

# Introduction

## **Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability**

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## Boom times and benefits

Australia and other parts of the globe are experiencing an unprecedented boom in the resource extraction sector.<sup>2</sup> In Australia, the sites of resource extraction often coincide with, or are adjacent to, traditional lands of indigenous people or indigenous communities, such as in the Pilbara and Kimberly regions of Western Australia, in Queensland and in the Northern Territory. A similar pattern of co-location occurs in the other countries from which case studies in this volume are drawn, due to historic patterns of colonial land appropriation and resource extraction. This coincidence presents unprecedented opportunities for indigenous and local peoples to build wealth and promote sustainable social and economic development. Of course 'development' is a highly contested term and the construct has various manifestations at both a global and local level, with an enhanced emphasis of late on economic empowerment and sustainability.<sup>3</sup>

This special edition of *JERL* contains ongoing interdisciplinary research examining the management, participation in and impact of resource extraction on indigenous and local peoples. Many factors are at play in determining whether potential benefits from resource extraction will be unlocked and flow to indigenous populations and local communities. The central question explored by the articles in this edition of *JERL* is: how can benefits from resource 'booms' be successfully translated into long-term benefits for indigenous peoples and local communities?

This selection of articles was included among a wide range of papers originally presented at a symposium held in Broome, Western Australia, where Australia's largest mining boom is under way.<sup>4</sup> The articles cover developments in Australia, Papua New Guinea, East Timor and South Africa. Each of these locations has its own particular modes of managing the relationship between indigenous and local peoples on the one hand,

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2 John Taylor and Benedict Scambary, 'Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation' (Research Monograph No 25, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); Australian Government (Department of Industry, Tourism and Resources), 'Working with Indigenous communities, Leading practice sustainable development program for the mining industry' (2007) (Canberra), .

3 See Kloppers and DuPlessis, 'Corporate Social Responsibility and Mining in South Africa', at p in this issue.

4 Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industry' (Agreements, Treaties and Negotiated Settlements (ATNS) project), Broome, 9-10 July 2007, [www.atns.net.au/pubs.asp](http://www.atns.net.au/pubs.asp).

and governments and the resources sector on the other. Law plays a role in formalising and implementing these relationships to varying degrees in particular contexts. While these sites have many differences in their historical and contemporary arrangements for managing these relationships, they all involve previously colonised peoples who have been historically and contemporarily disadvantaged, both socially and economically.

The articles, both individually and read as whole, present a range of evidence at both a macro and micro level of engagement, negotiation, impact, agreement and benefit sharing from which some key themes emerge as to how indigenous and local community interests are accommodated within the resources sector. These include benefits and incentives as well as impediments to long-term social and economic development for indigenous peoples and local communities.

The relationships that have developed between resource extraction companies and local and indigenous people in the shadow of their operations have conventionally been cast as corporate social responsibility issues. However, several jurisdictions have developed statutory and regulatory regimes that have improved the status of indigenous people and local communities beyond that of mere stakeholder. These regimes include impact benefit negotiations and agreements for compensation for impacts, and take various forms in different jurisdictions.

At a macro level there are three key sites for unlocking the social and economic potential of the resources boom for indigenous and local peoples: the first is the legal framework within which access to land and the resource is acquired and the consequential impact of these legal structures on the development of relationships, whether leading to access, control and benefits through negotiation of agreements or otherwise is worked out. These may be prescriptive, enabling or voluntary. The second is the effectiveness of the more discrete legal, social and cultural arrangements and relationships that affect participation in the resources sector at various levels and have an impact on the content and implementation of agreements and associated legal instruments that provide for the delivery of tangible benefits. The third is the structural arrangements for delivery of benefits (usually but not necessarily embodied in an agreement) and the successful implementation of that detail, whether for the immediate or long-term benefit of indigenous parties and local communities. At a micro level, local initiatives and experiences at all of these sites provide significant insights for enhancing social and economic development.

Thus, as the articles suggest, the multidimensional nature of these issues finds varied expressions in different locations and circumstances. These issues include the legal obligations imposed on the parties, the role of market

power, the social responsibility obligations of corporations, risk management, adaptation of processes and forms to local conditions, the impact generally of resource wealth on local communities and the need to identify, measure and evaluate benefits such as employment and education. All of these are crucial elements in what Australia's Treasury Secretary Ken Henry describes as human capital development.<sup>5</sup>

The legal framework in which these relationships develop and operate, and the power relationships that flow from this framework, can serve both as a barrier and a stimulus for productive relationships and the flow of benefits to communities. Not only are the context, process and substance of obligations arising under legislation or agreements vital to the flow of benefits and the development of sustainable indigenous and local communities and economies but also crucial are effective legal models for implementation.<sup>6</sup> Agreements might be structured into legal forms that inhibit or enhance the enjoyment of benefits and wealth creation. Administrative and financial arrangements for the management and disbursement of funds from agreements with mining or other specific project partners are crucial elements in providing opportunities for sustainable economic and social development and wealth creation for communities.<sup>7</sup> Law and its operation are central to the analysis of the complex set of institutional relationships at play in the engagement of indigenous and local peoples and the resource industry. However, as discussed below, law does not operate in a vacuum; it should be viewed as both a reflection of existing modes of accommodation, but as well holds the potential for more effective engagement.

This introduction contextualises the analysis and debate across the multidisciplinary research captured in the succeeding articles. The first section of the introduction provides a brief country overview of the history of colonisation and the status of the legal 'recognition' of indigenous peoples and local communities' 'rights' to land and resources. The discussion draws on common themes about the social, economic and institutional factors that go to the heart of capacity building for indigenous and local peoples. However, the overarching theme of the introduction, and indeed the articles themselves, is an examination of the enduring social and economic

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5 Ken Henry, 'Addressing Extreme Disadvantage Through Investment in Capability Development' (speech delivered at the Australian Institute of Health and Welfare Conference, Canberra, 6 December 2007), [www.treasury.gov.au/contentitem.asp?NavId=008&ContentID=1327](http://www.treasury.gov.au/contentitem.asp?NavId=008&ContentID=1327), at 13 December 2007.

6 See generally, Marcia Langton, Odette Mazel, Lisa Palmer and Maureen Tehan (eds), *Settling with Indigenous People: Modern Treaty Agreement-making* (2006).

7 Lisa Strelein and Tran Tran, *Taxation, Trusts and the Distribution of Benefits under Native Title Agreements* Native Title Workshop Report No 1/2007 (Australian Institute of Aboriginal and Torres Strait Islander Series (AIATSIS) 19 September 2007).

disadvantage of indigenous peoples and local communities that are surrounded by resource generated wealth, and the development of strategies, policies, and legal and institutional frameworks to address this imbalance. The specific areas examined in some detail include: corporate social responsibility agendas, including employment and training programmes, agreement-making and the revenue distribution processes.

### **Enduring disadvantage: legal frameworks of access to land and resources**

Broadly speaking, across the countries and situations included in this volume, there are two parallel legal frameworks that are relevant: first the legal and institutional structures for allocation of mining rights and their associated regimes, and secondly indigenous land and resources regulation and management. Each of these is affected by other regimes and frameworks. Typically it is at the points of intersection between the two major frameworks that recognition and engagement with indigenous interests and local communities are progressively delineated and reworked, particularly in light of the progressive expansion of legal protection for indigenous and local community interests in land and resources over the last decades.<sup>8</sup> These processes of expanding access to land and resources operate in conjunction with the pressures and opportunities introduced by a resource extraction boom, placing a premium on any such access or ‘licence to operate’.<sup>9</sup> The discussion of the two parallel frameworks operative in Australia demonstrates this pincer movement. A similar overview of our other sites provides further evidence that indigenous and local peoples were disengaged from the resources sector until relatively recently. This examination provides both the contextual and historical background to situate specific articles but also illustrates the potential opportunities and difficulties that current frameworks present for ‘accommodating’ the participation of indigenous peoples and local communities in the resource extraction process.

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8 For an overview of the situation in Australia see Maureen Tehan, ‘A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act’ (2003) 27(2) *Melbourne University Law Review* 523. For South Africa, see Hanri Mostert, ‘Constitutional Property Law and Land Reform’ in Tracy-Lynn Humby and Constantine Theophilopoulos et al. (eds), *Annual Survey of South African Law* (2006, 2007).

9 See, for example, Scott Cawrse and Bren Sheehy, ‘The Art of Social Monitoring in Maintaining a “licence to operate”,’ Mineral Council of Australia, *A Climate of Change: Sustainable Development Conference*, Brisbane 30 October 2007, [www.minerals.org.au/\\_data/assets/pdf\\_file/0017/25136/Cawrse\\_Scott.pdf](http://www.minerals.org.au/_data/assets/pdf_file/0017/25136/Cawrse_Scott.pdf) at 14 December 2007.

## *Australia*

In the Australian federal system, direct legal regulation of onshore resource extraction is largely governed by State and Territory legislation. The Commonwealth has power in relation to offshore resources<sup>10</sup> and has constitutional powers in a range of fields which directly affect the operation of State-based legal regimes.<sup>11</sup> In addition, the Commonwealth has plenary powers in relation to Territories<sup>12</sup> and this is particularly relevant for the Northern Territory given its mineral wealth and large indigenous population.<sup>13</sup> A further significant constitutional element is the provision that requires the Commonwealth to pay 'just terms' compensation for the acquisition of property.<sup>14</sup> Finally, the race power<sup>15</sup> has played a significant role in transforming the power relationship between the Commonwealth and the States, particularly since the common law recognition of native title in 1992.<sup>16</sup>

At Federation, the power to make laws in relation to a range of matters was specifically given to the Commonwealth while the States retained residuary powers,<sup>17</sup> but the transformation of Commonwealth/State relations over time has significantly increased Commonwealth power and this is particularly the case in relation to indigenous people. It is not the aim of this introduction to examine these complex constitutional arrangements but some understanding of them is necessary for an informed examination and analysis of the elements that affect the range of interests in resource extraction in the current 'boom' environment, as well as the relationships between governments, developers and indigenous peoples which inform and influence their conduct and outcomes. This configuration of division of powers between different governments has produced a complex web of statutory provisions governing not only indigenous land interests and heritage but also resource and environmental management. The conjunction of these issues produces myriad schemes for recognition, management and protection of indigenous interests in land and the coexistence of those

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10 Seas and Submerged Lands Act 1983 (Cth).

11 For example s 51(i) (trade and commerce power), s 51(xx) (corporations power), s 51(xxix) (external affairs power) of the Commonwealth Constitution 1901 (Constitution of Australia).

12 Section 122 of the Commonwealth Constitution 1901.

13 See Grant Schmarr, *Northern Territory* (1999), <http://members.ozemail.com.au/~enigman/australia/nt.html>, at 14 December 2007.

14 Section 51(xxxi) of the Commonwealth Constitution 1901.

15 Section 51(xxvi) of the Commonwealth Constitution 1901.

16 *Mabo v Queensland* (No 2) (1992) 175 CLR 1 and the Native Title Act 1993 (Cth).

17 See Patrick Lane, *A Manual of Australian Constitutional Law* (1991) and Cheryl Saunders, *The Australian Constitution* (annotated) (2000).

interests with other uses of land.<sup>18</sup>

As a consequence of these constitutional arrangements, the States and Territories manage mineral extraction, resulting in eight different legal regimes directly governing the industry, with the Commonwealth influencing directly or indirectly through its powers referred to above.<sup>19</sup> The norm in these regulatory regimes is that minerals are publicly, rather than privately, owned.<sup>20</sup> A significant consequence of this arrangement has been a regulatory system revolving around management of resources in a way that brings the various legal and constitutional elements together.<sup>21</sup> This has been achieved through a range of mining rights and mining titles which may involve property rights but not ownership of the resource for grantees.<sup>22</sup> The management mosaic involves parties with interests including the Crown as owner of the resource, the developer as holder of a right to access a resource (or explore for it) and the owner or title holder of land in which the resource is located.<sup>23</sup> In 1987, Fisher described this mosaic of interests and regulatory environment in the following way: ‘management of natural resources within the legal system has become the principal means of settling disputes arising in consequence of the fragmentation of rights of property into a series of potentially conflicting interests. Each of the institutions of the law has a part

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18 The power of the Commonwealth to make laws in relation to indigenous peoples was confirmed by referendum that changed s 51(xxiv) of the Australian Constitution in 1967 under which the Commonwealth was empowered to make special laws it ‘deemed necessary’ for people of particular races including ‘Aborigines’. The Commonwealth’s power has been confirmed, especially when exercised pursuant to enabling international instruments and obligations (Australian Constitution, s 51(xxix). See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168). This power has emerged as the crucial element for protection of indigenous interests through the application of the Racial Discrimination Act 1975 (Cth), the municipal implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (see *Mabo v Queensland (No 1)* (1988) 166 CLR 186).

19 While schemes for creating conservation reserves or granting resource tenements remain squarely within the legislative competence of the States, the Commonwealth has been able to influence resource developments by refusing to exercise its powers, for example, to grant export licences except in compliance with international obligations (*Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1).

20 John Forbes and Andrew Lang (1987) *Australian Mining and Petroleum Law* 15. This was achieved either by reserving all minerals (not just gold and silver) when granting private interests in land or by progressively passing legislation to claim ownership.

21 Douglas Fisher, *Natural Resources Law in Australia* (1987), p 43.

22 Fisher, *ibid*, at 44.

23 Forbes and Lang, n 19 above, at 197-229. Given the particular configuration of rights distribution in these schemes, mining on privately owned land is not uncommon and has been generally permitted by the grant of the particular mining right including rights of access. Legislation has included various limitations and provisions for compensation in these circumstances.



to play within this system.<sup>24</sup>

Indigenous land and cultural interests were historically absent from the resources regulatory scheme until the mid-1960s. This was partly because those interests were largely unrecognised, but once they did achieve some recognition they remained outside the resources regulatory regimes even though they began to have an effect on the operation of the resources industry. Four main legal devices have been used for managing, and sometimes recognising, indigenous interests associated with land: the historical reserves system, heritage protection legislation, statutory land rights schemes and common law recognition of native title and its related statutory regulation.<sup>25</sup>

Colonial governments started creating reserves for the 'benefit of Aboriginal people' from around the 1830s but there was no involvement of indigenous inhabitants of reserves in the resource extraction process and no financial benefits from the reserves were used for or flowed to the indigenous inhabitants of the reserves. This contrasts with Canada, for example,<sup>26</sup> where there has been a scheme for distribution of funds under the Indian Act.<sup>27</sup> This policy began to change in the 1960s with the establishment of Aboriginal Land Trusts in South Australia.<sup>28</sup> Thereafter activities on reserves by non-indigenous interests, including by resource developers, usually required some element of special consent by the body charged with responsibility for management of the reserve, but not from the indigenous inhabitants of reserves. Most jurisdictions established at least administrative regimes to process applications<sup>29</sup> and to make arrangements for special payments from the activity, including royalties. But these payments most often became part of consolidated revenue and were rarely, if ever, used on the reserve that produced the revenue.

Statutory land rights schemes,<sup>30</sup> established from the 1970s onwards, included provisions for the regulation of resource development and other

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24 Fisher, n 20 above, at 45.

25 See Native Title Act 1993 (Cth).

26 Brad Morse (ed), *Aboriginal peoples and the Law: Indian, Metis and Inuit rights in Canada* (1985).

27 Margaret Stephenson, 'Negotiating Resource Development Agreements with Indigenous Peoples: Comparative Lessons' in Bryan Horrigan and Simon Young, *Commercial Implications of Native Title* (1997), p 320.

28 Aboriginal Lands Trust Act 1966 (SA).

29 See Maureen Tehan, 'Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia' (1993/4) 65(4) *Australian Quarterly* 34.

30 For example, Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); Pitjantjatjara Land Rights Act 1981 (SA). For a general discussion see Phillip Toyne and Dan Vachon, 'Mining and the Challenge of Land Rights' in Nicholas Peterson and Marcia Langton (eds), *Aborigines, Land and Land Rights* (1983).



uses on granted land. Some of these schemes integrated indigenous processes with the resource regulatory regime for the first time.<sup>31</sup> In the case of the Northern Territory legislation, these schemes provide for consultation and for a veto of such proposals by indigenous landowners. Negotiations under these regimes, especially in the Northern Territory, provided the first examples of the potential for agreement-making.<sup>32</sup> They continue to operate alongside the native title scheme.

Legislative regimes for the protection of land-based cultural heritage were passed generally in the 1960s<sup>33</sup> and early 1970s.<sup>34</sup> These schemes stipulate that it is an offence to interfere with aboriginal heritage but create a regime to permit such interferences.<sup>35</sup> These provisions bind resource developers and have been the source of major disputes over time.<sup>36</sup> There was little or no integration of heritage into the regulatory regime until 2003 when Queensland attempted to integrate heritage, native title and development planning decision-making.<sup>37</sup>

Nonetheless, statutory land rights schemes did give effect to indigenous peoples' interests in land and resources in particular locations,<sup>38</sup> and heritage regimes did protect specific sites. These regimes also provided revenue sources for communities in particular instances. But of much more significance was the common law recognition of an indigenous title to land in *Mabo v Queensland (No 2)*.<sup>39</sup> As Fisher notes, this fundamental change in the legal situation required a new form of engagement and a more generous acknowledgment of a new player in the resources sector.<sup>40</sup> *Mabo* precipitated a point of intersection between what had previously been regarded as two,

31 Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). See also John Reeves, *Building on Land Rights for the Next Generation The Review of the Aboriginal Land Rights (NT) Act 1976* (1998).

32 John Altman, *Aborigines and Mining Royalties in the Northern Territory* AIATSIS (1983).

33 Aboriginal and Historic Relics Preservation Act 1965 (South Australia); the Aboriginal Relics Preservation Act 1967 (Queensland). See for a general discussion, J Connell and Richie Howitt (eds), *Mining and Indigenous Peoples in Australasia* (1991).

34 Archaeological and Aboriginal Relics Preservation Act 1972 (Vic). Other States and Territories passed similar legislation at various stages: for example Native and Historical Objects and Areas Preservation Ordinance 1976 (Northern Territory). See also Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

35 For example, s 6 of the Aboriginal Heritage Act 1980 (WA).

36 See, for example, Michael Dillon, *A Terrible Hiding... 'Western Australia's Aboriginal Heritage Policy* (1983) XLII *Australian Journal of Public Administration* 486; David Saylor, 'Aboriginal Cultural Heritage Protection in Western Australia: The Urgent Need For Protection' (1995) 3(76) *Aboriginal Law Bulletin* 9.

37 Aboriginal Cultural Heritage Act 2003 (Qld); see also the Aboriginal Heritage Act 2006 (Vic).

38 See Strelein and Tran, n 6 above.

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

40 Fisher, n 20 above.

predominately parallel, systems.

While there was considerable resistance initially to providing a 'seat at the table for indigenous peoples',<sup>41</sup> subsequent events reworked relationships across many facets of the Australian community including the resources sector. The Native Title Act 1993 (Cth) was passed following *Mabo*. In addition to providing a process for the establishment of native title and attempting to manage issues of invalidity of past grants of title (including resource titles), the Act attempted to provide a code for dealing with future activities (including resource activities) on land in which native title might exist. Briefly, the key relevant elements of the legislative framework provided for a right to negotiate over certain resource developments on land the subject of native title, with time limits for negotiations and an arbitral provision in the event that the parties fail to reach agreement.<sup>42</sup> In addition, as Langton and Mazel point out, a complex set of provisions governing other future acts on land had an impact on resource developers.<sup>43</sup>

One significant aspect of amendments to the Act in 1998 was the introduction of indigenous land use agreements (ILUAs) to be negotiated by the parties (including native title parties, governments and developers) as a preferred model of settlement of disputes. The Act bound the States and Territories. Although they continued to regulate resource development generally, the Act created rights for indigenous peoples to negotiate or to be consulted about mining in the resource-rich States of Western Australia and Queensland. The Act thus created a new layer of rights in Fisher's mosaic of rights that needed to be accommodated in the regulation of resources development.

As the resources boom developed during the 1990s, indigenous peoples' rights to participate in decisions about their land, and to negotiate economic benefits, were based on underlying cultural heritage rights, and statutory schemes where applicable, and the rights arising out of the Native Title Act.<sup>44</sup> As Langton and Mazel note, this complex scheme has resulted in resource developers embarking on negotiations and relationship building that goes beyond the strict requirements of the legal regime. Increasingly, it is in this space which lies beyond technical legal compliance where the most innovative management of complex relationships takes place.

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41 See generally Margaret Stephenson and Suri Ratnapala, *Mabo, a Judicial Revolution: the Aboriginal Land Rights Decision and its Impact on Australian Law* (1993).

42 See generally Lee Godden and Maureen Tehan, 'Translating Indigenous Title to Individual "Title" in Australia: Are Real Property Forms and Indigenous Interest Reconcilable?' Elizabeth Cooke (ed), *Modern Studies in Property Law* Volume 4 (2007), p 263.

43 Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, Resource Curse and Australia's Mining Boom', at p of this issue.

44 Godden and Tehan, n 41 above.

## *South Africa*

In South Africa, issues of land dispossession during the colonial and apartheid regimes, and subsequent measures to address this dispossession under the restitution regime underlies current relations between local communities, mining companies and the wider South African society. They highlight the role of mining in employment and wealth generation.

Colonisation of South Africa commenced with the initial Dutch assertion of sovereignty over the Cape of Good Hope in the mid-17th century. European sovereignty was asserted over areas already exhibiting a diverse ethnic mix owing to successive migrations, displacing the Indigenous Khoisan and San peoples.<sup>45</sup> As de Villiers notes, 'the struggle for land predates the colonial presence in Africa'.<sup>46</sup> African customary tenures were complex and integrated with traditional authority structures but most groups recognised common land, but with varying capacity for allotment to individuals.<sup>47</sup>

Following intensification of European settlement, especially after cession of the Cape Colony to the British in 1814, many indigenous and local tribal peoples were further dispossessed, forming a cheap labour force for the expansion of European agriculture. Many parallels exist with colonial contexts in Australia: '[a]s British Imperialism proceeded and whites conquered previously independent communities, British ownership of land increased and racist ideology and segregation intensified.'<sup>48</sup> During the latter 19th century, legislative measures introduced quit-rents (an insecure tenure form) and individual titles, rupturing African tribal societies and forcing many to leave the land. One consequence was the development of a pool of migratory labour which provided a ready supply for the emerging labour-intensive diamond and gold mining industries.<sup>49</sup> In a similar move to developments in Australia, the late 19th and early 20th centuries saw the government set up reserves for tribal groups, such as the Zulus, while simultaneously opening up much of the remaining areas of South Africa to white settlement. In 1910, the former southern African colonies were granted independence and formed the Union of South Africa.

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45 Stephanie Fryer-Smith, 'Addressing Past Wrongs: Dispossession and Restitution of Land in South Africa', Working Paper Series July 1998 Curtin Business School, 2.

46 Bertus de Villiers, *Land Reform Issues and Challenges: A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia*, Occasional Paper Johannesburg RSA 2003, 45.

47 P D Glavovic, 'Traditional Rights to Land and the Wilderness in South Africa' (1991) 23 *Case Western Journal of International Law* 281. See also Leonard Thompson, *A History of South Africa* (1995), p 23.

48 Emily Bordeaux-Smith, 'South Africa's Land Reform Policy and International Human Rights' (2000) *Wisconsin International Law Journal* 267, 268-9.

49 Fryer-Smith, n 44 above, at 5.

Land holding along racially segregated lines then intensified. One of the central mechanisms was the notorious Natives Land Act 1913. This law prevented African peoples from purchasing non-agricultural land, and confined them to historic or traditional lands, thereby reinforcing the exclusion of African peoples from the more commercially-oriented sectors, and placing the bulk of land in white ownership.<sup>50</sup> Again, as noted in several articles, the longstanding exclusion of indigenous and local peoples from highly productive land and enterprises has served to reinscribe economic distortions and to limit the capacity of these groups to take advantage of the wealth generated by natural resources, including mining.

The 1936 Native Trust and Land Act<sup>51</sup> marginally increased the land available to black South Africans to some 13 per cent of the total, but increased the controls over the administration and use of black lands.<sup>52</sup> These specific land laws and policies were accompanied by a more systematic cultural separation and racial segregation under the evolving apartheid system. Legal measures, such as the Population Registration Act 1950 and the Group Areas Act 1950 further cemented the economic and political disadvantage of the black and coloured populations, concurrently with the concentration of black communities into overpopulated marginal lands:<sup>53</sup> ‘[i]n short the social transformation after 1913 was swift, sweeping and severe.’<sup>54</sup> Mining, like many other forms of wealth generation was largely closed off to black communities, apart from participation in poorly paid labour positions. The disparities of wealth that this generated are particularly entrenched in rural areas, especially in the former black ‘homelands’. In several areas, such as the North West province, mining represents a major economic activity, often located in close proximity to the ‘traditional’ homeland areas. Yet to date, comparatively little of this wealth has flowed to local communities. Some notable exceptions include the Bafekong community.<sup>55</sup>

Land rights, land tenure and natural resources reform were key parts of the transformation to the ‘new’ South Africa that emerged after apartheid.<sup>56</sup> The apartheid legacies of dispossession and poverty were addressed through a three-pronged land reform package of upgrading of land tenure rights

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50 de Villiers, n 45 above, at 46.

51 Later ironically named the Development Trust and Land Act.

52 Fryer-Smith, n 44 above, at 7.

53 Fryer-Smith, n 44 above, at 8.

54 de Villiers, n 45 above.

55 See Kloppers and DuPlessis, at p of this issue. See also ATNS project website entries for Bafokeng – [www.atns.net.au/agreement.asp?EntityID=4124](http://www.atns.net.au/agreement.asp?EntityID=4124).

56 Department of Land Affairs, White Paper on Land Policy (1997), [www.land.pwv.gov.za/legislation-policies/whitepapers.htm](http://www.land.pwv.gov.za/legislation-policies/whitepapers.htm) at 13 December 2007. See also Bordeaux-Smith, n 47 above, at 276.

(particularly customary tenures), land redistribution (on a relatively modest scale) and land restitution.<sup>57</sup> The South African Constitution provides a mechanism for restitution. Under section 6 of the Restitution of Land Rights Act 1994, a claim can be lodged for restitution. If agreement cannot be reached between the dispossessed claimant and the current owner, the claim is adjudicated by the Land Claims Court. Claims for restitution are made against the state.<sup>58</sup> Restitution can be in the form of the original land, cash payments, alternative state land or priority access to state housing and land. As Mostert suggests, the land reform legislation had to address two objectives. First, it needed to acknowledge and to make good injustices arising from the racially inspired territorial segregation.<sup>59</sup> Secondly, it needed to ‘to address the phenomenon of massive underdevelopment that was the result of racially segregatory laws’.<sup>60</sup> Interestingly, in relation to historic dispossession, the bases of claim in South Africa and Australia are quite different. In South Africa under restitution legislation, it is necessary to show forced dispossession due to a racially discriminatory act,<sup>61</sup> while in Australia to claim native title it is necessary to provide evidence of continuing connection to land and waters.<sup>62</sup> Both processes were instrumental in producing a racially-based transfer of indigenous and local peoples to the more ‘marginal lands’ accentuating the role that the resources sector plays in any future capacity to redress historic patterns of economic and social inequality.

Historically, the ownership of mineral rights in South Africa was largely tied to land ownership, and common law title, until the reforming legislation, the Minerals and Petroleum Resources Act 28 of 2003 vested minerals in the nation state, in trust for the people of South Africa.<sup>63</sup> In addition, the seminal *Richtersveld* decisions recognised indigenous land claims.<sup>64</sup> Indeed, these decisions have been regarded as landmarks which reworked preconceived ideas about property, discrimination, dispossession, communities and

57 Bordeaux-Smith, n 47 above, at 284-6.

58 Shaunnagh Dorsett, ‘Making Amends for Past Injustice: Restitution of Land Rights in South Africa’ (1999) *Indigenous Law Bulletin* 2.

59 59 Hanri Mostert, ‘Beyond Richtersveld or the Parametres of Restitution: Policy and Legislation through the Judicial Lense’, paper presented at the Conference on Land Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa, Houw-Hoek SA, 13-15 September 2006, 5.

60 Mostert, *ibid*, at 5.

61 Dorsett, n 57 above, at 3.

62 Section 223 of the Native Title Act 1993 (Cth).

63 See generally Pieter Badenhorst and Hanri Mostert, *Mineral and Petroleum Law of South Africa*, first edition (2004, Juta Law, South Africa).

64 *Richtersveld Community and Others v Alexor (Pty) Ltd and Another*, 2001 (3) SA 1293 (LCC) *Richtersveld Community and Others v Alexor (Pty) Ltd and Another*, 2003 (2) All SA 27 (SCA), *Alexor (Pty) Ltd and Another v Richtersveld Community and Others*, 2004 (5) SA 460 (CC).

cultural identities in South Africa.<sup>65</sup> Given the broad reforming sweep of these decisions, it is striking that this claim was against Alexor (Pty) Ltd, the state-owned diamond mine which commenced operations in the lands occupied by the 'Nama' peoples in the 1920s. The Constitutional Court accepted the claim for restitution, acknowledging that the *Richtersveld* community has 'rights' that survived annexation and that the Precious Stones Act which initiated diamond mining constituted a discriminatory measure for restitution purposes.<sup>66</sup> Ultimately, a community claim for compensation was awarded. How the *Richtersveld* community will use the compensation moneys to build future social capital and reduce the current levels of poverty experienced by the community goes to the heart of the questions being explored in this volume.

