Negotiated Agreements and Indigenous Peoples: Opportunities and Challenges

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INDIGENOUS PEOPLES AND POLITICS

Negotiations in the Indigenous World

Aboriginal peoples and the extractive industry in Australia and Canada

Ciaran O'Faircheallaigh



Seven Key Issues in Agreements Identified

- Cultural heritage protection;
- Participation in environmental management;
- Revenue sharing/royalties;
- Aboriginal employment and training;
- Business development opportunities;
- Land use, land access and recognition of land rights;
- Agreement implementation (much else depends on this!).



Assessing Content

- Developed numeric scales for each issue which could be used to measure extent to which a particular agreement promoted Indigenous interests;
- To the extent an agreement scores towards the top of the scale, it is a 'good' agreement in relation to the relevant issue.



Example: Environmental Management

Indigenous peoples have two linked interests:

- Have the greatest possible control over identifying and managing environmental impacts and over project design and operations that shape these impacts;
- Minimise environmental limits of mining. Indigenous control essential to achieve this as state agencies and mining companies cannot be relied upon to so.



Scale for assessing environmental management provisions

-1	Provisions that limit existing rights.
0	No Provisions.
1	Mining company commits to Aboriginal parties to comply with environmental legislation.
2	Company undertakes to consult with affected Aboriginal people.
3	Aboriginal parties have a right to access, and independently evaluate, information on environmental management systems and issues.
4	Aboriginal parties may suggest ways of enhancing environmental management systems, and project operator must address their suggestions.
5	Joint decision-making on some or all environmental management issues.
6	Aboriginal parties have the capacity to act unilaterally to deal with environmental concerns or problems associated with a project.

Australian Agreements

- Got access to 45 agreements for projects in all major mining regions in Australia, different legal regimes, companies, sectors etc;
- Analysed each agreement in detail, awarded it a 'score' on each of seven key issues;
- Confirmed that outcomes vary enormously across agreements



Confirms high degree of variation ...

- In some cases Aboriginal groups possibly worse off, on balance, than with no agreement – very few benefits, and undertake not to exercise existing rights;
- >In other cases:
 - No limitations on existing rights;
 - Strong cultural heritage/environmental protection;
 - Substantial economic benefits, including large financial payments and strong E&T provisions;
 - Recognition of title, return of land



Explaining Outcomes

- Not negotiation trade-offs by Indigenous people. Agreements tend to be strong across the board, or weak across the board.
- Illustrate by ranking agreements according to score on 'environmental management' index (from -1 to +6);
- 'High' scores (roughly top third of each scale) illustrated by red cells in next two slides, which show 'bottom 25%' and 'top' 25% of agreements on environmental management

Griffith

Ratings for 'Bottom 25%' of 45 Australian Agreements, grouped by environmental rating

	Legis- lation	Environ -ment	Employ & Train'g	\$	Cul. Her. Protec- tion	Business Develop	Imple- ment
1.	NTA	-1	3	1%	2	1	1
2.	NTA	-1	2	0.016%	2/3	2	0
3.	NTA	0	0	0	0	0	1
4.	NTA	0	1	0	2/3	0	0
5.	NTA	0	2	0.01%	3/4	2	4
6.	NTA	0	1	0.75%	2/3	0	0
7.	NTA	0	4	0.75%	3	4	2
8.	NTA	0	4	0.45%	3	2	2
9.	NTA	0	2	0	2	4	3/4
10.	Policy	0	1	0.13%	1	0	0
11.	NTA	1,-1	1	0.1%	3	3	4
12.	NTA	1,-1	2	0.82%	2	0	0

Ratings for 'Top 25%' of 45 Australian Agreements, grouped by environmental rating

	Legis- lation	Environ -ment	Employ & Train'g	\$	Cul. Her. Protection	Busi- ness Develop	Imple- ment
34.	ALRA	4	4	3.05%	5	4	5
35.	QMRA	4	5	2.5%	3	3	3
36.	Policy	4	3	2%	3	4	5
37.	Policy	4	6	2.25%	5	4	2
38.	NTA	4	5	0.4%	4/5	4	2/3
39.	NTA	4	4	1.5%-2%	4	5	5
40.	ALRA	5	3	2%	3	3	2
41.	ALRA	5	5	3.05%	5	4	4
42.	QMRA	5	6	3%	5	0	2
43.	NTA	5	4	0.5%	3/4	4	4
44.	NTA	5	5	2%	5	3	2
45.	NTA	6	5	1.6-2.5%	4/5	4	3

How do we explain these outcomes?

