered as an Indigenous Land Use Agreement in March 2005, illustrates this change. The agreement, herein described, is the most progressive, mining company/Aboriginal community agreement negotiated to date in Australia and represents a business-oriented and community-empowered approach that complements statutory consent for mining development.*

Historical background

Rio Tinto was formed in 1995 by the merging, under a dual listed companies structure, of the Australian based CRA Limited and the United Kingdom-based The RTZ Corporation plc. The group's headquarters is in London

* Bruce Harvey is Chief Advisor Aboriginal and Community Relations, Rio Tinto Australia. Simon Nish is formerly Manager Participation Agreement, Argyle Diamond Mine. The authors can be contacted by e-mail at bruce.harvey@riotinto.com and simon.nish@woodside.com.au.

¹ *Mabo (No 2)* (1992) 175 CLR 1; 107 ALR 1 ('*Mabo*').

and there is a corporate office in Melbourne. It has operations in some 20 different countries, with about 60 per cent of its assets in Australia and New Zealand. It is predominantly engaged in the mining and smelting of minerals and metals and is a major producer of iron ore, coal, copper, diamonds, borax and aluminium. It also produces substantial volumes of gold, nickel, zinc, titanium oxide, uranium and industrial salt.²

For ten years following the passing of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth),³ the mining industry in Australia failed to come to terms with Aboriginal land rights. It stonewalled, refusing to recognise any form of customary or indigenous rights, concentrating instead on litigation and arguments advocating legislative review.

Why did this happen? The 1970s and 1980s were the period when the self-conscious nation-building activities of Australia's resource explorers and miners were coming to fruition. There was an export boom based on an expanding international demand for mineral commodities and the people who worked in the resources industry sensed that they were part of a project of immense national significance.

It was therefore a great shock to people in the mining industry suddenly to discover that the nation was no longer enthralled by what they were doing. In the 1960s and 1970s the mining industry had been encouraged by government to expand the frontier of resource development. In the 1980s, coincident with the rise in environmental awareness, there suddenly arose a groundswell of opposition to mining and there was increasing popular support for the struggle for Aboriginal land rights. For the next ten years the industry remained largely in denial and mounted arguments based on national interest and the need for expediency, often without reference to political and socio-economic analysis.

Hence, in the 1980s and early 1990s, in common with the rest of the Australian mining industry, Rio Tinto experienced trauma coming to terms with rapidly evolving community expectations over the control of exploration and mining access to land. For Aboriginal and Torres Strait Islander peoples these changes came to be reflected in the *Mabo* and *Wik*⁴ High Court decisions and native title legislation that recognised the pre-existing common law rights of Aboriginal and Torres Strait Islander people over land.

2 More references about the company and its activities can be found at www.riotinto.com/aboutus/companyinformation.aspx.

3 For the full text of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (Act 191 of 1976 as amended), see www.comlaw.gov.au/comlaw/legislation/actcompilation1.nsf/all/search/3EED665BFCCB6C92CA256FD5000ABA20.

4 *Wik Peoples v Queensland* (1996) 187 CLR 1; 141 ALR 129. The full text of the High Court decision can be found at www.austlii.edu.au/au/cases/cth/high_ct/unrep299.html#fn701.

This history can be illustrated by reference to Rio Tinto's Argyle Diamond Mine (ADM), discovered in the late 1970s in the East Kimberley region of Western Australia. At the time of discovery, exploration teams encountered opposition from local and other Aboriginal people, but eventually an agreement to mine was signed with a group of Aboriginal traditional owners, despite the fact that the mine would necessitate the destruction of a key ceremony site at what was known as Barramundi Gap. This so-called Good Neighbour Agreement, or Glen Hill Agreement, attracted adverse reactions, from the wider group of traditional owners and other Aboriginal groups and, for different reasons, from the Western Australian State Government. The nature of the agreement process and the destruction of the site at Barramundi Gap distressed the Aboriginal groups. The Government was concerned that an agreement outside statutory requirement was reached with an Aboriginal group at all. In the early 1980s, the company's linkages with local communities, most notably Warmun, Mandangala and Doon Doon, became much more extensive. The ADM 'Good Neighbour Program' became the vehicle for a number of largely unilateral programmes aimed at improving the circumstances of local Aborigines.⁵