South Africa exhibits many features that have been identified with post-colonial societies and current global trends towards blended models of private and public law governance and public-private partnerships.<sup>67</sup> For example, land-related agreements are being negotiated between local South African communities and the corporate sector. These include equity arrangements with resource companies whereby the local landholding community receives company shares in lieu of royalty payments. These arrangements can also incorporate aspects of the government's policy of Black Economic Empowerment, in that the communities acquire the shares at a discount rate. The impact of the Black Empowerment policy, which has been a central plank of ANC policy in the 'new' South Africa, in conjunction with emerging concepts of corporate social responsibility, is considered by Kloppers and du Plessis in this volume. While such positive human rights and private measures are significant, these authors identify the need for corporate social responsibility to be accompanied by more stringent legislative standards to ensure that long-term sustainability goals are achieved. As in other jurisdictions featured in this volume, the need for a mixture of prescriptive legal objectives and more incentive based schemes is necessary to facilitate effective engagement, particularly where agreement making may provide outcomes that go 'beyond compliance'.

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65 Mostert, n 58 above, at 10.

66 *Alexor (Pty) Ltd and Another v Richtersveld Community and Others*, 2004 (5) SA 460 (CC).

67 Martin Chanock, 'Constitutionalism in Africa', paper delivered at African Legal Interest Group November 2005 University of Melbourne, 10-11. Chanock comments on the coincidence of democratic, markets and rights oriented models that assumed pre-eminence in Africa during the 1990s.



### *Papua New Guinea*

Papua New Guinea (PNG), comprising the eastern half of the island of New Guinea and various other islands and island groups, is located in the Pacific, about 160km from the north-eastern tip of Australia. PNG's history of colonisation began when various European powers began taking an interest in the region in the nineteenth century. The Dutch annexed the western half of New Guinea in 1828,<sup>68</sup> while the Germans and British established protectorates in the eastern half in 1884. British New Guinea was renamed the Territory of Papua and came under Australian control with the passing of the Papua Act 1905, while control of German New Guinea also passed to Australia pursuant to a 1920 League of Nations mandate.<sup>69</sup> This was to remain the status quo, with the exception of a period of Japanese occupation during World War II, until the two territories merged and gained independence from Australia in 1975.

Mining has long been a dominant factor in the economy of PNG. Indeed, throughout the many colonial administrations and polity changes that occurred throughout the 19th and 20th centuries, the official attitude towards the development of mining and petroleum resources has remained largely consistent: that is that resources are the primary driver of the PNG economy.<sup>70</sup> This pre-eminence of mineral extraction has been controversial. The Ok Tedi gold and copper mine in the Western Highlands, for example, resulted in extreme detrimental effects to the local environment, leading to court challenges and protests both in PNG and abroad. It also brought to light tensions between customary law ownership of resources which claims ownership of all resources lying below the ground, and the laws inherited from PNG's colonial powers, under which the state claims ownership.<sup>71</sup> This issue of mineral ownership remains unresolved<sup>72</sup> despite being the subject

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68 Ernst & Whitney, *Doing Business in Papua New Guinea* (1988), p 1.

69 *Ibid.*

70 See George Yapou and Lily O'Neill, 'Papua New Guinea Customary Land Holding and Mining', in Lee Godden and Maureen Tehan (eds), *Sustainable Futures* (Routledge, forthcoming).

71 For example, s 5 of the Mining Act 1992 states that 'All minerals existing on, in or below the service of any land in Papua New Guinea, including any minerals contained in any water lying on any land in Papua New Guinea, are property of the State'.

72 For a comprehensive discussion on this issue see Robin O'Regan, 'Ownership of Minerals and Petroleum in Papua New Guinea: A Comment' (1992) 8 *Queensland University of Technology Law and Justice Journal* 141; K Posman, 'Rights of Customary Landholders under the Mining Act', paper presented at the Customary Law at the Crossroads: The Future of Customary Law in Papua New Guinea conference, University of Papua New Guinea, 28-30 October 1992); K Ongwamuhana and A Regan, 'Ownership of Minerals and Petroleum in Papua New Guinea: The Genesis and Nature of Legal Controversy' (1991) 7 *Queensland University of Technology Law and Justice Journal* 109; and P Donigi, *In-*



of numerous cases both in PNG and internationally.<sup>73</sup>

Mineral exploration in PNG began in the early 1870s in coastal areas, and took off with the 1888 gold discoveries on Sudest Island.<sup>74</sup> Exploration for gold intensified in the 1920s in the Morobe District<sup>75</sup> and was followed by the proclamation of the Morobe gold fields. In 1930, the colony saw the formation of Bulolo Gold Dredging Limited, which, during the period until 1939, commissioned eight large gold dredges. Today only one company, New Guinea Fields Limited, continues to operate in Morobe gold fields.

A second major phase in mining commenced in 1972,<sup>76</sup> with the start of production at the Panguna deposit on Bougainville Island, the first large-scale mining project undertaken in PNG. These gold and copper deposits found in the early 1960s became the subject of a special prospecting authority grant to Conzinc Rio Tinto (CRA),<sup>77</sup> under the then Mining Ordinance Act 1920. The mine was operated by Bougainville Copper Limited, a subsidiary of CRA, until 1989, when an armed secessionist rebellion forced it to cease operations.<sup>78</sup> It is estimated that during its lifetime, Panguna generated approximately one-half of the nation's foreign exchange receipts, and was responsible for approximately one-fifth of all government revenue from internal sources.<sup>79</sup>

The Ok Tedi gold and copper mine<sup>80</sup> was originally explored by Kennecott Explorations (Australia) Limited,<sup>81</sup> but Kennecott was unable to

*digenous or Aboriginal Rights to Property: A Papua New Guinea Perspective* (1994), pp 16-33.

73 *Donigi v The State* (1990) N 1008, *Wapulae Akipe and Others v Paterson Lova and Others* WS No 1067 of 1990 (unreported). Also see *S C Appeals Nos 19, 32, 36 and 60 of 1991* (unreported).

74 D T Dalton, 'Papua New Guinea: Resource Legislation and Policy' (1988) *Australian Mining and Petroleum Law Association Year Book* 100.

75 The search for gold was the major contributing factor to the opening of the Highlands of Papua New Guinea in the early part of the last century, see Dalton, *ibid*.

76 Although the Agreement was made on 6 June 1967 the mine did not come into commercial production until April 1972.

77 Conzinc Rio Tinto (CRA) of Melbourne, Australia (now Rio Tinto) is itself a subsidiary of the British-based international mining company Rio-Tinto-Zinc (RTZ). In Papua New Guinea, CRA of Australia established its subsidiary company Bougainville Copper Limited to operate the Panguna copper mine under the laws of Papua New Guinea.

78 See R B Moaina, 'Mining and Petroleum' in I Temu (ed), *Papua New Guinea: A 20/20 Vision, National Centre for Development Studies and National Research Institute* (Paragon Printers, Australia, 1997), p 118.

79 In the 18 years since production began in 1972, the mine has contributed over US\$2 billion and accounted for 48 per cent of the country's export earnings and nearly 20 per cent of the country's annual budget. At the time of its closure, mine assets were valued more than US\$1.2 billion.

80 Ok Tedi mine is a large porphyry copper deposit in a very remote area of the Star Mountains of the Western Province of Papua New Guinea, some 18 kilometres east of the Irian Jaya border. The mine is at an altitude of 2,000m in an area of high rainfall (between 8.5 and 10.5m) per year. See Moaina, n 77 above, at 119-120.

81 Kennecott Copper Corporation is a multinational American mining company. See R

reach agreement with the state. The government proceeded with further exploration on its own initiative<sup>82</sup> and then began negotiations with Broken Hill Proprietary Limited (BHP).<sup>83</sup> A concession agreement, ratified by the Parliament in the Mining (Ok Tedi Agreement) Act 1976, was made between the State and Dampier Mining Limited, a wholly owned subsidiary of BHP. Production commenced in 1984. Ok Tedi was not the same financial success as the Panguna mine. Costs significantly overran during the construction stage, and, because of the long period of time that elapsed between discovery and production, it missed out on high metal prices.<sup>84</sup> Ok Tedi achieved notoriety for the high levels of pollution from tailings that polluted the Fly River and surrounding lands. The PNG government passed legislation to block compensation claims by the affected landowners.

In comparison with mining, there have been no commercial discoveries of petroleum resources despite explorations carried out sporadically throughout the twentieth century.<sup>85</sup> For example, in 1911 reports suggested that numerous oil and gas seeps were located in Papuan Gulf but none has proved commercially viable.<sup>86</sup>

The country has seen several types of mining and petroleum agreements since Independence. The State Agreements for the Bougainville and Ok Tedi mines received legislative ratification with the passing of the Mining (Ok Tedi Agreement Act) Chapter 196 and the Mining (Bougainville Copper Agreement) Act Chapter 197. These legislatively entrenched agreements are notable for their exclusion of the local peoples from active engagement in resource negotiations, with the consequent effect being evidenced in the relatively modest distributions to local communities. As Filer records in this volume, the events surrounding Bougainville (where virtual civil war erupted over the access to resource extraction benefits and control over mining on customary land) produced a more responsive regime for customary landholders and Provincial governments with the establishment of the Development Forum and subsequent legislation providing for greater participation and impact benefit sharing.<sup>87</sup> Indeed, the legislative framework

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F Mikesell, *Foreign Investment in Mining Projects, Case studies of recent experiences* (1983), p 265. Also see R Jackson, *Ok Tedi: The Pot of Gold* (1982), p 40.

82 Mikesell, *ibid.*, at 267.

83 Broken Hill Proprietary Limited, (now BHP Billiton) is one of the largest multinational mining companies. At the time the company was based in Melbourne, Australia.

84 In the middle of the 1960s the world outlook for copper prices was good, and copper prices were significantly high in the early 1970s, particularly between 1973 and 1974.

85 Dalton, n 73 above, at 101.

86 L K Kalinoe and M J Kuwimb, 'Natural Resources Law and Policy in Papua New Guinea' (1996) 3 *The Australian Journal of Natural Resources Law and Policy* 164.

87 Filer, 'The Development Forum in Papua New Guinea: Upsides and Downsides', at p in this issue.

that State agreements rest on is generally seen as providing a high level of security to the developer.<sup>88</sup>

Following pressure from industry and locals, the government enacted the Mining Act 1992 to provide a simple standard agreement framework that could be applied across different projects. The new Act also allowed landowners to participate in the negotiation process, and made mandatory the holding of a developmental forum before either special mining leases (SMLs) or petroleum development licences (PDLs) could be granted. The Oil and Gas Act 1998 replaced the Petroleum Act Chapter 198 after the discovery of crude oil in the Iangifu in the Southern Highlands prompted similar calls for legislative change.

Filer provides a detailed analysis and evaluation of this changing process, recording its mixed outcomes: 'as matters stand, the nearest approximation to "community sustainable development plans" are the plans made by developers to meet their own social responsibilities. Even the district and local government planning process enjoined by the new Organic Law is normally revealed as a hollow form of wishful thinking when it takes place in the vicinity of a major resource project.'<sup>89</sup> The patterns of limited engagement with local communities who live in the shadow of resource extraction activities have again proven difficult to dislodge. While some advances have occurred in the direction of corporate social responsibility, without more substantial legal and administrative frameworks operating in tandem little substantive gains will be achieved. Clearly there remain significant challenges to ensure that PNG, yet another country whose economy is dominated by resource extraction, achieves long-term, sustainable social and economic development, for its communities, particularly in a country beset with mounting poverty and facing major health problems, such as Aids.

### *Timor-Leste*

Turning to Timor-Leste (until recently referred to as East Timor), the major focus of comparison *vis-à-vis* other cases studies in this volume, relates to the distribution of the resource generated wealth in the context of a newly emerged nation struggling with issues of capacity building, and the initiation of functional structures of government and administration. These emerging national institutions are now charged with wide responsibility for the management and distribution of resource wealth from the offshore oil and gas of the Timor Gap area. These emergent structures also need to

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88 Leigh Warwick, 'State Agreement' (1988) 62 *Australian Law Journal* 878, 882.

89 Filer, n 86 above.

take cognisance of customary interests, the overlay of past colonial forms of administration and the legacy of past violence and extreme poverty. In the context of the analysis in this volume, the complexities arise in relation to questions about how to best use the wealth for the long-term social and economic benefit of the nation. Moreover, the complexities of resolving long-term sustainability need to be understood in the light of the need to manage disparate interests, including customary forms of 'entitlement', political conflict and the overwhelming effects of poverty, which in large measure result from Timor-Leste's colonial past.

The Democratic Republic of Timor-Leste<sup>90</sup> comprises the eastern half of the island of Timor, situated north-west of Darwin, Australia. Timor has been colonised since the 16th century, with the Portuguese and the Dutch dividing the island between them until the Second World War. The Portuguese heavily exploited the country, while introducing coffee, sugar and cotton plantation<sup>91</sup> that disrupted traditional subsistence farming. Portuguese control was reasserted after the War, but with the administration operating under the auspices of the United Nations, as a result of the post-war decolonisation movement. Attempts were made to 'develop' the country, although the lax Portuguese administration preserved many former colonial structures.<sup>92</sup> Ultimately, administration broke down, and fighting broke out in Timor-Leste between political parties seeking East Timorese independence; this eventuated on 28 November 1975. The experience of sovereignty was short-lived.<sup>93</sup> Ten days later Indonesia invaded, occupying the country until 1999. The adjacent major offshore petroleum and gas reserves may have motivated the invasion.

The resulting occupation was marked by violence.<sup>94</sup> The East Timorese continued to struggle against the Indonesian regime, and ultimately it was determined that the country would undergo a United Nations sponsored referendum. The withdrawal of Indonesia was marred by violence, forced migration and the destruction of the bulk of the country's infrastructure.<sup>95</sup>

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90 Timor-Leste is the official name given to the new nation. Formerly, the country was known as East Timor.

91 *A Brief History of Timor-Leste* United Nations Development Programme Timor-Leste, [www.tl.undp.org/undp/undp\\_timor\\_lesste/timor-lesste\\_2.html](http://www.tl.undp.org/undp/undp_timor_lesste/timor-lesste_2.html), at 13 December 2007.

92 *Ibid.*

93 Gillian Triggs and Dean Bialek, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3 *Melbourne Journal of International Law* 322.

94 It is estimated that 200,000 Timorese were killed by the Indonesians in this period. *A Brief History* n 91.

95 About 1400 people were massacred following the ballot box results, which showed an overwhelming majority favouring independence.

After independence in 2002,<sup>96</sup> Timor-Leste remained plagued by social and legal unrest following over 400 years of Portuguese colonisation and, thereafter, 24 years of contested Indonesian occupation. Homelessness or displacement affected a quarter of the entire community.<sup>97</sup> Further, the legal system was non-existent, since law-makers and enforcers from the previous regime had absconded.<sup>98</sup> To restore stability, the Security Council set up the United Nations Transitional Administration in East Timor (UNTAET), which was authorised to legislate, administer and deliver justice.<sup>99</sup> A new legal system had to be established 'from scratch' rather than simply 'reconstructed'.<sup>100</sup> It had to be led by a new and impartial judiciary, supported by the legal profession.<sup>101</sup> The infant legal regime was beset with many complexities.<sup>102</sup> The overarching issue remains: how to reconcile the laws of the previous regime (applicable during the interim),<sup>103</sup> traditional laws which persisted since Portuguese colonisation<sup>104</sup> and international human rights norms.<sup>105</sup> The newly-created Timor-Leste Constitution, largely informed by international norms,<sup>106</sup> provides a space for accommodating these distinct legal orders by explicitly sanctioning consistent traditional laws.<sup>107</sup> However, this relationship is still in its embryonic stage.<sup>108</sup>

Despite recent internal conflict, Timor-Leste now appears to have achieved some degree of stability.<sup>109</sup> Clearly though, a pattern of violent conflict has distinguished the colonial history of Timor-Leste, as with many locations covered in this volume. While the problems of overcoming violent repression are serious enough in themselves, such situations also generate particular problems post-conflict, in terms of the local communities' capacity to engage in the benefits of economic development and resource extraction.

Currently the Timor-Leste Government's main concern, and largest portion of its budget, has been directed at alleviating poverty and improving

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96 Laura Grenfell, 'Legal Pluralism and the Rule of Law in Timor-Leste' (2006) 19(2) *Leiden Journal of International Law* 305.

97 *Ibid.*

98 Hansjoerg Strohmeyer, 'Policing the peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24(1) *University of New South Wales Law Journal* 171.

99 *Ibid.*, at 172.

100 *Ibid.*

101 *Ibid.*, at 173.

102 *Ibid.*, at 173-175.

103 *Ibid.*, at 173.

104 Grenfell, n 95 above, at 313.

105 Grenfell, n 95 above, at 305-306.

106 Grenfell, at 305.

107 Article 2(4) of the Timor Leste Constitution, cited in Grenfell, at 322.

108 Grenfell, at 312.

109 Gillian Triggs, 'Legal and Commercial Risks of Investment in the Timor Gap' (2000) 1 *Melbourne Journal of International Law* 98.

infrastructure.<sup>110</sup> There is little private sector involvement in these areas, due to a lack of regulation for business and investment. Timor-Leste's greatest economic asset is the offshore gas and oil deposits in the Timor Sea,<sup>111</sup> which have the potential to catalyse sustainable economic development for Timor-Leste. Development of these resources required resolution of a legal dispute with Australia over the delimitation of seabed boundaries, and resource allocation pursuant to the 1972 Seabed Agreement.<sup>112</sup> Following Indonesian annexation of East Timor, Indonesia asserted a demarcation of the Gap seabed that favoured their interest.<sup>113</sup> A compromise was reached in the Timor Gap Treaty in 1989,<sup>114</sup> enabling resources extraction to begin, with the first revenue received in 1998. Once independence became imminent, the East Timorese argued for a revision to bring more of the resource-producing areas into their jurisdiction.<sup>115</sup> Most recently, Timor-Leste and Australia signed two treaties<sup>116</sup> for the joint exploitation and distribution of profits of the 'Greater Sunrise' oilfield, without prejudice as to either party's rights at international law.<sup>117</sup>

Thus with the achievement of at least some measure of external stability, the problem of poverty amidst resource 'plenty' has become of central concern. For other jurisdictions considered in this volume, the critical questions for indigenous and local peoples remain, in part, securing participation in resource extraction activities. In a newly independent Timor-Leste, the basic issue of 'access' is no longer paramount. Instead, the focus is on how the potential benefits can be best realised in a country devastated by past conflict, where the social and cultural capacity of the local peoples is limited in terms of effective engagement in guiding the long-term implementation of the 'boom' wealth generated by resource extraction.

In this context, Timor-Leste has established a Petroleum Fund to manage the revenue generated by the exploitation of oil and gas resources. As Drysdale

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110 East Timor: Country Brief Australian Government: Department of Foreign Affairs and Trade, [www.dfat.gov.au/geo/east\\_timor/east\\_timor\\_brief.html](http://www.dfat.gov.au/geo/east_timor/east_timor_brief.html), at 13 December 2007.

111 Gillian Triggs and Dean Bialek, 'The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap' (2002) 3 Melbourne Journal of International Law 322, 327.

112 Gillian Triggs, 'Creative Conflict Resolution: The Timor Sea Treaty between Australia and East Timor' in Marcia Langton et al. (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004), pp 329, 331-2.

113 Triggs and Bialek, n 92 above, at 324.

114 Australia and Indonesia agreed to exploit the region cooperatively and share benefits equally. See Victor Prescott et al., *The Timor Gap Treaty: Three discussion papers*, Australian Institute of International Affairs (1995).

115 Triggs, n 97 above, at 336.

116 Timor Sea Treaty, EIF 2/4/03 and International Unitisation Agreement. For a discussion see Triggs and Bialek, n 92 above, at 329-336.

117 See Drysdale, this volume.

describes, the new state needs to be careful to manage this wealth well, including by balancing the needs of current and future generations, making the processes for its disbursement both transparent and accountable, and setting guidelines for its wise investment. With the country so highly dependent on resource revenues, Timor-Leste's formative legal system and institutional structures clearly face considerable challenges to ensure effective implementation of the resource funds and long-term sustainability for the community.

Drawing together the complexities involved in each case study area, the following sections address the paradox that many indigenous peoples and local communities continue to experience severe disadvantage and remain disengaged at various levels from the resources boom that produces benefits at a national or global level.

### **'Paradox of plenty': resource riches and indigenous and local peoples' social and economic disadvantage**

The unifying experience in the locations covered by the articles in this volume is the social and economic disadvantage experienced by indigenous peoples and local communities as a result of colonisation and/or racialised institutions of law and policy. These islands of disadvantage often now occur in resource-rich locations where, paradoxically, local social and economic disadvantage is surrounded by wealth producing activities. The challenge identified in all of the articles is how to effectively engage with such activities and to transform the potential wealth that participation in resource extraction may bring, into a sustainable social and economic future for those communities most impacted by the resources boom.

This dynamic is captured by Langton and Mazel using the 'resource curse' literature as an analytical tool. They suggest that "the resource curse" and "the paradox of plenty", as used by Auty,<sup>118</sup> refer(s) to the social and economic phenomenon in which many countries, rich in natural resources have had poor economic growth, conflict and declining standards of democracy'.<sup>119</sup> The implication is that resource wealth produced from a region or nation is 'exported' with minimal benefits remaining to support the local communities. This phenomenon is associated with economic models that encompass a centre-periphery or a globalisation perspective where non-local entities derive greatest benefit from resource activities.

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118 R Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993).

119 Langton and Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, Resource Curse and Australia's Mining Boom', at p in this issue.



The work of Stiglitz<sup>120</sup> and Sen<sup>121</sup> both define the nature of the resource curse and situate it within a ‘development paradigm’ in which a positive institutional framework that supports local peoples provides the basis for economic development. Sen’s work has been highly influential in asserting a core minimum standard for quality of life and opportunity that is to be regarded as a human right. Quoting Stiglitz, Langton and Mazel assert that ‘poor distribution of resource-derived wealth is the cause of poor socio-economic activity in mineral rich areas.’<sup>122</sup> Stiglitz believes, however, that this can be overcome by associating high institutional quality and improved governance, with sustainable wealth management. He emphasises the prioritisation of open, transparent and accountable institutions which reduce the scope for corruption, and increase the conditions for investment’.<sup>123</sup> Drysdale<sup>124</sup> and Filer<sup>125</sup> similarly draw on a similar concept of a ‘resource curse’ in their respective analyses of the challenges of management of resource riches in poor countries in pursuit of ‘sustainable development outcomes’.<sup>126</sup> The conjunction of this idea in different locations forms a key element of the contributions to *JERL* as part of the broad issue of management of benefits for indigenous peoples and local communities.

Langton and Mazel’s insight derives from their application of ‘resource curse’ literature to the situation of indigenous Australians in the mining regions of the country as a source of ‘critical lessons for understanding the problems faced by indigenous Australians in these regions’.<sup>127</sup> Significantly, they argue that ‘there are trends that illustrate similar tendencies at work in national sub-regions where indigenous populations experience disadvantages caused by historical racism and the recalcitrance of governments to invest in their capability to participate in the economy’.<sup>128</sup> The focus of their inquiry, however, is on the ‘inequitable distribution of impacts and measures for amelioration’<sup>129</sup> rather than the distribution of income which is more usually the focus of the ‘resource curse’ literature.

Filer and Drysdale address the distribution element and identify common issues in very different models. In PNG, Filer identifies the legislative basis for the redistribution of central government mineral revenues to

120 J Stiglitz, *Making Globalization Work* (2006).

121 See, for instance, Amartya Sen, *Development as Freedom* (1999). See also Martha Nussbaum and Amartya Sen, *The Quality of Life* (1993).

122 Stiglitz, n 105 above.

123 Langton and Mazel, n 42 above.

124 Drysdale, n 116 above.

125 Filer, n 86 above.

126 Filer, n 86 above.

127 Langton and Mazel, n 42 above.

128 Langton and Mazel, n 42 above, at 1.

129 Langton and Mazel, n 42 above, at 3.

customary land owners. Indeed, in many ways the Development Forum and its attempt to redistribute mining revenues to customary land owners provides an example of many of the goals identified in Langton and Mazel. In Timor-Leste, Drysdale has identified the key limitation as the weakness of formal institutions and structures, notwithstanding the prescription of a set of principles to guide the management of revenues. In South Africa, the historic inequalities of access to the wealth generation from resource extraction activities were acute, exhibiting many of the facets of the specific manifestation of the ‘resource curse’ operative in Australia.

Identification of more general causes for inequitable resource wealth distribution associated with resource activity is critical to a more nuanced approach to mechanisms for engaging indigenous peoples and local communities. It is clear that a wide complex of approaches is required and that law represents only one possible response.

### **Mechanisms for indigenous and local peoples’ empowerment: agreements, regulation, corporate social responsibility and wealth creation**

Turning to Australia as an example – more than a decade after native title was recognised and codified – it is apparent that ‘the complex legal process established for the resolution of native title matters’ is not working well.<sup>130</sup> The response, in many quarters has been to adopt agreements<sup>131</sup> for the resolution of conflicts about competing claims to land and resources.<sup>132</sup> While an agreement-based or partnership model can take many forms,<sup>133</sup> and it is not unproblematic,<sup>134</sup> it now appears to offer more scope to resolve

130 Sean Brennan, ‘Native Title In the High Court of Australia a Decade after Mabo’ (2003) 14 *Public Law Review* 209, 211.

131 Agreement-making was not unknown in the pre-native title era but it was unusual. For example, in relation to the Pitjantjatjara area there was an agreement in 1981 with Shell in relation to oil exploration: see Philip Toyne and D Vachon, *Growing Up the Country: The Pitjantjatjara Struggle for Their Land* (Fitzroy, McPhee Gribble, 1984), pp 111–19.

132 Mathew Riley, ‘“Winning” Native Title: The Experience of the Nharwuwangga, Wajarri and Ngarla People’ (Issues Chapter No 19, vol 2, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002), p 2.

133 Maureen Tehan and David Llewellyn, ‘“Treaties”, “Agreements”, “Contracts” and “Commitments” – What’s In a Name? The Legal Force and Meaning of Different Forms of Agreement Making’ [2005] 7 *Balayi: Culture, Law and Colonialism* 1.

134 Ciaran O’Faircheallaigh, ‘Implementing Agreements between Indigenous Peoples and Resource Developers in Australia and Canada’ (Research Paper No 13, School of Politics and Public Policy, Griffith University, 2003); Ciaran O’Faircheallaigh, ‘Negotiating a Better Deal for Indigenous Land Owners: Combining “Research” and “Community Service”’ (Research Chapter No 11, School of Politics and Public Policy,

longstanding issues of indigenous economic and cultural sustainability that once were regarded as premised on the attainment of land rights. In other locations, such as PNG, Filer points to the Development Forum and benefits packages as another model for the expansion of indigenous peoples' participation, in and benefits from, resource developments. This regulated scheme contrasts with the developments in South Africa through corporate social responsibility plans as described by Kloppers and du Plessis. These corporate social responsibility plans operate in respect of mining regimes but also need to be considered in the context of legislative support for achieving social and economic rights under the Black Economic Empowerment Act 53 of 2003. Clearly, as the authors indicate, these trends sit within a growing momentum that seeks to address racialised disadvantage across many facets of South African society.<sup>135</sup>

Within Australia, issues about Aboriginal land holding now arise in a wider discourse about land title, market incentives and economic and social benefits for indigenous peoples. Accordingly, debate has shifted to include not just questions about land 'rights' and the recognition of native title but also questions how land and resources may be used to stimulate 'development'. Agreement-making with indigenous peoples has played a pivotal role in debates about 'social and economic development' but more specifically it has provided a central means to begin to realise the potential riches for indigenous peoples in areas such as resource extraction. That indigenous peoples in many instances remain 'outside' the economic largesse of the mining boom, as detailed by Langton and Mazel, is testament to some of the more intractable problems encountered in ensuring long-term economic and social sustainability for communities through the agreement-based process.

Agreements, as both legal instruments and situated modalities for achieving 'policy' outcomes, are critical to realising potential long-term results. Law provides an important means of formalising relationships that have been forged at an economic and policy level, but also as an instrument that defines what those relationships are, and how they are to be managed to achieve goals of economic empowerment and development. It also provides the framework within which negotiations occur. The mix of law and policy that Langton and Mazel identify as triggers of negotiation include: the mining provisions of the Aboriginal Land Rights Act (Northern Territory) 1976 (Cth); the Native Title Act 1993 (Cth) and subsequent amendments; the absence of a statutory basis for Aboriginal rights in some jurisdictions requiring voluntary agreements for a period of time; heritage legislation;

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Griffith University, 2003).

135 Marcia Barry, 'Now Another Thing Must Happen: Richtersveld and the Dilemmas of Land Reform in Post-Apartheid South Africa' (2004) 20 SAJHR 355, 357.

commercial imperatives; government requirements for service contracts; and the Howard government's approach to Indigenous Affairs (including Shared Responsibility Agreements and Regional Partnership Agreements).<sup>136</sup>

Agreements are both a private law instrument to formalise relationships but also a public policy driver for instituting policy change particularly in situations where governments are reluctant to be direct about policy goals. Cynically it might be suggested that it is more palatable politically and less controversial (perhaps?) to facilitate agreement making than to act directly through the formulation and passage of legislation.

