

Negotiations between mining companies and Aboriginal communities: process and structure

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Foreword

Between March and May 1995 the Centre for Aboriginal Economic Policy Research sponsored a thematic seminar series titled 'Policy Aspects of Native Title'. The following eight seminars were presented:

- 'Relative allocative efficiency of the *Native Title Act 1993* and the *Aboriginal Land Rights Act 1976*' by Siobahn McKenna (March).
- 'Resource development agreements on Aboriginal land in the 1990s: features and trends' by Ciaran O'Faircheallaigh (March).
- 'Negotiations between Aboriginal communities and Mining companies: structures and process' by Ciaran O'Faircheallaigh (April).
- 'Tourism enterprise and native title: the Tjapukai Dance Theatre, Cairns' by Julie Finlayson (April).
- 'Funding native title claims: establishing equitable procedures' by Jon Altman and Diane Smith (April).
- 'Native title and land management' by Elspeth Young and Helen Ross (April).
- '*Native Title Act 1993*: latest developments and implementation issues for resource developers' by Jon Altman (May).
- 'Native title and regional agreements: the Kimberley case' by Patrick Sullivan (May).

Five of these seminars have now been revised into *CAEPR Discussion Papers Nos 85-89*. Of the others, Siobahn McKenna's seminar was published earlier as *CAEPR Discussion Paper No. 79* and Jon Altman and Diane Smith's seminar was published as 'Funding Aboriginal and Torres Strait Islander Representative Bodies under the *Native Title Act 1993*' (Issues Paper No. 8, *Land, Rights, Laws: Issues of Native Title*).

Owing to the pressing public policy significance of the issues addressed in this series, these discussion papers are intentionally exploratory and aim to disseminate information to a wider audience than that able to attend the seminars at the Australian National University.

Jon Altman
Series Editor
July 1995

ABSTRACT

During recent years, Aboriginal communities in Australia have become increasingly involved in negotiating mineral development agreements with mining companies and relevant State agencies. Two factors influence the extent to which indigenous interests can achieve benefits from such negotiations. The first is the bargaining power available to them associated, for example, with land ownership. The second, is the ability of Aboriginal communities to both mobilise such leverage and extend it. This paper draws heavily on the author's own experience in assisting Aboriginal communities in Cape York to prepare for and undertake negotiations, especially in relation to the Cape Flattery and Skardon River projects. Issues addressed include: the mechanisms for establishing common community goals; the means available to ensure access to vital information for commercial bargaining purposes; the need for adequate resources for equitable negotiations; the need for appropriate institutional structures; and the need for good working relations between technical staff and political decision-makers. At the end of the paper the key issue of the implementation of conditions in agreements is raised, especially if the significant potential benefits to communities, often foreshadowed, are to be realised.

The later sections of this paper draw on material which will be included in the author's contribution 'Negotiating with resource companies: issues and constraints for Aboriginal communities in Australia' in R. Howitt, J. Connell and P. Hirsch (eds) *Resources, Nations and Indigenous Peoples*, Oxford University Press.

Acknowledgments

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Introduction

During recent years Aboriginal communities in Australia have become increasingly involved in negotiating mineral development agreements with mining companies and relevant state agencies.¹ Two key factors determine the extent to which indigenous Australians can achieve benefits from such negotiations, or can utilise them to avoid outcomes they regard as undesirable. The first is the bargaining power available to them. This is influenced, in particular, by the status of the land involved (Aboriginal or non-Aboriginal), the legal context within which projects are developed (which varies considerably between individual states and territories), and the specific nature of the projects, mining companies and mineral commodities which are involved. The second factor is the extent to which Aboriginal communities mobilise the bargaining power they possess, and take advantage of any opportunities to enhance that power. Maximisation and effective use of bargaining power does not occur automatically, but rather requires Aboriginal communities and organisations to develop appropriate processes and structures. This paper discusses a number of key issues which must be addressed in developing such processes and structures.

In discussing process it should be stressed that it is not simply a means to an end (in this case the benefits created, or costs avoided, through a mining agreement). Process is extremely important in its own right, particularly for indigenous people who have often been excluded from decisions which affect them or who have been subject to processes they find alienating and degrading. The importance of process is increasingly recognised, for example, in the literature which evaluates public programs and policies. Evaluations of labour market access programs in the United States have revealed that while program managers are primarily concerned with program outcomes, for example, enhanced access to job opportunities, clients base their evaluations heavily on the 'quality of processes occurring within a program', and particularly on the way they are treated by program staff (Hougland 1987).

Closer to home, an extreme case clearly illustrates the importance of process. In the late 1980s a gold mine was developed on Horn Island in the Torres Strait, but was abandoned after the developer encountered financial difficulties. The mine was left in a state which had the potential to cause major environmental damage, leading local Kaurereg people to stop hunting and fishing in its vicinity. The Queensland Government is now taking remedial action to ensure that such damage does not occur. Indigenous people affected by the project were excluded from decision-making processes both in relation to approval of the mine and development of a remedial program. As a result, they have lost faith in the relevant authorities, and regardless of how positive the outcomes from the remedial program actually are, they are very unlikely to believe that the danger of environmental damage has been averted, and as a result will continue to experience economic and social deprivation and emotional stress (Stock and Lane 1994).

