

# Negotiated Agreements and Indigenous Peoples: Opportunities and Challenges

Professor Ciaran O'Faircheallaigh  
Griffith University

Extract from

Keynote Address to the Workshop on The Law and Politics of  
Indigenous-Industry Agreements, College of Law, University of  
Saskatchewan, 13 - 14 October 2017

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

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

# 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

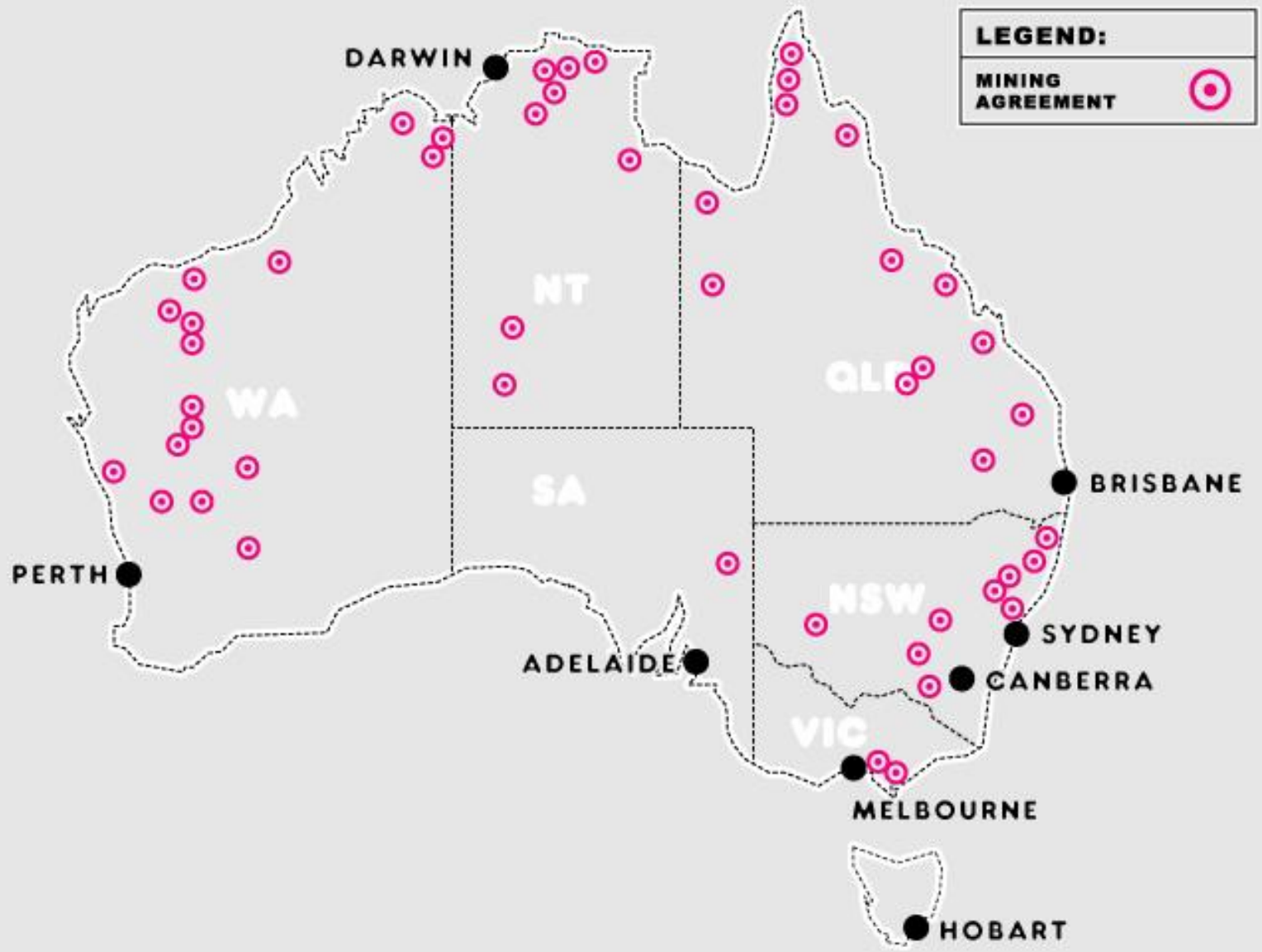
	Legis- lation	Environ- -ment	Employ & Train'g	\$	Cul. Her. Protec- tion	Busi- ness Develop	Imple- ment
34.	ALRA	4	4	3.05%	5	4	5
35.	QMRA	4	5	2.5%	3	3	3
36.	Policy	4	3	2%	3	4	5
37.	Policy	4	6	2.25%	5	4	2
38.	NTA	4	5	0.4%	4/5	4	2/3
39.	NTA	4	4	1.5%-2%	4	5	5
40.	ALRA	5	3	2%	3	3	2
41.	ALRA	5	5	3.05%	5	4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