Kloppers and du Plessis have recognised this trend in South Africa. The Constitution imposes an obligation on the government to realise socio-economic rights but the government has used public/private partnerships to advance this goal. Social responsibility plans for corporations are used to achieve these rights but without any direct legislative enforcement of the substance of the plans, as opposed to the procedural requirements. Thus as Kloppers and du Plessis argue, corporate social responsibility is not a substitute for regulating or legislating for social rights or shifting state responsibilities to the private sector.<sup>137</sup> They identify this as 'privatising' of the state's responsibilities.<sup>138</sup> They argue that in order to ensure an effective framework for corporate social responsibility a regulatory foundation that promotes growth, employment and good governance is required. Langton and Mazel, too, see this as an element in Australia, as governments fail to meet their obligations and look to corporations to fill the void left by them (governments) in the provision of infrastructure, services, human capital development and social and economic development in indigenous communities.<sup>139</sup>

It is necessary to refocus attention on the more overarching role that law may play in accommodating interests in resource extraction and achieving long-term economic and social sustainability for indigenous peoples. Law does not operate in isolation; it sits alongside many other factors that are necessary to accommodate interests in resource extraction to achieve sustainable outcomes. For this reason, this volume contains not only what lawyers may recognise as a more orthodox treatment of mining law, land rights and associated 'indigenous' regulatory regimes but also an understanding of the context in which law as both instrument and as a driver for normative

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136 Langton and Mazel, n 42 above.

137 Kloppers and DuPlessis, this volume.

138 Organisation for Economic Co-operation and Development 2004, [www.oecd.org/dataoecd/32/18/31557724.pdf](http://www.oecd.org/dataoecd/32/18/31557724.pdf), date of access 3 May 2007.

139 Langton and Mazel, n 42 above.

outcomes is situated. To this end, several articles provide analyses of social and economic issues connected with resource extraction and indigenous and local communities. Without such interdisciplinary analyses, law as a normative agent is poorly equipped to adapt and inform the dynamic of change that is implemented instrumentally and philosophically.

In particular, Brereton et al. report on research on employment programmes instituted at two mining sites as a result of agreements. Employment provisions are now regularly included in agreements. Such provisions form part of the corporate social responsibility obligations of corporations engaged in resource extraction. Recording the practice is valuable in itself. It is a key in building capacity – an aspect identified by Langton, Kloppers and Drysdale as central to capturing the benefits of resource extraction and creating long-term wealth. The evaluation of these practices then plays an important role in identifying the effectiveness of such provisions in meeting the corporate social responsibility goals of empowerment and capacity building. In addition, the paper by Brereton et al. provides a snapshot of both implementation of agreements and some of the broader concerns in developing employment programmes in a tight labour market. For example, the Century agreement was negotiated within the context of the Native Title Act's right to negotiate provisions. As such, the negotiating power of the native title parties was limited by the lack of a veto and it was accompanied by a difficult history between the native title, corporate and government parties.<sup>140</sup> At Argyle, another Australian mine, the negotiation of the recent agreement was not the result of statutory requirements but was nonetheless undertaken more broadly as part of the 'social licence to operate' referred to by Langton and Mazel.<sup>141</sup>

The importance of empirical and evaluative research of agreement based or even legislatively mandated, social and human capacity building provisions is underlined in a number of papers. In a time of plenty, Langton and Mazel argue that 'despite all this activity of agreement-making and policy development, there is no clear sense of overall impact (for want of consolidated administrative data) in terms of the collective number and nature of jobs created and the degree to which these might be further developed and supported to form part of a broad-based sustainable regional economy'.<sup>142</sup> Thus the issues transcend usual legal analysis and the evaluative

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140 David Martin, 1998. 'Deal of the Century? A case study from the Pasmaingo Century project', *Indigenous Law Bulletin* 4(11) 4-7. David Trigger, 'Aboriginal Responses to Mining in Australia: Economic Aspirations, Cultural Revival and the Politics of Indigenous Protest' in P Schweitzer, M Biesele and R Hitchcock (eds), *Hunters and Gatherers in the Modern World: Conflict, Resistance and Self-Determination* (2000), p 192.

141 Langton and Mazel, n 42 above.

142 *Ibid.*

work of Brereton et al. is necessary to inform the legal and policy process, planning and outcomes.

Taylor suggests that the 'current political economy of minerals development across remote Australia attempts to ensure that indigenous peoples and communities increase their capacity to participate in buoyant regional economies that are stimulated by the "super-cycle" of global demand for mineral products'.<sup>143</sup> Overall, the aim is to establish initiatives that will secure sustainable economies for mining regions and their communities beyond the operational life of mines making full use of local labour. Yet, as Langton and Mazel, and Kloppers and du Plessis, in particular, ask, how can economic development be measured and planned for? If corporations, whether strictly as part of their corporate social responsibility obligations or as more wide-ranging 'social licence to operate' seek to negotiate with indigenous and local communities ways to transform resource wealth into social and economic development, then, it is important to determine what provisions might be incorporated into agreements, and as well to ensure that there are measures for adequate evaluation of agreements and their implementation.<sup>144</sup>

A further common theme is that of the institutional constraints that are embedded in both legal and institutional relationships. These have a variety of sources but Langton, Filer and to some extent Drysdale identify government dependency on mining tax revenue as a significant factor. This dependency takes different forms in the various locations. It may derive from lack of capacity and weak institutions (Drysdale), power imbalances in spite of legally defined requirements (Filer) or a failure to invest and racialised policy (Langton and Mazel), but it has implications for the distribution of benefits and in the Australian context at least, results in a failure to reinvest in mining locations.

The long-term nature of the transformative project of economic empowerment and wealth creation incorporates this institutional capacity building and includes recognition of the need to build sustainable communities beyond the life of mines. The implications of this trend, more generally, are highlighted in a number of the articles but its significance for corporations

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143 John Taylor, paper delivered at the Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industry' (Agreements, Treaties and Negotiated Settlements (ATNS) project), Broome, 9-10 July 2007.

144 John Taylor, 'Data Mining: Applied Demography and the Resource Extraction Industry in Proximity to Indigenous Populations' (papers presented at the Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industry' (Agreements, Treaties and Negotiated Settlements (ATNS) project), Broome, 9-10 July 2007, [www.atns.net.au](http://www.atns.net.au).

is highlighted in Langton and Mazel. They refer to the Minerals Council of Australia's view that building lasting relationships reduces risks. There is a recognised risk to companies' reputations if they simply build dependency on the production phase of a mining project and fail to broaden economic and social capacities and opportunities. Thus, building sustainable institutions is crucial to capacity building and integral to the sustainability of agreements.

Clearly, not all 'partnerships' hold the same potential to achieve measurable improvements to the lives of indigenous peoples. In part, the potential of agreement-making will always be curtailed by the external context in which it operates and by the disparities that exist between the parties who comprise such 'partnerships'. However, agreement making in the resource extraction sector has the potential to deliver some very concrete gains to indigenous people in terms of land use and resource control and management.

## Conclusion

During the last decade in Australia, with the recognition of native title, there has been a proliferation of agreements between Aboriginal people, governments, non-government organisations and private entities, such as mining companies. These agreements occupy 'a new space between the old dichotomies of state and market, public and private, local and global'.<sup>145</sup> Much of the recent impetus for agreement-making has operated in the context of a resources boom although the subject matter and range of agreements now transcends a narrow land use and/or mining orientation (although this aspect remains important). As such, they form examples of an emerging model of community organisation, which adopts a 'blended' model of private law forms, such as contract and corporation, with public policy goals and functions.

These new forms do more than simply occupy the middle ground between state policy and private economic incentives. They are integral to the changing role that law plays alongside government institutional structures, and economic instruments and strategy. Law operates at a number of levels in this mode. It is at once the embodiment of 'public policy' when enshrined as statute but further when understood as discrete legal instruments; it is also the point of more specific resistance and empowerment for individual and other actors such as mining companies and other stakeholders in resource extraction activities. Within this sphere, law to date has been seen largely as the default; a backdrop framework that sets the broad rules of the

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<sup>145</sup> Mark Considine, 'Partnerships and Collaborative Advantage: Some Reflections on New Forms of Network Governance' (December 2005) *Centre for Public Policy*, The University of Melbourne.



game. However, as agreement-making with indigenous and local peoples, particularly in the mining sector, has revealed, the blended forms of legal instruments provides a very dynamic context. In many instances, law is simultaneously a technical instrument giving effect to outcomes, or in some instances providing a barrier to more effective engagement and outcomes while simultaneously reshaping the normative, economic and social context in which those outcomes can be achieved. This more constitutive role for law has not been widely canvassed in the literature or in research to date. Rather, attention has been primarily directed to the empowering role of institutional governance forms, in concert with economic and social policy.

We have referred above to the ‘third space’ that has replaced ‘the old dichotomies of state and market, public and private, local and global’.<sup>146</sup> It is within this space that Langton and Mazel’s argument resonates strongly, arguing as they do for collaborative solutions to the inequitable distribution of impacts.<sup>147</sup> This argument in turn reflects Fisher’s view, noted above, that ‘each of the institutions of the law has a part to play within this system’.<sup>148</sup>

The researchers involved in the Agreements, Treaties and Negotiated Settlements project (ATNS), and who convened the Broome Mining workshop on the implementation of agreements, therefore seek to bring law into the spectrum of disciplinary concerns about resource extraction regimes and the impacts on local and indigenous people. As an important means of formalising relationships that in many instances have been forged at an economic and policy level in areas such as corporate social responsibility, law may assist in defining those relationships and how they are to be managed to achieve goals of economic empowerment and development. Articles in this issue of *JERL* vividly display both the role of law and the social, economic and institutional responses to the issues of how best to accommodate the interests of indigenous peoples and local communities in a resources boom to ensure that it is not a ‘boom and bust’ cycle, but rather a means to address longstanding inequalities to ensure long-term economic and social sustainability.

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146 Considine, n 144 above, at 2.

147 Langton and Mazel, n 42 above.

148 Fisher, n 20 above, at 45.

# **Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom**

By Marcia Langton and Odette Mazel\*

*The lessons of the resource curse case studies for the institution and policy environment in Australia are explored in this article, drawing on research conducted on the negotiation and implementation of agreements with indigenous Australians. We show how the resource curse theories are partially applicable in areas in which Australian indigenous communities neighbour mining operations and outline the legal frameworks in Australia that apply especially in native title matters. Also, we include in our analysis the application of the concept of the 'social licence to operate' that informs the mining industry relationship with these communities. We also discuss the way that these practices form the basis of the industry's approach to 'corporate social responsibility', which, along with legal compliance with the statutory framework, are intended to ameliorate the disadvantages faced by those communities. Despite these reforms, however, little socio-economic improvement has been made in these communities and we look to the inequitable distribution of impacts on local peoples, issues of rent seeking and substitution, and the potential impacts of low levels of economic diversification, as explanations. Finally, we consider what institutional and other reforms might be effective in these circumstances.*

The phrases 'the resource curse' and 'the paradox of plenty', as used by Auty,<sup>1</sup> refer to the social and economic phenomenon in which many countries rich in natural resources have had poor economic growth, conflict and declining standards of democracy. The development economics literature on the resource curse has provided a useful theoretical and empirical set of problems against which we have compared trends and data in Australian mining provinces where Aboriginal populations are significant majorities and where the socio-economic data shows extreme poverty. In this special case of under-development,<sup>2</sup> we illustrate the peculiar problem of ethnic minority populations affected by the types of economic distortions described in case studies of correlations of natural resource wealth and economic underperformance or decline. We cannot and do not argue here that the resource curse is replicated in the Australian national situation. Indeed, in the study by Mehlum et al.,<sup>3</sup> the resource-rich countries that are also 'growth winners' include Botswana, Canada, Norway and Australia. The differences and similarities, however, provide critical lessons for understanding the problems faced by indigenous Australians in these regions.

In O'Faircheallaigh's sophisticated analysis of resource development and income inequality in indigenous societies, he tests a range of empirical evidence and reconsiders various conceptual frameworks to arrive at one that allows 'the concept of inequality to be adequately specified, taking into account the quite different forms of income which resource development can generate and specific changes in income distribution'.<sup>4</sup> While we agree with his approach, our own is

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- 1 Richard Auty, *Sustaining Development in Mineral Economies: The resource curse* thesis (1993).
- 2 See, for example, Joseph Stiglitz, *Making Globalization Work* (2006); Amartya Sen, *Development as Freedom* (1999). See also Martha Nussbaum and Amartya Sen, *The Quality Of Life* (1993).
- 3 Halvor Mehlum, Karl Moene and Ragnar Torvik, 'Institutions and the Resource Curse' (2006) 116 *The Economic Journal* 1, 1-20.
- 4 Ciaran O'Faircheallaigh, 'Resource Development and Inequality in Indigenous Socie-

more general: it is not focused on the distribution of income but rather on the inequitable distribution of impacts and measures for their amelioration.<sup>5</sup>

The largest escalation of mining activity in Australian history is currently under way, led by the operations in the Pilbara region of Western Australia.<sup>6</sup> With more than 60 per cent of these mineral operations neighbouring Aboriginal communities,<sup>7</sup> effective strategies to ensure that sustainable benefits accrue to the populations in these areas has emerged as an important issue. We do not discuss the gas, petroleum and exploration sectors of the natural resource extraction industry in Australia but rather focus on the hard rock mining projects in the vicinity of indigenous communities.

More than 20 per cent of Australia's land mass is held under a variety of statutory titles by Aboriginal and Torres Strait Islander peoples,<sup>8</sup> and there are other areas, especially unallocated Crown land, subject to native title rights or native title applications<sup>9</sup> made possible by the High Court's finding in the landmark *Mabo v Queensland (No 2)*<sup>10</sup> judgment and the codification of the Native Title Act 1993 (Cth). A statutory framework has been developed for the management of Aboriginal interests and agreements have become an increasingly important part of the way that mining companies engage with local communities to achieve the social and legal conditions for long-term, sustainable operations in these areas. The result is that the institutional environment for the initial phases of land access has been elaborated without attention to the following phases of mining operations and closure.

In this context, we draw on the political model of resource extraction

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ties' (1988) 26(3) *World Development* 381, 381-394.

- 5 We do not consider environmental impacts and their management. This issue is covered elsewhere, including in the work by O'Faircheallaigh and Corbett who argue that enhancing indigenous participation in environmental management through agreement making can be successfully included in agreements, according to O'Faircheallaigh, but only where indigenous people's inferior bargaining position is adequately addressed. **Ciaran O'Faircheallaigh and Tony Corbett**, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14(5) *Environmental Politics* 629.
- 6 **John Taylor and Benedict Scambary**, 'Indigenous People and the Pilbara Mining Boom: A Baseline for Regional Participation' (Research Monograph No 25, Centre for Aboriginal Economic Policy Research, Australian National University, 2005).
- 7 Australian Government (Department of Industry, Tourism and Resources), Working with Indigenous communities, Leading practice sustainable development program for the mining industry (2007).
- 8 For maps and further information see National Native Title Tribunal website, [www.nntt.gov.au](http://www.nntt.gov.au), at 29 November 2007.
- 9 See Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and *Ten Years of the Native Title Act*' (2003) 27(2) Melbourne University Law Review 523.
- 10 175 CLR 1 ('*Mabo*').

developed by Robinson et al.<sup>11</sup> who investigated ‘the types of political incentives triggered by resource booms and how these may have adverse consequences for national income and development’. They drew attention to the ‘mistakes’ that they described as ‘in fact ... rational political strategies as politicians respond to the incentives induced by resource rents’.<sup>12</sup> The peculiar form that this takes in Australia involves the federal system of government, the distribution of mining royalties and the failure of states and territories to invest in the mining regions where Aboriginal populations form significant and disadvantaged majorities. Despite best efforts in developing a regulatory framework, attention has been paid, paradoxically, more so by the mining industry than government, to the socio-economic status of indigenous people in the vicinity of mining operations. We suggest that one of the reasons for the low socio-economic status of Aboriginal people in Australia, exemplified by the Pilbara case, is the ‘exceptionalist’ and highly experimental approach to Aboriginal community development. This approach is based on narrow, simplistic and racially-informed theories influential in Australia to the exclusion of development economic and critical and theoretical approaches used in international jurisdictions. The role of Aboriginal ‘enabling’ institutions in this governmental system has received little attention, but if the lessons of the resource curse are applicable, it is these organisations that would play a critical role in overcoming the ‘inequitable distribution of benefits and consequences’<sup>13</sup> by strengthening the economic and institutional responses to the Australian mining boom.

The lessons of the resource curse case studies for the institution and policy environment in Australia are explored in this article, drawing on research conducted on the negotiation and implementation of agreements with indigenous Australians.<sup>14</sup> We show how the resource curse theories are partially applicable areas in which Australian indigenous communities neighbour mining operations and outline the legal frameworks in Australia that apply especially in native title matters. Also, we include in our analysis the application of the concept

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11 James Robinson, Ragnar Torvik and Thierry Verdier, ‘Political Foundations of the Resource Curse’ (2006) 79 *Journal of Development Economics* 447, 448.

12 *Ibid.*

13 Jason Switzer, ‘Armed Conflict and Natural resources: The cases of the minerals sector’ (2001) *Mining, Minerals and Sustainable Development Work Report No 12*, 8, International Institute for Environment and Development, [www.iied.org/mmsd/mmsd\\_pdfs/jason\\_switzer.pdf](http://www.iied.org/mmsd/mmsd_pdfs/jason_switzer.pdf), at 23 November 2007.

14 This research by a team from the University of Melbourne and the Australian Institute of Aboriginal and Torres Strait Islander Studies was funded by the Australian Research Council under the Linkage Project Scheme with three industry partners: the Office of Indigenous Policy Coordination, Rio Tinto Pty Ltd and the former Aboriginal and Torres Strait Islander Commission. See the project website and online database of agreements at [www.atns.net.au](http://www.atns.net.au).

of the ‘social licence to operate’ that informs the mining industry relationship with these communities. We also discuss the way that these practices form the basis of the industry’s approach to ‘corporate social responsibility’, which, along with legal compliance with the statutory framework, are intended to ameliorate the disadvantages faced by those communities. Despite these reforms, however, little socio-economic improvement has been made in these communities and we look to the inequitable distribution of impacts on local peoples, issues of rent seeking and substitution, and the potential impacts of low levels of economic diversification, as explanations. Finally, we consider what institutional and other reforms might be effective in these circumstances.

### **Resource curse: are there parallels in the Aboriginal domain?**

Several correlations between natural resource abundance and slow economic growth have been identified in development economics.<sup>15</sup> Sachs and Warner,<sup>16</sup> among others, document a ‘statistically significant, inverse, and robust association between natural resource intensity and growth over the past 20 years’.<sup>17</sup> That is, ‘resource-poor economies often vastly outperform resource-rich economies in economic growth’.<sup>18</sup> Moreover, as Auty observes, ‘not only may resource-rich countries fail to benefit from a favourable endowment, they may actually perform worse than less well endowed countries’.<sup>19</sup> There are many hypotheses about the causes of this correlation,<sup>20</sup> the two most significant explanations being economic factors and institutional or political economy factors.<sup>21</sup> ‘Dutch disease’<sup>22</sup> refers to the detrimental impact of ‘economic distortion that export booms can induce in a mineral-dependent economy’ such that non-mining sectors suffer as a result, with ‘exports becoming less competitive and wages more expensive’.<sup>23</sup>

15 Auty, n 1 above; Richard Auty and Raymond Mikesell, *Sustainable Development in Mineral Economies* (1998); Jeffrey Sachs and Andrew Warner, ‘Natural Resource Abundance and Economic Growth’ (Working Paper No 5398, National Bureau of Economic Research, 1995).

16 Sachs and Warner, *ibid.*

17 *Ibid.*, at 21; see also Auty, n 1 above, at 1; Auty and Mikesell, n 15 above, at 87.

18 Sachs and Warner, *ibid.*, at 2.

19 Auty, n 1 above, at 1.

20 The two most significant explanations being economic factors (Dutch disease) and institutional factors.

21 Martin Sandbu, ‘Natural Wealth Accounts: A Proposal for Alleviating the Natural Resource Curse’ (2006) 34(7) *World Development* 1153, 1155.

22 ‘Named after the negative effects on the Dutch manufacturing sector of Holland’s natural gas revenues from the North Sea, the “disease” refers to the contraction of other tradable sectors as a result of a boom in the natural resource sector’: *ibid.*

23 Chris Ballard and Glenn Banks, ‘Resource Wars: The Anthropology of Mining’ (2003) 32 *Annual Review of Anthropology* 287, 295.

Because the resource curse is associated with rising currency exchange rates as against other currencies, making export activities other than mineral and oil commodities less competitive and imports more competitive (with the associated loss of skill labour for agriculture and manufacturing), there can be no direct application in this respect to the situation of ethnic minorities within national economies, such as Aboriginal Australians.<sup>24</sup> However, there are trends that illustrate similar tendencies at work in national sub-regions where localised inflationary effects such as rising housing and food costs result from the influx of highly-paid labour in mining projects.

Political explanations of the resource curse point to the mismanagement of the economic boom and identify 'policy failure as the prime cause of the underperformance of the resource abundant countries'.<sup>25</sup> This might include greater 'rent-seeking behaviour by individuals, sectors or interest groups, and the general weakening of state institutions, with less emphasis on accountable and transparent systems of governance'.<sup>26</sup>

Robinson et al., in contrast to Sachs and Warner, argue that the 'overall impact of resource booms, on the economy depends critically on institutions since these determine the extent to which political incentives map into policy outcomes', suggesting that '[c]ountries with institutions that promote accountability and state competence will tend to benefit from the resource booms since these institutions ameliorate the perverse political incentives that such booms create'.<sup>27</sup> Similarly, Mehlum et al., analysing a sample of 42 countries, demonstrate the evidence for 'the variance of growth performance among resource rich countries as primarily due to how resource rents are distributed via the institutional arrangement'.<sup>28</sup> While generally the resource curse thesis applies to national economies, rather than regions within nations, and it is clear that Australia is an accountable and competent state, we are concerned here with the potential of this conceptual framework to understand Australian Aboriginal communities in resource-rich settings insofar as these communities might be able to benefit from the expansion of the minerals economy.

Stiglitz considers the resource curse through a development paradigm, based on the distinctive analysis of Sen,<sup>29</sup> arguing that poor distribution

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24 Paul Collier, *The Bottom Billion Why the Poorest Countries are Failing and What Can Be Done About It* (2007).

25 D Lal and H Myint, *The Political Economy of Poverty, Equity and Growth* (1996) as cited in Robinson, Torvik and Verdier, n 11 above, at 448.

26 Ballard and Banks, n 23 above, at 295; see also Michael Ross, 'The Political Economy of the Resource Curse' (1999) 51 *World Politics* 297.

27 Robinson, Torvik and Verdier, n 11 above, at 447.

28 Mehlum, Moene and Torvik, n 3 above, at 1.

29 See, for instance, Stiglitz, n 2 above and Sen, n 2 above. See also Nussbaum and Sen, n 2 above.



of resource-derived wealth is the cause of poor socio-economic activity in mineral rich areas.<sup>30</sup> He believes, however, that this can be overcome by partnering institutional quality and improved governance with sustainable wealth management. He emphasises the prioritisation of open, transparent and accountable institutions which reduce scope for corruption, and increase the conditions for investment.<sup>31</sup>

The costs borne by local communities are discussed by Switzer who draws attention to the gap between natural resource wealth and social prosperity as a source of conflict in mining regions, which he explains as a result of the inequitable 'distribution of impacts and benefits'.<sup>32</sup> Citing the IFC/World Bank assessment of four natural resource extraction projects in Colombia, Papua New Guinea and Venezuela, he notes that 'governments reap the most benefits from these projects, while social and environmental costs tend to be borne by local communities'.<sup>33</sup> Ballard and Banks also describe how mining can become a source of conflict 'over the control of resources and resource territories, the right to participate in decision making and benefit sharing, social and environmental impacts, and the means used to secure access to resources and to personnel'.<sup>34</sup>

It is these findings that have drawn our attention to some similarities of the impacts of the resource curse among Aboriginal populations in Australia affected by mining operations, although we note that there are also significant differences. The observed 'policy failure as the prime cause of the underperformance of the resource abundant countries'<sup>35</sup> has relevance in Australia. Most agreements related to mining are made with isolated Aboriginal communities. The consequence of isolation is that a far lower standard of service delivery and basic infrastructure exists in these areas and poor or inadequate relationships among government departments and agencies (both federal and State) and indigenous communities is evident. The 'chronic tendency for the state to become overexpanded'<sup>36</sup> in those economies subject to the impacts of the resource curse discussed by development economists in other countries is also present in a peculiar form in Australia where state or provincial governments, while employing excessive numbers of civil servants in the administration of indigenous policies, fail to invest in the social and economic infrastructure for the majority Aboriginal

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30 Stiglitz, *ibid.*

31 Stiglitz, *ibid.*

32 Switzer, n 13 above.

33 K McPhail, 'How Oil, Gas and Mining Projects Can contribute to Development' (2000) 37(4) *Finance and Development* as cited in Switzer, *ibid.*

34 Ballard and Banks, n 23 above, at 295; see also Switzer, *ibid.*

35 Robinson, Torvik and Verdier, n 11 above, at 448.

36 Richard Auty (ed), *Resource abundance and economic development* (2001) 13.2.

populations while reaping the royalty bonanza from mining.

As we reiterate and further explain in the following, the institutional environment for the initial phases of land access for natural resource extraction projects has been elaborated without attention to the later phases of mining operations and closure.

### Statutory environment

In areas where mining and indigenous populations in Australia coincide, there has been little conflict of the kind observed in many of the resource curse economies. However, mutual antagonism between the mining industry and the Australian indigenous population in the mining boom of the 1970s did create tensions that spilled over into national politics and led to extensive litigation by indigenous people.<sup>37</sup> This relationship has changed dramatically in the past two decades with the introduction of legal frameworks to govern the inclusion of indigenous communities in mining negotiations and the development of 'special measures' to protect their ways of life, livelihoods and traditional lands.<sup>38</sup> Along with indigenous political pressure, international developments in the recognition of indigenous rights and the shift among multinational corporations towards concern for their reputations expressed in a variety of 'corporate social responsibility' initiatives have also been influential in the Australian context.

Since the introduction of State and Commonwealth legislation relating to mining and indigenous rights, and the development of standards of social corporate responsibility, indigenous communities have achieved a limited range of direct benefits from engagement with mining companies primarily through the use of agreements. However, despite this, little or no improvement in the social and economic status of many of those communities has been

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37 See Switzer, n 13 above. Although there has been no armed civil unrest, many incidents involving riots, gang behaviour and civil unrest associated with public demonstrations have occurred during the last 40 years. Some of these, such as the Aboriginal Tent Embassy protests in Canberra beginning in 1970, influenced governments to fundamentally change their policy approaches to indigenous people. The incident, which greatly affected the approach of the mining industry, occurred at Noonkanbah in the Kimberley region of Western Australia. Protests in support of the local Aboriginal traditional owners resisting an exploration company, Amax Pty Ltd, took place across the nation. See Stephen Hawke and Michael Gallagher, *Noonkanbah: Whose Land, Whose Law* (1989).

38 Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain (eds), *Honour Among Nations. Treaties and Agreements with Indigenous People* (2004); Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation' in Langton, Tehan, Palmer and Shain, *ibid* 237-251; Peter Croke, Bruce Harvey and Marcia Langton, 'Implementing and Monitoring Indigenous Land Use Agreements in the Minerals Industry: The Western Cape Communities Co-existence Agreement' in Marcia Langton, Odette Mazel, Lisa Palmer and Maureen Tehan (eds), *Settling with Indigenous People Modern Treaty Agreement-making* (2006), pp 95-114.

recorded.<sup>39</sup> With little achieved over the past four decades the question remains: what economic and policy initiatives are necessary to transfer benefits from the current mining boom to indigenous communities?

### **Legal frameworks for resolving conflicts about native title and mining**

In Australia's federal system, both Commonwealth and State legislation apply to a range of land access matters and to dealings with indigenous people, and the legal and institutional environment is different from jurisdiction to jurisdiction. Under Australian law, mineral resources are owned either by the Australian or State/Territory Governments. However, governments are not engaged in commercial exploration and development, but rely on the private sector to undertake these activities.<sup>40</sup> The legal and policy contexts of land access for exploration and mining access also vary greatly. In the following, we outline the relevance of the Native Title Act 1993 (Cth) (amended in 1998) (NTA) to negotiated agreements and the outcomes of this approach for encouraging development in indigenous communities in relation to mining areas.<sup>41</sup>

In 1992, the High Court's recognition of native title in Australia in *Mabo v Queensland (No 2)*<sup>42</sup> reversed the longstanding fiction of *terra nullius* and acknowledged the traditional rights of indigenous Australians to their land and waters at common law. While various statutory land rights schemes already provided some rights for indigenous peoples in some parts of Australia,<sup>43</sup> native title applied nationally and provided important impetus

39 See, eg, Taylor and Scambary, n 6 above.

40 Ministerial Council on Mineral and Petroleum Resources, Minerals and Petroleum Taxation: A Review of Australia's Resource Industry Fiscal Regimes and their International Competitiveness (2006), pp 39-42, [www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectID=8736CECA-C608-10E1-01A214F74E40CA1A](http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectID=8736CECA-C608-10E1-01A214F74E40CA1A), at 23 November 2007.

41 We do not go into detail about the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), which predates the NTA by more than 20 years. The Act is, however, important to consider with regard to indigenous rights to land and compensation for mining in the Northern Territory.

42 (1992) 175 CLR 1.