To date, little has been written on developing appropriate structures and processes for use by Aboriginal communities (or other indigenous communities) in negotiations with mining companies. There is a large literature on negotiations between multinational companies and national governments, but quite apart from the fact that the circumstances of Aboriginal communities are generally very different to those of

national governments, most of this literature focuses on the content of mineral agreements and on negotiating tactics. Little of it deals with the actual processes and structures utilised in pursuing those agreements or in developing specific approaches to negotiation (for a review see O'Faircheallaigh 1981).

Reflecting the paucity of secondary source material, this paper draws heavily on the author's own experience in assisting Aboriginal communities in Cape York to prepare for and undertake negotiations in relation to the Cape Flattery and Skardon River projects. Cape Flattery is an existing silica sand mine located near Hope Vale, which has been operated for over 20 years by Cape Flattery Silica Mines (CFSM), a wholly-owned subsidiary of the Mitsubishi Corporation. During 1991-92 the Hope Vale Community Council negotiated terms for the renewal of CFSM's existing leases, and the issue of a new lease to allow expansion of silica mining. Skardon River is a kaolin mining and processing operation currently (June 1995) being established near Old Mapoon on land owned by people who now live mainly at Old Mapoon, Napranum and New Mapoon. Negotiations in regard to this project occurred during 1994 between the developer, Venture Exploration, and the trustees of the land and the Marpuna Corporation (supported by the Cape York Land Council). Both projects operate under Queensland's *Mineral Resources Act 1989*, which requires mining companies operating on Aboriginal land to seek the permission of the trustees before mining leases can be granted (for details see O'Faircheallaigh 1995).

In drawing on this experience the benefit of hindsight is acknowledged - some of the points made below are the result of realising, after the event, that things could have been managed more effectively. It should also be stressed that in discussing process and structure, the use of specific examples is illustrative rather than prescriptive; what works well in one community may not necessarily be appropriate in another. However all communities must address the issues raised in the following sections if they are to negotiate successfully with mining companies.

The paper takes as its starting point a decision by a community and/or its leaders to enter into negotiations with a mining company. This is of course not the only option open to Aboriginal people faced with a mining project which will utilise their land or otherwise affect them. They may decide to try and stop the project by whatever means available, and as a result may see little reason to negotiate with the developer. This may be because they feel that the effort and resources involved in undertaking negotiation and subsequently managing an agreement is not worth the benefits likely to be obtained, and therefore decide to ignore the development entirely. However, Aboriginal communities are increasingly entering into negotiations with mining companies and with State agencies involved in the project approval process. It should be stressed that their decision to do so need not reflect either support for mining or an expectation that negotiations will yield substantial benefits. It may just as easily result from a desire to obtain some benefit from a project which Aboriginal people would prefer not to proceed with, but which they cannot stop; and/or a desire to avoid negative impacts associated with a project, particularly in terms of damage to the environment, cultural heritage or significant sites.

Establishing community goals

The first and perhaps most important step in mobilising bargaining power is to establish community goals in relation to negotiations. This requires effective processes not only to seek community views on relevant issues, but also to disseminate information on existing or likely project impacts and on the options available to the community, so that people can make informed decisions. Information dissemination is particularly important where new projects are concerned or when mining has not previously occurred near a community, because people often cannot draw on previous experience in gauging likely impacts or in establishing preferred outcomes.

Consultation and information dissemination should not cease once negotiations begin, because the negotiation process itself will yield additional information and may open up unexpected opportunities or close off preferred options, requiring the community to reassess its position. It should also be stressed that the consultation process is very important not only in establishing goals, but also in ensuring community support throughout the negotiation process. Obviously, people are much more likely to support their community leaders and their advisers if they have been well informed about the issues involved and feel that they have helped shape negotiating positions.

A key part of the consultation and information dissemination process, in both the Cape Flattery and Skardon River projects, involved the conduct of Economic and Social Impact Assessments (ESIAs). These were not meant simply to predict impacts and suggest ameliorative measures; they played a key role in developing negotiating positions which sought to address the aspirations and concerns of the communities.

In the case of Cape Flattery, the ESIA proceeded as follows. Draft terms of reference were drawn up on the basis of the consultants' prior research, and these were revised after a preliminary visit to the community and discussions with community leaders. The terms of reference set out the areas of economic and social impact which would be subject to research and raised issues to be canvassed with the community. There was no intention to use the terms of reference to restrict the scope of the ESIA; rather they provided a basis on which to proceed with the research. It was expected that other issues would emerge as the research progressed.

Desk-based research and fieldwork were undertaken to develop a profile of the community, and in particular, to identify categories of people who might be affected differently by the mining at Cape Flattery. Government and company records were used to establish basic information relating to mining operations at Cape Flattery. For example, to study the patterns of employment and the extent and use of royalty payments under the existing agreement, negotiated on behalf of Hope Vale in 1971 by Queensland's Department of Aboriginal and Islander Affairs. The first phase of consultations then began. This involved a series of meetings with specific groups within the community, including wives of workers at the mine, the workers themselves, and the community rangers. Individual interviews were carried out with over half of Hope Vale's adult population; and a major public meeting was held. These meetings and interviews were used to provide people with the information gained from desk-based research and initial fieldwork, and to identify their concerns and aspirations about mining at Cape Flattery. The local television broadcasting capacity available through the BRACS system was utilised both to explain the

purposes of the ESIA and as another way of disseminating information. Three young people from the community worked with the consultants on the project, and their help was invaluable both in obtaining and in disseminating information.

