

Chapter 14

Rio Tinto's Agreement Making in Australia in a Context of Globalisation

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The common law and statutory recognition of Aboriginal land rights and native title in Australia has 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 despite its subsequent corruption through statutory codification and amendments, has changed the social landscape for mining company–Indigenous agreement making in Australia. At the same time, Rio Tinto has been engaged in a program of internal cultural change, exemplified in its agreement making with Indigenous communities. The Western Cape Communities Co-existence Agreement (WCCCA) between Rio Tinto's subsidiary, Comalco, Indigenous peoples of Cape York (in far north Queensland) and the Queensland Government, illustrates this change.

This chapter is in two parts. The first focuses on the WCCCA, while the second part extends the discussion of the issues set out in the first part of the chapter beyond Australia and interprets Rio Tinto's agreement making in the context of globalisation. This analysis is retrospective and has not informed Rio Tinto's activities over the past decade.

^{*} The views expressed in this paper are my own and do not necessarily reflect those of Rio Tinto.

¹ (1992) 175 CLR 1 (*'Mabo'*).

Rio Tinto and Indigenous community agreement making

History

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, and there is a corporate office in Melbourne. Rio Tinto has operations in some twenty different countries, with approximately 47 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), the mining industry failed to come to terms with Aboriginal land rights. It stonewalled, completely 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 was a period of self-conscious nation-building, during which 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. As a young exploration geologist, I remember thinking that I was working at the frontier—the so-called 'uninhabited frontier'³—on a project of national economic importance. The job was well paid, but I was driven by a sense of national endeavour, and I believe many geologists and engineers shared similar feelings at the time.

It was, therefore, a great shock to the mining industry 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 governments to expand the frontier of resource development. In the 1980s, coincident with the rise in environmental awareness, there suddenly arose a ground swell of opposition to mining and, particularly in the southern parts of Australia, there was increasingly popular support for the struggle for Aboriginal land rights. For the following ten years the industry was in denial and mounted

² See generally, Rio Tinto, <http://www.riotinto.com/> at 14 November 2003.

³ At the time I, along with others, had no sense or idea that it was only recently uninhabited due to many Aboriginal people having migrated or otherwise having been relocated out of their home country to missions or government settlements.

arguments based on national interest and the need for expediency, frequently without reference to political and socio-economic analyses.

Paradigm shift

In the early 1990s there was a paradigm shift. After ten years of long and contentious legal debate, the *Mabo* decision was handed down by the High Court and the *Native Title Act 1993* (Cth) (*NTA*) was passed. However, the *NTA* served to confuse the situation as much as to clarify it. 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.

In 1995, Rio Tinto's predecessor, CRA Limited, appointed a new Chief Executive Officer, Leon Davis. With strong words of encouragement from some prominent Australians such as Ron Casten⁴ and Lowitja O'Donoghue,⁵ Davis publicly declared his recognition of Aboriginal land rights. This recognition was of huge significance, reflecting his aspiration for a total cultural change within CRA: until then CRA had been viewed as the staunchest member of the mining hard-liners.

In a major speech to the Australian Securities Institute in March 1995, Davis said, 'In CRA, we believe there are major opportunities for growth in outback Australia which will only be realised with the full cooperation of all interested parties'. He went on to say that the *NTA* 'laid the basis for better exploration access and thus increased the probability that the next

⁴ Ron Castan AM QC (1939–1999) was appointed a Queen's Counsel in 1980 and was one of the leading barristers at the Melbourne Bar. He had a distinguished career in the law and appeared in a number of major cases. He was part of the Commonwealth's legal team in the landmark Gordon below Franklin Dam case in 1983; represented Eddie Mabo in the High Court; and was a significant player in the development of the *NTA* in 1993. He subsequently appeared for claimants in major native title cases. Mr Castan also served for several years as a part-time Hearing Commissioner for the Human Rights and Equal Opportunity Commission. In 1993, he was appointed a Member of the Order of Australia for service to the law, especially in relation to civil liberties and constitutional reform.