Current trends

Protracted dispute with local Aboriginal people at ADM was narrowly avoided, but residual resentment lingered as a result of 'unfinished business' between the mine and traditional owners, with some local Aboriginal communities being seen as receiving preferential treatment to traditional owners. Elsewhere in Western Australia in the following decade, other development approvals were gained under state enabling legislation, leading to greater antipathy. Similar experiences in other parts of the Rio Tinto Group, and comparisons with its overseas operations where land rights recognition is a normal part of business, led Rio Tinto to reassess its Aboriginal land access and community relations approach in Australia.

After ten years of contentious legal debate, the *Mabo* decision was handed down by the High Court and the Native Title Act 1993 (Cth) (the 'Native Title Act')⁶ was passed. However, the Native Title Act served to confuse the

⁵ For a useful historical account of developments at ADM see R A Dixon and M C Dillon, *Aborigines and Diamond Mining: the Politics of Resources. Development in the East Kimberley – Western Australia* (University of Western Australia Press, Nedlands, 1990).

⁶ For the full text of the Native Title Act with amendments, see <http://scaleplus.law.gov.au/html/pasteact/2/1142/pdf/NativeTitle1993.pdf>.

situation as much as to clarify it.⁷ At about the same time the position that some in the resources industry had been advocating for some time began to be taken seriously, that is, that there would be no solutions borne out of adversarial approaches and litigation: instead mining access to Aboriginal land needed to be based on soundly built relationships.

The experience with native title in Australia is not unique. It can be argued that globalisation, as much as anything else, is a transformation of social geography with far-reaching implications for governance. Public affairs are no longer managed solely, if they ever were, through the framework of sovereign statehood.⁸ State sovereignty, as traditionally understood, is changing, just as the terms 'sovereignty', 'crown ownership' and 'royalty payments' no longer carry their original literal meaning. Nation states can no longer aspire to be the supreme, unqualified rulers of discrete jurisdictions based on territorial control. In the challenge of government, states are increasingly turning away from unilateral control based on geography and instead are adopting multilateral approaches. Hence, native title in Australia is but one manifestation of a worldwide trend to 'diffuse' multilateral and multidimensional governance with greater local participation.

Consistent with this trend, indigenous peoples in many parts of the world, but particularly in common law countries, are reasserting their land connections and gaining recognition for this under sovereign law. Examples of this are the legal recognition of customary land connection through native title in Australia and Canada, and Maori consultation enshrined in development processes in New Zealand. Whether through compliance or negotiated contract, many corporations are also choosing to afford formal recognition to diverse indigenous interests in the regions in which they operate, the Argyle Participation Agreement (APA) being a prime example. However, it is by no means unique; throughout Australia in the past decade, Rio Tinto has directly negotiated more than 70 mine development and exploration access agreements with land connected Aboriginal groups.

Setting aside rights-based and legal arguments, on the basis of thinking globally and acting locally, Rio Tinto and its operations now carry out baseline communities assessments in order to better understand local trends that underlie potential emerging social disequilibrium. For instance, in 2002 Rio Tinto commissioned a study of indigenous population projections to the

⁷ For a comprehensive study of the native title concept, see R Barlett, *Native Title in Australia* (Butterworths, Sydney, 2000).