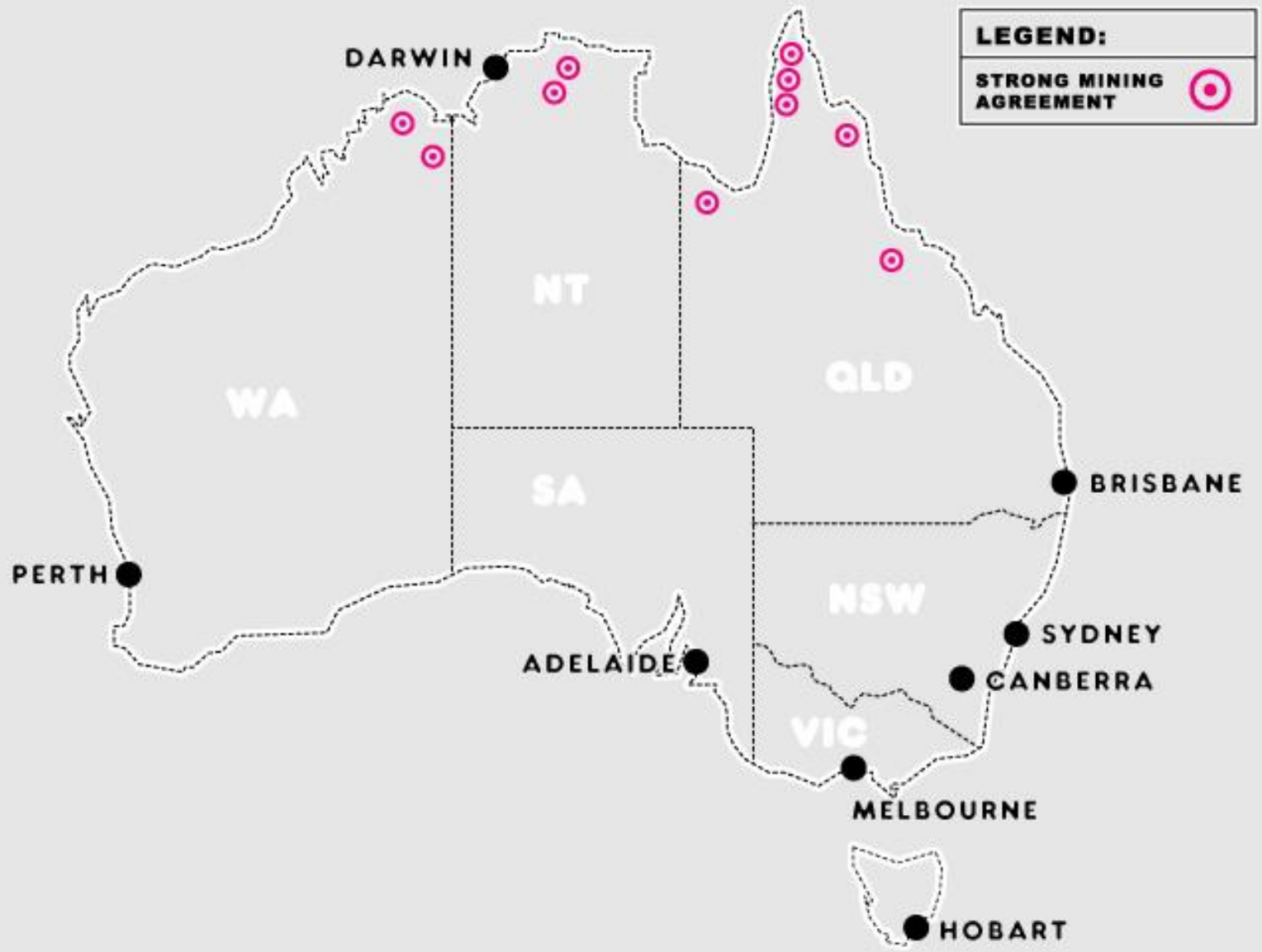
# How do we explain these outcomes?

- ◆ 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
- Cultural heritage protection: 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.