Additional desk-based research was undertaken in response to issues raised by community members and not included in the terms of reference, and initial proposals were developed aimed at maximising benefits and minimising costs associated with Cape Flattery. These were discussed with groups and individuals in the community, and in some cases alternative approaches were devised which appeared more likely to satisfy the (at times conflicting) aspirations of various groups.

An ESIA report was then prepared for the Hope Vale Community Council. This included a community profile and factual information about CFMSM's operations and future plans, an extensive and detailed discussion of people's concerns and aspirations, and a series of recommendations which offered concrete strategies for dealing with concerns and pursuing aspirations. It also suggested a monitoring program for ongoing measurement and review of social and economic impacts (Holden and O'Faircheallaigh 1991).

The ESIA report was used as a basis for preparing the negotiating position put to CFMSM/Mitsubishi, an outcome which was facilitated by the inclusion of one of the ESIA consultants in Hope Vale's negotiating team. For example, Chapter 10 of the report contained a detailed analysis of CFMSM's corporate structure and its accounting practices and operations, and demonstrated how these gave Mitsubishi considerable latitude in defining 'profits'. This indicated the need to shift away from the profit-based royalty contained in the existing compensation agreement, and such a change became part of Hope Vale's negotiating position. Chapter 7 recorded the concern of Hope Vale women at being unable to visit their husbands at the mine, which provides only single accommodation. Hope Vale negotiated for CFMSM to refurbish and make available a disused accommodation barracks for use by visitors from the community.

Most members of the Hope Vale Community Council attended the negotiating sessions, and this provided an important mechanism for maintaining a flow of information to the community on the proceedings. When the negotiations and the related legal proceedings reached a crucial phase, a public meeting was organised at Hope Vale and the Council Chairman and the negotiators reported back to community members and sought their views on how to proceed. Mining was suspended at Cape Flattery for the afternoon so that workers could also attend.

The ESIA process in relation to Skardon River was similar (Holden and O'Faircheallaigh 1995), but complicated by the fact that the Mapoon people live in three communities: Napranum, near Weipa; Old Mapoon, about an hour's drive away; and New Mapoon, near the tip of Cape York and about 15 hours drive from Weipa. Public meetings were held with people from all three communities. A survey was administered to most traditional owners for the land affected by the Skardon project, and issues were canvassed in informal discussions with community members. A Steering Committee of seven people was utilised in order to maintain communication as negotiations proceeded. This included some of the Deed of Grant in Trust (DOGIT) trustees, representatives of the traditional owners as well as

representatives of the Marpuna corporation (the entity which administers the recently re-established community at Old Mapoon), and members from each of the three communities. Whenever members of the negotiating team visited any of the communities, they tried to meet with Steering Committee members and brief them on developments. In addition, some members of the Steering Committee travelled to Brisbane and Cairns for negotiating sessions, but the cost involved, combined with logistical problems, limited the Steering Committee's involvement.

Effective consultation and information dissemination is time-consuming and expensive. For example, six months was required to plan, prepare and circulate draft copies of the Cape Flattery ESIA, while over \$60,000 was required to fund the Skardon River ESIA.

As indicated above, the ESIA process does not rely exclusively, or even mainly on formal public meetings; to do so would be to greatly reduce the likelihood that community opinion would be thoroughly canvassed, since certain categories of people (for example women, the aged, young people) are less likely to attend such meetings or to voice their opinions if they do attend. Public meetings are also not an ideal medium for disseminating information, since effective communication will often require one-on-one or small group discussions.

Nevertheless public meetings do play a key role, both because they are an essential part of community decision-making, and because time is often a restricting factor during negotiations, meetings can become the major form of consultation and information dissemination. Thus, great care needs to be taken to ensure that they are conducted in a way which makes them as conducive as possible to the articulation of community opinion and the effective communication of information.

As people who live or work in Aboriginal communities will realise, public meetings are in fact not always conducted in this way, because time is scarce and/or because enough consideration is not given to adapting 'European-style' meeting processes to local needs. It is still sometimes the case that those responsible for conducting meetings fly in to a community on the appointed day; set the meeting room up in a way which emphasises their separateness from local people (for instance by sitting behind a table piled high with imposing-looking documents); present a large amount of information, some of which may be highly technical; and raise alternative options for decision. They then ask for input from those attending the meeting. Some people will respond, but many will not, and indeed some will already have left the meeting because they fail to perceive its relevance or because they have more urgent matters to attend to. If sustained discussion occurs, it may have to be cut short so that the visitors can catch their return flight.

Within the constraints created by available time and resources, there are a number of things which can be done to enhance the role of public meetings as effective tools for information dissemination and community decision-making. Two examples can be cited. It should be stressed again that these are by way of illustration; what is feasible and appropriate will depend very much on the individual community concerned.

The first involves giving some thought to catering for the needs of young children while the meeting is in progress. If children are not catered for, before long they will start demanding attention from adults, and almost inevitably it will be women who will respond. They may be forced to leave the meeting temporarily, or for good, and so will be disadvantaged in terms of their access to information and decision-making.² Alternatively, anticipating such problems, they may not come to the meeting in the first place. It can make a considerable difference if, for example, children are taken into account in choosing a location for the meeting (for instance by holding it near an area where children can play safely, and where physical access is easy, allowing both parents and children to slip in and out and check on each other). Children's needs should also be taken into account in catering for a meeting, for example, by ensuring a supply of refreshments they will enjoy. These may sound like matters of detail, but they can have a major impact on women's involvement in a meeting. It should also be noted that arrangements of this sort are very difficult to make if those attending the meeting arrive in a community on the day it is held.

