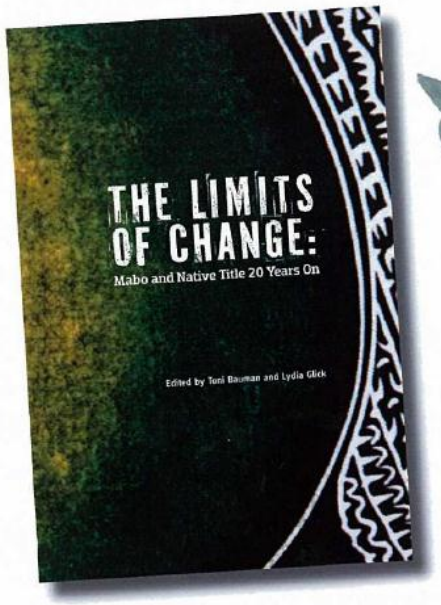


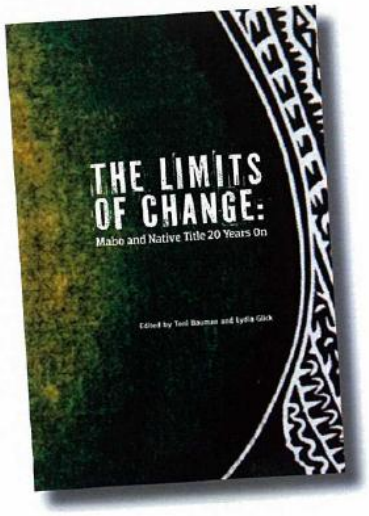
THE LIMITS OF CHANGE:

Mabo and Native Title 20 Years On

Edited by Toni Bauman and Lydia Glick

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

AN UNPRECEDENTED COLLECTION OF COMMENTARY AND REFLECTIONS ON THE DEFINING CASE FOR INDIGENOUS LAND JUSTICE IN AUSTRALIAN HISTORY.



THE LIMITS OF CHANGE:

Mabo and Native Title 20 Years On

On 3 June 1992, the High Court of Australia handed down the Mabo decision, recognising the continuing rights of Aboriginal and Torres Strait Islander peoples as the original inhabitants of the land under their own law and customs.

In 2012, on the 20th anniversary of Mabo, the contributors to this book present a story of a mixed aftermath.

From the first years of expectation and debate, to the bureaucracy that was to develop, this volume makes clear that even for those involved from the beginning, native title remains a tough terrain to navigate, though now an established part of the legal and political landscape.

Introduced by Professor Mick Dodson AM, this is a narrative testified by those who were close to the Mabo case, the negotiations leading up to the Native Title Act, or who for the past two decades have helped shape native title outcomes.

The Limits of Change includes perspectives from native title claimants and holders, community, political and corporate leaders, lawyers and judges, academics, consultants and government bureaucrats.

The authors dispel myths that continue to surround Mabo, drawing into question assumptions about the impact of the High Court's ruling and unresolved questions of justice for Indigenous Australians.

THE LIMITS OF CHANGE IS A NARRATIVE TESTIFIED BY THOSE WHO WERE CLOSE TO THE MABO CASE, THE NEGOTIATIONS LEADING UP TO THE NATIVE TITLE ACT, OR WHO FOR THE PAST TWO DECADES HAVE HELPED SHAPE NATIVE TITLE OUTCOMES.

PERSPECTIVES FROM NATIVE TITLE CLAIMANTS AND HOLDERS, COMMUNITY, POLITICAL AND CORPORATE LEADERS, LAWYERS AND JUDGES, ACADEMICS, CONSULTANTS AND GOVERNMENT BUREAUCRATS.

CONTRIBUTORS

Simon Balderstone AM
The Hon. Michael Black AC QC
Dr Bob Brown
Associate Professor Ramy Bulan
John Catlin
Darryl Cronin
Professor Mick Dodson AM
Dr Mary Edmunds
Rick Farley
Bruce Harvey
Dr John Hewson AM
The Hon. Paul Keating
Bryan Keon-Cohen AM QC
Cheryl Kernot
Professor Marcia Langton AM
Les Malezer
Dr David Martin
Greg McIntyre SC
Professor Kent McNeil
Monica Morgan
Graeme Neate
Dr Lowitja O'Donoghue AC CBE DSG
Kirstie Parker
Professor Henry Reynolds
James Rice
Peter Seidel
Dr Fiona Skyring
Dr Lisa Strelein
Dr Carolyn Tan
Alo Tapim
Dr Jakelin Troy
Patricia (Pat) Turner AM
Paul Wand AM
Alistair Webster
Professor Robert A. Williams, Jr.
Emeritus Professor Hal Wootten AC QC
Peter Yu

CONTRIBUTORS

The voices represented in this diverse collection include some of the leading practitioners behind the decisions and consequences of the most important case in the struggle for land justice for Australia's first peoples.

Their unique perspectives do not always reach the same conclusions and are expressed in a range of styles, from formal research papers to memoir-style reflections and interviews.

Informed and illuminating, this book will be essential reading for anybody who seeks to understand the issues, debates and current thinking surrounding native title in Australia.

MABO AND NATIVE TITLE 20 YEARS ON

PROFESSOR MICK DODSON AM
AIATSIS CHAIRPERSON

Looking back and reflecting two decades later, many of us will recall the great hopes and high expectations we had for the Mabo decision. It is timely to look back on the achievements and the challenges and what this recognition has meant in order to clearly see where we are going in the years ahead.