43 **Aboriginal Land Rights (Northern Territory) Act 1976 (Cth); Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth); Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA); Maralinga Tjarutja Land Rights Act 1984 (SA); Aboriginal Land Rights Act 1984 (NSW); Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982 (Qld); Aboriginal Land Act 1991 (Qld); Torres Strait Islander Land Act 1991 (Qld); Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth); Lands Act 1970 (Vic); Aboriginal Land (Aboriginal Advancement League) (Wall Street Northcote) Act 1982 (Vic); Aboriginal Land (Northcote Land) Act 1989 (Vic); Aboriginal Lands Act 1991 (Vic); Aboriginal Land (Manatunga Land) Act 1992 (Vic).** As well as these statutes, several others pertaining to cultural heritage management were also enacted, including the Aboriginal Sacred Sites Act 1989 (as in force at 29 March 2006) in the Northern Territory and the Aboriginal Heritage Act 1972 in Western Australia.

for government and industry to engage with indigenous people.<sup>44</sup> Following *Mabo*, the Commonwealth Government passed the NTA to provide a legislative framework for the recognition and protection of native title, and to establish procedures for the way in which native title may proceed.<sup>45</sup> Importantly, it provided a set of procedural rights relating to ‘future acts’ including any dealing in land that might affect native title, including the development of natural resources.<sup>46</sup> In some circumstances, the NTA gives native title holders, and those with a registered native title claim, the right to be notified and consulted about a proposed action and provides the right for objections to be heard by an independent body if an agreement between the parties cannot be reached.<sup>47</sup> The rights that are applicable depend on the nature of the interest being sought, but actions relating to compulsory acquisition of land and grants for the right to mine trigger the right to negotiate procedures.<sup>48</sup>

Amendments to the NTA in 1998 included the introduction of Indigenous Land Use Agreements (ILUAs) as a means of validating future acts through negotiation.<sup>49</sup> ILUAs are voluntary agreements made between native title holders (and registered native title claimants) and government or industry bodies. They provide a flexible approach to settling a range of issues including access to land, resources and infrastructure, environmental management, tourism, cultural heritage, compensation and employment and training opportunities.<sup>50</sup> They also provide legal certainty for governments or industry

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44 See Odette Mazel, ‘Returning Parna Wiru: Restitution of the Maralinga Lands to Traditional Owners in South Australia’, in Langton, Mazel, Palmer and Tehan, n 38 above; Marcia Langton and Lisa Palmer, ‘Modern Agreement-Making and Indigenous People in Australia: Issues and Trends’ (2003) 8(1) *Australian Indigenous Law Reporter* 1-31; Marcia Langton, Maureen Tehan and Lisa Palmer, ‘Introduction’ in Langton, Tehan, Palmer and Shain, n 38 above.

45 See Native Title Act 1993 (Cth) s 4.

46 Division 3 of Part 2 of the original Act was substituted and amended in 1998 and is now detailed in the Native Title Act 1993 (Cth) pt 2 div 3 subdiv ss 25-44; Margaret Stephenson, ‘Resource Development in Aboriginal Lands in Canada and Australia’ (2002) 4 *James Cook University Law Review Special Issue*, Australasian Legal Information Institute, [www.austlii.edu.au/au/journals/JCULRev/2002/4.html](http://www.austlii.edu.au/au/journals/JCULRev/2002/4.html), at 6 December 2007; see also Richard Bartlett, *Native Title in Australia* (2000).

47 See, eg, Native Title Act 1993 (Cth) s 24MD(6A)-6(B) and s 35.

48 See Native Title Act 1993 (Cth) pt 2, div 3, subdiv P. See especially Native Title Act 1993 (Cth) ss 26(1) and 31; *Brownley v Western Australia* (1999) 95 FCR 152; *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303; *Walley v The State of Western Australia* (1999) 87 FCR 565.

49 Under the Native Title Act 1993 (Cth), there are three types of ILUAs including body corporate agreements (div 3, subdiv B), area agreements (div 3, subdiv C) and alternative procedure agreements (div 3, subdiv D). See also Lee Godden and Shaunnagh Dorsett, ‘The Contractual Status of Indigenous Land Use Agreements’ (1999) 2(1) *Land, Rights, Laws: Issues of Native Title*, Australian Institute of Aboriginal and Torres Strait Islander Studies, <http://ntru.aiatsis.gov.au/ntpapers/IPv2n1.pdf>.

50 See for instance the Agreements, Treaties and Negotiated Settlements Project Data-

parties once registered, as the agreements are binding on all those who hold native title under the terms of the agreement as well as those who are later found to hold native title but were not party to the original agreement.<sup>51</sup>

Two types of statutory bodies are provided for under the Act: native title representative bodies and prescribed bodies corporate. A native title representative body has the powers and functions to support indigenous people and native title holders to make various applications under the NTA, including claimant, objection, future act and compensation applications and to negotiate ILUAs on behalf of indigenous parties.<sup>52</sup> A prescribed body corporate is the corporation established to represent a group of native title holders and manage their native title rights and interests. Once the corporation is approved by the court, it is entered onto the National Native Title Register as the 'Registered native title body corporate'.

The recognition of native title in Australia and the introduction of the instruments described have led to a significant increase in agreements between indigenous people and other parties. Figure 1 illustrates a gradual increase observed following the introduction of the NTA, and more particularly its amendments in 1998, and a sharp rise in 2005 with the introduction of a new Commonwealth Government policy involving 'shared responsibility' and regional partnership agreements. There are now 308 ILUAs negotiated in Australia and over 2,000 future act determinations (these are not included in Figure 1).<sup>53</sup> With an emphasis on resolution of native title issues by negotiation, agreements now constitute a major form of engagement involving collaboration as opposed to client-patron relations between indigenous people, governments and industry.<sup>54</sup> While, for mining companies, the issue is one of gaining access to areas under Aboriginal-owned titles or subject to claim by Aboriginal people, the potential for indigenous people to obtain benefits from agreements is considerable.

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base, *Argyle Diamonds Indigenous Land Use Agreement* (2005), [www.atns.net.au/agreement.asp?EntityID=2591](http://www.atns.net.au/agreement.asp?EntityID=2591), 21 November 2007.

51 ILUAs are registered with the National Native Title Tribunal, which cannot influence the terms of the agreement, but must ensure that it complies with the Native Title Act 1993 (Cth) and Regulations (Native Title (Indigenous Land Use Agreements) Regulations 1999 (Cth) and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)).

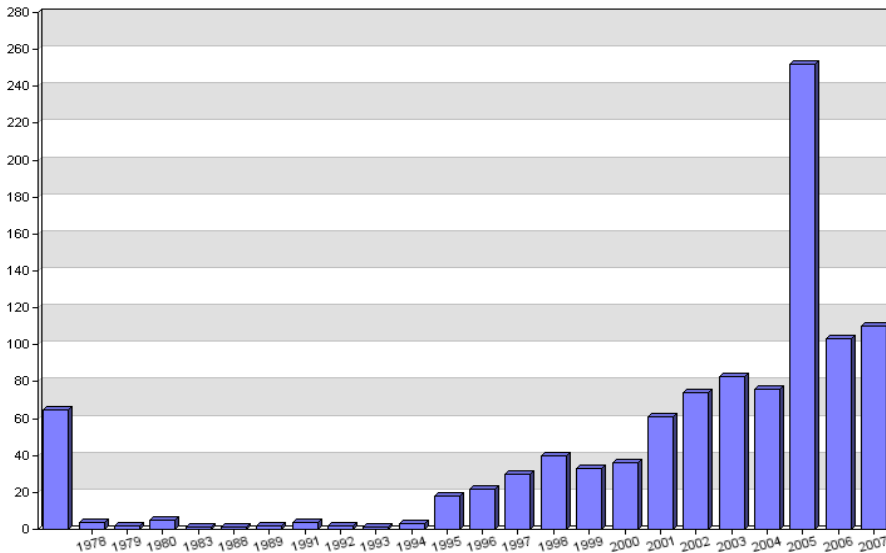
52 Section 203B of the Native Title Act 1993 (Cth).

53 National Native Title Tribunal, *Registered indigenous land use agreements* (4 December 2007), [www.nntt.gov.au/ilua/browse\\_ilua.html](http://www.nntt.gov.au/ilua/browse_ilua.html), at 7 December 2007; National Native Title Tribunal, *Future Act Search* (2007), [www.nntt.gov.au/cgi-bin/search/search.pl](http://www.nntt.gov.au/cgi-bin/search/search.pl), at 7 December 2007.

54 Such agreements have been negotiated, variously, with federal, State and local governments, resource extraction companies, farming, grazing and environmental representative bodies, arts organisations and many other institutions and agencies; see Langton, Tehan, Palmer and Shain, n 38 above, at 2; Mary Edmunds (ed), *Regional Agreements: Key Issues in Australia: Volume 1* (1998); Mary Edmunds, *Regional Agreements: Key Issues in Australia: Volume 2 Case Studies* (1999).

**Figure 1: Number of agreements with indigenous people in Australia by year on the Agreements Treaties and Negotiated Settlements (ATNS) Database**

Source: ATNS Database (2007), www.atns.net.au, at 10 December 2007.



### **Beyond legal compliance: corporate social responsibility**

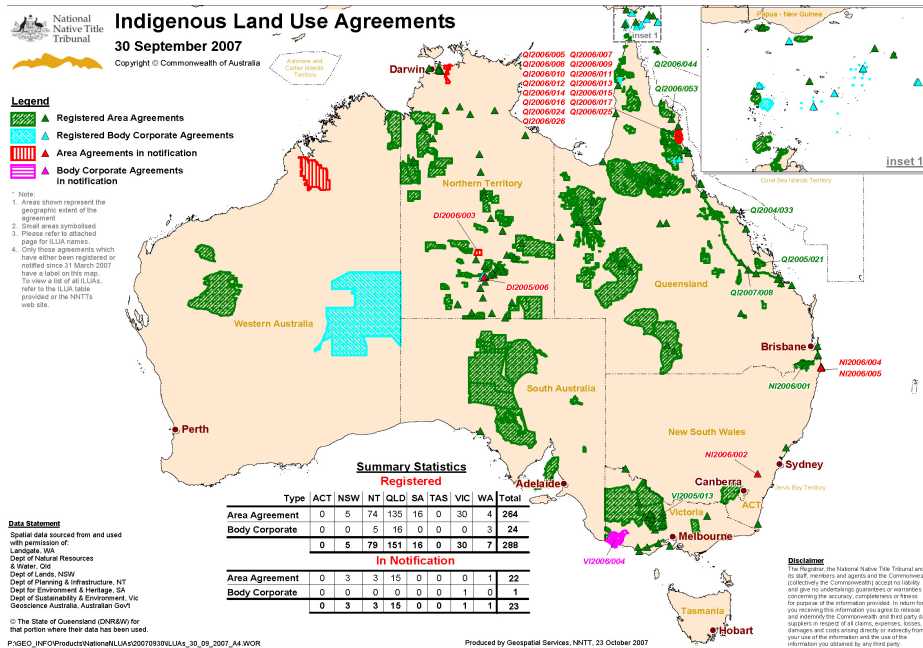
The impact of the formal recognition of indigenous rights in the Australian legal landscape is reflected in the approach of the minerals industry, which increasingly seeks to settle competing claims more by negotiation and less by litigation. A deeper understanding of the issues caused some mining companies to change their attitudes towards mining impacts and the entitlement of Aboriginal communities to benefits as a result of the detriments they incur from mining and related activities.<sup>55</sup> The Minerals Council of Australia has explicitly expressed a preference for the negotiation of a sustainable relationship with agreed approaches to, and the conditions for, land access and local support for mining operations.<sup>56</sup> This strategy is subtly different from the conventional corporate social responsibility approach, defined by the World Business Council for Sustainable Development as ‘the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their

<sup>55</sup> Australian Government (Department of Industry, Tourism and Resources), n 7 above.

<sup>56</sup> *Ibid.*



**Figure 2: Number of indigenous land use agreements in Australia: map provided by the National Native Title Tribunal**



Source: National Native Title Tribunal (2007), [www.nntt.gov.au/publications/data/files/ILUA\\_A4.jpg](http://www.nntt.gov.au/publications/data/files/ILUA_A4.jpg), at 10 December 2007.

families as well as of the local community and society at large’.<sup>57</sup> In addition to compliance with the NTA, a motivation for mining companies to reach agreement with local traditional Aboriginal owners is to avoid costly litigation and delays to exploration and mining projects.<sup>58</sup> There is a growing recognition in the mining industry ‘that it will be increasingly difficult for them to operate profitably unless they establish cooperative working relationships with local indigenous interests’.<sup>59</sup> The advantage of the Australian industry approach is that a ‘social licence to operate’ – an agreed commitment on the part of the Aboriginal parties in these agreements to mining operations, along with the conditions of that access and use of the land – provides one of the important

57 World Business Council for Sustainable Development, *Corporate Social Responsibility: Making good business sense*. World Business Council for Sustainable Development (2000), p 9.

58 Charlie Lenegan (Managing Director, Rio Tinto), ‘The Minerals Sector and indigenous Relations’ (paper presented at the Resourcing and Innovative Industry – Minerals Week 2005, Canberra, 30 May-3 June 2005).

59 Ciaran O’Faircheallaigh, ‘Negotiating Major Project Agreements: The “Cape York Model”’ (Discussion Paper No 11, Australian Institute for Aboriginal and Torres Strait Islander Studies, 2000), p 1, [www.aiatsis.gov.au/rsrch/rsrch\\_dp/negotiating.htm](http://www.aiatsis.gov.au/rsrch/rsrch_dp/negotiating.htm), at 23 November 2007.



conditions for security of access to the resource.<sup>60</sup>

However, while these statutory rights and other developments have provided a sound, if cumbersome and costly, governance and administration system for native title rights and access for mining, energy and exploration companies, the economic situation in indigenous communities is falling well behind the rest of Australia.<sup>61</sup> Agreement-making has created a unique context for engagement, but the mere fact of agreements has not necessarily assured positive, meaningful or equitable outcomes for indigenous communities.<sup>62</sup> As O'Faircheallaigh has warned, it is 'entirely possible, for example that an agreement might [actually] leave an indigenous party worse off than before'.<sup>63</sup> Yet when an agreement is negotiated pursuant to a right in a statutory regime, the outcomes are much more favourable to indigenous communities than those in which the developer does not have to obtain community consent. O'Faircheallaigh reports that because of the huge divergence in parties and provisions in the mining agreements, close monitoring is important to gain an accurate idea of both their implications and ability to meet indigenous expectations.<sup>64</sup>

The present legislative and policy framework for the development of an institutional environment that encourages diverse Aboriginal economic opportunities does have limitations. The lack of government investment in these mining provinces and the declining economic status of Aboriginal people draw attention to the matter of accountability that is referred to in the resource curse literature. Further, while native title corporations are statutory institutions for the negotiation of native title and related issues, they are largely excluded from functions relating to the commercial issues that agreements present. The Pilbara example described in the following section draws particular attention to indigenous poverty in the midst of the mining boom.

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60 Australian Government (Department of Industry, Tourism and Resources), n 7 above.

61 Ciaran O'Faircheallaigh, 'Mineral development agreements negotiated by Aboriginal communities in the 1990s' (Discussion Paper No 85, Centre for Aboriginal Economic Policy Research, Australian National University, 1995), p 17.

62 Langton and Palmer (2003), n 44 above, at 1; see also Taylor and Scambary, n 6 above.

63 Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Langton, Tehan, Palmer and Shain, n 38 above, at 303, 304; O' Faircheallaigh and Kelly found that the outcomes from agreement making are in fact highly variable. In some cases indigenous groups are achieving substantial economic benefits and innovative provisions to minimise the impact of commercial activities on their traditional lands. In others the benefits gained by indigenous groups are negligible, impact minimisation provisions are similar to those already provided in general legislation, while in some cases restrictions are placed on the exercise of rights that indigenous parties possess under general legislation. (Ciaran O'Faircheallaigh and Rhonda Kelly, Corporate Social Responsibility, Native Title and Agreement Making: Report to the Human Rights and Equal Opportunity Commission, 2003.)

64 O'Faircheallaigh, n 61 above, at 17.

### **Pilbara example of indigenous poverty in the midst of the mining boom: case study**

In the Pilbara region, where Aboriginal people were artisanal miners after World War II<sup>65</sup> and have lived on the margins of the large-scale mining operations which commenced in the 1960s, there are more than ten agreements with local indigenous groups, including the Yandicoogina Regional Land Use Agreement. We consider this one example in our brief case study as it is the only agreement in this area for which there is publicly available data. This was the first land use agreement for a major resource project to be concluded after the *Mabo* decision. It pertains to an area of 26,000 square kilometres in the central Pilbara area and was signed in March 1997 between Hamersley Iron Pty Ltd, a wholly owned subsidiary of Rio Tinto Ltd, and the Gumala Aboriginal Corporation, representing the native title claimants of the land, the Niapiali, the Bunjima (or Panyjima) and the Innawonga (or Yinhawangka). It was negotiated to enable the development of the Yandicoogina iron ore mine and its associated infrastructure.

While the actual agreement is confidential, it is known that it involved extensive negotiation between groups of Aboriginal traditional owners and the mining company. It includes provision for specific long-term community benefits, such as employment and business development, and financial benefits of AUS\$60 million over the estimated 20-year life of the mine transferred in annual instalments to a trust fund to support the community.<sup>66</sup> Such financial benefits by themselves have not contributed to improvements in socio-economic outcomes and it thus important to consider the management and distribution policies of such funds as well as other potential factors that may ameliorate the inequitable impacts of the mining boom in these regions including government investment in infrastructure, development and capacity building. These matters are discussed later.

Historically, local Aboriginal people were largely excluded from employment in the mining industry.<sup>67</sup> More recently, the corporate resolve to employ indigenous workers according to the provisions of their agreements

65 Sarah Holcombe, 'Early Indigenous engagement with mining in the Pilbara: lessons from a historical perspective' (Working Paper No 24, Revised Edition, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 2004, 2006), [www.anu.edu.au/caepr/Publications/WP/CAEPRWP24.pdf](http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP24.pdf) at 6 December 2007.

66 Agreements, Treaties and Negotiated Settlements Project Database, *Yandicoogina Regional Land Use Agreement* (2003), [www.atns.net.au/agreement.asp?EntityID=1352](http://www.atns.net.au/agreement.asp?EntityID=1352), at 23 November 2007.

With the support of Hamersley Iron Pty Ltd, three joint-venture businesses were established by Gumala Corporation and private companies to provide services, such as earth-moving, to the Yandicoogina mine.

67 Taylor and Scambray, n 6 above.

has done little for improving the socio-economic conditions for Aboriginal people in the Pilbara even in this unprecedented mining 'boom'. The indications are that economic growth in the Aboriginal domain is declining relative to the Aboriginal population.<sup>68</sup> The outcome of many years of such exclusion is the health status of Aboriginal people, with life expectancy estimates at 52 and 55 for males and 60 and 63 years for females in the East and West Pilbara.<sup>69</sup>

In their study of the region, Taylor and Scambary found that 'for a complex set of reasons, indigenous economic status has changed little in recent decades'.<sup>70</sup> They have found that 'dependence on government remains high and the relative economic status of indigenous people residing adjacent to major long-life mines is similar to that of indigenous people elsewhere in regional and remote Australia',<sup>71</sup> despite the fact that 'private sector economic activity dominates the labour market and accounts for as much as 81% of locally-resident employees'.<sup>72</sup>

'While the regional labour market has grown in both size and complexity, Indigenous participation has remained relatively marginal. In effect, the past 30 years have witnessed a shift from an almost total reliance on the private sector for employment (mostly in the pastoral industry), to increased reliance on the government sector in the form of CDEP [work-for-the-dole] and the community services industry.'<sup>73</sup>

Further, they found that the:

'past 40 years have witnessed a generational attrition in terms of economic engagement as the trades skill-base is relatively focused on older adults, while many young people find themselves ill-equipped for workforce participation, due to low literacy and numeracy, lack of qualifications and work experience, substance misuse and consequently, low motivation.'<sup>74</sup>

In this respect, the similarity with resource curse conditions is conspicuous. The low levels of educational and skills attainment in the Aboriginal population, combined with racism, poverty, poor housing and high levels of morbidity and mortality, have contributed to low levels of participation, far below parity, 'across the full range of activities associated with the region's key economic sectors'.<sup>75</sup> The future of Aboriginal people will be shaped by

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68 *Ibid*, at 45.

69 *Ibid*, at 150.

70 *Ibid*, at 45.

71 *Ibid*, at 1.

72 *Ibid*, at 330.

73 *Ibid*, at 28.

74 *Ibid*, at 146.

75 *Ibid*, at 40.

their choices and opportunities, and these in turn will be dictated by their access to education and training. This state of affairs has developed while the non-indigenous labour force has grown dramatically, with large-scale importation of labour from cities and other locations far distant from the Pilbara region. The high level of dependence of the entire regional workforce on the mining operations is also reminiscent of the low levels of economic diversity of the 'resource curse' countries, although here it is a localised effect, but one with other economic consequences, such as local inflation resulting from the import of a highly-paid external labour force.

It is clear then that while the right to negotiate under the NTA underlies significant opportunities for indigenous people in remote areas, such as the Pilbara, low levels of educational attainment, work readiness and economic participation in remote and rural areas pose difficult challenges for companies seeking to engage indigenous populations in economic participation to ensure measurable improvements in indigenous well-being. This leads us to consider how governments contribute to the failure to provide benefits to indigenous communities by failing to redistribute the wealth generated in those regions where the impacts of mining are already inequitably distributed.

### **Inequitable distribution of impacts and mining rents: the Australian indigenous case**

As already noted, while studies have shown that 'resource-abundant countries generally have had lower rates of growth than resource-poor countries',<sup>76</sup> it has also been accepted that outcomes vary according to differing institutional and political circumstances.<sup>77</sup> Auty showed that often 'the demand for good governance in resource-rich settings increases'.<sup>78</sup> For indigenous communities in Australia this may also prove to be the key to making a difference.

In the following section we discuss the misunderstandings associated with perceptions about rent-seeking behaviour in Aboriginal communities in the context of several of the relevant characteristics of the institutional environment and the distribution of impacts on local peoples developed in the resource curse literature, including the failure of the state to invest in mining regions despite the substantial amounts of revenue collected from these areas. Further, we discuss the consequences for the mining industry

76 Auty and Mikesell, n 15 above, at 6; Auty, n 1 above; Sachs and Warner, n 15 above.

77 Mehlum, Moene and Torvik, n 3 above, at 1-20; Robinson, Torvik and Verdier, n 11 above, at 448; Ragnar Torvik, *The Resource Curse* (2005) Norwegian University of Science and Technology, [www.svt.ntnu.no/iso/ResourceCurse/Default.htm](http://www.svt.ntnu.no/iso/ResourceCurse/Default.htm), at 5 July 2007.

78 Auty and Mikesell, n 15 above, at 223.

of this failure to invest insofar as industry becomes involved in a form of substitution for the responsibilities of governments by paying for the costs of engaging local Aboriginal communities in labour force participation, cultural heritage protection and other ongoing issues of mining operations. Another impact we draw attention to is the potential impact of low levels of economic diversification in mining regions on indigenous communities.

### **Rent-seeking and Aboriginal communities**

Rent-seeking behaviour has been discussed in the literature as a proponent of the resource curse. However, the two concepts of financial compensation for impacts and 'rent-seeking' are often elided. This is especially true when applied to negotiated financial benefits in mining agreements made with Aboriginal communities. It is therefore important to understand this concept of 'rent-seeking' and the claim of some that Aboriginal actors are engaged in 'rent-seeking' behaviour and seeking financial benefits by corrupt or inappropriate means.

The misunderstandings in the attribution of 'rent-seeking' to indigenous groups seeking compensation have emerged in highly contentious and racist debates in Australia about the rights of Aboriginal people in mining contexts. Peter Saunders, in reference to the Australian welfare system, suggests that:

'[a]s government spending rises, so the level of expectation is continually inflated among client groups in the population ... [t]he result is that the culture of self-reliance has eroded over time and is replaced by an unedifying new culture based on what economists call political "rent-seeking".<sup>79</sup> Rather than expressing and reinforcing values of self-help and personal responsibility, this system of mass democracy encourages and rewards a "cargo cult" of aggressive political rent-seeking.'<sup>80</sup>

This argument is mistakenly extended to apply to indigenous negotiations for compensation for present and future detrimental impacts on their societies and lands. Antagonists opposed to Aboriginal rights have suggested that negotiated financial benefits paid to traditional Aboriginal owners by mining companies are evidence of 'rent-seeking' behaviour, inferring improper political behaviour and corruption.<sup>81</sup> Mining compensation

79 Peter Saunders, *Australia's Welfare Habit and how to kick it* (2004), pp 10-12.

80 *Ibid*, at 186.

81 See Michael Bachelard, *The Great Land Grab* (1997), pp 79-81. The basis and quantum of mining revenues to indigenous communities under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) differ in several fundamental ways from those negotiated under the NTA. In addition to negotiated agreements between traditional owners and developers (comparable to right to negotiate agreements though from a much stronger

packages are perceived by settler protagonists as increasing welfare payments to undeserving groups, but this inference is entangled with the ‘absent government’ trend in remote regions with large Aboriginal majorities and their role in preventing economic development in indigenous communities.

O’Faircheallaigh provides an important counter to the view that these negotiations are a form of ‘rent-seeking’ in his survey of conceptual and practical issues involved in the indigenous capacity to tax non-renewable resources extracted from their traditional lands.<sup>82</sup> He refers to the literature

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position as traditional owners may also decide not to permit exploration), the Land Rights Act stipulates that ‘statutory royalty equivalents’ (an amount equal to the royalties paid by the mining company to the NT or Commonwealth government) be paid into the Aboriginals Benefit Reserve from Commonwealth Consolidated Revenue. Until the amendment to the Act in 2006 these moneys were then allocated by an approximate formula of 30 per cent to ‘areas affected’ by the project, 40 per cent to fund the land councils and 30 per cent to be invested in a trust account for investment and wider distribution for the benefit of Aboriginal people of the Northern Territory (ss 35 and 64). The channelling of statutory royalty equivalents through Consolidated Revenue led some analysts to argue that such moneys are in fact public moneys, and should therefore be spent on public purposes, an argument extended by some detractors of indigenous rights to revenues from negotiated agreements. According to this argument: ‘As public moneys, their management and use will be subject to what I will call “deep accountability”; accounting practices must be sufficient to demonstrate ordinary financial propriety, and application of moneys must accord with externally prescribed social policy priorities’ (R Levitus, ‘Local organisations and the purpose of money’ (1999) in J Altman, F Morphy and T Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No 14, Australian National University, Canberra, p 123). The need to ensure financial propriety is not contested; however, the imposition by Commonwealth governments of specific funding priorities and requirements (to the extent this occurs) undermines the rationale and reality of the recognition of indigenous property rights. Alternatively, mining revenues can be conceptualised as payments in recognition of the property rights of indigenous peoples (a form of economic rent for the right to access and conduct exploration and mining operations on Aboriginal land); in this case, the revenues have a definitively ‘private’ basis and may therefore be spent entirely at the discretion of the relevant indigenous people rather than at the direction of the government. Although an absolute public–private categorisation cannot be maintained (eg negotiated agreement funds are often allocated to community purposes, and payments may also be considered a form of compensation for social and environmental impacts with both public and private characteristics), the distinction remains influential in debate and can determine which legal, accounting and taxation regimes are applied to the investment and distribution of funds (J Altman, ‘The proposed restructure of the financial framework of the Land Rights Act: a critique of Reeves’ (1999) in J Altman, F Morphy and T Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No 14, Australian National University, Canberra; E Willheim, ‘Legal issues in implementation of the Reeves report’ (1999) in J Altman, F Morphy and T Rowse (eds), *Land Rights at Risk? Evaluations of the Reeves Report*, CAEPR Research Monograph No 14, Australian National University, Canberra; E Willheim, ‘Legal issues in implementation of the Reeves report’).

82 Ciaran O’Faircheallaigh, ‘Indigenous people and mineral taxation regimes’ (1998) 24

on the economic and moral justifications for allowing indigenous people to tax natural resources (including the highly detrimental mining impacts on indigenous societies and indigenous capacity arising from statutory and political rights).

O’Faircheallaigh’s analysis of the influence of mining, including the destruction of land, possible relocation of communities, in-migration of mine workers and impacts on social cohesion and community autonomy,<sup>83</sup> explains why mining projects have great potential to cause indigenous and local peoples harm and little potential to yield high and stable levels of compensation to ameliorate the detrimental impacts. Given the low socio-economic status of such groups, however, an agreement to exploit the resources may be the only way to raise living standards. By examining their need, just as governments do, to ‘seek a balance between encouraging resource exploitation and extracting revenues from it’, O’Faircheallaigh shows that the levels and stability of compensation arrangements are critical to Aboriginal communities in these circumstances, especially given that the affected local indigenous group may have ‘only one chance to extract revenue’.<sup>84</sup> The attribution of ‘rent-seeking’ in this context is based in a disregard for, or ignorance of, the extent of the detrimental impacts of mining on local indigenous people.