⁸ B Harvey, *Rio Tinto's Agreement Making in Australia in a Context of Globalisation*, in "Honour Among Nations" – Treaties and Agreements with Indigenous Peoples' (M Langton, M Tehan, L Palmer and K Shain, eds, Melbourne University Press, 2002).

year 2016 for the hinterlands of its long-life mines and areas of exploration interest in northern Australia.⁹ It is worth pointing out that census data from these regions do not reflect the true picture, and that future population scenarios by government or other agencies have rarely been attempted for indigenous groups at regional levels. Hence, significant difficulties were present in attempting the projections and the figures are likely to be very conservative. Nevertheless, these data are vitally important for mine and closure planning, regional development and social services allocation. A detailed study commissioned by ADM for the northern East Kimberley region makes this clear.¹⁰

The research indicated that in the East Kimberley region the momentum for population growth lies with indigenous residents. A related and similarly striking feature was the degree to which the non-indigenous population is dominated by people of working age (ages 20-44), reflecting in movement, frequently temporary, for employment purposes.

The key finding was that by 2016 the indigenous population in the East Kimberley region is conservatively projected to increase by some 2,100 people, which represents an increase of 35 per cent. A second key finding involved the projected indigenous population as a percentage of the projected total population; the indigenous population is expected to increase its relative weight to as much as 60 per cent of the total resident population, and a much higher proportion of those will live their entire life in the region. A third key finding was that while the indigenous population is expanding in all age categories, it is heavily weighted to individuals of prime working age. In 2001 there were 2,263 individuals aged between 25 and 64 years. By 2016, this group will have increased by 1,053, or 46 per cent.

The study demonstrated that the region has a serious economic development problem. Taylor points out:

‘... around one half of its resident adult population, representing the majority of its Aboriginal population, remains overly dependent on welfare, structurally detached from the labour market, and poorly equipped to engage in it. More disconcerting, perhaps, is a prognosis that these indicators will worsen as a consequence of rapid population growth if recent trends in the rate of Aboriginal job acquisition continue;

9 J Taylor and M Bell, *Implementing Regional Agreements: Aboriginal Population Projections*, in ‘Rio Tinto Mine Hinterlands 1996-2016’ (Internal Research Paper for Rio Tinto: Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2001).

10 J Taylor, *Aboriginal Population Profiles for Development Planning in the Northern East Kimberley*. CAEPR Monograph No 23 (Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2004).

this is even assuming that ADM targets for local employment are met. From a policy perspective, "business as usual" is simply insufficient to meet the expanding needs of the regional population.'

These data show that even with the most optimistic indigenous employment objectives the mining industry cannot hope to employ anywhere near the rapidly expanding Aboriginal population in the East Kimberley region. While mining has a critical role, sustainable development is going to require a broad coalition of government, corporate and local interests to build a regional economy that can provide a range of enterprise and employment opportunities. While not Rio Tinto's sole responsibility, long-term corporate self-interest demands that the company ensures all stakeholders recognise the challenge and work together to this end.

Negotiating a new relationship

Hence, it can be seen that several motivators coalesced to encourage ADM to review its relationship with neighbouring indigenous groups. The first, and most obvious, was the evolving statutory and policy regime in Australia. This included the Native Title Act requirements and comprehensive community consultation requirements in environmental impact studies, and the procedural rights associated with both. While ADM faced no immediate threat to its operating licence from these or other sources, nor were any statutory consents required from traditional owners for mining activities, enough uncertainty and potential for delay existed in these emerging arenas to engender from ADM a proactive risk management strategy based on consultation and formal agreement.

In reality, ADM's second and stronger motivator to negotiate directly with local peoples was the harsh reality of relative population explosion and the emerging threat of compounding social service and socio-economic deficit. ADM recognised that in order to exercise the option of extending its life by going underground, it needed to maintain a local 'social licence to operate'. This would be difficult in the years ahead if regional disadvantage and resulting social dysfunction grew, both relative to the wealth of the mine and in absolute terms. Hence, ADM developed a 'localisation strategy' that came to encompass, dependent on commercial viability, commitments to switch from a fly-in, fly-out operation with employees largely based in the state capital Perth, to a drive-in, drive-out strategy with greater than 80 per cent of the workforce home based in the East Kimberley region. A change in operating strategy of this magnitude could not be contemplated without reducing risk by securing through agreement with local peoples collaborative commitment to the plan.