Twenty years later, we are still contending with the legacy of Mabo in ways that extend beyond the questions of law and legislation that arose from it.

The publication casts a wide net to include a diverse group of contributors ranging from native title holders to current and retired practitioners in the sector, to politicians and leading international scholars in Indigenous law. They offer a range of unique experiences and perspectives which are expressed in various forms: from the immediacy of interviews and personal reflections through to more formal academic overviews and analyses.

This book offers a portrait of the last 20 years that I am confident will allow readers to see with greater clarity the challenges that remain and all that has been accomplished.

I commend the book, also to be published as an e-book, to everyone. Undoubtedly it will become a significant historical text, marking as it does, the two decades since the Mabo High Court decision and will be of interest to a wide range of readers.

HOW TO GET YOUR COPY

The Limits of Change will be sold at a special discount price of $24.95 before 30 June 2012. After 30 June 2012, the book will be available for $39.95.

To purchase a copy - or for more information - please send an email to: NTRU@aiatsis.gov.au

www.aiatsis.gov.au

CHAPTER 23

The sky did not fall in! Rio Tinto after Mabo

Paul Wand and Bruce Harvey

Introduction

When the High Court of Australia made its determination in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 *(Mabo)* on 3 June 1992, the response from the mining industry was swift and strident.[1]

The decision was eventually given a legislative framework with the passage of the *Native Title Act 1993* (Cth) (NTA). Subsequently, after the High Court decision in *Wik Peoples v Queensland* (1996) 187 CLR 1 *(Wik)* in 1996, the *Native Title Amendment Act 1998* (Cth) was passed into Commonwealth law. At the time of the *Mabo* decision and in the immediate aftermath, CRA Limited (a pre-cursor of Rio Tinto) was one of the country's largest explorer, miner and metal processors and the company played a leading role in the public discussions that reverberated nationally.

In 1995, CRA took a public stance on the *Mabo* decision and native title that put it at odds with most of the mining industry and a number of conservative political leaders across the country. In the following year, CRA's major shareholder RTZ Inc based in the United Kingdom merged with CRA to form a dual listed company, registered in both Australia and the United Kingdom. After a relatively short time, this new entity was branded as Rio Tinto with the Australian arm trading as Rio Tinto Limited.

This chapter captures the history of Rio Tinto's involvement in the post–*Mabo* development of native title law, policy and practice. Many other companies working in the mining sector experienced similar issues and decision dilemmas to those described in this chapter.

The evolving position of industry and others is revealed in the portrayal of company-specific events, some highly conflictive. In this context this chapter goes on to explore the resolution of conflict through the new institutions that *Mabo* engendered and concludes by placing *Mabo* and Rio Tinto's response in a global context.

The mining industry's initial response to *Mabo*

In 1992, the peak body for the majority of the mining industry was known as the Australian Mining Industry Council (AMIC), with CRA Limited a significant member. AMIC and its members had long campaigned against the limitations imposed by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and had contributed to the abandonment of national Aboriginal land rights legislation mooted by Prime Minister Hawke in the mid 1980s. Against this background the High Court's Mabo decision surprised the industry, and the initial oppositional hue and cry was less than measured. As noted by Damien Short in his reflective 2007 paper, the decision was followed by:

> ... a construction of a public 'debate' that largely focussed on hypothetical, counterfactual concerns but which nevertheless successfully shaped the subsequent legislation. Indeed, the Court's legal reasoning, in particular the limited nature of native title, was ignored by commercial interests that sought advancement of their cause via a campaign that constructed a 'national crisis' out of a relatively minor private concern.[2]

The mining industry pushed the 'uncertainty' issue strongly. By 1993, AMIC had prepared a '*Mabo* Pack' and distributed it widely within the industry. It was a sober collection of legal opinions, press releases, papers on the value of the industry and pleas to the federal government to accelerate the legislative process to provide 'certainty', including a document outlining a preferred legislative response to the *Mabo* decision.

The pack contained an article from *The Mining Review* from November 1992 that stated:

> ... in the Northern Territory, which occupies one sixth of Australia, the *Aboriginal Land Rights (Northern Territory) Act*

> has been in force for 17 years and although that Act does not prohibit mining on Aboriginal land, the reality has been that it has been next to impossible to procure a reasonable level of exploration and mineral development on Aboriginal land since its operation. That is a dismal state of affairs and there is very real and reasonable concern that if legislation based on the Northern Territory model [is] enacted as a response to the *Mabo* decision, then the resource base of Australia would be significantly diminished.[3]

Also included was an op-ed, 'Government must protect business against *Mabo* fallout' from *The Australian* newspaper of June 7 1993 by the Assistant Director of AMIC, Geoffrey Ewing, who acted for AMIC as a principal polemicist. He opened with:

> The High Court decision in the *Mabo* case has undermined Australia's ordered system of commerce and unless the system can adapt to accommodate *Mabo* then the nation will face serious economic and perhaps social difficulties.

Further:

> Respected legal opinion now tells us that if native title can be established over an area which is subject to any type of property right granted since the commencement of the *Racial Discrimination Act* of 1975 without appropriate compensation, there is a significant possibility that the very grant of that property may be invalid. This may apply to freehold land, pastoral leases, mining leases, fishing leases, forestry licences, resort leases and indeed any sort of property right.