The second example involves the time periods over which meetings are conducted. It can be much more productive to spread meetings out, holding a series of short sessions rather than one or two long ones. For example, a session might be held from 10.00 am to noon; a second one from 2.00 to 4.00 pm; and a third on the morning of the following day. An arrangement of this sort allows people time to deal with other commitments, some of which may be both urgent and inflexible; it is also very useful to have a vehicle available during breaks in the meeting, making it easier for people to attend to their commitments and return in time for the next session. People also have time between sessions to think about and discuss issues raised in the meeting; and, very importantly, they have an opportunity to discuss matters informally with community leaders and advisers. It is often during informal discussions between sessions or in the evenings that key issues are first raised, and they can then be canvassed with the wider group and discussed more fully when the meeting resumes. Finally, planning a series of relatively short sessions provides greater flexibility, for example, allowing the discussion to continue past the scheduled finishing time if important matters are being dealt with.

Some of these points may appear to be self-evident. But if they are not attended to, the impact on community consultation and information dissemination can be severe, which in turn greatly reduces the likelihood that subsequent negotiations with mining companies will be effective in meeting community aspirations and concerns.

Ensuring access to information

One objective of processes such as ESIA is to acquire specific sorts of information for use in negotiations, in particular, information about community goals and about the historical or likely impact of a mining operation. But other forms of information must also be acquired. These include details of project economics, particularly expected commodity prices, revenue, costs and profits; the size and structure of the workforce; anticipated environmental impacts; and corporate structure and strategies. The last is of particular significance. A major part of any successful negotiation strategy must be to achieve an accurate understanding of the other party, of its strengths, weaknesses and core objectives in relation to the project concerned.

In this context, it may be extremely important to obtain information about the structure of an international corporation as a whole, and not just of the subsidiary responsible for developing or operating a specific project. This is very evident from the experience of the Hope Vale community with CFSM. A major part of CFSM's physical and financial transactions were with other entities within the Mitsubishi group of companies. For example, most of CFSM's loan finance came from Mitsubishi Banking Corporation, and a high proportion of its silica output was sold to Japanese foundry and glass manufacturing companies in which Mitsubishi had an interest. Against this background, it was necessary to get a clear picture of how CFSM fitted into Mitsubishi's overall corporate structure before negotiating positions could be developed, for example, in relation to the nature of an appropriate royalty regime.

Recent developments in information technology have made it both easier and cheaper to obtain access to some forms of information. For instance on-line, full-text access to newspapers and to company reports can allow very rapid searching of these sources for information on specific projects or companies. Material identified in this way can immediately be downloaded to a personal computer, sorted and stored for future use.

However, some of the information required for negotiations can be difficult and expensive to obtain. The issues involved are often complex; for example, more than 2,400 separate corporate entities were identified in attempting to unravel Mitsubishi's structure. In addition, relevant information may not be in the public domain. A case in point relates to commodity prices. While prices for homogeneous commodities traded on open markets (such as gold) are readily available, those for heterogeneous commodities which are generally sold on the basis of contracts (such as bauxite, silica or kaolin) can be very difficult to obtain. In both the Cape Flattery and Skardon River cases, a variety of trade sources and advice from commodity specialists were utilised in order to obtain relevant price data. Some information could only be obtained through personal contacts of individuals on the negotiating teams (for instance with international trading houses and with a major international environmental organisation which maintains extensive databases on multinational corporations).

Complex and extensive information may also be required regarding non-economic issues, such as the likely environmental impact of specific mining or processing operations, management of significant sites, and mine rehabilitation.

In some areas information may be provided by the companies themselves, but this will have to be independent verified. When the Cape York Land Council commissioned an independent audit of Venture Exploration's original Environmental Impact Statement (EIS) for the Skardon River project, it revealed a number of major deficiencies, and the company agreed to complete a revised EIS. Clearly, access to research expertise and to skilled negotiators is essential if the information required by Aboriginal communities is to be obtained and put to good use, a point which raises the issue of access to resources.

Access to resources

Negotiating with mining companies is an expensive business. Legal, economic and negotiating expertise must be obtained; fieldwork conducted; legal proceedings undertaken; and travel expenses incurred in bringing Aboriginal people and their advisers to negotiating sessions. The cost of the last item alone can be substantial, as illustrated by the Cape Flattery negotiations. These involved eight series of meetings over a period of eight months, mainly in Cairns. Two of the negotiating team had to be flown from Sydney for each meeting, a third from Brisbane, while community leaders had to travel from Hope Vale.

It is difficult to accurately estimate the costs involved in any set of negotiations, and the cost can vary substantially from case to case depending, for example, on the nature of the project and of the community affected by it, the duration of the negotiation process, and the extent to which legal proceedings are involved. As an indication of the scale of expenditure required, Hope Vale's costs in undertaking the Cape Flattery negotiations exceeded \$300,000.