Thirdly, Rio Tinto's communities policy and procedures recognise that planning for the future cannot satisfactorily progress without comprehensive consultation with those most affected. It has been argued earlier that these policies, and indeed the changes in Australia's national and state-based indigenous land regimes, are actually manifestations of more comprehensive changes taking place in the world as a result of globalisation.¹¹

Hence, in 2001 ADM committed to reviewing its 'Good Neighbour Agreement' and commenced a comprehensive process of consultation with traditional owners, leading to a new agreement. In September 2004, after three years in the making, Mirriuwung, Gidja, Malgnin and Woolar traditional owners, ADM and the Kimberley Land Council signed the APA. The agreement was registered as an Indigenous Land Use Agreement (ILUA) under the Native Title Act in April 2005.¹²

Argyle Participation Agreement¹³

The agreement process took three years from the initial community meeting where ADM agreed to commence a process to renew its relationships with local Aboriginal people to the signing of a formal agreement. ADM funded the representation of traditional owners by the Kimberley Land Council (KLC), as well as the costs of the KLC to participate in the process in its own right. The KLC also secured some funding from the Commonwealth towards the process costs. The first step was the commissioning by the KLC of a traditional owner ethnography to comprehensively identify all those people with rights and interests in the mining lease area (about 80,000 ha). The ethnography formed the basis for traditional owners selecting a negotiating

11 Rio Tinto's community relations policy states 'Good management of community relationships is as necessary to our business success as the management of our operations. Good performance requires all of us to accept responsibility for community relationships. We detail local arrangements in rolling five year communities plans which all operations submit and update annually. The plans are set within the context of this policy and apply throughout the life cycles of the Group's activities,' at www.riotinto.com/library/microsites/socEnv2003/comm/100_pol.htm. Also see Brereton and Harvey, *Emerging Models of Community Engagement in the Australian Minerals Industry*, paper presented at the UN Conference on engaging communities, Brisbane, 2005, at www.riotinto.com/media/downloads/speeches/UN%20Conference%20on%20Community%20Engagement_BH_150805.pdf.

12 *Ibid.*, at 15.

13 The Argyle Participation Agreement – Breaking New Ground, 2005, at www.argylediamonds.com.au/pdfs/breakingnewground.pdf. Also, see generally the ATNS Agreements Database, at www.atns.net.au/biogs/A000094b.htm.

group of 26 people and defining the traditional decision-making process by which the agreement would be authorised. This negotiating group consistently made timely, consensus decisions to which the entire group held throughout the agreement process.

ADM, traditional owners and the KLC agreed to the process of agreement making, which was formalised in a Framework Agreement. A number of interim Heritage Protection Agreements not only provided for heritage clearance work during the agreement process, but helped the parties build the relationship and mutual understanding required to reach a long-term heritage protection agreement.

The key elements of a comprehensive agreement, which came to be known as the Argyle Participation Agreement (APA), were agreed with the signing of an in-principle agreement, at which point the parties gave themselves two months to resolve all outstanding issues, subsequently achieved.

The APA is a legally binding agreement (in Rio Tinto communities policy terms it represents a legally binding form of comprehensive consultation, mutual obligation and long-term partnership); it describes the mutual rights and responsibilities of the parties, the consultation process by which it was derived, and sets out a framework for the ongoing relationship between ADM and traditional owners. The APA is the most advanced mining company/Aboriginal community agreement in Australia to date. It formally sets out a shared vision for regional development, including traditional owner ceremonial responsibilities associated with the mine lease area and their approval for the mine to proceed underground if commercially feasible.

Rio Tinto and ADM are to decide in late 2005 whether or not to proceed with an underground mine. The current open pit operation is due to close in 2008; going underground would extend mine life to 2024. The APA secures traditional owner approval and participation in the activity of either option. In effect, the APA says how traditional owners and ADM will work together from now on for the life of the mine, whether it be 2008 or 2024.