The federal government, under Prime Minister Keating, was consulting widely as it worked towards a legislated framework. Indigenous leaders, state governments and industry bodies were locked in tense discussions. AMIC and the peak farming body, the National Farmers' Federation (NFF) were prominent, with AMIC's position remaining fixed throughout. When the NFF, under the leadership of Mr Rick Farley, moved to an accommodation with Indigenous interests and the government, AMIC became isolated and lost influence in the negotiations.

In 1994, in a move aimed partially at developing a new approach to native title, AMIC was rebranded as the Minerals Council of Australia (MCA). Under changed management and as the warriors of the previous battles against Aboriginal land rights either retired or retreated, the MCA moved to accommodate the new reality after the NTA came into force in 1994. Through its Land Access Committee, of which Rio Tinto executives were members, the MCA engaged in a series of meetings with Indigenous leaders of land councils and native title representative bodies (NTRBs). These meetings proceeded throughout 1996 but stopped suddenly with the High Court's decision in *Wik* and the new uncertainty that emerged. Following *Wik*, the MCA took a strong position during the negotiations of Prime Minister Howard's Ten Point Plan and the subsequent amended legislation. It consistently argued for certainty in exploration and mine development and, successfully, for a watering down of many tenets of the original NTA.

Rio Tinto's role in these discussions related largely to Point 10 of the Ten Point Plan, involving an idea which had been outlined in an earlier submission to the Attorney-General. Point 10 was the provision in the amended legislation for parties to reach their own accommodation by mutual agreement under contract law and have it ratified after the event by government. This provision was subsequently acknowledged as providing the most flexible and acceptable options in the post–*Mabo* world: the Indigenous land use agreement (ILUA).

Rio Tinto — establishing a policy of agreement-making: 1992–2000

In the immediate aftermath of *Mabo*, CRA was in the vanguard of the concerns expressed by AMIC and many others across the sector. The Managing Director at this time, John Ralph, appeared in the national media on account of the *Wik* native title claim that covered 35,000 square kms of Cape York and included several mining leases held by Comalco. Ralph suggested that CRA would defer or scrap projects worth AUD 1.75 million unless the *Wik* issues were resolved. The company sent letters to all government Ministers stating that:

> You will appreciate that we cannot enter into any consultations with the Wik people until we have an assured position regarding title and absence of liability for any compensation arising out of invalidity.[4]

In July 1994 John Ralph retired as Managing Director of CRA Limited and was replaced by Leon Davis. Davis was a long-term CRA executive, having started his career as a metallurgist at the Port Pirie smelter in South Australia. He had held subsequent roles in the Melbourne headquarters, Bougainville and in Singapore where he was the Managing Director of a CRA business unit, Conzinc Asia Holdings. Davis had returned to Australia in the mid 1980s as Managing Director of Pacific Coal before becoming a group executive with responsibility for CRA's operations in Western Australia. In 1989 he was seconded to RTZ in London as Director of Mining.

When he returned to Australia to succeed Ralph, Davis commenced a period of change within the CRA Group that included the establishment of the dual-listed company that became Rio Tinto.

A key contributor to the Aboriginal aspects of this change process was CRA Vice President External Affairs, George Littlewood. In 1993, Littlewood conducted an overhaul of the external relations work of CRA. He based his efforts on extensive consultation and community research and perceived that a changed stance on Aboriginal issues would be of significant value to the company and the Indigenous communities impacted by its operations. With the people in his team, Littlewood worked with Davis in crafting a new approach and the new competencies needed to support it.

Davis commenced his reformation of CRA's approach to Aboriginal relations in the knowledge of some internal criticism, the opposition of conservative governments and a reluctant industry. It was a measure of his leadership that he persisted against such odds in the conviction that, ultimately, both Indigenous peoples and Rio Tinto would benefit. In a widely publicised speech entitled *New Directions for CRA*, Davis stated:

> As someone keenly interested in getting access to Australia's mineral and energy resources, I am glad to see that the vexed question of whether or not native title can still exist has been settled in principle ... Let me say this bluntly, CRA is satisfied with the central tenet of the *Native Title Act*. In CRA we believe that there are major opportunities for growth in outback Australia which will only be realised with the full cooperation of all interested parties. The Government's initiative has laid the basis for better exploration access and

> thus increased the probability that the next decade will see a series of CRA operations developed in active partnership with Aboriginal people.[5]

These statements gained national attention and received a mixed response; adverse from most of the industry and the conservative side of society and supportive from Aboriginal interests and sections of liberal society.

At this time, one of the authors of this chapter (Wand), a Group Managing Director, was appointed to the new head office position of Vice President Aboriginal Relations. At the 1995 CRA Managing Directors' (MD's) conference, Davis reinforced his new philosophy:

> 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.[6]

In 1995, CRA was engaged in the high profile Century Zinc mine development in Queensland's southern Gulf of Carpentaria region, and the much lesser known but important Hamersley Iron Yandicoogina iron ore development in Western Australia's Pilbara region. As mentioned above, Comalco, through its Mining and Refining Business Unit, was a party to the *Wik* claim in western Cape York. Davis held a meeting at the MD's Conference with the Group Executives and Managing Directors responsible for Century Zinc, Hamersley Iron and Comalco Mining, plus the Vice Presidents External Affairs, Aboriginal Relations and the Corporate Counsel. The operations executives were instructed to proceed with making agreements with the Aboriginal people appropriate to their sites. Some related actions were also taking place across CRA.