Another aspect of ‘rent-seeking’ behaviour is highlighted when attention is drawn to Aboriginal mining revenues that are spent on consumption rather than investment. Some economic thinkers in Australia argue that the poverty in Aboriginal communities is caused by Aboriginal people themselves or by their apparent ‘dysfunctional’ economic behaviour. However, we would argue, based on Sen’s notion of poverty as capability deprivation, that this poverty is more the result of capability deprivation, such as racist exclusion and its consequences including especially low levels of educational attainment. That the extreme poor spend income inappropriately is not a symptom of ‘rent-seeking’ but rather a symptom of institutional incapacity to enable investment in development.<sup>85</sup>

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*Resources Policy* 187.

83 *Ibid.*, at 188-191.

84 *Ibid.*, at 190. He further examines the methods used by indigenous people in Australia to extract taxes, and suggests that the solution to the problems faced by indigenous groups with respect to the threat of declines in income (associated with falling commodity prices or production levels) could be solved by ‘hybrid’ packages of forms of resource taxation, that would ‘emphasize fees fixed in advance of investment, unit royalties, and to a lesser extent, *ad valorem* royalties’, rather than profit-based systems and resource rent taxes: 191-194.

85 Further, it must be understood that there is little to gain by Aboriginal actors in mining negotiations as financial benefits are required to be managed by a charitable trust (this is the case with most ILUAs negotiated in the last five years) and are monitored by



## Rent-seeking and the state

Davis and Tilton discuss ‘rent-seeking’ in terms of the political control it affords:

‘The mining rents captured by the State end up in government coffers, which according to the alternative view often cater to the ruling elite. For this and other reasons, mining accentuates the income disparity found between urban and rural areas. In addition, the poor are largely excluded from any benefits.

... Even worse, the presence of mining rents may lead to a decline in institutional quality ... and in some instance to civil insurrection and war ... Even when the rents are not squandered, but used by the government to promote economic development, the results are often disappointing due to incompetence and poor planning.’<sup>86</sup>

For these reasons, a strongly supported view holds that the negative association between mining and economic development reflects a causal relationship, but as Davis and Tilton note, the complexity of the problem mitigates universal policy solutions. They observe that the conventional view of mining:

‘... contends that good governance can thwart the economic incentives that give rise to rent-seeking behaviour, and ensure that mining rents are re-invested in human capital and other assets that promote economic development. As always, good governance requires adequate incentives, either by extensive property rights and a domestic political structure that constrains inappropriate public sector behaviour ...’.

In the Australian federal system, the Commonwealth Grants Commission calculates federal redistribution of income according to levels of disadvantage in the states and territories.<sup>87</sup> Both federal and state levels of government bear responsibilities for services to the region, but state governments are responsible for investing their portions in the disadvantaged members of their regions. That these moneys never find their way back to those communities, the case strengthens for the strong hypothesis<sup>88</sup> that it is the state governments that engage in a form of ‘rent-seeking’ by investing these

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funds management regimes established by the agreements.

86 Graham Davis and John Tilton, ‘The Resource Curse’ (2005) 29 *Natural Resources Forum* 236.

87 The Commonwealth Grants Commission funds distributed to state and territory governments according to the horizontal fiscal equalisation formula to overcome several types of disadvantage (eg geographical remoteness, etc): Commonwealth Grants Commission Act 1973 (Cth).

88 See, for instance, John Taylor and Owen Stanley, ‘The Opportunity Costs of the Status Quo in the Thamarrurr Region’ (Working Paper No 28, The Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, 2005).

Commonwealth funds, not in measures intended for the disadvantaged, but for state's non-indigenous citizens. In this way, the disadvantage levels of their indigenous citizens are accelerated, and the state's role in this trend becomes evident.

The royalty income from iron ore paid to the Western Australian Government shows the scale of the wealth collected from resources taxes: this income was AUS\$679,628, 477 in 2005-2006 and AUS\$851,069,611 in 2006-2007, with growth calculated at AUS\$171,441,134 or 25 per cent on the previous year. The total value of production of iron ore (domestic and exported) was AUS\$15 billion.<sup>89</sup>

The dependence of the Western Australian Government and economy on mining incomes is a particular feature in the Australian economy, taking 24.4 per cent of Australia's royalty collection. The Commonwealth's share is 47.7 per cent. Western Australia, Queensland and New South Wales together accounted for some 93 per cent of minerals revenue in 2004-05. However, when petroleum revenues are also included, the Commonwealth is a significant beneficiary. Coal is the biggest generator of mineral royalties at 20 per cent of the total collection in Australia, but iron ore is also prominent accounting for a further 7.7 per cent of Australia's government royalty revenue in 2004-05.<sup>90</sup>

#### Resource tax and royalty revenue in 2004

Mineral	NSW	VIC	QLD	WA	SA	NT	TAS	C'wealth	Aust total	
									\$m	%
Coal (all types)	354.0	16.3	637.0	14.2	1.7				1,023.2	20.3
Copper			50.0	6.1	31.7		4.9		92.7	1.8
Silver/lead/zinc	12.0		49.0	2.7	0.3		7.2		71.2	1.4
Bauxite/alumina				54.6					76.9	1.1
Mineral sands		0.1		25.8					29.9	0.5
Iron ore & ironstone			0.0	380.3	3.4		1.4		385.1	7.7
Diamonds			0.0	32.6					32.6	0.6
Other metallic minerals (& gold)	30.0		30.0	181.3	9.1	37.6	5.1	10.6	277.4	6.0
Other non-metallic minerals			5.0	8.6	1.5		0.9		19.7	0.4
Petroleum		0.8	54.0	521.9	53.3	4.8		2388.6	3,023.4	60.1
<b>Total Royalty Collection</b>	<b>396.0</b>	<b>20.9</b>	<b>825.0</b>	<b>1,228.1</b>	<b>101.0</b>	<b>42.4</b>	<b>19.5</b>	<b>2399.2</b>	<b>5,032.1</b>	<b>100.0</b>
<b>Percent of Total</b>	<b>7.9%</b>	<b>0.4%</b>	<b>16.4%</b>	<b>24.4%</b>	<b>2.0%</b>	<b>0.8%</b>	<b>0.4%</b>	<b>47.7%</b>	<b>100.0%</b>	

Source: Ministerial Council on Mineral and Petroleum Resources, Minerals and Petroleum Taxation: A Review of Australia's Resource Industry Fiscal Regimes and their International Competitiveness (2006), 41.

89 Government of Western Australia (Department of Industry and Resources), *Western Australian Mineral and Petroleum Statistics Digest 2006-07* (2007), pp 40-41, [www.doir.wa.gov.au/documents/StatisticsDigest/071259-06-07-StatsV3\\_2.pdf](http://www.doir.wa.gov.au/documents/StatisticsDigest/071259-06-07-StatsV3_2.pdf), at 6 December 2007.

90 Ministerial Council on Mineral and Petroleum Resources, n 40 above, at 39-42.

## **Substitution of government investment**

The industry perception is that as a result of the failure to reinvest in these remote regions, mining companies incur a double cost – they transfer financial benefits to indigenous communities negotiated in agreements and they also pay royalties to the state – yet the state does not invest in the poorest sector of the population. The failure of governments to invest in these communities then entangles the mining industry in the responsibilities of governments. Mining companies substitute for lost opportunities as a result of the lack of government investment by bearing the costs of engaging local Aboriginal people in labour force participation, cultural heritage protection and other ongoing issues related to infrastructure and services near mining operations.

O’Faircheallaigh posits that the reluctance of government to effectively engage with indigenous communities in negotiations for mineral development is that state ideology may be contra indigenous land interests, that governments have other funding priorities or that the perception is such negotiations are already well resourced. He also notes, however, that when governments do participate, the benefits are substantial, including the ability to include benefits only possible with government participation (for example, the land transactions involved in the Western Cape Communities Co-Existence Agreement).<sup>91</sup>

Davis and Tilton suggest that royalty payments should be transparent, and that less of the rents should be allocated to government and more to citizens and mining companies investing in community services. They also observe that such initiatives are rarely undertaken.<sup>92</sup>

### ***Thamarrurr region – case study***

In the following we highlight the findings of John Taylor and Owen Stanley’s study of the remote area Aboriginal community Thamarrurr in the Northern Territory to demonstrate the cause for concern. While Thamarrurr is not adjacent to a mining operation, it provides one of only a few public data sets and analysis on the direct local impact of the failure of states to invest in Aboriginal communities. The authors explain the gravity of the inequity by referring to the Canadian situation where:

‘... it was found that remedial costs due to the lower socioeconomic status

91 Ciaran O’Faircheallaigh, ‘Creating Opportunities for Positive Engagement: Aboriginal People, Government and Resource Development in Australia’ (paper presented to the International Conference on Engaging Communities, Brisbane, 12-17 August 2005), pp 1, 1-15.

92 Davis and Tilton, n 86 above, at 236.

of Indigenous peoples were substantially above zero. That is, Canadian governments spent more per head on the Indigenous population than they did on the population overall. This excess is incurred to assist Aboriginal people to overcome their socioeconomic disadvantage and is the sort of result one would expect in a modern democratic welfare state that has obligations to assist its disadvantaged members.<sup>93</sup>

At Thamarrurr, in contrast, he found that:

‘this result did not apply ... since the total remedial cost was substantially negative (instead of positive) to the tune of \$4 million, or \$1,944 per Aboriginal resident. This means that after accounting for all government dollars and transfer payments expended on residents of the region, far less is spent on them per head than is spent on the average Territorian.’

The education deficit was once again the key factor, resulting from ‘an apparent gross underspending on education at Thamarrurr of some \$3.2 million per annum, largely reflecting low levels of school attendance’.<sup>94</sup>

Taylor and Stanley’s conclusions show how resource curse manifests in Australia in relation to the distribution of impacts resulting from poor government economic policy:

‘... one might have expected that the remedial costs to government of servicing a growing Australian community that is relatively sick, poorly housed, illiterate, innumerate, disengaged from the education system, on low income, unemployed, and with a sub-standard communications network would be substantially higher (not lower) than the Northern Territory average. What emerges instead is something akin to Hart’s (1971) oft-cited inverse care law in relation to health care needs – “to those most in need the least is provided”.

Furthermore, there is a structural imbalance in funding at Thamarrurr with proportionally less expenditure on positive aspects of public policy such as education and employment creation that are designed to build capacity and increase output, and proportionally more spending on negative areas such criminal justice and unemployment benefit ... While negative remedial costs represent a saving for government, this is ultimately false economy since the proposition here is that it results in the lost output being much higher than it would be if government spending at Thamarrurr were substantially higher.’<sup>95</sup>

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93 Taylor and Stanley, n 88 above, at 63.

94 *Ibid.*

95 *Ibid.*, at 63-64.

The case of Thamarrurr is evidence of the failure of government policy to ensure that wealth derived in part from mining revenue is adequately redistributed. It also highlights the lack of investment in positive approaches to developing strong and capable communities that would benefit in the long term from better education and other facilities.

### **Low levels of economic diversification**

Auty suggests that:

‘The sustainable development of mineral economies lies in the successful diversification into competitive non-mining tradeables. The mineral sector should not be regarded as the backbone of the economy; instead it should be viewed as a bonus with which to accelerate economic growth and healthy structural change.’<sup>96</sup>

In Australia, mining offers indigenous populations the only significant potential for employment and contracting opportunities and income from negotiated financial benefits, and therefore the only regular income apart from welfare entitlements and transfers on which many remote Aboriginal communities are highly dependent. During the operational phase of mining the income streams to local Aboriginal people (such as compensation, wages and the increasing enterprise income) result in high levels of dependency on mining operations. These communities may then be in a precarious position in the future when mine closures have an effect on those income streams. This is recognised by the Minerals Council of Australia, which has expressed the concern of its members about this emerging problem of dependence, noting that their reputational standing will suffer following mine closures where affected Aboriginal communities –and the local and regional economies – will incur severe detrimental impacts if development aimed at increasing economic diversity does not occur. It recommends ‘the establishment of lasting relationships with indigenous communities’ in order to enhance ‘the industry’s sustainable development credentials by contributing to the development of prosperous and sustainable regional communities.’<sup>97</sup>

This narrow industrial usage of ‘sustainability’ terminology to refer to the ‘sovereign’ and other risks associated with security of access to ‘assets’,

96 Auty, n 1 above, at 258. Auty reported the ‘resource curse thesis’ in relation to six hard mineral economies (Bolivia, Peru, Chile, Jamaica, PNG and Zambia), confirming that ‘mineral booms can corrode the competitiveness of non-mining tradeables and down-swing adjustment tends to be lagged and inadequate, even with cautious economic policies’ (257) and ‘manufacturing as opposed to natural-resource production, leads to a more complex division of labor and hence to a higher standard of living’. See also Sachs and Warner, n 15 above, at 5.

97 Australian Government (Department of Industry, Tourism and Resources), n 7 above.

however problematic, raises the risk factors that the declining socio-economic standards among Aboriginal populations pose for industry. Mining company representatives see this as the failure of governments to invest in mining regions despite the resource industry's transfer of royalties to the state and the substantial benefits that accrue from these regions as previously discussed.

Developing economic diversity in Australia's mining provinces where the Aboriginal populations represent the poorest sector of the nation is not without significant challenges. Reminiscent of the arguments of resource curse analysts, however, about the importance of adequate institutional (political, legal and accounting) arrangements and economic diversification, Altman and Taylor have suggested the selective use of community and regionally based 'import substitution' and 'export promotion' strategies for the generation of products, labour and services.<sup>98</sup> These are increasingly being combined; for instance, Aboriginal organisations established primarily for community development and maintenance, or natural resource management and environmental protection, are increasingly securing contracts from governments, mining companies and others for goods and services. The vital role of Aboriginal organisations and individuals to regional economies in Australia<sup>99</sup> suggests that, in addition to the potential for regional cooperation to enhance the capacity of individuals and organisations, significant financial benefits may result from efforts to realise Aboriginal 'economies of scale' and leverage. The responsibility for encouraging and funding these services (eg education, health services, housing and other basic infrastructure), however, lies with State and Territory governments which have historically neglected, and continue to neglect, the Aboriginal populations. This leads us then to consider what institutional reforms are necessary for overcoming inequitable impacts on indigenous communities including the effective management and distribution of financial benefits resulting from mining projects and agreements.

### **Institutional reforms for overcoming inequitable impacts**

The large increase in native title and related agreements<sup>100</sup> has seen concomitant increases in financial and human resources directed into agreement negotiations and conclusions without sufficient attention to the

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98 Jon Altman and Luke Taylor, *The economic viability of Aboriginal outstations and homelands* (1987).

99 For example, Pritchard and Gibson found that approximately 92 per cent of Aboriginal expenditure in the Katherine region was spent locally: Bill Pritchard and Chris Gibson, *The Black Economy: Regional Development Strategies in the Northern Territory* (1996).

100 Edmunds (1999), n 54 above; Langton, Tehan, Palmer and Shain, n 38 above.

factors that promote or inhibit long-term sustainability.<sup>101</sup> Sustainability is defined here as the capacity of agreements to endure over time and continue to meet the economic, environmental and social objectives and goals of the parties. Further, these agreements made between indigenous communities and others are occurring in a complex cultural, institutional and legal environment. This dense history of administrative, legislative and policy change (especially the situation during the last decade) has resulted in a state of unstable administrative arrangements in which Aboriginal organisations, councils and other organisations operate. In the following section we discuss the need for clear institutional arrangements, local and regional capacity building through indigenous institutions, the effective management and distribution of financial benefits resulting from mining agreements and the need for transparency in agreement making between the mining industry, governments and local indigenous communities.

### **Institutional environment**

Two former senior civil servants Westbury and Dillon<sup>102</sup> suggest that the cause of indigenous disadvantage lies in the ‘complex array of institutions, policies and programs which govern public policy outcomes in Australia’, and observe that the primary challenge for the nation in this area is to ‘overcome embedded institutional constraints which attenuate the effectiveness of indigenous related policies’.<sup>103</sup> They identify several constraints, which, along with the relative absence of the state, include: the way federal/state financial arrangements systematically disadvantage remote regions; the duplication of mainstream and indigenous specific funding systems; and the reticence of governments to acknowledge indigenous cultural perspectives in policy implementation.<sup>104</sup>

Others support these views, pointing to the need in these areas with large Aboriginal populations for governmental arrangements that emphasise Aboriginal capability (including sufficient skills training, education and social capital to ensure distribution and sustainable management of those benefits for communities). For example, Taylor and Scambray observe:

‘Levels of economic exclusion on the scale indicated here raise questions about the adequacy of government resourcing to meet the backlog

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101 Ciaran O’Faircheallaigh, ‘Implementation: The Forgotten Dimension of Agreement-making in Australia and Canada’ (2002) 5(20) *Indigenous Law Bulletin* 14; O’Faircheallaigh, n 63 above.

102 Neil Westbury and Michael Dillon, ‘The Institutional Determinants of Government Failure in Indigenous Affairs’, *The Australian Financial Review*, 8 December 2006, 3.

103 *Ibid.*

104 *Ibid.*



of disadvantage that has so obviously accumulated in the Pilbara region.<sup>105</sup>

The relationship between all levels of government, industry and local and regional indigenous organisations is crucial to the development of adequate regional and local infrastructure and service provision, especially in these underdeveloped remote regions. Agreements such as the Memorandum of Understanding signed by the Minerals Council of Australia and the Commonwealth government and involving various mining companies, as well as the Regional Partnership Agreements concluded in the East Kimberley region<sup>106</sup> and at Port Hedland in the Pilbara region,<sup>107</sup> have created opportunities for developing collaborative solutions to the problems discussed here. These agreements, however, are not binding on the parties and the industry and Aboriginal parties may take further measures to ensure that the intended outcomes are achieved, or, if the outcomes do not eventuate, as is so often the case, withdraw from the arrangements.<sup>108</sup>

Although the establishment of regional 'Indigenous Coordination Centres' by the federal government and intergovernmental framework agreements have improved coordination among public institutions, policies and programmes in Australia, there has been little investment in capacity-building in Aboriginal communities. Moreover, the ongoing development of the authority and capacity of regional indigenous organisations has been significantly disrupted by the abolition of the national indigenous statutory commission, the Aboriginal and Torres Strait Islander Commission and associated structures for regional representation, strategies and coordination. Also, there have been a series of major changes to the legislative regimes for

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105 Taylor and Scambray, n 6 above, at 153.

106 Minerals Council of Australia (2006) 2 *Regional Partnerships Newsletter*, [www.minerals.org.au/\\_\\_data/assets/pdf\\_file/0019/12097/RPA\\_NewsLetter\\_June\\_2006.pdf](http://www.minerals.org.au/__data/assets/pdf_file/0019/12097/RPA_NewsLetter_June_2006.pdf), at 10 December 2007; see Australian Government and Government of Western Australia, *Regional Partnership Agreement on Indigenous Employment in the East Kimberley* (2006), [www.indigenous.gov.au/rpa/wa/eastkimberley.pdf](http://www.indigenous.gov.au/rpa/wa/eastkimberley.pdf), at 10 December 2007.

107 Agreements, Treaties and Negotiated Settlements Project Database, *Regional Partnership Agreement (RPA) on Indigenous Employment in Port Hedland* (2006), [www.atns.net.au/agreement.asp?EntityID=3624](http://www.atns.net.au/agreement.asp?EntityID=3624), at 10 December 2007; see Australian Government and Government of Western Australia, *Regional Partnership Agreement on Indigenous Employment in Port Headland* (2006), [www.indigenous.gov.au/rpa/wa/porthedland.pdf](http://www.indigenous.gov.au/rpa/wa/porthedland.pdf), at 10 December 2007.

108 Agreements, Treaties and Negotiated Settlements Project Database, *Memorandum of Understanding between the Commonwealth of Australia and the Minerals Council of Australia* (2005), [www.atns.net.au/agreement.asp?EntityID=3307](http://www.atns.net.au/agreement.asp?EntityID=3307), at 10 December 2007; see Australian Government and Minerals Council of Australia, *Memorandum of Understanding between the Commonwealth of Australia and the Minerals Council of Australia* (2005), [www.minerals.org.au/environment/memorandum\\_of\\_understanding](http://www.minerals.org.au/environment/memorandum_of_understanding) at 10 December 2007.

incorporated associations.<sup>109</sup> The customary traditions of indigenous political organisations have been ignored or suppressed in many of the governmental administrative responses. Political scientist Botsman observes that indigenous corporations are often ‘inspired by and developed in partnership with elders and traditional culture’ and developed in partnership with innovative non-indigenous figures and organisations.<sup>110</sup> Indigenous non-government organisations often fail to grow and develop because they are not recognised and their role in capacity-building and developing effective relationships between indigenous groups, industry and government is undervalued.

### *Capacity-building and enabling indigenous institutions*

Integral to the sustainability of agreements and to the communities they service are the indigenous organisations managing those agreements. But few of those organisations have even the resources for basic administration of their duties and certainly lack sufficient resources to further develop the groups’ fortunes. As such they are particularly vulnerable. Other difficulties include the often geographically dispersed membership of those corporations making it expensive for the members to meet, and the challenge of recruiting competent, skilled staff and service providers.

There are several reasons for addressing the levels of recognition and support for indigenous enabling institutions, such as native title corporations, regional service provision corporations, specialist service provisions agencies and community councils.<sup>111</sup> These organisations could play a critical role in overcoming the ‘inequitable distribution of benefits and consequences’<sup>112</sup> by strengthening the economic and institutional responses to the Australian mining boom. There is also an urgent need to improve the administrative and governance capacity of the several tiers of Aboriginal leadership and personnel involved in the enabling bodies by providing and maintaining capacity-building programmes, such as leadership programmes.<sup>113</sup> Building

109 See Tom Calma, ‘An Integrated Approach to Economic and Community Development on Indigenous Land’ (paper presented at the National Native Title Conference 2006: Tradition and Change, Darwin, 25 May 2006).

110 Peter Botsman, ‘Polity, Capability, Culture’ in *Governance* (2007) Australian Prospect, [www.australianprospect.com.au](http://www.australianprospect.com.au), at 20 November 2007.

111 Examples of Aboriginal non-government organisations which act as ‘enabling organisations’ include the Balkanu Aboriginal Development Corporation, the Torres Strait Regional Authority, the Cape York Institute for Policy and Leadership and the Marnda Mia Central Negotiating Committee Ltd.

112 Switzer, n 13 above.

113 See Palmer and Tehan, ‘“Anchored to the Land”: Asserting and Recognising Aboriginal Jurisdiction in the Northwest Territories’ in Langton, Mazel, Palmer, Shain and Tehan (eds), n 38 above; Janet Hunt, ‘Capacity Development in the International

indigenous perspectives and social constructs into the operation and design of policies and programmes is essential to their success,<sup>114</sup> and will also assist in ensuring that government services and agreement outcomes are appropriately responsive to community needs and more collaborative in implementing local initiatives.

Managing director of Rio Tinto Australia, Charlie Lenegan argues that in order to speed up current negotiation timelines, native title representative bodies must become better resourced.<sup>115</sup> Pearson and Kostakidis-Lianos<sup>116</sup> note that ‘the creation of economically efficient structures reduces, over the long term, the amount of funding that needs to be poured into indigenous infrastructure by creating the conditions for independently viable indigenous communities’. Considering the effort and resources that go into securing indigenous rights in relation to land and infrastructure, the need for economically efficient structures and the arrangements for potential finance and securities assume critical importance.

### *Management and distribution of financial benefits*

The management and distribution of financial benefits have been addressed in the literature on the resource curse in a variety of ways. Sandbu and others propose the adoption of natural wealth accounts or natural resource funds as a strategy to limit the impact of the natural resource curse.<sup>117</sup> Sandbu argues that such systems in which the income from natural resource exploitation is given directly to citizens, and is only then partially collected by the government in the form of individual taxes, would alleviate the resource curse in resource-rich countries. Elsewhere, Humphreys and Sandbu revise this proposal arguing that, to be effective, there must be clear rules, that

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Development Context: Implications for Indigenous Australia’ (Discussion Paper No 278, Centre for Aboriginal Economic Policy Research, Australian National University, 2005); Mick Dodson and Dianne Smith, ‘Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities’ (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003); *Morgan Disney & Associates, A Red Tape Evaluation in Selected Indigenous Communities: Final Report for The Office of Indigenous Policy Coordination* (2006) Office of Indigenous Policy Coordination, [www.oipc.gov.au/publications/PDF/RedTapeReport.pdf](http://www.oipc.gov.au/publications/PDF/RedTapeReport.pdf), at 30 January 2006, 10.

114 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, 138. Botsman, n 109 above, at 44.

115 Lenegan, n 58 above, at 1-4.

116 Noel Pearson and Lara Kostakidis-Lianos, ‘Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy’ (2004) (Easter) *Australian Prospect* 1, 8-9.

117 Sandbu, n 21 above, at 1153-1170. See also Macartan Humphreys and Martin Sandbu, ‘The Political Economy of Natural Resource Funds’ in Joseph Stiglitz and Jeffrey Sachs (eds), *Escaping the Resource Curse* (2007), p 194.

key decisions should be made by bodies representing the interests of diverse political constituencies and that there should be high levels of transparency regarding their status and operation. They urge that there be, in each case, a unified budgetary process and public reporting of payments, holdings and investments.<sup>118</sup>

In Australia, while the NTA provides a set of standards and procedures in relation to the negotiation of native title related issues, there needs to be further consideration of models for managing subsequent benefits distribution and associated procedures. The study of mining payments by O’Faircheallaigh in this area was important in developing our understanding of the models available to Aboriginal societies in the shadow of uranium mining from the 1960s and 1990s.<sup>119</sup> Developments in the last decade with agreement making under the terms of the NTA have demonstrated the need to reconsider O’Faircheallaigh’s work. One of the increasingly consistent features of ILUAs is the establishment of trusts to manage the financial benefits negotiated under the terms of those agreements. Their initial significance lay not just as an example of good practice in financial management but in their potential to strengthen indigenous governance. However, the legal limits of charitable trusts as accumulation vehicles have recently become evident and the sustainability of fund management mechanisms jeopardised by both legal and tax implications. It is important therefore that a broader understanding of legal, commercial and financial models that affect or apply to indigenous organisations, trust bodies and businesses is developed so that parties about to enter into negotiations are able to determine which model might best be suited to their particular circumstance.<sup>120</sup>

The greater part of the income stream in the indigenous sector derives from government welfare transfers as there have been historical and continuing difficulties faced by indigenous people in entering the workforce and more generally in raising finance for indigenous business (through investments, equity arrangements, loans or grants). While it is possible that agreements may be used to leverage further private sector participation (including financial investment) as well as support, capital and partnerships with government, this is an area for further investigation as there remains much to be done to take advantage of these opportunities. The formulation of a broader framework for agreement making through the combined efforts

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118 *Ibid.*

119 Ciaran O’Faircheallaigh, *A New Approach to Policy Evaluation Mining and Indigenous People* (2002).

120 See Adam Levin, ‘Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts’ (unpublished discussion paper, August 2007).

of government and the private sector could contribute to this endeavour.

Policy thinking about these issues in government circles tends to focus on the cost of welfare to remote area Aborigines and the potential for the Australian Taxation Office to increase taxes on Aboriginal incomes from mining agreements, such as the accumulated trust funds. A report by the National Indigenous Council's Economic Independence Subcommittee states that current policies fail to create enough progress towards economic independence for indigenous people and suggests radical and punitive measures, such as an end to welfare payments. The report is quoted as saying that indigenous people should be economically independent and 'not reliant on welfare by 2015'.<sup>121</sup> At the same time, the Australian Taxation Office has issued warnings to Aboriginal trusts concerning their accumulated funds in charitable trusts. Under Australian law, a ten-year limit is allowed for accumulation at the end of which the trust is required to be wound up. These problems have caused others, such as Levin,<sup>122</sup> to respond with policy suggestions aimed at increasing economic development in the Aboriginal sector and structural change at a national level that can encourage the private sector to work together with indigenous communities to develop indigenous enterprise.

Several suggestions have been made concerning the adoption of tried and tested tax incentive models currently operating in other sectors of the economy in Australia and making appropriate modifications for implementation within the indigenous community.<sup>123</sup> Tax incentive proposals are based on the assumption that an appropriate tax framework for indigenous funds accumulation entities, such as charitable trusts and corporations limited by guarantee, would lead to improvements in three critical areas. First, by developing indigenous economic enterprises through joint venture partnerships and other commercial and social enterprise models, tax incentives would encourage the talent and resources of the private sector to engage with indigenous organisations to develop indigenous economic enterprises, especially when combined with ways to improve business incubation support. Secondly, such incentives could contribute to supporting the efforts of indigenous community leaders and government in their efforts to build and strengthen institutional capacity. The advocates for an appropriate tax concessional environment propose that this capacity-building is not charity or welfare but rather incentivises economic behaviour among indigenous groups enabling them to participate in the economy

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121 As cited in Adam Levin, n 120 above, at 1.1; *The Weekend Australian* 'Advisers set Welfare Deadline for Aborigines' (Sydney), 21-22 July 2007, 11.