Argyle mine had been operating for 24 years prior to the signing of the APA, requiring the agreement to deal with past, present and future issues. It does not 'park' any issues between the parties for future generations to resolve, rather it provides a structured and transparent engagement framework between the mine and traditional owners into the future so there is a process to deal with new issues that may arise.

The structure of the agreement is unique and draws on learnings from other agreements. ILUAs under the Native Title Act are not readily amended. If parties wish to change them, generally they have to negotiate a new agreement. In response to this, the APA has two components: the

ILUA¹⁴ and a management plan agreement. The latter comprises a suite of legally binding management plans dealing with the day-to-day interactions between the mine and traditional owners. The management plans can be amended by agreement and the parties expect them to be updated as the dynamic nature of the relationship and mine operations require.¹⁵

The management plans cover:

- Aboriginal site protection and heritage clearance work;
- training and employment programmes for greater direct Aboriginal participation in the mine;
- cross-cultural training for all mine employees and contractors;
- traditional owner access to non-operational areas of the mine lease;
- once-a-year traditional owner land management inspection of land and water management;
- traditional owner participation in planning eventual closure and decommissioning options;
- business development opportunities associated with the mine; and

14 'The Argyle Diamond Mine Indigenous Land Use Agreement (ILUA) is the product of almost three years of negotiation between Traditional Owners, the Kimberley Land Council and Argyle Diamonds. The ILUA provides the support of the Traditional Owners for Argyle's current and future mining operations, including the development of underground operations. The ILUA also recognises indigenous interests and directs resources toward community and economic development. As Argyle held existing mining titles, an ILUA was not legally required. However, the signing of the ILUA creates a partnership arrangement for the future of the mine, and for community development. The ILUA was made in conjunction with a Management Plan Agreement which details day-to-day activities at the site. The ILUA supersedes the 20 year old "Good Neighbour Agreement" between Rio Tinto and Traditional Owners' (at www.atns.net.au/biogs/A002198b.htm).

15 'The Argyle Diamond Mine Participation Agreement: Management Plan Agreement (the MPA) establishes management plans between Traditional Owners and the Argyle Diamonds for the Argyle mine site. The MPA operates in conjunction with the Argyle Diamond Mine Indigenous Land Use Agreement (the ILUA). The provisions in the MPA have been excluded from the related ILUA so that they may be amended by agreement. The MPA sets up a Relationship Committee that consists of 26 traditional owners and four representatives from Argyle Diamonds who monitor the MPA. The Relationship Committee can amend the Management Plan by a unanimous vote. This provides greater flexibility to manage the day-to-day relationship between Traditional Owners and Argyle Diamonds. There are no confidentiality clauses in the MPA. The MPA also includes plain language statements so that the main ideas of each clause can be understood. A video was made so that people who cannot read can understand the Agreement. The MPA commenced on the same day as the ILUA and will continue until the last Management Plan terminates. If Argyle Diamonds wishes to assign any of their rights in the agreement area, they must obtain the consent of any future party to the MPA (and the ILUA). Furthermore, the MPA includes a provision for a prescribed Aboriginal Corporation becoming party to the agreement in the event of a native title determination in the area.' (at www.atns.net.au/biogs/A002199b.htm).

- provision of specific attention, with its own management plan, to Devil Devil Springs, a heritage site of particular importance that has been affected by mine activities.

The APA provides for secure Aboriginal sacred site protection: traditional owners have a veto over any new development that will damage significant Aboriginal sites.

Traditional owners' financial benefits are linked to the fortunes of the ADM business. While a floor payment mechanism provides a degree of financial security for traditional owners, their benefits are calculated to a formula that includes a percentage of EBITDA (earnings before interest, tax, depreciation and amortisation) component. EBITDA results are publicly reported half yearly, and provide a clear and independently verifiable basis for calculating the traditional owner benefit stream. Importantly, the formula and quantum of benefit are also linked as much to the economic development and mitigation needs of the region as the mine's ability to pay.