In order to obtain a corporate direction and clarity over roles and responsibilities, Davis and Wand convened a meeting of the Group Executives and Managing Directors accountable for Comalco, Hamersley Iron, Argyle Diamonds and CRA Exploration. The meeting agreed on a consistent approach whilst allowing for each negotiation to be the responsibility of the relevant business unit

with the head office providing advice and examples of success and failure in relationships with Aboriginal people and communities from Australia and overseas.

In October 1995, Davis gave another speech where he said:

> In CRA we see what we have done in the past to train, employ and, in general, to assist Aboriginal people has not been wrong, but we have to think about it earlier in our planning and we have to implement our plans better. We must capture this social dimension in our planning with the same thoroughness that we apply to solving technical problems ... it's a shift that means that our geological, engineering and mine planning skills are going to have to be augmented by skills in understanding and relating to community needs and concerns.[7]

Concurrent with these initiatives was the establishment of the Aboriginal Relations Division under Wand. In its early years, work was dominated by the legal circumstances surrounding the newly recognised Aboriginal rights and the resulting negotiations.

In 1996, this division developed and published the Aboriginal and Torres Strait Islander policy. Input to the policy was sought and received from a number of Indigenous leaders from across the country. Endorsed by the Executive Committee of CRA, it became the Rio Tinto policy. The first public expression of the policy was in a paper by Wand, 'CRA exploration and mine development in Australia after Mabo' delivered at the Aboriginal Land Rights Conference.[8] The policy is shown below:

Rio Tinto Aboriginal and Torres Strait Islander Policy

In all exploration and development in Australia, Rio Tinto will always consider Aboriginal and Torres Strait Islander people 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 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.

In August 1996 a conference was held in Old Parliament House Canberra to commemorate the 20th anniversary of the formation of the Northern and Central Land Councils in the Northern Territory. Their formation was a result of the ALRA. Wand presented a paper where he introduced his speech by mentioning the CRA mines at Weipa, in the Pilbara and at Argyle and their rather chequered impingement on local Aboriginal and Torres Strait Islander people. He concluded:

> In the light of CRA's present position on Aboriginal relations — a position that I believe will endure — I feel that it is appropriate to express regret to Aboriginal people in general

> and the communities of Cape York, the Pilbara and the eastern Kimberley region in particular.[9]

Littlewood later observed that this public expression had significant influence on the future conduct of Aboriginal relations with the Rio Tinto group.

The Aboriginal Relations Division was also closely involved in the provision of Aboriginal awareness training programs for senior management. As this was embedded, efforts shifted to the provision of support to those aspects of the policy quoted above that were concerned with Aboriginal employment and business development. To advance these concerns, Janina Gawler was recruited to the Division and resources were directed towards government engagement at the federal level. Consequently, Memoranda of Understanding (MOUs) were signed with three federal departments that were concerned with Aboriginal issues of employment, business development, education and training. These MOUs underpinned subsequent work that saw the Rio Tinto Group become the accepted leader in private sector Indigenous employment in Australia.

In 1999, Davis was on the threshold of retiring from his position of Chief Executive Office of Rio Tinto, based in London. As one of his last actions he directed the Managing Directors of the Australian Business Units to increase the levels of Indigenous employment in their operations and to include this in their planning processes. Over the subsequent decade the number of Indigenous employees in Rio Tinto grew to 9 percent of the total workforce, with achievement and targets substantially higher at north Australian operating sites.

Early experiences in reaching agreements

In the mid–1990s, Century Zinc had attracted the most national attention because it became a testing ground for the new NTA legislation. Ian Williams from Hamersley Iron had been appointed Managing Director of Century Zinc and found himself in previously untested circumstances. The President of the newly formed National Native Title Tribunal (NNTT), Justice Robert French, ruled that the claim over the proposed Century Zinc mine area was invalid, because native title had been extinguished by the grant of a pastoral lease. The High Court in *North Ganalanja Aboriginal Corporation v Queensland*[10] determined that the NNTT did not have the authority to make such

a determination and confirmed the Tribunal's mediation role. This decision is often referred to as the Waanyi case after the Waanyi Aboriginal traditional owners involved.

The negotiations with various traditional owners and their Native Title Representative Body, the Carpentaria Land Council, were protracted and difficult. The difficulties were compounded by a plan to convey concentrates to the Gulf Coast at Karumba via an underground pipeline — a distance of approximately 300 km. This meant the involvement of Aboriginal people who had traditional rights from the mine site to the port along the pipeline route. In the early stages, the Federal Minister for Aboriginal Affairs, the Hon. Robert Tickner appointed eminent jurist, the Hon. Hal Wooten AC QC, as a mediator between the company, the Carpentaria Land Council and the disparate Aboriginal groups. These negotiations failed to realise a result and the NNTT stepped in to mediate. Negotiations were again unsuccessful and the process moved to arbitration. A return to the negotiations phase occurred when it became apparent that an arbitrated outcome could result in much less favourable considerations for traditional owners.

CRA and the Century Zinc development team were urged by the federal (Howard) and state (Borbidge) governments to proceed to a legislated outcome. CRA and Century Zinc under Williams decided against such a course in order to maintain the policy position of preferring an outcome of mutual satisfaction. After settlement of the negotiations and establishment of the Gulf Aboriginal Corporation, CRA sold the mine to the newly independent Pasminco who maintained the agreement and eventually opened the mine for production in 2000.