⁵ Dr Lowitja O'Donoghue, AC CBE, is a Yankunytjatjara woman from South Australia's far north. Her contribution to the advancement of Aboriginal people is great and widely recognised. Her positions have included inaugural Chairperson of the Aboriginal and Torres Strait Islander Commission; Deputy Chairperson of the Aboriginal and Torres Strait Islander Development Corporation; a member of the Council for Aboriginal Reconciliation, the Indigenous Land Corporation, the National Australia Day Council and the Board of Trustees of the United Nations Voluntary Fund for Indigenous Populations (Geneva); and Director of Aboriginal Hostels Limited.

decade will see a series of CRA operations developed in active partnership with Aboriginal people'.⁶

A month later, at the annual company conference, Davis told the managing directors of CRA:

It is my desire to move away from a litigious framework, I wish to open channels to those who are not favourably disposed to CRA. I want to establish innovative ways of sharing with and/or compensating Indigenous people. I believe that a negative attitude will produce negative results, I have an open mind on how we should approach the question.⁷

Policy

Davis then initiated a program of cultural change within CRA, and deliberately set out to establish a relationship with prominent Australian Aboriginal leaders. These leaders were, understandably, initially suspicious of him. It was eighteen months before the company earned enough trust with those leaders for them to accept the task of helping Rio Tinto write its Aboriginal and Torres Strait Islander policy. This policy states that:

In all exploration and development in Australia, Rio Tinto will always consider Aboriginal and Torres Strait Islander issues. Where there are traditional or historical connections to particular land and waters, Rio Tinto will engage with Aboriginal and Torres Strait Islander stakeholders and their representatives to find mutually advantageous outcomes. Outcomes for Aboriginal and Torres Strait Islander people will result from listening to them. Economic independence through direct employment, business development and training are among the advantages that Rio Tinto will offer. Strong support will be given to activities that are sustainable after Rio Tinto has left the area.

This policy is based upon recognition and respect. Rio Tinto recognises that Aboriginal and Torres Strait Islander people in Australia have been disadvantaged and dispossessed; have a special connection to land and waters; have native title rights recognised by law. Rio Tinto respects Aboriginal and Torres Strait Islander peoples' cultural diversity; aspirations for self sufficiency; interest in land management.⁸

Rio Tinto's objective is to transform this policy into action. Since 1995, wherever Rio Tinto explores for or develops a mine in Australia, it has sought to formally acknowledge and consult with Aboriginal and Torres

⁶ Leon Davis, 'New Directions for CRA' (Speech delivered to the Securities Institute Australia, Sydney, March 1995).

⁷ Leon Davis, 'New Competencies in CRA' (Speech delivered to the CRA Annual Company Conference, Townsville, April 1995).

⁸ Rio Tinto, *Aboriginal and Torres Strait Islander Policy* (January 1999).

Strait Islander people. It does this through a formal negotiation and agreement process that, where appropriate, is tri-partite, involving Indigenous people, Rio Tinto and government. Rio Tinto has now signed five major mine development agreements and more than fifty exploration access agreements across Australia.⁹

Western Cape Communities Co-existence Agreement

The Western Cape Communities Co-existence Agreement (WCCCA) is a recent example of this new era of agreement making. The agreement concerns Rio Tinto's subsidiary, Comalco, which has a mining operation at Weipa on western Cape York Peninsula. Comalco has developed and mined bauxite at Weipa since 1960, until recently without any consultative involvement or formal agreement with the Aboriginal traditional owners for the mining area. In 1996, Comalco sought to modernise its relationship with Aboriginal people and commenced negotiations aimed at reaching a comprehensive regional agreement with the Cape York Land Council (CYLC)¹⁰ representing traditional owners. Agreement was reached in early 2001.¹¹

The WCCCA is multi-lateral; its signatories include eleven traditional owner groups (Alngith, Anathangayth, Ankamuthi, Peppan, Taepadhighi, Thanikwithi, Tjungundji, Warranggu, Wathayn, Wik and Wik-Way, and Yupungathi), four Aboriginal community councils (Aurukun, Napranum, Mapoon and New Mapoon), Comalco, the CYLC and the Queensland Government. The latter provided financial benefits, additional to Comalco's, when the agreement was registered as an Indigenous Land Use Agreement (ILUA) under the provisions of the *NTA*.¹²

Significant aspects of the agreement include:

- recognition for traditional owner groups and their claims for native title
- registration of the agreement as an ILUA under the *NTA*

⁹ See generally, ATNS Project database <http://www.atns.net.au> at 17 November 2003.

¹⁰ Cape York Land Council is the Representative Body for Cape York under the *Native Title Act*. See generally, Cape York Land Council Website <http://www.cylc.org.au/> at 17 November 2003.

¹¹ See the ATNS Project database, *Western Cape Communities Co-existence Agreement* <http://www.atns.net.au/biogs/A000088b.htm> at 17 November 2003.