The APA recognises that there are a range of Aboriginal interests in the mining lease area, all of which need to be addressed in the distribution of financial benefits. These interests include key decision-making elders who are unlikely to benefit from long-term benefits, the estate groups with primary rights and interests, adjacent estate groups with secondary rights and interests and the broader Mirriuwung, Gidja, Malgnin and Wolar peoples. In providing for benefits for traditional owners and local Aboriginal communities, the APA recognises their respective and differing governance structures and sources of decision-making, while acknowledging that there is an overlap in the groups.

If the proposed underground mine goes ahead, the agreement will run for the life of the mine – potentially another 20 years. The agreement recognises intergenerational interests and therefore allocates benefits to existing generations and ensures that a 'sustainability fund' (a long-term capital fund, the principal of which cannot be divested until after the cessation of the mine) creates long-term benefits for future generations.

The APA provides for traditional owner governance structures and capacity by creating a traditional owner-controlled trust (the Gelganyem Trust), which manages four funds (the Land and Culture Fund, the Partnership Fund, the Education Fund and the Sustainability Fund). Traditional owners and ADM agreed that a portion of the financial benefits will also be used to attract other social capital investment, hence a Partnerships Fund that has already been used to good effect in securing a co-commitment of AU\$300,000 from the Commonwealth government for education purposes.¹⁶ In another

¹⁶ For instance, see www.atsia.gov.au/media/media05/v0529.htm.

dimension, the Law and Culture Fund provides a long-term capital base, the interest from which will fund women's and men's law and culture business each year.

The agreement secures proactive resolution of native title issues, in contrast to the passive coexistence resolution that is common in many other agreements. ADM holds both a mining lease and a grazing lease over much of the mine and surrounding area, totalling some 80,000 ha. ADM has agreed to hold the grazing lease on trust for traditional owners for the life of the mine, with full beneficial ownership transferring to them when the mining lease is surrendered. The APA contemplates traditional owners lodging a native title claim over the mining lease/grazing lease area and, with ADM's support, seeking full beneficial ownership of the area, subject to maintaining ADM's interests for the life of the mine. The intent is that traditional owners end up with the greatest native title rights allowable under the Native Title Act, and ownership of the grazing lease. This combination will enhance the traditional owners' ability to use the land as an economic base after mine closure.

There are many challenges to implementing complex long-term agreements. One of the most important prerequisites to successful implementation is the ability for the parties to understand what is in the agreement and its intent. This is particularly the case where the people who have negotiated the agreement move on soon after the deal is finalised. Unlike virtually every other ILUA in Australia, it was agreed that the APA be made a public document.¹⁷ Only one schedule to the agreement, that which mainly deals with the formula for calculating some of the financial benefits of the agreement, is confidential. Each major clause of the APA has a corresponding plain English description in language designed for comprehension by a local audience. The agreement itself provides plain English descriptions that can be used as an interpretive tool to understand the intent of the parties.

The APA establishes a collaborative mechanism for ADM and traditional owners to monitor the implementation of the agreement: a relationship committee comprising 26 traditional owner representatives and four ADM representatives meets quarterly, to monitor the implementation of the agreement and adapt the management plans as required over time.

¹⁷ For instance, see www.atns.net.au/biogs/A002198b.htm, and www.freehills.com.au/publications/publications_4962.asp.

Conclusions

The Argyle Participation Agreement is the most progressive, directly negotiated mining company/Aboriginal community agreement achieved in Australia to date.¹⁸ In other places in the world similar arrangements are commonly known as Benefit Impact Agreements. These various instruments represent a more business-oriented and community empowered approach than the social impact analyses and mitigation responses commonly required by statute. Looking to the future, there is greater scope for governments to participate in such agreements and, in doing so, to secure multilateral commitment to regional development in regions where mining frequently provides the only realistic basis for sustainable economic development.

¹⁸ For instance, see www.goodpracticemining.org/documentdetails.php?URN=1452.