With little fanfare, concurrent negotiations towards establishment of the Yandicoogina mine in the Pilbara were moving carefully forward. In its prior mine development, Marandoo in 1992, Hamersley Iron had its first experience of Aboriginal opposition, which resulted in a two year struggle and delay for the project. The position taken by Hamersley Iron in this confrontation was adversarial with little consideration given to traditional owners. Eventually, this opposition was overcome by enabling legislation in the Western Australian Parliament. Ian Williams, who was then Managing Director Development for Hamersley Iron, recognised the long-term risk and reacted by establishing an Aboriginal Training and Liaison Unit (ATAL). The purposes of this unit were to gain an understanding

of the various Aboriginal groups in the Pilbara, establish a sound relationship with them and provide training to equip Aboriginal people for employment in the mining industry.

The performance of ATAL and the shift in CRA/Hamersley's position provided a sound platform for negotiations with Aboriginal traditional owners in the establishment of the Yandicoogina mine. In contrast to the Marandoo project, Yandicoogina was brought into production ahead of time and under budget. Three traditional owner groups had combined into a single negotiation group, Gumula, which achieved a settlement in March 1997 involving initial mitigation payments, ongoing benefits and assistance in business development. An important aspect of this negotiation was that Hamersley provided for the mediation expertise of Dr Clive Senior, a prominent Perth lawyer. Dr Senior went on to outline the process in an Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Regional Agreements Paper published in February 1998, 'The Yandicoogina Agreement: A model for negotiating land use agreements'.[11]

As mentioned above, CRA Exploration (CRAE) was very active in Australia in the 1990s. Contemporaneous with Davis's New Directions directive, a negotiation over the St Vidgeon native title claim area in South East Arnhem Land was concluded by the other author of this paper, (Harvey), who, in 1995, was Chief Geologist Northern Territory for CRAE based in Darwin. The Walgundu Agreement was negotiated with the Northern Land Council on behalf of the native title claimants. It was Australia's second agreement under the NTA (the first was also with CRAE at Wellington in NSW where the company agreed to not explore over a small native title claim at Wellington Common) and was the first tangible expression of the new direction for CRA set by Davis.

In order to illustrate Rio Tinto's intention that the engagement between the company and the local community was to go beyond the minima of an agreement only on paper, Rio Tinto became involved in a number of other ventures that centred on the Roper River community of Ngukurr, the home of most of the signatories to the Walgundu Agreement. In 1997, the Rio Tinto Aboriginal Fund supported Ngukurr community members and Greening of Australia NT in an award-winning program to improve the civic landscape in the township. Later, in 1999, a Memorandum of Understanding was established between the Ngukurr Council, the University of

Wollongong (UoW) and Rio Tinto for UoW to conduct an extensive socio-economic baseline study, particularly in the areas of health, education and governance. This major effort to construct a baseline to inform decision-making and from which to measure progress was an innovation directly attributable to Rio Tinto's growing professional social science competency emanating from colleagues in London, notably Professor Glynn Cochrane.

By the end of the 1990s Rio Tinto had established a position as the company willing and able to negotiate mutually advantageous agreements.

Rio Tinto – improving processes and outcomes: 2000–2005

By the turn of the century, recognising the role that strong institutional representation plays in arriving at stable consensus agreements, Rio Tinto had consolidated its publically stated policy, outlined above, of working through NTRBs, even where other options existing under statute were preferred by others in the industry seeking expediency.

In the early 2000s, two major 'next-generation' agreements were concluded, one with traditional owners on Western Cape York in Queensland and the other in the East Kimberly region of Western Australia.

In Cape York, after six years of 'on-again, off-again' discussions and negotiations, the process received the required impetus by the appointment of a General Manager, Peter Crooke, to a full time role of negotiating a favourable outcome. Thus, the Western Cape Communities Co-existence Agreement (WCCCA) was finally signed in March 2001. The signatories to the Agreement included 11 traditional owner groups, four Aboriginal community councils, the Queensland Government, the Cape York Land Council and Comalco Limited (now Rio Tinto Alcan). In August 2001 the Agreement was registered by the NNTT as an ILUA under the NTA.

For Western Cape traditional owners, the WCCCA recognised their inherent native title rights and provided for their close consultation on future mining options on their traditional lands. For Comalco the Agreement guaranteed the use of traditionally owned lands for the company's present and future mining operations.

As well as the finance provided by Rio Tinto, the Queensland Government committed to making an annual payment of $1.5 million into the regional development trusts. At the signing ceremony the

Managing Director of the Comalco Mining and Refining Business Unit said:

> When we look back over Comalco's 40 year history here on the Cape, we see many incidents where our behaviour fell far short of the standards we now expect. When the Lease was granted to Comalco in 1958, the Indigenous people of the Western Cape were largely unrecognised and unacknowledged. Comalco must now and does now face up to that unfinished business ...
>
> So, on behalf of Comalco, I want to say sorry to the people of the Western Cape. As a company we cannot be proud of everything in our past here. But I stand before you today with determination to make the future different; to make Comalco part of the solution rather than a part of the problem. Through the process of reaching this Agreement, we have listened to many other stories where traditional owners have not been recognised or consulted, where traditions were not respected. Comalco is part of Rio Tinto, a company that has attempted to practice reconciliation with Indigenous communities in its businesses. We have progressed far since Leon Davis, former Chief Executive of Rio Tinto, made a speech in 1995 that surprised many people within and without the mining industry.[12]

Elsewhere, Argyle Diamond Mines (ADM) in the East Kimberly region had been operating since 1985, although diamond recovery from alluvial deposits had been undertaken for a number of years up to then. Traditional owner approval to mine the deposit was obtained from a very small group with four Aboriginal signatories to what was termed the Glen Hill Agreement. For many years consultation with and support for local Aboriginal communities occurred through what was called the Good Neighbour Agreement.