¹² National Native Title Tribunal, *Registered ILUA Summary* <http://www.nntt.gov.au/ilua/30.html> at 17 November 2003.

- progressive relinquishment of parts of the Comalco mining lease, no longer needed for mining, to the State Government for return to Aboriginal ownership
- \$2.5 million each year (minimum) to a Western Cape Communities Trust for projects benefiting traditional owner groups and the Western Cape communities. This amount grows with increases in Weipa production and with higher aluminium prices
- \$500,000 annual Comalco expenditure on employment, training and youth educational programs, endorsed by the Western Cape Communities
- a State Government contribution of about \$1.5 million a year to the Western Cape Communities Trust for allocation to local community development projects and traditional owner proposals once the Agreement was registered as an ILUA
- cultural heritage surveys and site protection plans, and cultural awareness training for all Comalco staff and principal contractors
- support for community development, Aboriginal business enterprises and establishment of outstations on suitable areas of the mining lease.

There was particular recognition for the traditional owners of land on which the Weipa Township is established and which remains under continuing use and development. Provision was also made for transfer to the traditional owners of Sudley, a Comalco-owned, 1,325 square kilometre pastoral property located about 70 kilometres east of Weipa.

Under the agreement, financial contributions are distributed to the Western Cape Community Trust, which comprises a majority of traditional owner representatives. The trustees have stipulated that the majority of funds be placed in secure long-term investments to provide a sustaining economic base for all its beneficiaries, and particularly to provide for future generations.

A co-ordinating committee, comprised of two representatives from each traditional owner group across the lease area, a representative from each of the four community councils, and a representative from each of Comalco, the State Government and the CYLC, was established to deal with the day-to-day matters arising from the agreement. The co-ordinating committee is consulted by Comalco on policies and programs involving:

- Aboriginal employment and training
- business development
- cultural awareness
- cultural site protection.

The committee also consults with relevant traditional owners on issues such as land management, regeneration plans, environmental applications, and any review of the land access permit system.

What has been said above does not adequately convey all that transpired during the negotiation process and what has evolved since. The scope of the agreement is truly regional; an ambitious undertaking that seeks to encompass all affected Indigenous people in the region, not only those with customary connections, but people with historic connections through re-location and contemporary connections through marriage. Under such circumstances, **process** is all important, and it must be founded and maintained on trust and mutual goodwill beyond any definitions in the WCCCA.

For instance, early in the negotiations, the High Court found in the case of *Wik* that the Comalco mining leases were valid under Queensland and Commonwealth law and had extinguished native title.¹³ This decision in effect relieved Comalco of any legal obligation to negotiate with the local Aboriginal community. In addition, the 1998 amendments to the *NTA* further reduced any legal imperative for Comalco.

However, Comalco's lease at Weipa extends to 2062, and the company recognised that a sustainable long-term relationship with traditional owners and neighbouring communities was essential. Furthermore, under the ILUA provisions of the *Native Title Amendment Act 1998*,¹⁴ there now existed a process through which this long-term relationship could be formalised. The ILUA provisions allow parties to negotiate flexible and pragmatic agreements to suit individual circumstance. This includes agreement on the relationship between native title rights and interests, and other rights and interests in relation to an agreement area. Once registered, ILUAs bind all the parties and all persons holding native title in an agreement area to the terms of the agreement.

In this case, the intent of the desired agreement was that the Aboriginal parties to the WCCCA would support Comalco's future mining operations in return for support, benefits, employment, business development and educational opportunities, and the full recognition of their status as traditional owners on their own lands. The spirit, intent and richness of the WCCCA relationship is not necessarily reflected in the written content of the Agreement. For example, the principal of mutual obligation looms large in the Agreement. If the trajectory of local Aboriginal employment fails to remain on track for a target of 35 per cent by 2010, Comalco is obliged to increase the level of pre-employment spending on education and training. However, if the level of Indigenous Year-10 graduation in the region drops

¹³ *Wik Peoples v State of Queensland* (1996) 187 CLR 1.

¹⁴ Now s 24C of the Consolidated *Native Title Act 1993* (Cth).

below the same trajectory, the company is relieved from this obligation. In other words, the schools, the students and their families have accountabilities equal to that of Comalco's. In addition, however, Comalco's Chief Executive Officer has made a further commitment, outside the terms of the Agreement; he has said that **every** Year-10 Aboriginal graduate from western Cape York will be offered training and a job on the mine.¹⁵

The signing ceremony on Wednesday 14 March 2001 was itself a highly significant event. In the speeches of senior Comalco staff, the company apologised for taking forty years to formally recognise Aboriginal land connections. The Minister for Transport, Steve Bredhauer, representing the Premier, spoke on behalf of the Queensland Government and apologised for the coerced removal of Aboriginal people from the area in 1963. In many respects the acknowledgment, the apologies and the ceremony were worth as much as the agreement and the benefits. They represented a recognition of history that had formerly been denied.