While they are expensive, negotiations can yield a very high return. For example, over the period 1972-92 Hope Vale received an average of \$20,000 per annum in royalty income from the Cape Flattery mine (Holden and O'Faircheallaigh 1991: 109). As a result of the new conditions negotiated with CFSM, the community received over \$500,000 in 1993 alone. Thus it more than recouped its outlay on the negotiations in a single year. This does not take into account other benefits the community received under the revised agreement such as employment and training, access to land, environmental management and infrastructure development. The Mapoon people are guaranteed a minimum annual income comparable to that currently received by Hope Vale from the Skardon River project from year six of production onwards, and if company forecasts of output are accurate its income will be considerably higher (O'Faircheallaigh 1995).

A problem in this negotiating process is that Aboriginal communities often do not have access to the funds needed to meet 'up front' expenditure which would allow them to make maximum use of their negotiating position. Given this situation, arrangements for provision of funding are absolutely crucial. Funding can be arranged on the basis of specific allocations by government, obligations placed on project developers, or through a broader legislative framework.

In the Northern Territory, many of the costs involved are borne by the land councils, which are entitled, under the *Aboriginal Land Rights (Northern Territory) Act 1976*, to obtain income from operating mines on Aboriginal land within their jurisdiction. These land councils have statutory responsibilities to assist owners of land affected by resource development. However, they have always faced severe resource constraints in attempting to fulfil their wide range of statutory responsibilities. They carry an additional burden as a result of the Northern Territory Government's practice of appealing all land grant decisions made under the Land Rights Act and have encountered problems in recovering legal costs subsequently awarded against the Northern Territory Government. The land councils have consequently tried to insist that mining companies bear at least those costs which are directly associated with consultations and negotiations including for example, travel, catering and other costs involved in consulting traditional owners.

There is no legislative provision in Queensland or in Western Australia for statutory land councils, and Aboriginal communities have had to make more ad hoc funding arrangements. Requests were made to the Queensland Government for assistance with Hope Vale's negotiating expenses in relation to Cape Flattery. These were not successful, though the Department of Family Services and Aboriginal and Islander Affairs (DFSAIA) did share the costs of conducting the ESIA with the Aboriginal and Torres Strait Islander Commission (ATSIC) and the Hope Vale Community Council. Hope Vale was therefore thrown back on its own resources, and at times encountered major difficulties in funding the negotiation effort.

In the Skardon River case, the initial costs of providing advice and support to the Mapoon people were borne by the Cape York Land Council, which obtains its base funding from ATSIC. However, that funding does not include an allocation for negotiating mining agreements. Funding of negotiations is seen as a State government responsibility, and the Land Council was severely constrained in terms of the assistance it could provide. The community's legal advisers argued that Venture Exploration, as the proponent of the Skardon development, should bear the costs involved in obtaining the consent of the Mapoon Trustees and traditional owners. The company did agree to meet some legal and negotiation expenses and to help fund the ESE, along with the DFSAIA. However, it should be noted that under current Queensland legislation there is no statutory requirement for developers to meet the costs of Aboriginal landowners, which places Aboriginal people in a vulnerable position. In addition, these costs arise at a time when mining companies are facing a whole range of other project development costs and are not yet in receipt of income from their investment. Particularly for smaller companies such as Venture Exploration, the necessity to fund Aboriginal participation in negotiations can represent a substantial burden.

It is also important that funding be available during project development when it is most required. For example, the Cape York Land Council initially requested funds for an ESIA of the Skardon River project in August 1993, but it was October 1994 before funding was finalised. Because of the project development timetable, the ESIA then had to be completed in a much tighter time frame than was desirable.

Elsewhere in Australia, Aboriginal communities and organisations have met similar, and in some cases more severe, problems in obtaining adequate funds to support their negotiation effort, placing them at a serious disadvantage and consequently imposing substantially greater economic, social, cultural and psychological costs on some communities.

It is important to stress that when it comes to resources to support negotiations, there is a fundamental inequality between mining companies and governments, on the one hand, and indigenous communities, on the other. This can be illustrated using two examples, the first involving the Cape Flattery negotiations. After four sets of meetings between the parties many issues had been resolved, but a few key ones remained in dispute. As often happens at this stage in negotiations little progress was made in the next two sets of meetings, as both sides sought to maintain their positions on important issues. But while a company with Mitsubishi's resources faces no

difficulty in maintaining its involvement in negotiations during such a period of deadlock, Hope Vale found it extremely difficult to do so, putting it under great pressure to reach agreement. Had a breakthrough in negotiations not occurred soon afterwards, the community's financial position would have become untenable.

The second example involves the Mapoon community. In 1993 the Mining Warden's court was due to consider a number of issues relating to the Skardon project. Failure to have itself represented at the hearings could have weakened the community's ability to subsequently object to the development and/or negotiate a compensation agreement. But the Marpuna corporation had no funds available to engage legal representation. The ATSIC commissioner for the region became aware of the dilemma, and persuaded a firm of solicitors to take on the case on the basis that he would then explore funding options with the relevant government authorities. Had he been unsuccessful, the firm would have had to carry the loss.

It should be stressed that communities will often require access to funds simply to determine 'threshold' issues such as whether or not to negotiate with a mining company. An informed decision on such matters will usually require access to at least some information, for example, regarding the community's legal situation and the likely impact of the project involved. In addition, the community may have to expend some funds in order to keep its options open in relation to legal proceedings until a decision is made on whether or not to negotiate (for instance by lodging objections to project approval in a Mining Warden's court).