122 *Ibid.*

123 Levin, n 120 above.

as agents of their own economic assets, whether social or material, rather than as recipients of state or company largesse. Thirdly, tax incentives might help create an intergenerational capital base. Notwithstanding the immediate financial hardship experienced by individuals within some indigenous communities, there are a number of communities interested in accumulating funds to create a capital base to provide for future generations. These communities seek to achieve what every individual Australian strives to achieve through superannuation and what the government has chosen to achieve for the Australian people through the Future Fund.<sup>124</sup>

***Transparency in negotiations and agreement outcomes: improving monitoring and evaluation processes***

The available evidence on the measurable outcomes of agreements is insufficient to draw definitive conclusions. This results from the lack of transparency in many, if not most, of the agreements negotiated by resource extraction companies with indigenous groups. The content of agreements, excluding commercial-in-confidence matters such as financial information, some cultural heritage matters and private matters, should be made available to the public in order to allow for the evaluation and measurement of outcomes (including benefits and detriments) of agreement-making and the trends of agreement-making, and to allow public scrutiny and monitoring of these trends. Legal representatives rely on the principle of privilege between legal counsel and client to deem the content of these agreements entirely confidential. Given the economic value of these agreements in the indigenous domain the measurement of their financial and economic impacts is an ever more pressing concern with the increasing complaints that indigenous people are missing out on the benefits of the mining boom. Issues to keep in mind, however, include ways to encourage transparency without limiting the commercial potential of these arrangements; and ensuring that pro-forma agreements do not supersede the benefits of negotiating particular terms for particular situations.

## **Conclusion**

This application of the development economics literature on the resource curse to the situation of indigenous people and mining in Australia has revealed several tensions in the Australian situation. These tensions arise from the relative lack of coherent and consistent government policy and

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<sup>124</sup> See Levin, n 120 above.

intervention, accountability and competence in areas with large Aboriginal majorities and mining projects.

While there is great variation from the case studies of resource-rich nations elsewhere, similarities with the Australian situation highlight the need for more effective measures within regionally integrated strategies to overcome inequitable impacts on local indigenous populations. With little economic diversity in the mining provinces, such as the Pilbara, the relative absence of Australian government investments in the educational, health and other social infrastructure of Aboriginal communities compared to the funding available for mining projects and associated towns and amenities has the potential to exacerbate detrimental impacts in these areas, not only during the construction and operational phases, but also following closure. The 'poverty as capacity deprivation' analysis so persuasively argued by Sen is evident in the Pilbara data analysed by Taylor and Scambray, as the following instance shows: 'Despite unprecedented labour demand in the Pilbara, the capacity of local Indigenous people to benefit from this remains substantially constrained by their limited human capital.'<sup>125</sup>

In our analysis, we have drawn attention to the significance of the legal trigger of native title recognition for both the protection of a *sui generis* form of Aboriginal property rights through native title negotiations and the subsequent increase in benefits directed to local Aboriginal communities by mining agreements. The NTA changed the status of local Aboriginal traditional owners in relation to the mining industry by according them a status greater than that of mere stakeholder. As a result, such negotiated agreements now constitute the major form of engagement between indigenous communities, government and the private sector, and can to some extent circumvent or mitigate deficiencies in the institutional and political environments. The potential to improve community capacity and implement policies that might advance and benefit communities is most likely to occur through agreement-making. If so, it is important to ensure that such agreements are set up to succeed. This means that agreements should include implementation strategies aimed at capacity and institution-building, so that during the operational and closure phases of mine life, there are robust structures that transfer wealth generated by mining to indigenous communities to provide a long-term financial base, prospects for ongoing labour participation and skills development, and to establish commercial enterprises whose viability is not entirely dependent on mining activities. Such institutions would also monitor the fair negotiation of agreements and, in particular, ensure that there are adequate resources for the implementation

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<sup>125</sup> Taylor and Scambray, n 6 above, at 152.



of wealth generation strategies. To be most effective, agreements must occur within and be integrated with adequate and appropriate arrangements for regional and community infrastructure and service provision.

If the lessons of the resource curse are relevant in the circumstances of indigenous communities in the shadow of mining operations, then appropriate and accountable institutional frameworks may be the key to economic and social development in these communities.

# Indigenous Employment in the Australian Mining Industry

By David Brereton and Joni Parmenter<sup>1\*</sup>

*In the last decade or so Australian mining companies have begun to take a more proactive approach to increasing indigenous participation in the mining workforce. This article provides an overview of key trends and reviews recent research on the outcomes for indigenous people of increased participation in the mining workforce. The article concludes that the industry's performance in providing employment opportunities for indigenous people has been highly variable and there is still much to be achieved. However, research data from two large mines with substantial indigenous workforces shows that there is potential for positive outcomes to be delivered for indigenous people who do obtain work in the sector.*

This article provides an overview of current and emerging practice in the Australian mining industry in relation to indigenous employment, and reviews available evidence about the potential impacts and benefits of mining employment for indigenous people. The discussion draws extensively on various studies undertaken under the auspices of the Centre for Social Responsibility in Mining (CSRMI). Where relevant, reference is also made to work undertaken by other Australian researchers and to data collected by government agencies such as the Australian Bureau of Statistics (ABS) and the Australian Bureau of Agricultural and Resource Economics (ABARE).

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The article does not purport to provide a comprehensive analysis of this complex and rapidly changing area. There is still only a limited amount of data available about what is happening ‘on-the-ground’ in the Australian mining industry in relation to indigenous employment and other forms of economic engagement. While practices at some operations have been reasonably well documented,<sup>2</sup> these mines tend to be the good performers rather than typical of the industry more generally. There has been little work that focuses specifically on the outcomes of mining sector employment for indigenous people, or that evaluates the effectiveness of indigenous employment initiatives. The broader question of how indigenous communities might be changed – for better or worse – by increased employment involvement with the industry has also so far attracted little attention from researchers.<sup>3</sup>

The first part of the article reviews available statistical data about the level of – and recent trends in – indigenous representation in the Australian mining workforce, describes the steps being taken by some companies to increase the number of indigenous employees and reviews new developments in the area. The second part of the article focuses on the employment experience from the perspective of indigenous people working in the mining industry; in particular, the extent to which that experience is positive and contributes to improved employment-related outcomes. This section is primarily based on research conducted by CSRSM at two large mines in northern Australia, both of which have substantial indigenous workforces. The article concludes by briefly considering policy and practice implications and identifying areas for further research.

## **Indigenous employment in the Australian mining industry: an overview**

### ***Drivers***

Indigenous employment in the Australian mining industry has a long history, with some studies documenting involvement back to at least the

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2 Tony Tiplady and Mary-Anne Barclay, ‘Indigenous Employment in the Australian Minerals Industry’ (Centre for Social Responsibility in Mining, The University of Queensland, Brisbane, 2006). Patrick Vidler, *Indigenous Employment and Business Development in the Queensland Resources Sector* (Report to the Queensland Resources Council, Centre for Social Responsibility in Mining, The University of Queensland, 2007).

3 Tanuja Barker, ‘Employment outcomes for Aboriginal people: An exploration of experiences and challenges in the Australian minerals industry’ (Research paper no 6, Centre for Social Responsibility in Mining, The University of Queensland, 2006).

early 1900s.<sup>4</sup> However, until recently, indigenous involvement in the sector was highly localised and sporadic. It is only in the last decade or so that mining companies, with assistance from state and national governments, have begun to take a more proactive approach to increasing indigenous participation in the mining workforce.

The impetus for this shift in focus was the formal recognition of indigenous rights by Australian governments and courts, culminating in the passage of the Native Title Act 1993. This event did not necessarily create legally enforceable rights for indigenous participation in the mining sector. Native title only exists where there has been a continuing connection with land and there has been no extinguishment of native title by inconsistent Crown actions. Native title does not give indigenous people rights in or title to minerals in land, nor does it entitle them to control the terms and conditions pursuant to which mining may take place on land. Rather it provides a framework for a right to negotiate (but not a veto) over mining. While there are strict time limits and provision for arbitration where the parties are unable to negotiate a settlement, increasingly the trend is to negotiate indigenous land use agreement under the Native Title Act rather than rely on strict legal rights.<sup>5</sup> Recognition of native title has had the effect over time of bringing the mining industry to the table to engage with indigenous communities. In this sense, rather than in a strict legal sense, it has provided the impetus for change.

Initially, the mining industry was strongly resistant to these developments, but has now come to accept that dealing with native title is part of doing business in Australia. Sixty per cent of mining currently occurs on or near Aboriginal land and many new mines are likely to be on land subject to native title.<sup>6</sup> Given the imperative for mining companies to be able to access

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4 Christopher Anderson, 'Aborigines and tin mining in North Queensland: A case study in the anthropology of contact history' (1983) 13 *Mankind* 473. Sarah Holcombe, 'Early Indigenous engagement with mining in the Pilbara: Lessons from a historical perspective' (Working paper no 24, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2004). Peter Rogers, *The industrialists and the Aborigines: A study of Aboriginal employment in the Australian mining industry* (1973).

5 The changing role of the mining industry in relation to its engagement with indigenous peoples beyond its strict legal rights and in the context of CSR is one of the major themes of this issue. For more detailed discussion of the effect of native title recognition and its operation as a trigger to rather than mandating negotiation in some instances see Langton and Mazel at p31 and Tehan, Godden, Langton and Mazel at p1 of this issue. For an overview analysis of the major elements of native title and the operation of the Native Title Act see M Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27(2) *Melbourne University Law Review* 523-571.

6 Australian Government Department of Industry, Tourism and Resources, 'Working with Indigenous communities' (Leading practice development programme for the

and develop new resources cost-effectively, the business value of developing and maintaining good relationships with traditional owners is becoming increasingly apparent to mining companies. In addition, over the last decade most of the leading companies have formally expressed their commitment to the principles of corporate social responsibility and sustainable development and now accept, at least in principle, that they have a role to play in addressing indigenous socio-economic disadvantage.<sup>7</sup>

Initially, agreements reached between mining companies and traditional owners tended to have a narrow focus on the provision of direct financial benefits. However, it is now common for agreements to include provisions aimed at delivering long-term outcomes for indigenous communities through creation of employment and training opportunities, business development and promotion of social well-being.<sup>8</sup> Some mining companies have sought to follow through on these commitments by developing tailored indigenous employment policies, strategies and programmes, as described in more detail below.<sup>9</sup>

A factor that is beginning to assume greater importance as a driver of change is the severe labour shortage now being experienced within the resources sector. Australia is currently in the midst of a resources boom, with the gross value of mining production growing from AU\$56 billion to AU\$104 billion between 2001 and 2006<sup>10</sup> and mining employment up by 42 per cent.<sup>11</sup> Some estimates suggest that a further 70,000 workers will be required by the industry by 2015.<sup>12</sup> For those mines within close proximity to communities

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mining industry, 2007).

7 Barker, n 2 above, Tiplady and Barclay, n 1 above.

8 Marcia Langton and Lisa Palmer, 'Modern Agreement-making and Indigenous People in Australia: Issues and Trends' (2003) 8(1) *Australian Indigenous Law Reporter* 1. Ciaran O'Faircheallaigh, 'A new approach to policy evaluation: Mining and Indigenous people' (2002). Benedict Scambray, 'Indigenous people, mining and development contestation in remote Australia' (Doctor of Philosophy, Australian National University, 2007). Maureen Tehan, Lisa Palmer, Marcia Langton and Odette Mazel, 'Sharing Land and Resources: Modern Agreements and Treaties with Indigenous People in Settler States' in Marcia Langton, Odette Mazel, Lisa Palmer, Kathryn Shain and Maureen Tehan (eds), *Settling with Indigenous People* (2006), p 1. Most agreements are confidential and therefore provisions may only appear in summary form. One major exception is the Argyle Diamond Mine Participation Agreement: Management Plan Agreement. It is not confidential and its provision can be viewed in full at: [www.atns.net.au/objects/Agreements/Argyle%20MP.pdf](http://www.atns.net.au/objects/Agreements/Argyle%20MP.pdf) (accessed 12 December 2007). Summaries of many other agreements are available on the Agreements, Treaties and Negotiated Settlements database: [www.atns.net.au](http://www.atns.net.au).

9 Tiplady and Barclay, n 1 above. Vidler, n 1 above. Australian Government Department of Industry, Tourism and Resources, n 5 above.

10 Australian Bureau of Agricultural and Resource Economics, 'Australian Commodities, September, Quarter', Canberra, 2007.

11 Australian Bureau of Statistics Cat No 2068.0, Canberra 2006 and 2007.

12 Diannah Lowry, Simon Molloy and Yan Tan, 'Staffing the Supercycle: Labourforce Out-

with large populations of indigenous people, a long-term strategy to address this issue may be to source more labour from these communities and invest in building a regionally-based workforce.

The next section reviews available data on indigenous representation in the mining workforce and employment practices at the operational level, in order to assess the extent to which the changes that have occurred at the policy level are being translated into improved outcomes 'on the ground'. This section also briefly describes some examples of more innovative approaches to increasing indigenous employment in the mining workforce.

### *Statistical overview*

Recently released data from the June 2006 national census shows that the number of indigenous employees recorded as working in mining has increased since 2001 from 1,390 to 2,488 (79 per cent).<sup>13</sup> Notably, the rate of increase in the indigenous workforce over this period has been well above that of the mining workforce generally.<sup>14</sup> According to the census, Aboriginal people now account for 2.3 per cent of the total mining industry workforce, which broadly reflects their representation in the overall population and places mining ahead of most other industry sectors.<sup>15</sup> However, for the reasons detailed below, this provides an overly favourable picture of the industry's performance in this area, as the appropriate benchmark is not the overall population, but the relative size of the indigenous population in those regions where the mining industry is concentrated.

Table 1 provides a breakdown of indigenous employment in the mining sector by state, based on 2006 census data. This shows that the two largest mining states – Queensland and Western Australia – between them accounted for 73 per cent of the total indigenous mining workforce, with New South Wales accounting for another 14 per cent. In all three of these states, indigenous representation in the mining workforce was below the proportion of indigenous people in the overall population. The Northern Territory, which has a small but growing resource sector, had the highest *rate* of indigenous representation in the mining workforce (ten per cent), but this looks considerably less impressive when compared to the composition of the Territory's population (27.8 per cent indigenous).

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look in the Minerals Sector 2005 – 2010' (National Institute of Labour Studies, Flinders University, Adelaide, 2006).

13 Australian Bureau of Statistics, n 10 above.

14 *Ibid.*

15 *Ibid.*

**Table 1: Indigenous employees in mining by State or Territory**

State or Territory	Number of indigenous employees	Total mining workforce	Indigenous employees as percentage of total workforce	Indigenous employees as percentage of state/territory population
Northern Territory	176	1,708	10.0	27.8
Tasmania	66	1,628	4.0	3.5
Queensland	911	30,723	3.0	3.3
Western Australia	897	40,084	2.2	3.0
New South Wales	343	20,319	1.7	2.1
South Australia	66	5,966	1.1	1.7
Victoria	29	6,279	0.5	0.6
Other (inc ACT)	0	186	0.0	1.3
<b>Total – Australia</b>	<b>2,488</b>	<b>106,893</b>	<b>2.3</b>	<b>2.3</b>

Source: Australian Bureau of Statistics Cat No 2068.0, Canberra 2007.

Table 2 disaggregates the data further to show mining employment data for selected regions in Australia in which there is mining activity and a substantial indigenous population. In each region, the level of indigenous participation in the mining workforce is low in comparison to the proportion of the regional population. This is not surprising at one level, given the severe socio-economic disadvantage experienced by many indigenous people living in these regions; nonetheless, these data are a stark reminder of how much more work needs to be done before genuine parity of indigenous representation in the mining workforce is attained.

**Table 2: Indigenous employees in mining by selected indigenous regions**

Indigenous region	No of indigenous people in mining workforce	Total mining workforce	% of indigenous employees in mining workforce	% of indigenous population in region
Kununurra	69	295	23.4	47.0
Cape York	19	189	10	54.7
Mt Isa	239	2,874	8.3	24.2
Nhulunbuy	26	341	7.6	61.3
South Hedland	327	5,756	5.7	13.1
Kalgoorlie	132	4,746	2.8	9.9

Source: Australian Bureau of Statistics Cat No 2068.0, Canberra 2006 and 2007.

Apart from the census, the main source of statistical data about indigenous employment in Australian mining is a 2002 industry survey conducted by ABARE.<sup>16</sup> This study, which was undertaken well prior to the current resources

16 L. Tedesco, M Fainstein and L Hogan, 'Indigenous people in mining' (eReport 03.19, Australian Bureau of Agricultural and Resource Economics, Canberra, from <http://>



boom, estimated that there were 2,460 indigenous people employed in the industry, equating to 4.6 per cent of the mining workforce. This was much higher than the number recorded in the June 2001 census, in which only 1,390 indigenous mining employees (1.9 per cent) were identified.<sup>17</sup> This discrepancy may reflect differences in methodology: census data is obtained directly from individuals, whereas the ABARE survey relied on companies to provide information about their workforces. Another possibility is that the census uses somewhat different classifications for 'industry of employment' (ie whether on-site catering is included under 'food and accommodation' or 'mining'). Ostensibly, the census data should be more accurate, but given the ongoing issue of variable levels of indigenous participation in the census and the reluctance of some indigenous people to self-identify, it is likely that there has been some under-counting.<sup>18</sup>

The ABARE survey is a useful source of data about sectoral differences within the industry. In particular, the survey highlights the extremely low level of representation within the coal sector relative to the 'other' sectors (mainly metalliferous mining) and, to a lesser extent, the gold sector. Part of the explanation for this is that the main coal mining areas – the Hunter Valley in New South Wales and the Bowen Basin in Central Queensland – have relatively small indigenous populations (only 2.2 per cent of the total population of the Hunter Valley in 2001 self-identified as indigenous<sup>19</sup> and 4.4 per cent of the total population of the Bowen Basin).<sup>20</sup> Another important consideration is that, in contrast to the metalliferous sector, most coal mines in Australia are on freehold land and have not been subject to native title; hence, there has been no imperative for companies to negotiate agreements with traditional owners. A third contributing factor may be the industry 'culture', which is characterised by low level of diversity generally; only 5.6 per cent of the coal workforce is female,<sup>21</sup> compared to the overall mining industry average of 15 per cent.<sup>22</sup>

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abareonlineshop.com/product.asp?prodid=12599 (accessed 12 September 2007).

17 Australian Bureau of Statistics, n 10 above.

18 John Taylor and Martin Bell, *Population Mobility and Indigenous Peoples in Australia and North America* (eds) (2004).

19 Hunter Valley Research Foundation, 'Newcastle and the Hunter Region 2005-2006' (2005) from [www.hvrf.com.au/pages/publications/other\\_downloads.php](http://www.hvrf.com.au/pages/publications/other_downloads.php) (accessed 21 November 2007).

20 Queensland Department of Local Government and Planning 'Comparative profile: Bowen Basin localities 2001' (2005) from [www.bowenbasin.equ.edu.au/pdfs/bblocal.pdf](http://www.bowenbasin.equ.edu.au/pdfs/bblocal.pdf) (accessed 8 May 2006).

21 Australian Bureau of Statistics, Cat No 6291.0.55.003. Table 6, Canberra 2007.

22 Australian Bureau of Statistics, n 10 above.

### *Practices at the operational level*

Aggregate statistics can hide a lot of variability at the level of individual mines. Unfortunately, only a limited amount of mine-specific data is available as only some companies and operations record and publish statistics on the indigenous status of their employees. There is also no agreed definition within the industry as to what constitutes an indigenous employee (eg whether it should be based on self-identification or the classification of the employer).

The main published source of data on indigenous employment at the operational level is a recent study conducted by CSRM of ten mining operations across Australia.<sup>23</sup> Also relevant is a review undertaken by Vidler in 2006/7 of indigenous employment and business development in the Queensland resources sector.<sup>24</sup>

The ten sites in the Tiplady and Barclay study had indigenous representation rates ranging from under one per cent to up to 22 per cent. All of the operations that had representation rates above 15 per cent were located in regions where there are relatively large indigenous populations *and* were covered by comprehensive agreements<sup>25</sup> that made explicit reference to indigenous employment and training.<sup>26</sup> These sites were also more likely to have tailored systems and processes in place to

23 Tiplady and Barclay, n 1 above.

24 Vidler, n 1 above.

25 Comprehensive agreements here describe agreements that focus on long-term objectives and benefits. A summary of the Gulf Communities Agreement relating to the Century mine provides an example: the agreement 'covers a wide range of issues and commitments, including: social impact assessments, health facilities, compensation at mine site and along the pipeline corridor, strategic plan funding, and detailed commitments in relation to employment and training. The Agreement has seen the development of local businesses and the hand back to Indigenous owners of Turn-off Lagoons Pastoral lease, with other leases in the process of transfer. A number of committees have been established to oversee environmental issues and employment and training. A legal trust has been established consisting primarily of local Aboriginal community members to manage Century Mine's contributed funds for business development': Agreements, Treaties and Negotiated Settlements, [www.atns.net.au/agreement.asp?EntityID=446](http://www.atns.net.au/agreement.asp?EntityID=446) (accessed 15 December 2007). Unlike comprehensive agreements in the Canadian sense, they do not cover all matters to be resolved between indigenous parties and governments.

26 Tiplady and Barclay, n 1 above. Most agreements are confidential so the detail of the employment and training provisions are unavailable. The Argyle Diamond Mine Participation Agreement: Management Plan Agreement, n 7 above, sets out the obligations of the parties, which include a commitment to provide training and for preference for traditional owners in employment and obligations on traditional owners to ensure school attendance. There is provision for review and variation and career development provisions. Information about other agreements containing employment and training provisions can be viewed at [www.atns.net.au/subjectmatter.asp?subjectmatterid=14](http://www.atns.net.au/subjectmatter.asp?subjectmatterid=14) (accessed 12 December 2007).

support indigenous employment, such as reliance on face-to-face rather than written communication in the initial recruitment process, use of selection centre workshops, work-ready programmes, compulsory cultural awareness training on induction and formal and informal mentoring. For the most part, however, operations in the study still tended to deal with indigenous employment in an ad hoc, rather than systematic, way. The level of site and corporate commitment to increasing indigenous employment also varied significantly between the different mines in the study.

Vidler's study included a web-based survey of resources companies and major contractors operating in Queensland and interviews with representatives of government agencies, indigenous organisations and companies providing professional services to the resource industry. All of companies that responded to the survey had implemented some direct initiatives in relation to indigenous employment, but most of these were on a limited scale, with the exception of two mines where agreements with traditional owners were in place.<sup>27</sup>

### *Recent developments*

In addition to seeking to increase indigenous representation in the mainstream mining workforce, some companies have provided opportunities for indigenous-owned and operated businesses to contract for the provision of ancillary services such as cleaning, mine rehabilitation work and site civil maintenance.<sup>28</sup> There is likely to be more focus on developing these opportunities in the future – both because there is a finite number of entry level positions available in mining proper and because it may be easier to implement more flexible working arrangements in some of these areas.

Another development has been the emergence of some predominantly indigenous labour hire and training organisations that have partnered with other organisations or government to create training and employment opportunities. For example, Myuma – an indigenous-owned and managed civil construction company in northwest Queensland – has achieved considerable commercial success with contracts exceeding AU\$10 million

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27 Vidler, n 1 above.

28 *Ibid.* It is possible that these preference provisions may fall foul of the anti-competitive provisions of the Part IV of the Trade Practices Act 1974, although this has not been tested. They may also offend anti-discrimination legislation. The issue is only likely to arise if challenged by another potential employee or contractor. The human rights framework that encompasses the special measures provisions of the International Convention on the Elimination of all forms of Racial Discrimination which are incorporated into domestic law may well provide an answer to challenge: see the Racial Discrimination Act 1975, s 8 and *Gerhardy v Brown* (1985) 159 CLR 70.

since 2000.<sup>29</sup> Myuma has also been successful in training many indigenous people from the local region. Of the 82 trainees enrolled over the period 2001-2006, 69 have gone on to complete courses and moved on to full-time work or further training.<sup>30</sup> Another indigenous organisation, more focused on recruitment, is the Ngarda Foundation in the western Pilbara region. Ngarda has partnered with Hudson – a worldwide recruitment organisation – to help facilitate permanent and contract recruitment services for indigenous candidates identified by the Ngarda Foundation.<sup>31</sup> Ngarda recently secured a AU\$300 million, five-year contract with BHP Billiton Iron Ore to provide total mine services at BHP's Yarrrie mine in the Pilbara region.<sup>32</sup>

A third – and potentially very important – development has been the formalisation of collaborative arrangements between the mining industry and government to facilitate better outcomes for indigenous people. In June 2005, the Australian Government and the Minerals Council of Australia (MCA) signed a memorandum of understanding (MOU)<sup>33</sup> to work together to provide employment and business opportunities for indigenous people in regions where mining companies operate. Similarly, in October 2007 the Queensland Resources Council and the Queensland Government entered into an MOU to facilitate the greater economic engagement of indigenous people in the Queensland resources sector. Both initiatives involve an emphasis on applying a more integrated approach that addresses key contextual factors such as health, education, housing and transport, rather than the focus just being on the provision of training and jobs. It is too early to tell if either or both of these initiatives will be successful, but the recognition of the need for a more holistic approach is a significant advance.

## *Summary*

In summary, indigenous participation in the mining workforce has increased in both absolute and relative terms over the last few years, but there is clearly scope for much more to be achieved. Regional level data show that indigenous employment levels are still low relative to the proportion of the regional population that is indigenous. The performance across sectors within the

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29 *Ibid.*

30 *Ibid.*

31 *Ibid.*

32 Colin Jacoby, 'BHP awards Australia's largest Indigenous contract' *Mining News.net* from [www.miningnews.net/StoryView.asp?StoryID=117666](http://www.miningnews.net/StoryView.asp?StoryID=117666) (accessed 5 September 2007).

33 Australian Government and the Minerals Council of Australia, 'Memorandum of Understanding between the Commonwealth of Australia and the Minerals Council of Australia' from [www.minerals.org.au/\\_data/assets/pdf\\_file/0012/11514/MCA\\_Commonwealth\\_MOU.pdf](http://www.minerals.org.au/_data/assets/pdf_file/0012/11514/MCA_Commonwealth_MOU.pdf) (accessed 19 November 2007).

industry is also highly variable, with coal being the stand-out poor performer. At the level of individual operations there are several examples of 'emerging good practice', but it would appear that most operations are still dealing with indigenous employment on an ad hoc, rather than systematic, basis.

On a more positive note, there are signs of a growing willingness by government and mining companies to collaborate in addressing some of the socio-economic obstacles to increasing indigenous economic engagement with the industry. In addition, the new indigenous labour hire and training organisations that are emerging could be an effective vehicle for bringing more indigenous people into the industry.

### **Is mining employment delivering positive outcomes for indigenous people?**

The extent to which indigenous people will benefit from increased participation in the mining industry is yet to be determined. This section of the article seeks to inform this discussion by presenting key findings from several studies undertaken under the auspices of the CSRM.

The prevailing wisdom, particularly within industry and government, is that greater indigenous participation in the mining workforce should be encouraged. Much of the large-scale mining that is conducted in Australia occurs in remote regions in the north and west, where there are often few other sources of regular income and employment for indigenous people. Mining has therefore come to be seen as an important source of 'real jobs' for indigenous people and as providing them with the opportunity to acquire increased income, skills and occupational mobility.<sup>34</sup> For indigenous communities, the assumed benefits include the creation of positive role models and incentives for young people, broadening of the income and asset base and building the community's stock of human capital. In the words of Charlie Lenegan, the current managing director of Rio Tinto Australia:

'The ideal is surely to minimise the negative impacts ... and to maximise the positive legacy by leaving behind strong independent communities able to choose from a number of economic options.'<sup>35</sup>

Some, however, have questioned the long-term value of mining employment for indigenous individuals and communities.<sup>36</sup> For example, the industry has been criticised for focusing on hiring Aboriginal people who are already job-experienced, in preference to growing the labour pool; thereby inflating

34 Barker, n 2 above.

35 Charlie Lenegan, 'The Minerals Sector & Indigenous Relations' (address to *Minerals Week 2005*, [www.atns.net.au/papers/Lenegan.pdf](http://www.atns.net.au/papers/Lenegan.pdf) (accessed 19 November 2007)).

36 Barker, n 2 above.

mining's 'real' contribution to indigenous employment. A related criticism is that many of the jobs that Aboriginal people have obtained in the industry are entry-level positions, such as truck driving, that offer few prospects in the longer term for promotion or skills development, and which are likely to disappear in the future as the industry moves towards greater automation.<sup>37</sup> Some observers have taken the analysis further to question the cultural appropriateness of mining employment – as currently constituted – for many indigenous people.<sup>38</sup>

Addressing these issues is important, especially given the substantial investment of time and resources required to achieve sustained growth in indigenous representation in the industry. If mining employment is not benefiting Aboriginal people in a significant or sustainable way, either additional steps must be taken to enable these benefits to be realised, or the rationale for focusing effort in this area will have to be revisited.

The data sources used to address the above issues comprise: surveys of indigenous employees (both former and current) of Zinifex Century Mine;<sup>39</sup> a recently completed survey of indigenous former employees of Rio Tinto's Argyle Diamond Mine;<sup>40</sup> and research on indigenous women in mining undertaken as part of a larger study of the retention of women in mining.<sup>41</sup>

37 The Argyle agreement includes provisions that encourage development of career paths and training and employment options that facilitate this: [www.atns.net.au/objects/Agreements/Argyle%20MP.pdf](http://www.atns.net.au/objects/Agreements/Argyle%20MP.pdf) (accessed 12 December 2007). Further research is necessary over a longer period before it is possible to determine the effectiveness of these provisions.

38 Barker, n 2 above. Katherine Trebeck, 'Democratisation through corporate social responsibility? The case of miners and Indigenous Australians' (PhD thesis, Australian National University, 2005). David Trigger, 'Large scale mining in Aboriginal Australia: Cultural dispositions and economic aspirations in Indigenous communities' (proceedings of Council of Mining & Metallurgical Institution Congress 2002, International codes, technology & sustainability for the minerals industry, Carlton, 2002), p 189. David Trigger, 'Mining projects in remote Aboriginal Australia: Sites for the articulation and testing of economic and cultural futures' in D Austin-Broos and G Macdonald (eds), *Culture, economy and governance in Aboriginal Australia* (2005), p 41.