A context of globalisation

The WCCCA is the result of the vision of one company and a number of communities to formally re-define their relationship; it reflects a determination to achieve a formal relationship appropriate to local circumstances. But how does the WCCCA fit with an international context? I believe it can be seen as part of a much broader process of globalisation.

Globalisation is many things; in particular it is, arguably, 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. The case can be made that it is the large-scale diminution of geographic sovereignty that really makes contemporary globalisation new and different to the incipient globalisation we saw at the end of the nineteenth century, rooted as it was in nation states. The governance challenge of the twenty-first century is to find ways of creating social contracts reflective of this new age of globalisation, beyond the boundaries of state sovereignty.

That is not to say that nationalistic social geography is no longer relevant. On the contrary, nations, states and territorial identities continue to exert very significant influences over local governance. However, globalisation co-exists with nationalism and they inter-relate in complex ways. Globalisation, by confining itself to matters of economic reach, has the

¹⁵ Sam Walsh, Chief Executive Officer, Comalco (2001).

potential to contribute to a new form of governance that leaves aside the perceived need for coercive cultural aggregation of sub-national identities. The old nation-builders wanted economic aggregation, but they mistakenly believed that to achieve this they also had to engage in spiritual, cultural and religious aggregation.

The rules for social order under nationalism emanate largely from federal authorities or national governments. The epitome, of course, is sovereign statehood in which a government body has exclusive control over its designated territories and its inhabitants. However, in the globalised world, sovereign states are quite unable themselves to control phenomena such as mass media, satellite remote sensing, global ecological issues and financial markets. Many people have acquired loyalties that supplement and, in some cases even override, their feelings of national solidarity. Moreover, many people in the globalising world have become increasingly ready to give values such as economic growth, human rights and ecological integrity a much higher priority than state sovereignty with its associated nationalist interpretation.

Globalisation does not necessarily lead to the demise of the sovereign state. Most states, particularly strong states, are surviving very well. What is happening is that 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 multi-lateral approaches.

Whereas the optimising scale of government in the 'Industrial Age', dictated by railways, steam ships and the telegraph, was the geographically defined nation-state; in the 'Information Age' of jetliners, Cable News Network (CNN) and the Internet, the optimising scale is global. Thus, strong central control over information and authority is no longer possible in the 'Information Age' and, in order to cope, governance needs to be many-faceted and diffuse.

To date, this trend towards global governance, aside from a few exceptions such as international hotels and airports, has not, as people feared, produced an homogeneous global culture. In fact, quite the opposite has occurred. People all over the world are actually choosing to accentuate their local identities. In places, there is a celebration of this diversity; elsewhere it is the basis, sadly, of political fragmentation and conflict.¹⁶ The apparent

¹⁶ This is the situation in areas such as Bougainville, Lebanon, Congo, Cyprus, and the Balkans.

paradox of globalisation and local diversity, I think, finds explanation in the innate countervailing nature of people. One phenomenon drives the other. As people perceive themselves as losing control over their daily economic lives, they react by taking and expressing greater control over their cultural, social and spiritual lives. For instance, Indigenous peoples in many parts of the world, but particularly in common law countries, are finding a voice and rejuvenating in a very robust way. Not only are Indigenous peoples experiencing escalating interest in their cultural, social, spiritual and economic pursuits, their unique cultural presence is being recognised and protected by sovereign law. Examples of this are the legal recognition of customary land connection through native title in Australia, the recognition and inclusion of traditional environmental knowledge in environmental impact assessment in Canada¹⁷ and Maori consultation enshrined in development processes in New Zealand.¹⁸ 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 WCCCA being a prime example.