With the desire for positive legacies beyond the life of the mine, a more comprehensive, regional approach was sought and negotiation of a new agreement commenced in 2001 under the leadership of then Operations General Manager and later Managing Director, Brendan Hammond. Recognising the need to cross-fertilise agreement-making

competence, Simon Nish was recruited from the National Native Title Tribunal to lead the on-ground work at Argyle.

The Argyle Participation Agreement (APA) was reached after almost three years of negotiation between traditional owners, the Kimberley Land Council and ADM. The APA secured the support of the traditional owners for Argyle's current and future mining operations.

In August 2004, in a signing ceremony on the mine site attended by the Governor-General of Australia and the State Premier, the former Governor-General Sir William Deane said the agreement was unique:

> It is not only notable in its fairness but it also provides extraordinary employment opportunities and economic benefits, and faces up to the need to reverse the injustices of the past. There are three aspects of the Agreement that must appeal to anyone with the interests of Indigenous Australians in their hearts. The first is the respect it shows for the culture of the region. The second is the readiness it shows to seek to reverse the injustices of the past extinguishment of native title. The third respect is that the Agreement looks to the future – it looks to the future of coming Indigenous generations.[13]

Despite the increasing sophistication of agreements being negotiated elsewhere in Rio Tinto, its coal businesses were late to be involved in any Aboriginal dealings; a reflection on geography and history. Australia's major coal basins are located in more settled, rural regions of Australia – central Queensland and the Hunter Valley in New South Wales. The 2002 Mount Pleasant development proposal had attracted the Wonnarua native title claim and the Hail Creek project development inland from Mackay in Queensland had concluded an agreement of sorts that remained moribund when the project was suspended for market-based reasons in 1999. In 2004 the separate business units of Coal & Allied and Pacific Coal were brought under single management as Rio Tinto Coal Australia. At that time the operating mines were Hunter Valley, Bengala and Mount Thorley-Warkworth in New South Wales and Tarong, Hail Creek, Blair Athol and Kestrel in Queensland. In 2008 Tarong was sold to a state entity.

Mount Pleasant in NSW and Clermont in Queensland remained development projects.

Engagement with local Aboriginal groups has become a strong feature of coal operations in recent times. Rio Tinto Coal Australia has employed the ILUA provision of the *Native Title Amendment Act 1998* (Cth) to formalise relationships with traditional owners and local Aboriginal people in each region. As well as coverage of the heritage management issues, the tangible expression of each ILUA is a trust arrangement in each region, which has Aboriginal control over allocation of funds for local projects.

Contemporary agreement-making at Rio Tinto: 2006–2012

The Australian iron ore business of Rio Tinto has been the subject of remarkable change over the past 20 years. The Yandicoogina agreement outlined above was exercised when Hamersley Iron was the managing entity for Rio Tinto's Pilbara operations. In 2000 Rio Tinto was successful in a takeover bid for North Limited and the Robe River Associates. Their mine at Pannawonica and associated rail and port infrastructure came under the control of what eventually became known as Pilbara Iron. In 2004, under the name of Hamersley Iron, a future act agreement ILUA was concluded with the Eastern Guruma people, covering approximately 6,800 square kms near the first Pilbara iron ore town of Tom Price. On 1 March 2007, the Eastern Guruma secured native title rights to the area and a renewed ILUA was negotiated and registered on 23 June 2008. As well as a financial trust package, the ILUA included now standard and mutually obliging provisions for education, training, employment, business and community development.

Early discussion and negotiations with traditional owners likely to be affected by a new generation of expansions commenced in the early 2000s. Whilst initial efforts were largely ineffective, in late 2006, after an internal review, a fresh start was made. In a substantial escalation of any agreements previously attempted, the agreement-making ultimately involved 11 separate native title groups covering existing mines, potential mines and extensive infrastructure. As was now Rio Tinto common practice, the NTRB, the Yamatji Land and Sea Council, was involved where particular native title groups chose to engage its services. Several native title claimant groups chose not to be represented by Yamatji and these negotiations proceeded

independently. Late in 2010, after five years of intense discussion and negotiation, participation agreements were signed with five of the native title groups. Janina Gawler, who had previously worked in the Melbourne office of the Aboriginal Relations Division and was involved in the Argyle agreement process, joined Rio Tinto Iron Ore as General Manager Communities and took a leadership role in these negotiations. Two more agreements were added in 2011 with several other negotiations continuing concurrently. The coverage in this set of agreements is an estimated 71,000 square kms, the largest single area covered by aligned native title arrangements in Australia.

In mid–2007 Rio Tinto acquired the global interests of the Canadian aluminium corporation Alcan. In Australia this included the mine and alumina refinery on the Gove Peninsula in the Northern Territory. The operation and its dealings with local Aboriginal people (Yolgnu) have been the source of long contention and debate since exploration of the area's bauxite reserves commenced in 1955. Without any positive consultation with the traditional owners, the mine and refinery were built and became the first modern era mining enterprise in Australia to proceed where a vibrant Aboriginal culture persisted.