39 Tanuya Barker and David Brereton, 'Survey of local Aboriginal people formerly employed at Century mine: Identifying factors that contribute to voluntary turnover' (Research paper no 4, Centre for Social Responsibility in Mining, The University of Queensland, 2005). Joni Parmenter and Mark Love, 'Survey of local Indigenous employees at Century Mine: Implications of mine completion on Gulf communities' (Research paper no 7, Centre for Social Responsibility in Mining, The University of Queensland, 2007).

40 Tapan Sarker and Grant Bobongie, 'Survey of Aboriginal and former employees and trainees at Argyle Diamond Mine' (Research paper no 8 Centre for Social Responsibility in Mining, The University of Queensland, 2007)

41 Deanna Kemp and Cath Pattenden, 'Retention of women in the minerals industry' in Australian Government Office for Women and Minerals Council of Australia, *Unearthing New Resources: Attracting and Retaining Women in the Mining Industry* (2007), p 111.

By way of background, the Argyle Diamond Mine is an open-cut operation located in the Kimberley region of Western Australia and has been operating since 1985. The mine has mainly been a fly-in fly-out (FIFO) operation, but is in the process of shifting to a regionally-based workforce. Zinifex Century Mine is a large open-cut zinc, lead and silver mine located in the Gulf of Carpentaria region, northwest Queensland. It is a fully FIFO operation with employees travelling to the mine from multiple locations in the Gulf and north Queensland. Both mines have agreements with traditional owners that include provisions for increasing employment for local indigenous people. Each operation has implemented tailored processes for recruiting, training and managing indigenous employees, and each has been successful in attracting a substantial amount of government funding. Both mines have been able to attract and retain sufficient indigenous employees to create an environment in which there is a good level of informal support. Employment numbers at the sites fluctuate, but according to the most recent available data, indigenous employees make up around 20 per cent of the Century workforce and 24 per cent of the Argyle workforce.

Argyle and Century are in the leading group of Australian mines in terms of both the level of indigenous employment and the relative sophistication of the supporting organisational systems. Focusing on atypical operations obviously limits the potential for generalisation, as indigenous people working at mines with fewer employees and less developed systems might well have different experiences. However, the advantage of this research strategy is that Century and Argyle can provide more insights into the *potential* benefits of mining employment for Indigenous people than can operations that have not had this as a priority.

Table 3 provides details on the surveys that CSRSM has undertaken at the two mines. In each case the response rate exceeded 59 per cent, which can be considered good for this kind of study. Importantly, there is no reason to believe that non-participants were significantly different from those who did participate; rather, non-participation was primarily due to individuals being absent on leave, having out-of-date contact details, or simply being missed within the time frame for the study. Very rarely did the researchers encounter a refusal.



**Table 3: Description of surveys undertaken at Century and Argyle mines**

Survey	Target group	Total target group	Participants	Response rate (%)
Century former employees 2004/05	All indigenous people who had worked at the mine between 2001 and 2004 and had voluntarily ceased work	73	46	63
Argyle former employees 2006/2007	All indigenous people who had worked at the mine between 2004 and 2006 and had voluntarily ceased work	110	66	60
Century current employees 2007	All indigenous people currently working at Century Mine	140	89	64

### *Are new employment opportunities being created?*

As a high-paying industry, mining has generally been able to out-compete other sectors for in-demand workers, such as skilled trades. This has arguably made it easier – and cheaper – for the industry to buy in additional workers as required, as opposed to investing in long-term strategies to grow the pool through means such as traineeships and apprenticeships. The behaviour of the industry, particularly in the early stages of the current resources boom, has often appeared to fit this pattern.

Some critics have suggested that a similar process may have been at play in relation to indigenous employment. According to this argument, mining operations with ostensibly good levels of indigenous employment have primarily achieved this by recruiting (‘poaching’) indigenous people who are already in the mainstream workforce, rather than by drawing new people into the pool. This analysis, if substantiated, would undermine the industry’s claim to be contributing to increased indigenous participation in the labour market.

While this criticism may well apply to some mining operations (see below), it does not appear to hold true for Century and Argyle. Both operations presumably still prefer to recruit indigenous people with previous mainstream employment experience where they are available, but the reality for these mines is that the pool of ‘job ready’ local people has now largely been utilised. The response, in both cases, has been to put more effort into recruiting and training indigenous people who have previously had little or no exposure to the mainstream workforce. This has been done with substantial financial assistance from government.

According to the 2007 Century indigenous employee survey, only 35 per cent of indigenous people employed at the mine had been engaged in full-time work immediately prior to taking up their current position. Most of the

remainder had been employed on CDEP<sup>42</sup> (47 per cent), with the balance engaged in part-time or seasonal work (11 per cent) or not working at all (seven per cent). Not counting those who had previously worked at Century, it is likely that, for about 28 per cent of the indigenous workforce, working at Century was one of their first experiences with mainstream employment.

Data from Argyle is more limited, as the question about previous employment was asked only of those who had entered as trainees and apprentices. Of the 21 trainees and apprentices in the sample, only 42 per cent had been exposed to mainstream work experience prior to joining at Argyle, in jobs such as mining, construction work, painting, sales, teaching assistant and service station work. A further 29 per cent had worked for CDEP only and an equivalent number had not had any prior work experience.

At the same time, there is considerable anecdotal evidence from within the industry of companies poaching each other's indigenous employees in an effort to improve their numbers.<sup>43</sup> It is also known that some operations with ostensibly good levels of indigenous workforce representation employ very few people from the local area, which raises a strong suspicion that the mines concerned may have filled these jobs largely by hiring job-ready indigenous people from other regions. For example, in the case of the mine that was the largest employer of indigenous workers in the Tiplady and Barclay study,<sup>44</sup> just 23 per cent of that workforce were defined as local.

These findings highlight the need for more research to be conducted into the *net* contribution of the mining industry to indigenous employment growth and for more relevant metrics to be used by the industry. In particular, it would be highly desirable for mines to record and report not only the total number of indigenous people that they employ, but also the number for whom this was their first 'regular' job. Another key indicator would be the balance of 'locals' to 'non-locals' in the indigenous workforce.

### ***What opportunities are being provided for career development?***

Currently, most indigenous employees in the Australian mining industry are in unskilled or semi-skilled roles, with the majority occupying truck or plant operator positions<sup>45</sup> (Table 4). A similar situation holds for Canada.<sup>46</sup>

42 The Community Development Employment Projects (CDEP) programme is an Australian Government funded initiative for unemployed indigenous people outside major urban and regional centres.

43 Lenegan, n 34 above.

44 Tiplady and Barclay, n 1 above.

45 Tedesco et al., n 15 above. Tiplady and Barclay, n 1 above. John Taylor and Benedict Scambury, 'The relative socio-economic status of Indigenous people in the Pilbara: A baseline for regional participation' (Research monograph no 25, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2005).

46 Ginger Gibson and Jason Klinck, 'Canada's resilient north: The impact of mining on

**Table 4: Indigenous employees occupation**

	Male	Female	Total	% of total indigenous workforce
Semi-skilled	578	89	667	56.6
Trade	82	3	85	7.2
Admin	4	73	77	6.5
Supervisor	31	2	33	2.8
Technical	19	2	21	1.8
Graduate	1	1	2	0.2
Professional	7	7	14	1.2
Specialist	5	2	7	0.6
Superintendent	8	0	8	0.7
Manager	5	0	5	0.4
Traineeship	100	60	160	13.6
Apprentice	96	4	100	8.5
Total	936	243	1179	

*Source:* Adapted from Tiplady and Barclay (2006).

A number of factors account for this bottom-heavy distribution. The key factor is probably the lower standard of education in remote areas, but the lack of career development and guidance for indigenous employees, and the absence of a legal requirement for companies to train local indigenous employees, are also relevant considerations.<sup>47</sup> Further, some indigenous employees – and particularly women – may face challenges when asked to take positions of authority over other indigenous employees.<sup>48</sup> The optimistic view is that this occupational profile will improve over time, as increasing numbers of indigenous people obtain experience and confidence and new opportunities open up for them. However, for this to occur, employees will need to be provided with appropriate training and support to equip them to take advantage of these opportunities.

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Aboriginal communities' (2005) 3(1) *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health* 115.

47 Tiplady and Barclay, n 1 above. The effectiveness of legal requirements to increase training depends on the precise nature of the obligation in any agreement. For example, in the Argyle agreement there is a commitment to a level of expenditure by the company but it is also dependent on the government providing a certain level of funding. There is also a target for training. Evaluation of these provisions will provide important information into the effectiveness of imposing legally binding targets: see [www.atns.net.au/objects/Agreements/Argyle%20MP.pdf](http://www.atns.net.au/objects/Agreements/Argyle%20MP.pdf) (accessed 12 December 2007), Schedule 2.

48 Kemp and Pattenden, n 40 above.

### *Does mining employment lead on to other jobs?*

Another test of whether indigenous people are benefiting from mining employment is whether they are able to make the transition to other employment when and if they leave their current employer. This can provide a good indication both of their employability and of the extent to which they have acquired, or retained, the motivation to continue working.

Of the indigenous employees who were working at Century at the time of the survey, 77 per cent agreed that working at the mine would help them in the future and only one respondent answered in the negative.<sup>49</sup> The vast majority of these respondents (96 per cent) indicated an intention to seek full-time employment, either within the mining industry (52 per cent) or in another sector, after they had finished working at Century.<sup>50</sup> While 47 per cent had been on CDEP prior to taking up their current position, almost none wanted to go back on to CDEP (2.3 per cent).

This data relates to aspirations only; a much better indicator is whether former employees have actually succeeded in finding other employment post-mining. Some data relevant to this aspect was collected in the surveys of former employees of Argyle and Century (Table 5).

**Table 5: Employment status at time of interview: former indigenous employees of Century and Argyle**

	Century 2005 n=46 %	Argyle 2007 n=66 %
Mining industry	10	30
Other employment	28	43
CDEP	23	18
Not in labour force*	39	9

\* Those not in the labour force (38 per cent) included full-time mothers, carers, those pursuing further education and those who were not able to work because of medical reasons. *Source:* Barker and Brereton (2005) and Sarker and Bobongie (2007).

In the case of Argyle, 73 per cent of the respondents were working in mining or other full-time employment and only nine per cent were not in the labour force at the time they were interviewed. For Century, the outcomes were not as positive, with 39 per cent classified as 'not in the labour force' at the time they were surveyed. However, the level of workforce participation for Century respondents is higher when account is taken of the overall work history of respondents since leaving the mine.

A contributing factor here is that 43 per cent of the Century respondents

<sup>49</sup> Parmenter and Love, n 38 above.

<sup>50</sup> *Ibid.*

were female, compared to 27 per cent of the Argyle respondents. This is relevant because women were more likely than men to have left the labour force (eg to have children or care for a family member). It *may* also be that there are fewer employment opportunities – especially in mining – in the Lower Gulf than in the Kimberley Region. The different times at which the surveys were conducted (late 2004/early 2005, prior to the current boom, v late 2006/early 2007) could have been another contributing factor.

Another finding of note is that 79 per cent of the respondents who had worked at Argyle and 66 per cent of those who had previously been employed at Century said that the skills and experience they had acquired working at the mine had helped them to find other work. In conjunction with the other findings reported above, this is persuasive evidence that, for former indigenous employees of Argyle and Century, lateral (if not vertical) occupational mobility was generally enhanced, rather than diminished, as a result of working at the mine.

### *How positive is the overall employment experience?*

Issues of career progression and mobility aside, it is important to know whether the overall experience of working in the mining industry has been negative or positive for indigenous people. A negative employment experience is likely to result in an early exit from mine employment and, particularly for those individuals who have no other employment exposure, could be a deterrent to further participation in the mainstream workforce. Conversely, a positive experience can lay a good foundation for ongoing engagement, both within the mining and the labour force more generally.

The surveys of former employees at Century and Argyle both indicate that the experience of employment has generally been positive, notwithstanding the dissatisfaction expressed about some aspects of the workplace and the many suggestions made about how the work experience could be enhanced.

The surveys included a series of questions that asked respondents to rate different aspects of the workplace environment on a scale of 1 to 5, where 1 was very unhappy (as depicted by a frowning face) and 5 very happy (a smiling face). Table 7 shows how respondents from the two operations responded to these two items. Respondents at Site A tended to give higher satisfaction ratings, but at both operations the responses to most items were 3.5 or more, indicating a generally positive assessment. The standard of accommodation, recreational facilities and the general social environment received the highest ratings at both locations, whereas scores tended to be lower – but still generally positive – for items relating to supervision, training and work arrangements (eg rosters).

**Table 7: Rating of work aspect items Argyle and Century former employees**

Work aspect	Average satisfaction level* Site A	Average satisfaction level Site B
Recreational activities	4.1	4.3
Standard of accommodation	4.0	4.4
Living and working in a multicultural environment	4.0	4.3
Relationship with fellow workers	3.9	4.4
Induction training	3.9	4.1
Social activities	3.9	4.2
Type of work	3.8	4.2
Roster pattern	3.8	3.6
Flexibility of leave arrangements	3.7	3.9
Level of organisational support	3.7	3.8
Pay	3.6	4.3
Flying in and out of work	3.5	3.9
Level of on-the-job training	3.5	4.0
Supervisors in workplace	3.4	3.8
Living away from home	3.4	3.7
Career development training	3.0	3.9

\* Average satisfaction levels were obtained by dividing the total score for each work aspect by the number of respondents who answered that particular question. As a guide, the following ratings correspond to the following satisfaction levels:

3 – neutral;

4 – happy/satisfied;

5 – very happy/very satisfied.

Source: Barker and Brereton (2005) and Sarker and Bobongie (2007).

In addition, interview participants spoke about the financial benefits of working at the mine and the positive impact that employment has in terms of providing a good role model to their children and others in the community.

The two most commonly cited reasons for leaving Century were personnel management issues (29 per cent) and family reasons (27 per cent).<sup>51</sup> Most were satisfied with their pay and this was not a significant factor in their decision to leave.<sup>52</sup> The two most commonly cited reasons for leaving Argyle were family reasons (20 per cent) followed by high commuting expenses, lack of cultural awareness<sup>53</sup> and personnel management issues (11 per cent

51 Barker and Brereton, n 38 above.

52 *Ibid.*

53 Many agreements contain provisions for cross-cultural training: see for example the

each). In both instances, an often-quoted downside of working at the mine was being away from family. Working in the Australian mining industry often involves 12-hour shifts, rotating rosters and, for those in FIFO operations, absences from home for two or more weeks at a time. Such arrangements can be challenging for indigenous and non-indigenous employees alike, especially those who are new to the industry. This is evidenced by the high rates of employee turnover that are often reported by remote operations, especially in the FIFO sector.<sup>54</sup>

Much of the industry continues to be resistant to changing established workforce management practices, but some mining operations in Australia are beginning to show signs of a more flexible approach. For example, there has been an increasing acceptance by Century Mine management that some indigenous employees would prefer to work for finite periods, rather than in open-ended arrangements.<sup>55</sup> According to the Century employees' survey, 37 per cent of respondents had worked at the mine previously; the 2004 survey of indigenous former employees identified 20 per cent who had a previous stint of employment at the mine.<sup>56</sup> The business case for allowing and even encouraging increased re-entry is also strong, because the training costs for re-hires are much less. However, it remains to be seen whether other operations will be willing to adopt this approach.

### *How have indigenous employees benefited economically?*

Some commentators have argued that mining and its associated negative environmental effects are in direct opposition to the indigenous world view<sup>57</sup> and should not be pursued at all. Others have encouraged indigenous employment with the mining industry as a way for indigenous communities to benefit from the economic opportunity that it brings and argue that employment does not have to come at the cost of culture.<sup>58</sup>

Mining has the highest average wages of any industry in Australia. For many indigenous people, this presents a unique opportunity to accumulate

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Argyle agreement, Management Plan 3 Cross-Cultural Training, [www.atns.net.au/objects/Agreements/Argyle%20MP.pdf](http://www.atns.net.au/objects/Agreements/Argyle%20MP.pdf) (accessed 12 December 2007).

54 Ruth Beach, David Brereton and David Cliff, 'Workforce turnover in FIFO mining operations in Australia: An exploratory study' (Research report by Centre for Social Responsibility in Mining and Minerals Industry Safety and Health Centre, The University of Queensland, 2003).

55 Parmenter and Love, n 38 above.

56 Barker and Brereton, n 38 above.

57 Barker, n 2 above. Trigger, n 37 above.

58 Marcia Langton, 'A new deal? Indigenous development and the politics of recovery' (Dr Charles Perkins Memorial Oration, University of Sydney, 4 October 2002). Noel Pearson, *Our right to take responsibility* (2000, Noel Pearson and associates, Cairns).



income and improve living standards for themselves and their dependants, but the challenges are also considerable. Pressure to share with kin or 'demand sharing'<sup>59</sup> may influence the desire to enter and remain in the workforce. Some interview respondents from Century Mine commented that when pestered for money ('humbug') they stressed that the money earned from working at the mine was for their immediate families' use and their children's future.<sup>60</sup> 'Humbugging' was also cited as a cause to move out of their community since working at the mine.

Peterson and Taylor<sup>61</sup> argue that accumulating assets is incompatible to the egalitarian ethos of Aboriginal society. Trigger<sup>62</sup> questions if the desire to accumulate assets is emerging or changing. His observations in Doomadgee (a nearby indigenous community to Century Mine) over 25 years suggest that individuals and their close kin are seeking acquisition of material items in the same way as non-indigenous people in nearby towns.

Parmenter and Love<sup>63</sup> found limited evidence of long-term financial security for indigenous employees at Century Mine. Many respondents to the survey noted a deficit in money management skills, and several informants recommended that a money management programme, perhaps supported by a formal (but voluntary) savings scheme or salary sacrificing scheme for house payments or desired assets, would be a valuable initiative. Numerous respondents indicated their concern that post closure individuals and families would be more in debt than before the mine began.<sup>64</sup>

Most respondents in the Century workforce survey had invested primarily in depreciating assets such as cars and white goods since they began working there. Only eight per cent had purchased a house, although this could be attributed in part to legal restrictions on purchasing houses in indigenous communities plus the logistical difficulties of constructing houses in remote locations. Those who had moved to a major city since working at the mine were significantly more likely to have purchased a house.

It is important to note that for many indigenous employees, the attraction of mainstream employment such as mining is not solely about fiscal rewards but also the opportunity to maintain kin relationships and customary practices.<sup>65</sup> In the case of Century employees (81 per cent) of respondents

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59 Nicolas Peterson, 'Demand Sharing: Reciprocity and the Pressure for generosity among Foragers' (1993) 95(4) *American Anthropologist* 860.

60 Parmenter and Love, n 38 above.

61 Nicolas Peterson and John Taylor, 'Aboriginal intermarriage and economic status in western New South Wales' (2002) 10(4) *People and Place* 11.

62 Trigger, n 37 above (2005).

63 *Ibid.*

64 *Ibid.*

65 Barker, n 2 above. Parmenter and Love, n 38 above. Taylor and Bell, n 17 above.

had three or more relatives working at the mine. Only ten per cent of respondents reported having no relatives working at the mine.

Access to flights and cars was seen as a benefit by some participants, who noted that transport made it easier to maintain their connection to the country.<sup>66</sup> Sixty-three per cent of respondents from the Century survey had purchased a car since starting working at the mine. Several interviewees noted that purchasing a four-wheel drive made it easier to fish, hunt, visit relatives and maintain a 'connection to country'.<sup>67</sup> In such instances transport is supporting the 'customary economy'.<sup>68</sup> In other contexts (remote community art and craft centres), numerous commentators have noted that increased transport has been central to enhancing customary practices.<sup>69</sup> While, economically speaking, vehicles are a depreciating asset, they can also facilitate the appreciation of social and cultural capital.<sup>70</sup>

Broader questions about how income from mining employment flows into, through and out of indigenous communities – and how these communities are affected as a consequence – are outside the scope of the current review. However, these questions would clearly need to be addressed in a comprehensive analysis of the impact of mining employment on indigenous people.

### *Experience of indigenous women*

Indigenous women currently represent approximately 16 per cent of the total indigenous workforce in mining across Australia.<sup>71</sup> The majority of these women (like men) are employed in semi-skilled positions.<sup>72</sup> There were significantly fewer indigenous female apprentices, tradespersons, supervisors and technicians, and significantly more women in administration roles. A similar pattern is seen in the female mining workforce more broadly.<sup>73</sup>

Kemp and Pattenden<sup>74</sup> reported that indigenous women are more

66 Parmenter and Love, n 38 above.

67 *Ibid.*

68 Jon Altman, 'Exploring sustainable development options on Aboriginal land: the hybrid economy in the 21st Century' (Discussion paper no 226, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, 2001).

69 Eric Michaels, 'Western desert sandpainting and postmodernism' in Eric Michaels (ed), *Bad Aboriginal art: Tradition, media, and technological horizons* (1994), p 49. Lin Onus, 'Language and Lasers' (1990) *Art Monthly Australia* 14 (Special Supplement: The Land and the City: The Emergence of Urban Aboriginal Art).

70 Parmenter and Love, n 38 above.

71 Australian Bureau of Statistics, n 10 above.

72 Tiplady and Barclay, n 1 above.

73 Kemp and Pattenden, n 40 above.

74 *Ibid.*

attracted than non-indigenous women by the opportunity to work with family or friends, the availability of study assistance and to be a role model for other indigenous people. Consistent with this, the great majority of female respondents to the Century Mine employee survey had three or more relatives or family members working at the mine.<sup>75</sup> Parmenter and Kemp<sup>76</sup> suggest there is a lack of focus on issues specific to indigenous women working in the industry, highlighting that the industry agendas of increasing participation of both women and indigenous people are being driven separately, resulting in separate strategies. However, a study on the retention of women in the Australian mining industry conducted by CSRM concluded that indigenous women face additional employment challenges to non-indigenous women, such as socio-economic disadvantage, complex family responsibilities and issues associated with holding positions of authority over indigenous men, as well as cultural pressure to stay at home and look after children and family members.<sup>77</sup>

Although not an issue unique to indigenous women, in a male-dominated industry women often face sexist views that limit career advancement.<sup>78</sup> The issue may be compounded for indigenous women who may also have to face cultural challenges when put in a supervisory position. The extent to which gender is a factor in holding positions of authority in the mining workplace is under-researched. Age, position in community and complex kinship rules are likely also to be significant factors.

### *Summary*

The above discussion can be briefly summarised as follows:

- (1) As far as Century and Argyle Mines are concerned, there is persuasive evidence that these two operations have: helped to grow the indigenous labour pool in their regions; contributed (to varying degrees) to increased employability and mobility; and provided the majority of indigenous employees with a generally favourable employment experience. Neither mine can be considered typical of the Australian industry, but they provide an indication of what outcomes can potentially be achieved if the will is there and the right settings are in place.

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<sup>75</sup> Parmenter and Love, n 38 above.

<sup>76</sup> Joni Parmenter and Deanna Kemp, 'Increasing the participation of Indigenous women in the Australian Minerals Industry' (paper presented at the Minerals Council of Australia Sustainable Development Conference, Cairns, September 2007).

<sup>77</sup> Kemp and Pattenden, n 40 above.

<sup>78</sup> Ginger Gibson and M Scoble, 'Regenderneering mining: A survey of women's career aspirations in mining' (2004) 97(1082) *CIM Bulletin* 55. S E Tallichet, 'Barriers to women's advancement in underground coal mining' (2000) 65(2) *Rural Sociology* 234.

- (2) It remains to be seen whether the industry has the will and capacity to change the current occupational distribution and significantly increase the number of indigenous employees in higher level positions.
- (3) It is apparent that indigenous employees face particular challenges in relation to managing the income generated from mining employment. This may constrain the capacity of individuals and communities to derive long-term economic benefits from the employment opportunities being provided by the mining industry. It also appears that mining employment can generate significant cultural and social tensions in communities and relationships, although consideration of these aspects was outside the scope of this review.
- (4) Indigenous women working in the mining industry are in a unique position, as they must deal both with issues of gender and race. To date, there has been a lack of focus on the specific needs of this group.

## **Conclusion**

This article had dual objectives: to provide an overview of recent trends and developments in indigenous employment in the Australian mining industry and to review the available research on employment outcomes and impacts for Aboriginal people who have engaged with the industry. As far as the first of these objectives is concerned, the evidence indicates that the performance of the industry has been highly variable and there is still much to be achieved, notwithstanding that indigenous participation in the mining workforce has increased in both absolute and relative terms in recent years. Addressing the second objective has been challenging, both because it is an inherently more complex question and because there is less data available. However, the evidence from Century and Argyle Mines is that employment-related outcomes (to the extent that they can be measured) have been broadly positive for indigenous people working at these operations. This gives cause for confidence that similar or better outcomes can be achieved at other operations, provided there is appropriate organisational commitment and support.

Achieving further substantial growth in indigenous employment in the Australian mining sector in the coming years will require action on a number of fronts. At the operational level, mines need to implement better systems and processes for recruiting, retaining and developing indigenous employees, building on the good practice models that are emerging in this field. This includes being prepared to take a more flexible approach to employment and working time arrangements. Collaborative initiatives such

as the Commonwealth Government–MCA MOU need to be strengthened and extended to ensure that a coordinated approach is taken to tackling the problems of indigenous socio-economic disadvantage in mining regions. It is also important that all players take a broader approach to indigenous employment and training, with the primary focus being on delivering benefits at a regional scale, rather than just on discharging obligations under local agreements.

The bigger challenge will be to ensure that the direct benefits that mining provides to individuals – such as higher incomes, increased employability and greater mobility – contribute to the building of stronger, more sustainable, communities. Mines have a finite life, so the question of what legacy will be left is critical, as Charlie Lenegan has acknowledged.<sup>79</sup> Understanding the factors that may have an impact on this legacy, either positively or negatively, needs to be a key focus of future research into employment and other forms of indigenous economic engagement with the mining industry. As other contributions to this issue attest, this work is one part of an interdisciplinary response, including legal forms and analysis, to finding solutions.

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<sup>79</sup> Lenegan, n 34 above.

# **Corporate Social Responsibility, Legislative Reforms and Mining in South Africa**

By Henk Kloppers and Willemien du Plessis<sup>1\*</sup>

*The South African mining industry is currently one of the largest contributing sectors to the country's economy. In the years preceding the new constitutional era, the sole aim of the mining sector was the exploitation of South Africa's rich mineral resources while the majority of South Africans only benefitted indirectly from the infrastructure and economy established by the mining sector. Mines' social responsibility were to a large extent neglected and only received attention after the introduction of the Constitution of the Republic of South Africa, 1996 and the promulgation of legislation such as the Mineral and Petroleum Resources Development Act 28 of 2002. Although the concept of CSR has been developing since the 1970s, there is still no single universally accepted definition. South African legislation does not place an obligation on companies to fulfil their CSR. However, CSR language is used to bring about measures to achieve some of the CSR objectives. Since the abolition of the apartheid system several pieces of legislation were passed in parliament dealing with skills development and the redress of past discrimination, as well as to ensure that everyone in South Africa has an opportunity to share in the country's wealth. The purpose of the paper is to indicate how South African legislation indirectly introduced CSR and how this legislation impacts on the mining industry. In this article a brief interpretation of the definition of CSR in the South African context is given, after which legislation that indirectly introduces CSR is discussed. Voluntary mechanisms are then discussed with reference to CSR practice in order to come to a conclusion and to make recommendations.*

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In the years preceding the new constitutional era, the sole aim of the mining sector was the exploitation of South Africa's rich mineral resources. The mining companies were in many instances owned by non-South African companies that abandoned mines without taking account of their environmental and social footprint.<sup>2</sup> South Africans only benefited indirectly from the infrastructure and economy established by the mining sector, while a large number of people suffered as a consequences of mining either due to their health or abandonment and subsequent non-rehabilitation of mines.<sup>3</sup> In the 1980s and 1990s mining companies were confronted by their environmental responsibilities.<sup>4</sup> Social responsibilities only received attention after the introduction of the Constitution of the Republic of South Africa 1996<sup>5</sup> and the promulgation of legislation such as the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).<sup>6</sup>

Although the Constitution regards the realisation of socio-economic rights such as the right to housing, clean water and medical assistance as the obligation of government,<sup>7</sup> the government is challenged by a lack of resources and skilled personnel.<sup>8</sup> In 1994 the Interim Constitution<sup>9</sup> brought the realisation that public-private partnerships had to be forged to realise these rights and to mobilise in the fight against poverty.<sup>10</sup> It was necessary to establish a society that is self-sufficient and no longer dependent on assistance

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2 See for example G Eweje, 'The role of MNEs in community development initiatives in developing countries' (2006) 45(2) *Business & Society* 93-129; Anon, 'Socio-economic consequences of the restructuring and privatisation of the Alexkor diamond mine – Report on project SAF/97/14 to the Department of Economic Affairs and Tourism of the Government of the Northern Cape Province, South Africa', [www.natural-resources.org/minerals/CD/docs/unctad/alexkor.pdf](http://www.natural-resources.org/minerals/CD/docs/unctad/alexkor.pdf) (date of access 18 June 2007).