It can be argued that Australian politicians, state and federal, are guilty of inconsistency (if not hypocrisy) particularly when they complain that Aboriginal people hold up resource development, but then fail to ensure that Aboriginal communities and organisations are adequately funded to participate in relevant decision-making processes. Governments clearly need to review, as a matter of urgency, arrangements for funding Aboriginal participation in negotiations and related activities. One option is to impose a charge on mineral exploration licences, and pool the revenue earned in a fund which could then be utilised to support Aboriginal negotiating efforts.³

Another resource, the value of which is often underestimated, is time. In fact it is a crucial input into the negotiation process. Time is needed to allow researchers to establish appropriate methodologies and to collect the wide variety of information discussed above, particularly where community consultations are involved; to permit community members to evaluate the reliability and sensitivity of their advisers; to analyse the data collected and on this basis to develop negotiating positions and strategies; to have legal and economic advisers and community leaders examine the succession of draft agreements which typically emerge during a negotiation; and to seek community approval for final negotiating positions. In the Cape Flattery case, over two years elapsed between initiation of discussions in Hope Vale and signing of an agreement with CFSM.

However Aboriginal communities are often constrained in the time they have available, usually as a result of time lines established by legal processes, by political pressure from governments, or by project development schedules. For example, the

Aboriginal Land Rights (Northern Territory) Act 1976, as amended in 1987, sets time limits on consultation and negotiation processes. The Skardon River project negotiations had to be accelerated because commercial considerations (particularly the requirement to raise loan capital) required the developer to have an agreement in place within a very short time frame. Schedules can also be compressed at specific points within the overall negotiation process, for instance because of the dates set for court hearings. The scheduling of Mining Warden's hearings in relation to both the Cape Flattery and Skardon River projects had this effect.

Governments can create major problems for Aboriginal people by pushing for accelerated development schedules (sometimes, though not always, at the developer's request). An extreme example is offered by the EIS approval process for Skardon River. At one stage the Mapoon community was given seven days to respond to a draft EIS which was several hundred pages in length. The community's solicitor responded as follows:

As to your request that our comments on that report be provided within 7 days, all the writer can say is 'you can't be serious'. To suggest that our clients, the traditional owners of the subject land ... can give your department an informed and considered response to a document of such complexity and size is absolutely astounding in its naivety (cited in Stock and Lane 1994: 5.13).

Pressure to hasten decision-making is not only inimical to Aboriginal interests, it often has little effect because of the range of other factors which can delay project development. These include adverse market conditions, industrial disputes, engineering or geological problems and delays in raising finance.

Time constraints create severe problems when they limit the capacity to accumulate information and, in particular, to undertake consultations with Aboriginal landowners. In some cases, appropriate adjustments can be made to conventional research processes. For instance, the authors of the Skardon River ESIA undertook to provide a brief interim report which simply listed the key aspirations and concerns of traditional owners so that negotiations could proceed on principles for an agreement; a full draft ESIA was provided later, prior to finalisation of the agreement. In other cases negotiators simply have to manage with the limited time at their disposal; the capacity to identify key issues and pieces of information then becomes crucial.

Institutional structures

Aboriginal communities also need an effective institutional framework within which to pursue negotiations. This is required for procedural reasons which, while they may appear mundane, are in fact indispensable. For example, it is necessary to maintain a point of contact between participants over time, to commission and collate research, to sign contracts and to issue invoices and process payments. In more substantive terms, an appropriate institutional structure is required to permit accumulation of knowledge and expertise, to ensure that the lessons learned from one set of negotiations are remembered and applied in the next. A team of experts can be brought together on an ad hoc basis for specific negotiations, but in the absence of

appropriate institutional arrangements, that expertise is quickly dissipated once an agreement is signed. Such arrangements also facilitate the essential task of monitoring agreements once they are concluded, an issue discussed below.

Because most Aboriginal communities are likely to have only one (or at most two) resource projects on their land, community-based institutions (such as community councils) are usually not very well placed to provide the specialist expertise required to negotiate with mining companies and subsequently to monitor implementation. This highlights the value of regional institutions such as land councils, which over a number of years will deal with a series of resource developments and in doing so have an opportunity to build up their negotiating skills. Because they operate on a larger scale, land councils are also better able to employ specialist staff, for example, lawyers with a background in resource development as well as environmental experts. In addition, they can play a coordinating and facilitative role in developing long-term relationships between particular communities and 'external' specialists such as university-based researchers. This can both broaden the pool of available expertise and reduce difficulties created by the (often related) problems of high staff turnover and 'burnout' among land council field personnel.

It is no accident that land councils have been the subject of sustained and harsh criticism by the mining industry and by some state and territory governments in Australia. They are accused of being bureaucratic, ineffective, and of preventing mining companies from dealing directly with traditional landowners to quickly reach agreements which are acceptable to the developer and those most directly affected by mining projects. While land councils may not always operate with maximum efficiency, there is no doubt that these criticisms reflect, in substantial measure, their success in extracting more favourable conditions for Aboriginal landowners.