Over the years, ownership of the Gove operation changed a number of times, but the fundamental grievance of the Yolgnu on the matter of unilateral expropriation remained unresolved. When Rio Tinto assumed management in 2008 there was little engagement between the company and the community on this fundamental issue.

In the face of continuing unresolved issues around lease renewals and unrequited commitments, Rio Tinto sought to address the underlying anachronism and malaise arising from the original expropriation without consent. Alan Tietzel, another Rio Tinto executive with Argyle agreement experience, was selected to lead this work. With Gumatj and Rirratjingu clans taking the lead and Rio Tinto Alcan and the Northern Land Council involved and resourcing the process, the longest-running Aboriginal-mining dispute in Australian history was brought to a close.

The resulting agreement was signed and witnessed in May 2011 at Yirrkala by senior leaders of the Gumatj, Rirratjingu and Galpu peoples in the presence of the Prime Minister of Australia, the Hon Julia Gillard, who said:

> Today we celebrate an agreement between the traditional owners of this land and a mining giant. We celebrate jobs and

> investment for the region. We celebrate the long-term projects and investments which will benefit the Indigenous community living in north-east Arnhem Land. We celebrate the new leases for community use of buildings and the new lots at Nhulunbuy for traditional owner-funded construction projects, for medical facilities, shops and housing. We celebrate the contracting opportunities for traditional owner entities and employment opportunities for Yolngu people across the region ... This is an agreement to be proud of because it heralds a better future which will be built together ... [a]n agreement struck between a mining company and traditional owners, a bark petition addressed from one Australian people to the nation as a whole, an act to constitute the Commonwealth of Australia.[14]

Late in 2011, the North Parkes Mine (NPM) in NSW became the last Rio Tinto mining operation to change its philosophy and formally embrace the *Mabo* legacy; signing an agreement with the Peak Hill Land Council and Wiradjuri Council of Elders. In the heartland of NSW's mid-west, without the coercion of native title, in the midst of long-held settler wealth, this unassuming post-*Mabo* agreement is in some ways the most significant of all for Rio Tinto. The decadal shift in broad public sentiment in the rural heartlands of Australia is reflected in the way NPM moved from denial of an Aboriginal presence in the 1990's to its celebration in 2011.

By 2012, 20 years after *Mabo*, Rio Tinto Australia has successfully negotiated well over 100 exploration access agreements and all its current operations have in place comprehensive consent and participation agreements. All expansion projects, with the exception of an acquired legacy at the Jabiluka project in the Northern Territory, are similarly placed with agreements finalised or in the pipeline. More than 25 comprehensive participation agreements formalise company–Indigenous community interaction and recompense, both retrospectively and for the future. For Rio Tinto, the agreements secure generational Aboriginal consent to its full portfolio of known resource development options.

At the end of the first quarter of 2012, Rio Tinto had over 2000 Indigenous employees at its operations and a momentum of recruitment that comfortably outstrips its non-Indigenous recruitment rate. Over a billion dollars of present and future payments linked to

the profitability of Rio Tinto operations are projected to regional development trusts under local Aboriginal institutional control.

Perhaps most significantly, the dealings between Aboriginal and mining industry institutions and government have been completely transformed. Where rancour between AMIC and land councils once prevailed, there is now formal collaboration between the MCA and the confederation of NTRBs and the National Native Title Council on a range of policy initiatives.

Overall, it is a remarkable legacy to emerge from disregard, discord and adversity.

20 Years since *Mabo* — making sense of it all

In this narrative of one company's journey through a world shaped by *Mabo* we have deliberately provided selective humanist detail to what might otherwise be regarded as little more than the refutation of one and evolution of another legal doctrine. Reading between the lines of history it is clear that human qualities, including frailty, ego, courage and conviction, were formative elements in the legal landscape that did emerge. It is also clear that conflict, often deep and divisive but fortunately not violent, played a seminal role. And yet here we are now; the dire predictions that *Mabo* was a death rattle for industry have not come to pass, the sky has not fallen in and Australia's minerals and metals industry remains in rude good health. What sense are we to make of this?

The role of societal values, conflict and power relationships were central. Contrary to what many agents of sovereignty may want to think, the day-to-day conduct of people and communities is not governed by sovereign law. Rather, people's conduct is largely driven by social norms and values, governed on a daily basis by the emersion of peer pressure.

In the face of stalled attempts and the many personalities involved, Rio Tinto's norms have inexorably shifted to match the evolving post-*Mabo* norms, often with hiatus but with very few reversals.

Rio Tinto's ability to do this was grounded in what may appear trite; its claim to be a values-driven company, expressed on the company website as:

> Our values – accountability, respect, teamwork and integrity – are expressed through our business principles, policies and standards ...

> We set these out in our worldwide code of business conduct, The Way We Work. Our values underpin the way we manage the economic, social and environmental effects of our operations, and how we govern our business.
>
> Wherever Rio Tinto operates, health and safety is the first priority. All our Group businesses put sustainable development at the heart of their operations, working as closely as possible with host countries and communities, respecting their laws and customs. For Rio Tinto it is important that the environmental effects of its activities are kept to a minimum and that local communities benefit as much as possible from operations.[15]

From the authors' personal experiences what this actually meant in practice is that while operating in accord with prevailing sovereign law, Rio Tinto adopted broader social norms and values as a leading indicator of where sovereign law is moving and brokered options accordingly. The values-driven approach actually reflects an underlying preparedness to broker constructive dissent and debate and it is this which drove Rio Tinto's embracement of *Mabo*. As well as values, it was significant that the principal change agents in the Rio Tinto approach were not encumbered, nor embittered, by a history of confrontation over the pursuit of rights by Aboriginal people.