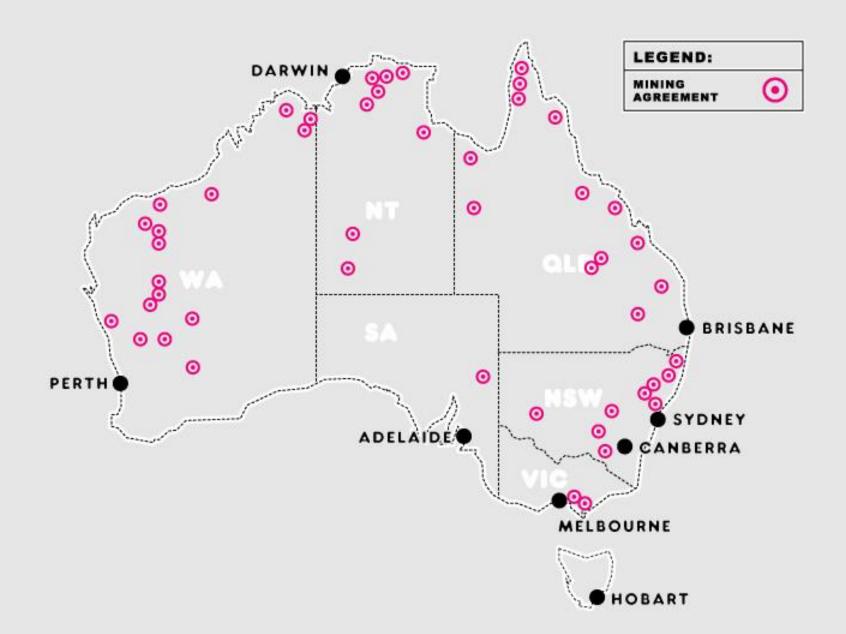
- Not company policy or industry sector weak and strong agreements with same company and within same sector;
- Not company size some of strongest agreements with medium sized companies rather than large;
- Legal regime is important. Australia's Native Title Act (NTA) seriously weakens bargaining position of Aboriginal groups (Indigenous people can't say 'no' to development; Act puts huge pressure on Indigenous parties to reach agreement);
- Many of weakest agreements are negotiated under NTA;
- No weak agreements under Northern Territory Land Rights
 Act, which gives Aboriginal people a veto over mining.

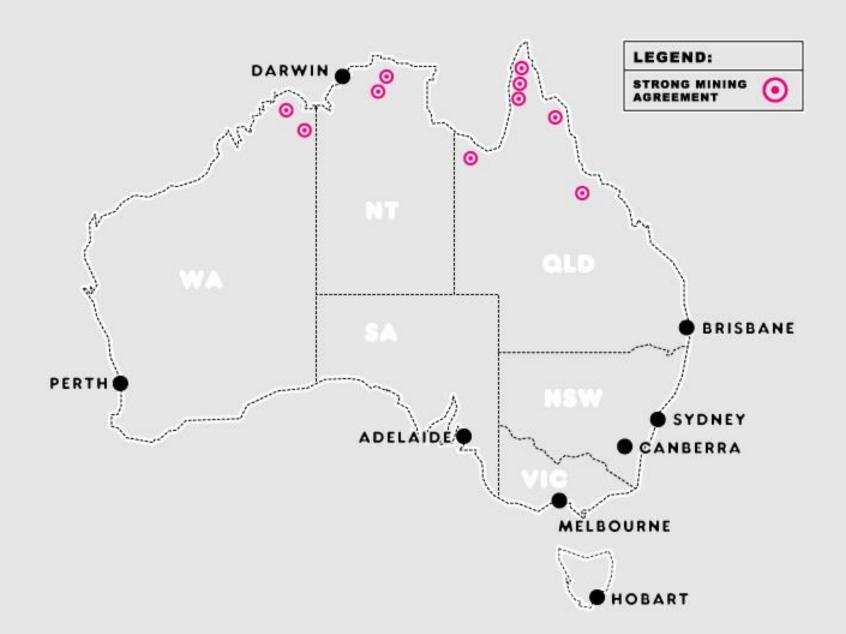


Explaining Outcomes

- But legislation is not the whole story;
- There are very strong agreements (including three of the strongest) under NTA;
- Strong agreements occur where Aboriginal groups have no legal right to insist on negotiations ('policy agreements');
- Mapping geographical location of 'strong agreements' helps to provide an explanation.
- These agreements occur in areas where Aboriginal regional political organisation is strong.







Explaining Outcomes

Aboriginal landowner groups linked to strong regional political organisations are able to:

- Get access to financial and technical resources to support negotiations, including by negotiating with developers and the State;
- Can make 'credible threats' of direct political action;
- Develop strategic approach to using environmental impact legislation, administrative law, mining law;
- Develop regional strategies to build precedents from agreement to agreement.



Achieving Positive Outcomes from Agreement Making in the Extractive Industries: Australia and Canada

Professor Ciaran O'Faircheallaigh Griffith University, Brisbane

Address to the Conference on 'Māori Engagement with Extractive Industry: Innovative Legal Solutions', University of Auckland, 12 June 2015



Illustrating Diverse Outcomes: LNG in Australia

Kimberley LNG

• Legal framework – native title act

- Claim status undetermined
- One LNG project, 50+years
- Project output 50 MTPA
- Corporate context consortia of oil/gas majors
- Timing 2008 2011

Gladstone LNG

- Legal framework native title act
- Claim status undetermined
- Four LNG projects, 50+ years
- Combined Output 120 MTPA
- Corporate context consortia of oil/gas majors
- Timing 2008 2013

Illustrating Diverse Outcomes: Australia

Kimberley LNG

- Financial: A\$1.5 billion, minimum A\$550 'hard cash';
- Aboriginal employment and training: early education funding, targets, dedicated resources;
- Environmental management:
 Direct and major role for
 Traditional Owners (TOs), total
 control over some key decisions
 (e.g. water source);
- Cultural heritage protection:
 comprehensive regime, e.g.
 Aboriginal c.h. rangers funded for life of project

Gladstone LNG

- **Financial**: less than A\$10 million total;
- Aboriginal employment and training, general commitments only, probably unenforceable.
- Environmental management:
 No role

<u>Cultural heritage protection</u>: No extra protection beyond inadequate state laws



Explaining the Difference: Community Engagement and Representation

Kimberley LNG

- Aboriginal regional organisation, Kimberley Land Council, with a lot of experience in agreement making, supporting Traditional Owners;
- 'Traditional Owner Task Force' representing all affected native title claim groups;
- 'Indigenous Impacts Assessment' process involving communities.

Gladstone LNG

- No Aboriginal land council involvement;
- Little experience in agreement making;
- Various Aboriginal groups using private lawyers;
- No community engagement process.