An alternative approach is for individual communities to retain a commercial law firm which can act as an institutional base in undertaking negotiations and in subsequently monitoring implementation of agreements. This arrangement can work well where the firm has appropriate expertise (both in a legal sense and in dealing with Aboriginal people and organisations) and assigns a senior member of staff to the task, and where continuity in personnel can be ensured. For example, Hope Vale was advised during the Cape Flattery negotiations by a partner in a Cairns-based law firm, and the same person has, over the last three years, been responsible for monitoring implementation of the agreement. This continuity has been very important in allowing Hope Vale to deal with the (substantial) difficulties which have arisen in ensuring effective implementation of certain aspects of the Cape Flattery agreement.

Unfortunately, these conditions are not always achieved, and some Aboriginal communities have had unfavourable experiences with commercial law firms, at times suffering from these firm's frequent changes in responsible personnel and/or from allocation of briefs to junior staff or to individuals who lack the necessary legal and interpersonal skills. Such experiences may become rarer as legal work associated with native title matters generates a wider base of expertise within private legal practices.

There is also the issue of cost to consider, given that commercial legal fees are substantial. This issue is in turn linked to the question of scale. If only one

community in a region has a resource project on its land, reliance on a commercial firm may be appropriate. If a number of communities and projects are involved, it may be more efficient to develop appropriate in-house expertise through a land council. Of course, these two outcomes represent ends of a spectrum. In practice, it may be appropriate for a land council to develop expertise in certain areas and obtain external advice on more complex matters. This is how the Northern Land Council (NLC) operates, for instance, in-house staff deal with most routine matters relating to mining negotiations, but it does retain external environmental, geological and legal expertise when this is required to deal with specific issues. A final reason why institutional structures are important relates to the role they can play in facilitating interaction between technical advisers and negotiators, on the one hand, and community leaders, on the other. Because of its importance, this point is discussed separately in the next section.

Relationships between ‘technical’ staff and community leaders

One point which emerges clearly from the international literature on negotiations is that the development of effective communication, and more generally of good working relationships, between technical staff (negotiators, legal and economic advisers) and political decision-makers is crucial in ensuring a satisfactory outcome to negotiations (O’Faircheallaigh 1981: 90). The same applies to negotiations which involve Aboriginal communities, except that in this case the lines of communication must often encompass a broader range of actors and includes traditional landowners, members of community councils and office-holders in land councils.

Little has been written about relations between technical advisers and Aboriginal political leaders and communities in Australia. This may partly reflect a defensiveness created by disparaging comments regarding the supposedly manipulative role of ‘white advisers’, and partly the fact that few of those involved on either side of the relationship have had the opportunity to document their experiences.

Effective communication between technical staff and community leaders is absolutely essential if the former are to develop a clear understanding of Aboriginal aspirations and concerns, and if the latter are to have a sound grasp of the issues being dealt with through the negotiation process. In addition, development of good rapport is crucial if advisers and community leaders are to work together as a negotiating team, maintaining cohesion in their dealings with mining company representatives and developing a capacity to react quickly to opportunities and threats, as these arise in negotiations. Where a good relationship is established the individuals involved will often be able to develop appropriate negotiating tactics as a meeting unfolds.

Effective communication does not occur automatically, but will happen more freely as trust develops between the two groups. Specific measures can also be taken to encourage it. Involvement of negotiators in ESIA’s and other community consultation processes can be very helpful, giving them a chance to become more familiar with the communities concerned. Very importantly, it also allows them to spend time with Aboriginal participants in situations which the latter find comfortable, for example fishing expeditions, as opposed to city office blocks or hotels, where some Aboriginal people do not feel very comfortable.

The actual conduct of negotiations themselves is also very relevant. Allowing time before and after negotiating sessions is essential, to plan strategies and later to evaluate their success and to reach a common understanding of positions put by the mining company. It also provides an opportunity for less formal interaction among members of the negotiating team. This may be relatively easy to ensure when negotiations are undertaken within a land council where permanent staff reside in a specific location such as Darwin, Alice Springs or Cairns. Where negotiating teams are put together to deal with specific projects, as was the case with Cape Flattery and Skardon River, it is by no means easy to achieve. Maintaining continuity among both advisory personnel and Aboriginal representatives is also very important, if the rapport built up at one stage of the process is to be carried through to the next.

While there may be points in the negotiation process where it is useful for technical advisers from both sides to meet in the absence of principals, it is generally beneficial for community leaders to be present throughout the negotiation process, even if they do not actively participate in much of the discussion. This allows them to see at first hand how the advisers are attempting to achieve the goals they themselves have set, and helps ensure that they retain a sense of involvement. (It also reminds mining company officials that they must take the concerns of Aboriginal people seriously if they are to achieve a negotiated settlement.) A majority of Hope Vale councillors, for example, attended every one of the negotiating sessions with Mitsubishi, which was of considerable help when final negotiating positions had to be established and defended.

The NLC's policy is that it prefers traditional owners to attend negotiating sessions, but leaves the decision to them. While traditional owners will always be involved in key meetings, for instance, when matters of general principle are being discussed or when a draft agreement is close to completion, detailed negotiations are often conducted by NLC and mining company officials. However, in some recent cases traditional owners have chosen to attend all negotiating sessions.⁴

For financial and logistical reasons, it is often not possible for all of those who wish to attend negotiations to do so. In such cases probably the best solution is for at least one community leader to participate in all sessions, ensuring that a degree of continuity is maintained, and for the others involved to attend in rotation, allowing some sense of continued involvement.