A constructive hypothesis is that conflict over resource extraction can lead to progressive institutional change.[16] The history and case studies presented in this chapter demonstrate that conflict driven by anachronistic land entitlements in Australia contributed to institutionalised reform. Pressure from Indigenous Australians directly affected by resource extraction and their allies forced the pace of statutory reform and the development of new institutions triggered by the *Mabo* decision. Perfect outcomes are not guaranteed, but the yokes for managing the future are in the hands of those with the most to gain or lose.

The resolution of conflict with the appropriate checks and balances on power relationships was the unique gift of *Mabo*. Unlike other places in the world, where powerful vested interests ignore the objections and claims of marginalised peoples, including Indigenous peoples, and the marginalised then resort to unlawful blockades and violence to seek redress, Australia has arrived at a workable process in sovereign law. The NTA encourages parties to reach their own arrangements regarding their respective interests, against all the world and a

potential myriad of other unconnected interests, and then have such agreements ratified by government on the basis of procedural checks on power balance.

Presented in this manner the two decades of conflict before, during and after *Mabo* and the casualties along the way are not decades wasted. The *Mabo* decision emerges not only as a seminal moment in Australia's history, it emerges as a catalyst that triggered constructive conflict enabling the maturing of a nation and the on-going realisation and equitable distribution of its resource endowment.

Mabo in an international context

Viewed in the broad context of Rio Tinto's operations worldwide and with the benefit of mature hindsight, the Mabo legacy can be seen as part of a global phenomenon.

In 2007 the United Nations *Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly. While it is not a legally binding instrument it does represent the dynamic development of international legal norms and it reflects the commitment of the UN member states to recognise the primacy of Indigenous land connections, not the least in Australia. Four member states voted against the Declaration: Australia, Canada, New Zealand and the United States, all of which have since endorsed it in full.

In 2011, the International Finance Corporation (IFC), one of the major organs of the World Bank Group, formalised Performance Standard 7, including specific provision that its client projects recognise the free, prior and informed consent of project-affected Indigenous peoples. The IFC standard and associated guidelines are the default position for numerous other financial institutions; meaning market-funded resource projects worldwide must conform or lose access to development funding. Hence, far from being an aberration, *Mabo* was at the forefront of an emerging global innovation in land rights and resource development consent. Like many innovations in history, a leap of advantage can accrue to early movers who, finding themselves in the right place at the right time, respond in the right way.

Viewed in this light, the journey Rio Tinto commenced through *Mabo* has taught it how to make agreements with host Indigenous communities and gain a unique competence and competitive advantage along the way. It looks remarkably prescient in this globally connected world.

Notes

1. The authors respectfully acknowledge the many people, past, present and future, who have contributed to Rio Tinto's and Australia's remarkable journey of reconciliation with our nation's first peoples. Too many to name, we thank you all for allowing us to share the extraordinary story and history we were all involved in. Any opinions implied or openly stated in this chapter are those of the authors and do not represent the official positions of Rio Tinto, other institutions or people.
2. D Short, 'The social construction of Indigenous native title land rights in Australia', *Current Sociology*, vol. 55, no. 6, November 2007, pp. 860–861.
3. G Ewing, 'The likely impact of the *Mabo* case on Aboriginal land rights claims', *Mining Review*, vol. 16, no. 5, Nov 1992, p. 12.
4. R Tickner, *Taking a stand: Land rights to reconciliation*, Allen & Unwin, NSW, 2001.
5. LA Davis, 'New directions for CRA', speech to the Securities Institute of Australia, Melbourne, March 1995.
6. LA Davis, speech to the CRA Managing Directors conference, Gold Coast, April 1995.
7. LA Davis, 'The new competencies in mining', speech to the Australian Institute of Company Directors, Melbourne, October 1995.
8. PD Wand 'Australia and the *Mabo* judgement', speech to the Aboriginal Land Rights Conference, Australia House, London, 18–19 April 1996.
9. PD Wand, paper presented at the Land Rights, Past, Present and Future Conference, sponsored by the Northern and Central Land Councils, Old Parliament House, Canberra, August 16–17, 1996.
10. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595.
11. C Senior, 'The Yandicoogina Agreement: A model for negotiating land use agreements', Regional Agreements paper no. 6, *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, AIATSIS, Canberra, February 1998, <http://www.aiatsis.gov.au/ntru/docs/regionalagreements/RAIP6.pdf>.
12. K Johnson, speech at the signing of the Western Cape Communities Co-existence Agreement, Evans Landing, Weipa, March 2001.
13. W Deane, speech at the signing of the Good Neighbour Agreements, Argyle Diamond Mine Site, August 2004.
14. J Gillard MP, speech at the signing of the Agreement between Rio Tinto Iron Ore and the Gumatj, Rirratjingu and Galpu clans, Yirrkala, 8 June 2011.
15. Rio Tinto, 'At a glance', <http://www.riotinto.com/aboutus/19602_overivew.asp>.
16. A Bebbington and J Bury, 'Institutional challenges for mining and sustainability in Peru', *Proceedings of the National Academy of Sciences*, vol. 106, no. 41, pp. 17296–17301.