The apparent paradox of growth of the global economy and rejuvenating social diversity and formal recognition at a local level has resulted in the emergence of a 'tri-polar' world. Business and community (the latter frequently supported by non-government organisations (NGOs) now increasingly transact directly with each other, rather than through the pole of government. Global companies now deal with provincial, state and federal authorities, and local institutions as much as, or even more than, central government. Sub-state authorities have created networks of their own that largely bypass nation-states. For instance, most of the world's financial infrastructure and its transactions emanate from little more than a dozen or so virtual city states.¹⁹

Concurrently, there has also been a great increase in the number of supra-state institutions, some with regional and others with global scope. Governance in a globalising world involves, for instance, the European Union (EU), the International Monetary Fund (IMF), North Atlantic Treaty Organisation (NATO), Organisation for Economic Co-operation and Development (OECD), the World Trade Organisation (WTO), the World Bank, the International Labour Organisation (ILO) and many other bodies that were non-existent or insignificant fifty years ago. Many individual com-

¹⁷ See, for example, Diavik Diamond Mines Inc, *Diavik Diamond Project Environmental Agreement* (8 March 2000) <http://www.diavik.ca/pdf/DiavikEnvironmentalAgreement.PDF> at 17 November 2003.

¹⁸ Section 8 *Resource Management Act 1991* (NZ); see Williams, this volume.

¹⁹ These include, amongst others, New York, London, Singapore and Tokyo.

panies, business organisations and sub-state institutions have developed direct links with these multi-lateral bodies. Along with the dispersion of authority upwards and downwards from the sovereign state, there have also been lateral shifts in governance from the public to non-government sectors.

In this context, local governance bodies whose scope of authority is limited may nevertheless have considerable power in that they can transact directly with global corporations. Comalco and the Western Cape communities' negotiation of the WCCCA is tangible proof of this phenomenon.

Conclusion

The most far-reaching implication of globalisation concerns the question of governance. I suggest that globalisation has enabled a shift away from dominating national sovereignties to a situation of multi-faceted and diffuse identity and regulation. Local agreement making, corporate citizenship and global financial scrutiny offer counterweights to potential sovereign governance deficits in the globalising world, particularly in countries in which public-sector arrangements are not adequate for human security, social justice and democracy. This may seem very difficult to conceive, but then who in the sixteenth century, when sovereign states were defined by allegiance to divine majesty, would have imagined that within 200 years the norm would be nation-states with comprehensive public sectors as the unifying governance framework.

In the twenty-first century, far from being the sole domain of sovereign states, it will be free market institutions, international agencies, civil society, corporations, religious institutions, local communities and NGOs in a myriad of multi-lateral networks that will provide the necessary power balance and transparent governance. To a large extent the driver for this governance shift is the communication and transmission of common ideals, made possible by new technology.

The emerging underlying societal trend away from rigid government intermediation to multi-lateral relationships is what inspires both global citizenship and local agreement making. As described early in this chapter, no statutory or legal imperative required Comalco to negotiate a formal community agreement on western Cape York. Instead, the driving factors were Rio Tinto and Comalco's pragmatic desire for rights-based recognition of customary land connections, on-going mining approval, transparent governance and a sustainable relationship.

Whatever the local drivers for the WCCCA (and they were real and their realisation long overdue) the enabling factor was the advancing tide of globalisation.

Chapter 14 Bibliography

Articles/Books/Reports

Davis, Leon, 'New Directions for CRA' (speech delivered to the Securities Institute Australia, Sydney, NSW, March 1995).

Davis, Leon, 'New Competencies in CRA' (speech delivered to the CRA Annual Company Conference, Townsville, Qld, April 1995).

Rio Tinto, *Aboriginal and Torres Strait Islander Policy* (January 1999).

Case Law

Mabo v Queensland (No.2) (1992) 175 CLR 1.

Wik Peoples v State of Queensland (1996) 187 CLR 1.

Legislation

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

Native Title Act 1993 (Cth).

Native Title Amendment Act 1998 (Cth).

Resource Management Act 1991 (NZ).

Treaties and Agreements

Diavik Diamond Project Environmental Agreement, Diavik Diamond Mines Inc. (8 March 2000), online at <http://www.diavik.ca/pdf/DiavikEnvironmentalAgreement.PDF> at 17 November 2003.

Western Cape Communities Co-existence Agreement, Agreements, Treaties and Negotiated Settlements Project database, online at <http://www.atns.net.au/biogs/A000088b.htm> at 17 November 2003.

Websites

Agreements Treaties and Negotiated Settlements Project database, <http://www.atns.net.au> at 17 November 2003.

Cape York Land Council, <http://www.cylc.org.au/> at 17 November 2003.

National Native Title Tribunal, Registered ILUA Summary, <http://www.nntt.gov.au/ilua/30.html> at 17 November 2003.

Rio Tinto, <http://www.riotinto.com/> at 14 November 2003.