The general point here is simple but crucial. Negotiations, from the Aboriginal perspective, ultimately involve political decisions about the mix of costs and benefits which a community will accept and about the distribution of those costs and benefits within a community. Aboriginal communities and their leaders, rather than non-Aboriginal advisers, should make such political decisions. But Aboriginal leaders will not be in a position to offer their communities informed recommendations, or make informed decisions, unless effective communication is maintained between themselves and the technical advisers and negotiators and, more generally, unless they are fully involved in the negotiation process.

Implementation

It is easy to assume that the community's interests are secured once negotiations are concluded and an acceptable agreement achieved, but in fact this is far from the case. It is necessary to ensure that agreements are actually put into effect (or continue to be put into effect) and that their implementation takes account of changing circumstances; given that agreements may apply for up to 21 years, the latter point is of considerable importance. Ensuring that agreements are properly implemented requires sustained attention over time.

That this is not easy to achieve is obvious, for example, from the history of the agreements negotiated in relation to the Ranger and Nabarlek uranium mines. In both cases major problems occurred regarding the non-implementation of certain provisions. For example, under the Ranger Agreement (Article 13.2), the Commonwealth undertook to 'require the Joint Venturers to ensure that appropriate training facilities are made available' where Aboriginal organisations lacked the skills to 'satisfactorily provide' goods and services to the Ranger mines. At certain times the contracting company owned by the major Aboriginal organisation in the region, the Gagudju Association, did indeed lack the skills necessary to compete successfully for contracts, but the Commonwealth did not fulfil its obligations under Article 13.2. To cite another example, QML did not submit annual reviews of its training and employment program to the NLC, as required by the Nabarlek agreement (O'Faircheallaigh 1995).

What can be done to try and ensure effective implementation? Where a regional land council exists, it may be possible to have a dedicated unit or staff member(s) whose role is to monitor implementation of agreements. Thus, for example, the NLC established a Uranium Monitoring Unit to monitor implementation of the Ranger and Nabarlek units and of the impact of uranium mining in general. However more urgent pressures in relation to current negotiations or other land council business such as land claims tends to create pressure to divert resources from such units. This is exactly what happened with the Uranium Monitoring Unit: within 18 months it had been disbanded and its resources allocated elsewhere (O'Faircheallaigh 1995).

Another approach is to insert provisions regarding monitoring of implementation in the mineral development agreement. The NLC now seeks to include an annual 'administration fee' as part of the terms and conditions for granting of a mining lease on Aboriginal land. It is intended that this fee will cover the cost of monitoring compliance with the agreement (as well as paying, for example, for ongoing consultations with traditional owners). The NLC also seeks to include provisions regarding access to the project site and to relevant information, both required to ensure effective monitoring. To date these provisions have only been included in the 'mining parameters' attached to exploration licence agreements and so it is too early to assess its effectiveness (O'Faircheallaigh 1995).

In the case of the Cape Flattery agreement, the role of ensuring implementation was assigned to a Coordinating Committee made up of three members nominated by the company and three from Hope Vale. But problems arose in relation to funding of the community's participation in this Committee, partly because it was decided that input

was required from Hope Vale's legal advisers. The Skardon River agreement also provides for establishment of a Coordinating Committee, but in this case the company has agreed to fund community participation up to an agreed amount.

More generally, an important way to enhance implementation of negotiated agreements is to raise the level of awareness regarding the need for effective implementation processes, partly by having more research published on the implementation of agreements as well as on their content and their negotiation. It was only when scholars in the United States began publishing detailed studies which examined the implementation of public policies in the 1970s, for example, that policy makers in liberal democracies also began to plan explicitly to ensure policy implementation, rather than just assume that it would happen.

Conclusion

Negotiation of mineral development agreements constitutes only one possible response by indigenous people to mining projects which affect their land or their communities. But it is an increasingly prevalent response in Australia, and is likely to become even more widespread as more indigenous Australians reassert ownership over land and the political climate makes it less and less acceptable for developers to ignore indigenous interests. There are also signs that agreements will increasingly be negotiated in relation to other types of development, such as tourism.⁵

Negotiation of mineral development agreements can yield significant benefits to indigenous communities, but if positive outcomes are to eventuate they must develop appropriate processes and structures to identify community aspirations and concerns, obtain and apply relevant information and resources, and recruit and direct appropriate technical expertise. They must also ensure that agreements which in theory offer benefits (or allow significant costs to be avoided) are actually put into practice over extended periods of time. Given the resources, social and emotional as well as material, which are absorbed in negotiating with mining companies, it is especially important that communities, and their advisers, strive to effectively address the issues raised in this paper, and that governments support them in doing so.

Notes

1. Mineral development agreements are defined here as contractual arrangements entered into by Aboriginal organisations or communities under which they agree to support, or not to oppose, exploration or mining activity on land they own or claim, and in return are offered defined benefits which would not accrue to them as a result of standard commercial transactions or of general government policy.
2. Howitt notes, in discussing gold mining in Central Australia, other difficulties which women face in having equal weight attached to their views in relation to mining (Howitt 1991: 130-31).

3. I am grateful to Jim Fingleton, Native Title Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, for this suggestion.
4. Personal communication, Engineering and Environmental Officer, Northern Land Council, 14 April 1995.
5. A current example is provided by the agreements being negotiated between developers and the Djabugay community in relation to the Tjapukai Cultural Theme Park and the Skyrail project, near Cairns.

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