3 *White Paper on a Mineral Policy for South Africa* of 1998 (GN R2359 in GG 19344 of 1998-10-20) and Minerals Act 50 of 1991. See also L A Feris, 'The asbestos crisis – the need for strict liability for environmental damage' (1991) *Acta Juridica* 287-302; M Mabiletsa and W du Plessis, 'Impact of Environmental Legislation on Mining in South Africa' (2001) *South African Journal of Environmental Law and Policy* (SAJELP) 185-215; see also *Bareki NO and Another v Gencor Ltd and Others* 2006 1 SA 432 (TPD).

4 Sections 38-39 of the Minerals Act 50 of 1991 read with GN R801 in *Government Gazette* 20219 of 1999-06-25.

5 Henceforth Constitution.

6 The definition of 'environment' in the MPRDA includes the socio-economic impact of activities on people with reference to s 1 of the National Environmental Management Act 107 of 1998 (NEMA). See also ss 26 and 27 of the Constitution. The MPRDA commenced on 1 May 2004.

7 Sections 26-27 of the Constitution. See Devenish, *A commentary on the South African Bill of Rights* (2006).

8 Aliber, 38.

9 Constitution of the Republic of South Africa 200 of 1993.

10 'Poverty' might be defined as 'the absence of sufficient resources to meet a specified quantum of basic requirements' (Leibbrandt and Woollard 2006, [www.treasury.gov.za](http://www.treasury.gov.za)).



from external sources such as a system of social security.<sup>11</sup> The South African government furthermore subscribed to the millennium development goals and set targets for poverty alleviation and skills development.<sup>12</sup> The South African Government has become increasingly aware of the fact that corporate social responsibility (CSR) may contribute to the general uplifting of those historically disadvantaged people that have been discriminated against for centuries.

The concept of CSR has only recently received attention from academics and the public and private sectors respectively. Only after 1991 when sanctions were lifted and South Africa once again became a world trade partner, did companies introduce CSR programmes either voluntarily or as a result of pressure by importing companies. The Johannesburg Stock Exchange (JSE) introduced a voluntary system for listed companies to report on the fulfilment of their CSR targets.<sup>13</sup>

South African legislation does not place an obligation on companies to fulfil their CSR. However, CSR language is used to bring about measures to achieve some of the CSR objectives. Since the abolition of the apartheid system several pieces of legislation were passed in parliament dealing with skills development and the redress of past discrimination, as well as to ensure that everyone in South Africa has an opportunity to share in the country's wealth, such as the Employment Equity Act 55 of 1998, Skills Development Act 97 of 1998, the Broad-based Black Economic Empowerment Act 53 of 2003 and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

The MPRDA, for example, recognises the fact that government must promote local and rural development as well as the social uplifting of communities affected by mining. Mining companies must compile a social or economic strategy plan to address *inter alia* the results of past or present discrimination, transformation of the mining industry, skills development and the socio-economic development of communities that host the mine or supply

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11 See President Mbeki's State of the Nation Address in Parliament, February 2007, [www.info.gov.za/speeches/2007/07020911001001.htm](http://www.info.gov.za/speeches/2007/07020911001001.htm) (date of access: 15 June 2007). See also R Hamann and N Acutt, 'How should civil society (and the government) respond to "corporate social responsibility"? A critique of business motivations and the potential for partnerships' (2003) 20(2) *Development Southern Africa* 255-257. They argue that partnerships should not only be created between business and government but between business, government and civil society – see 261-264.

12 United Nations 2005 [www.un.org/millenniumgoals/#](http://www.un.org/millenniumgoals/#). See also address by Premier of the Eastern Cape 2007, [www.info.gov.za/speeches/2005/05061312151001.htm](http://www.info.gov.za/speeches/2005/05061312151001.htm) (date of access: 15 July 2007). Even before the government made this international commitment, it committed itself to the fight against poverty in various national programmes and committed itself to halve poverty and unemployment by 2014 – South Africa 2006 [www.info.gov.za/asgisa/asgisa.htm](http://www.info.gov.za/asgisa/asgisa.htm).

13 See 'Voluntary measures' below.

labour to the mine.<sup>14</sup> Unfortunately the Act is silent on the enforcement of social plans and it is uncertain whether the social plan also requires continued action after mine closure. The format and contents of the social plan are described but the Act does not require mining companies to contribute to a development fund. Most of the mining companies are, however, also listed on the JSE and therefore report on their corporate social responsibility. In many instances the mines decide what the needs of the community are and the communities are not always consulted in the process.<sup>15</sup>

Some communities that host mines feel that they are not benefiting from the mining process. New and novel approaches have to be found. In some instances mines conclude agreements with communities or establish partnerships to initiate mining on the community's land. In other instances whole new villages are built for resettled communities. Despite public participation and consultation several communities still feel threatened by mining companies that are in a stronger bargaining position. It is said that in some communities only certain persons benefit from mining but that others are still struggling to survive. Activists acting on behalf of communities claim that communities are not properly compensated for the use of their land and that the health of their members is impaired by mining.<sup>16</sup>

The purpose of this article is to indicate how South African legislation indirectly introduced CSR and how this legislation affects the mining industry. The article provides a brief interpretation of the definition of CSR in the South African context, after which legislation that indirectly introduces CSR is discussed. Voluntary mechanisms are then discussed with reference to examples in order to come to a conclusion and make recommendations.

### **Corporate social responsibility (CSR)**

Although the concept of CSR has been developing since the 1970s, there is still no single, universally accepted definition. The definition of CSR in a developed country will not necessarily be the same as the definition provided for in developing countries.<sup>17</sup> The European Commission defines CSR as 'essentially a concept whereby companies decide voluntarily to contribute to a better society'.<sup>18</sup> The Commission is further of the opinion that being socially responsible constitutes doing something beyond mere

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14 See 'Legislation' below.

15 See below.

16 See 'Current practices' below.

17 One of the reasons for this might be the fact that developed and developing countries have different developmental goals.

18 European Commission, *Promoting a European framework*, 5.

compliance with a set of legislative requirements.<sup>19</sup> This sentiment was echoed in the initial South African Draft Codes of Good Practice on Broad-Based Black Economic Empowerment which defined corporate social investment (as it was referred to in the document) as ‘an enterprise’s contributions to society and community that are extraneous to its regular business activities’.<sup>20</sup> If it is accepted that the regular business activities of a business are conducted within the boundaries of a legislative framework it seems as if there is general consensus that CSR requires a business to voluntarily go beyond compliance.

The aforementioned statement holds true for developed countries where the private sector has an established understanding of its social responsibility. The same is not necessarily true for developing countries. In developing countries it seems as if it is necessary to encourage the private sector to a larger extent to adhere to its social responsibilities. In this regard the World Bank’s definition of CSR might be viewed as being more accurate:<sup>21</sup>

‘the commitment of business to contribute to sustainable economic development – working with employees, their families, the local community and society at large to improve the quality of life, in ways that are both good for business and good for development.’

If the private sector does not show its commitment to sustainable economic development, government regulation might be necessary. One of the most important drivers or instruments of CSR is government regulation.<sup>22</sup> Advocates of legislative intervention highlight the failure of the present voluntary systems as one of the main reasons for the state to play a more

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19 European Commission, *Promoting a European framework*, 8.

20 Gen Not 2036 in GG 28351 of 20 December 2005. For further reading on this subject see Thompson and Haysom, *Black Economic Empowerment: Commentary, legislation & charters* (2005), Jack, *Broad-Based BEE: The complete guide* (2007), Whiteford, *BEE: Key determinants of success* (2005) and Scholtz, *BEE service: empowerment* (2005).

21 Ward, *Public sector roles in strengthening corporate social responsibility: taking stock* (World Bank 2005), p 3. This report was derived from the work of the CSR Practice of the World Bank Group’s Investment Climate Department. The aim of CSR Practice is to advise governments of developing countries on the roles and instruments that can be utilised to encourage CSR.

22 R Hamann and N Acutt, ‘How should civil society (and the government) respond to “corporate social responsibility”? A critique of business motivations and the potential for partnerships’ (2003) *Development Southern Africa* 258, 255-270; R Hamann, ‘Corporate social responsibility, partnerships and institutional change: The case of mining companies in South Africa’ (2004) 28(4) *Natural Resources Forum* 278-290. The four roles of government in strengthening CSR are: mandating (laws, regulation, etc); facilitating (setting policy frameworks); partnering (combining public resources with private resources); and endorsing (award schemes, labelling, etc); Ward, *Public sector roles in strengthening corporate social responsibility: taking stock* (World Bank 2005), p 5.

important role in the facilitation of CSR.<sup>23</sup> Although the government realises the importance of encouraging responsible business, it should be noted that CSR should not be a substitute for regulation or legislation concerning social rights. Furthermore, it should not be seen as shifting the state's responsibility in respect of facilitating CSR to the private sector and thus 'privatising' the state's responsibilities.<sup>24</sup> In order to ensure an effective framework for CSR a regulatory foundation that promotes growth, employment and good governance is required whereby all participants have certainty about their rights and responsibilities. Regulation should be consistent, effective, transparent, fair and understandable.<sup>25</sup> Given South Africa's history, legislation should be viewed as one of the main instruments enabling the government to address the private sector's social, environmental and economic impact. The private sector's social responsibility should accordingly ensure full compliance with the social, environmental and economic laws already in place.

Just as there is no universally accepted definition for CSR, there is also no single commonly accepted blueprint for a government CSR policy framework.<sup>26</sup> As indicated above, South Africa does not have specific legislation that addresses CSR but elements of CSR language are incorporated into legislation.

## Legislation

This section discusses the Broad-based Economic Empowerment Act and the MPRDA as examples of legislation that include CSR language that impacts on mining.

### **Broad-based Black Economic Empowerment Act (BEE Act)**

The BEE Act is probably the most aggressive legislative step taken by the post-apartheid government to address the legacies left by a system based on discrimination, inequality and suppression of the masses – a system that used race not only to control access to South Africa's productive resources but also to exclude the majority of South Africans from ownership of productive resources. The Act aims to create a legislative framework to facilitate and

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23 T Cannon, *Corporate Responsibility* (Prentice Hall, Harlow, 1994), p 80.

24 Organisation for Economic Co-operation and Development 2004, [www.oecd.org/dataoecd/32/18/31557724.pdf](http://www.oecd.org/dataoecd/32/18/31557724.pdf) (date of access: 3 May 2007).

25 Government Notice 1183 of 2004.

26 Mazurkiewicz, *CSR Guide – Non-legislative options for the Polish Government* (World Bank, 2006).

accelerate the process of black economic empowerment and states that:<sup>27</sup>

‘unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race.’

Empowerment must be achieved through the promotion of economic transformation in order to effect meaningful participation of black people in the economy.<sup>28</sup> The Act envisages a substantial change in the racial composition of ownership and management of the business sector and emphasises skills development and empowerment of rural and local communities to achieve sustainable development and general prosperity. According to section 1 of the Act, BEE is defined as:

‘the economic empowerment of all black people, including woman, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include but are not limited to–

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership, and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement; and
- (f) investment in enterprises that are owned or managed by black people.’

From the above-mentioned definition it is clear that BEE is not only concerned with increasing the levels of black ownership but also includes general uplifting of historically disadvantaged individuals and communities through inter alia human resource and skills development.

The preamble to the Act also refers to the effective participation of the majority of South Africans in the economy which excludes mere fronting or window-dressing.<sup>29</sup> The effect of increased effective participation would not

27 Preamble to the BEE Act.

28 Section 1 of the Act defines ‘black’ people as a generic term which means Africans, Coloureds and Indians.

29 The issue of fronting practices and misrepresentation of BEE status is dealt with in Statement 1 of the Notice of the draft 2nd phase of the Codes of Good Practice on Broad-Based Black Economic Empowerment (Gen Not 2036 in GG 28351 of 20 December 2005). ‘Fronting’ is defined as: ‘any practices or initiatives which are in contravention of or against the spirit of any law, provision, rule, procedure, process, system,

only give rise to the achievement of the constitutional right to equality but would also be beneficial to the country as a whole in the sense that a more positive growth rate will be achieved, with better distribution of income and a lower rate of unemployment.<sup>30</sup>

In order to assess the extent to which businesses comply with the BEE measures, the BEE Act authorises the Minister of Trade and Industry to issue codes of good practice that may include indicators used to measure the rate of compliance together with the weighting to be attached to the indicators.<sup>31</sup> The final indicators and the weight attached to each indicator was finalised in the Codes of Good Practice on Black Economic Empowerment.<sup>32</sup> The indicators used to measure compliance are set out in a generic scorecard and include, among others, ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development initiatives. These indicators are each afforded an individual weighting. The weightings for the respective indicators and the specific codes<sup>33</sup> in which the indicators are addressed are set out below.<sup>34</sup>

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policy, practice, directive, order or any other term or condition pertaining to black economic empowerment under the Codes.' The Statement classifies window-dressing (the practice where black people are appointed or introduced to a business on the basis of tokenism and where they are not substantially participating in, for example, the management or ownership of the business) and benefit division (instances where black people do not receive economic benefits in the ratio of, for instance, their ownership) as possible fronting practices. An example of fronting would thus be where a business claims that it has black people as shareholders, executives or management, while they are unaware or uncertain of their role or participation within the business. The Statement contains sanctions to be imposed on businesses that are found to be taking part in fronting practices. The sanctions vary from instances where the business will be decreased by one level on the recognition scale to the forfeiture of all points scored on the BEE scorecard. It is important to note that the final Codes of Good Practice on Black Economic Empowerment do not define fronting but they do indicate that any misrepresentation or attempt to misrepresent a business' true BEE status may lead to the disqualification of the entire scorecard of that business. The business would thus forfeit all its points. The Code further states that a representation by a business about its BEE status must be supported by suitable evidence or documentation. If no such evidence or documentation is provided the business will not receive any recognition for the specific BEE activity.

30 Preamble to the BEE Act.

31 Section 9(1)(c) and (1)(d) of the Act.

32 Gen Not 112 in GG 29617 of 9 February 2007.

33 The Code is divided into a number of sub-codes, while each of the sub-codes is afforded a number of its own. The framework for measuring BEE is set out in code 000, while the measurement of the socio-economic development contributions of a business is set out in code 700.

34 Table adapted from Gen Not 112 in GG 29617 of 9 February 2007.

Indicator	Weighting	Code series reference
Ownership	20 points	100
Management control	10 points	200
Employment equity	15 points	300
Skills development	15 points	400
Preferential procurement	20 points	500
Enterprise development	15 points	600
Socio-economic development initiatives	5 points	700

Based on the overall levels of compliance of the mentioned indicators, a business receives a particular BEE status and a subsequent BEE recognition level. The recognition level is used to indicate, as a percentage, the level of recognition that a business will receive in its dealings with the state or other businesses. The recognition level is determined by the amount of points that a business scores on the generic scorecard.<sup>35</sup> The BEE status and recognition levels are set out below.<sup>36</sup>

BEE status	Qualification	Recognition level (%)
Level one contributor	≥100 points on the generic scorecard	135
Level two contributor	≥85 but ≤100 points on the generic scorecard	125
Level three contributor	≥75 but ≤85 points on the generic scorecard	110
Level four contributor	≥65 but ≤75 points on the generic scorecard	100
Level five contributor	≥55 but ≤65 points on the generic scorecard	80
Level six contributor	≥45 but ≤55 points on the generic scorecard	60
Level seven contributor	≥40 but ≤45 points on the generic scorecard	50
Level eight contributor	≥30 but ≤40 points on the generic scorecard	10
Non-compliant contributor	< 30 on the generic scorecard	0

A business that receives 66 points on the generic scorecard will be regarded as being 100 per cent BEE compliant, while a business with less than 30 points will be regarded as non-compliant. The BEE status of a business will be, in certain instances, used as determining criteria for the issuing of licences (such as mining licences), concessions or other forms of authorisations.<sup>37</sup> It also plays an important role where state-owned businesses are sold or where the private sector enters into partnerships with the state. A contract between the State and a private business would in all likelihood be awarded to a level four contributor<sup>38</sup> rather than, for instance, to a level six contributor.<sup>39</sup>

35 Table adapted from Gen Not 112 in GG 29617 of 9 February 2007.

36 Table adapted from Gen Not 112 in GG 29617 of 9 February 2007.

37 Section 10(a).

38 A business with a 100 per cent BEE recognition level, and scoring more than 66 but less than 75 points on the generic scorecard. For a discussion of the BEE scorecard applicable to the mining sector, see 'Mining Charter' below.

39 A business with an 80 per cent BEE recognition level, and scoring more than 45 but



### *Mineral and Petroleum Resources Development Act (MPRDA)*

The government's commitment to reform and to address the injustices of distribution of natural resources in the past has been reaffirmed by the Mineral and Petroleum Resources Development Act.<sup>40</sup> The Act recognises the fact that the government is under an obligation *inter alia* to promote economic as well as social development. This recognition is brought about by the fact that mining operations not only have an impact on economic growth and development but also have a social impact on various stakeholders, including employees, their families and the local communities surrounding the mining operations. In the preamble to the Act it is recognised that government needs to promote local and rural development as well as the social uplifting of communities affected by mining. The promulgation of the Act stems from the government's constitutional duty to take legislative and other steps to redress the results of past racial discrimination and ultimately achieve a society that is based on the equal enjoyment of all the constitutionally afforded rights.

#### *Social uplifting of communities*

Social uplifting of communities includes empowerment which brings the Act within the framework of empowerment legislation. The Act defines broad-based economic empowerment<sup>41</sup> as:

‘a social or economic strategy, plan, principle, approach or act which is aimed at –

- (a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and
- (b) transforming such industries so as to assist in, provide for, initiate or facilitate –
  - (i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations;
  - (ii) the participation in or control of management of such

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less than 55 points on the generic scorecard.

40 Section 25(2) of the Constitution states that property may be expropriated in the public interest and that the ‘public interest’ includes the nation's commitment to land reform and to bring about equitable access to all South Africa's natural resources.

41 It is interesting to note that the Act does not refer to broad-based black economic empowerment as is the case with the BEE Act. The scope of application of the Mineral and Petroleum Act is thus not limited to the group referred to as ‘black’ in terms of the BEE Act; the Act simply refers to communities affected by mining, which could per definition include any community.

operations;

(iii) the development of management, scientific, engineering or other skills of historically disadvantaged persons;

(iv) the involvement of or participation in the procurement chains of operations;

(v) the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries;

(vi) the socio-economic development of communities immediately hosting, affected by the of supplying labour to the operations; and

(vii) the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations.<sup>42</sup>

In the definition, the Act acknowledges the need for socio-economic development of communities affected by mining operations, whether it is the community that hosts the mining or whether it is the community that supplies labour to the operations. CSR could be one of the mechanisms used, as the definition recognises socio-economic development of previously disadvantaged South Africans<sup>43</sup> through utilisation of the proceeds of mining operations.<sup>44</sup> Reference is also made to skills development of disadvantaged communities, further stressing the link to CSR.

The objects of the Act are linked to the principle of empowerment and improvement of the quality of life of those that have been affected by previous unfair discrimination. Opportunities must be provided to previously disadvantaged persons, specifically women, to enter the mining sector and to benefit from the profits.<sup>45</sup> The promotion of economic growth and advancement of the social and economic welfare of all South Africans through mineral and petroleum resource development are also envisaged by the Act.<sup>46</sup> From a CSR point of view the most important objective of the Act is to ensure that holders of mining and production rights contribute towards the socio-economic development of areas in which they operate.<sup>47</sup> This objective confirms that mining companies should strive towards improved wealth creation and economic stability not only for its stakeholders but also

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42 Section 1.

43 Referred to in the Act as 'historically disadvantaged persons'. The Act defines a historically disadvantaged person as any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect.

44 The reference to socio-economic development is in line with the terminology used in the BEE Codes.

45 Section 2(d).

46 Sections 2(e) and 2(f).

47 Section 2(i).

for the communities affected by their operations.<sup>48</sup>

The Act does not, for example, require holders of mining and production rights to establish a development fund that could be utilised to improve the quality of life of the affected communities and to achieve the goal of building the capacity of the communities to manage their own affairs and eventually to become not only self-sufficient but also economically independent. The Act is also silent on prescribing a specific net profit after tax percentage to be applied to communities as part of the operation's CSR framework. Since no contributions towards CSR programmes are required, the Act is also silent on any form of legal retribution or any legal recourse that a community could take if the holders of the mining and production rights did not comply with these specific requirements. It can only be hoped that should a community decide to take on a mining operation the courts would consider the spirit of the Act – that is ultimately to not only benefit the shareholders of the mines, but also the communities affected by the mining operations. The Act does not state how this should be achieved.

#### *Environmental management plans*

In order to be granted the right to mine the applicant must prepare an environmental management plan that must inter alia investigate, assess and evaluate the impact of the proposed operations on the environment as well as the socio-economic conditions of any person (or community) that might be directly affected by the operation.<sup>49</sup>

The question as to how environmental and socio-economic conditions should be balanced was recently a point of debate in the Constitutional Court.<sup>50</sup> The majority of the court stated:

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48 Although the duty to contribute towards the socio-economic development of an affected community is only established as an objective of the Act, this by no means detracts from the legitimacy thereof. Accordingly, this section falls within the scope of the s 8 constitutional duty to promote the rights contained in the Bill of Rights. It is, however, noticeable that the Act does not prescribe any specific steps to be taken by the holders of mining and production rights to contribute towards the communities affected by their operations.

49 Section 39(3) (b) (ii). The section only requires an investigation into the socio-economic conditions of persons directly affected by the operation, no reference is made to the fact that the operations might indirectly affect a person (or community). The reasoning behind this omission might be that it would be too burdensome to require an applicant to investigate and assess influences that are not immediately identified.

50 *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Others* 2007 (10) BCLR 1059 (CC) pertaining to the erection of filling stations. See also <http://concourt.law.wits.ac.za/files/Fuel%20Retailers%20Association%20of%20Southern%20Africa/Fuel%20retailers%20Association%20for%20Southern%20Africa.pdf> (date of access 27 November 2007).

‘the nature and the scope of the obligation to consider the impact of the proposed development on socio-economic conditions must be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment.’<sup>51</sup>

The court also refers to the principles of the National Environmental Management Act 107 of 1998 that are directly applicable to mines<sup>52</sup> and states the following:<sup>53</sup>

‘The continued existence of development is essential to the needs of the population, whose needs a development must serve ... The collapse of a development may have an adverse impact on socio-economic interests such as the loss of employment. The very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation.’

Applied to mining operations, the life span of a mine and what will happen to a community after closure of a mine should be considered as section 2(2) of NEMA ‘requires people and their needs to be placed at the forefront of environmental management – *batho pele*’.<sup>54</sup> This also links with the social plan that has to be compiled when an application for a mining right is made.<sup>55</sup>

### *Social and labour plans*

The social and labour plan is regulated by regulation 42 of the Mineral and Petroleum Resources Development Regulations,<sup>56</sup> which states that an application for a mining right must be accompanied by a social and labour plan. The objectives of the social and labour plan stated are similar to the objectives contained in the Mining Charter. The plan is aimed at the promotion of employment and advancement of social and economic welfare of all South Africans as well as ensuring that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.<sup>57</sup> The plan, once approved, is valid until a closure certificate has been issued in terms of section 43 of the Act and no amendments to the plan are allowed without the consent of the Minister.<sup>58</sup> All

51 Paragraph [71].

52 Section 37 of MPRDA.

53 Paragraph [75].

54 Paragraph [60]. *Batho pele* – directly translates as ‘People first’.

55 See, eg, s 23(1).

56 GN R527 in GG 26275 of 23 April 2004. Henceforth referred to as the Regulations.

57 Regulation 41.

58 Regulation 43. The social and labour plan may not be amended without the permission of the Minister – regulation 44. Annual reports must be submitted to the Regional

mines that had a mining authorisation in terms of the Minerals Act 50 of 1991 (predecessor to the MPRDA) had to reapply for authorisation and include a social and labour plan in their new applications as it was not previously required.<sup>59</sup> The authorisation would not be issued unless the Department is satisfied that the plan is acceptable.

The content of the social and labour plan is set out in regulation 46 and must include, among others, a human resources development programme as well as a local economic programme.<sup>60</sup> The human resources development programme must contain a skills development plan that identifies and reports on aspects such as the education levels of employees and the implementation of a career progression plan that is in line with the skills development plan. The skills development plan must contain the employment equity statistics and the mine's strategy to achieve ten per cent participation of women in mining and the 40 per cent participation of historical disadvantaged South Africans (HDSAs) in management within five years of the granting of the right.

The local economic development programme must include the social and economic background of the area in which the mine operates as well as the key economic activities in the area. The programme must clearly indicate the impact that the mine would have not only on the local but also on the sending communities.<sup>61</sup> The programme must also indicate which infrastructure and poverty eradication projects the mine would support in line with the integrated development plan<sup>62</sup> of the areas in which the mines operate. Reference should further be made to measures to address the housing and living conditions as well as the nutrition of the mine employees and include an undertaking by the holder of the mining right to the effect that the holder would ensure compliance with the plan and make it known to its employees. The plan must also set out the mechanisms 'to ameliorate the social and economic impact on individuals, regions and economies where retrenchment or closure of the mine is certain'.<sup>63</sup>

The requirement to submit a social and labour plan and the approval of the

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Manager – regulation 45.

59 Schedule 2 to the MPRDA.

60 See also Department of Minerals and Energy, *Social and Labour Plan Guidelines for the Mining and Production Industries* available at [www.dme.gov.za/minerals/documents.stm](http://www.dme.gov.za/minerals/documents.stm) (date of access 17 May 2006).

61 Many people employed by mines do not come from local communities. Most mines make use of migrant workers. The communities of origin are referred to as the sending communities.

62 In terms of the Local Government: Municipal Systems Act 32 of 2000. It is an integrated plan compiled by municipalities which indicates the future use of land and other socio-economic objectives.

63 Regulation 46(d)(iv).

plan before a mining right is granted illustrates the importance of regulating the impact of the mining industry on communities and the need to address it in accordance with a well-formulated plan. By recognising beforehand what the social and economic consequences of a mining operation might be, the mine is in a position to formulate a strategy to minimise the effect of its operations. It is submitted that the requirement of proper social and economical planning might prove to be a catalyst ultimately to achieving development that is self-sustainable.

### *Preferential rights of communities*

Section 104 of the Act creates the opportunity for communities<sup>64</sup> to obtain a preferential right to prospect or mine, provided that the land on which the prospecting or mining would take place is registered or to be registered in the name of the community concerned. The Minister may facilitate financial and technical assistance to conduct these operations.<sup>65</sup> If the community can prove that the right shall be used to contribute towards the development and the social uplifting of the community,<sup>66</sup> that the envisaged benefits of the prospecting or mining project will accrue to the community in question<sup>67</sup> and that the community has access to technical and financial resources to exercise the right,<sup>68</sup> the Minister must grant a preferential right on submission of a development plan that indicates the manner in which the right is going to be exercised.<sup>69</sup>

Since 1 May 2004 when the MPRDA took effect, mineral resources are regarded as the common heritage of all people of South Africa. The state is the custodian thereof for the benefit of all South Africans. But to whom should the royalties allocated to the holder of previous mineral rights<sup>70</sup> accrue? Item 11 of Schedule 2 to the MPRDA states that royalties that accrued to a community would continue to accrue to them. Communities must, however, submit annual reports indicating the usage and disbursement of the royalties. Within five years after promulgation of the Act (ie 2009), the

64 A 'community' is defined in s 1 as 'a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law'.

65 Section 12.

66 Section 104(2)(a).

67 Section 104(2)(c).

68 Section 104(2)(d).

69 The Minister will not grant the preferential right in respect of areas where a mining or similar permit has already been granted.

70 Mineral rights were regarded as real rights – mineral rights in this sense do not refer to the authorisation to mine (as set out in the MPRDA) but to the holder of a real right. Traditional communities were, for example, entitled to royalties if their land was mined by a mining company.

communities must inform the Minister of their need to continue to receive royalties. The Minister may, if he or she decides to continue the accrual of royalties to the community, state conditions and terms. These conditions and terms must include at least the manner in which the royalty must be used to promote rural, regional and local economic development and social uplifting, proper financial control, a development plan to indicate that the royalty is used for the benefit of the community, the right of the minister to intervene and the establishment of a legal entity to administer the funds.<sup>71</sup>

### *Mining Charter*

The MPRDA contains a section<sup>72</sup> similar to section 12 of the BEE Act that requires the drafting of industry-specific transformation charters. The Minister of Minerals and Energy's duty in this regard is twofold. In the first instance he or she must within five years from the date that the Act took effect<sup>73</sup> develop a housing and living conditions standard as well as a code of good practice for the minerals industry.<sup>74</sup> The Minister also had a duty, within six months after the Act took effect, to develop a broad-based socio-economic empowerment charter for the industry to achieve social and economic equality as envisioned by the Constitution and to address inequalities associated with the previous regime. The Charter should set the framework, targets and timetable for enabling HDSAs<sup>75</sup> to enter into the mining industry and allow them to draw benefits from the utilisation of mining and mineral resources,<sup>76</sup> as well as indicate how economic growth and social welfare will be promoted.

The Department of Minerals and Energy, together with representatives from the Chamber of Mines, the South African Mining Development Association and the National Union of Mineworkers, signed a Broad-Based Socio-Economic Empowerment Charter for the Mining Industry on 11 October 2002. The goal of the Charter is 'to create an industry that will proudly reflect the promise of a non-racial South Africa'.<sup>77</sup> The Charter recognises the need to adopt a strategy that would effect and encourage BEE and transformation among others in ownership, management, skills

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71 Item 11(7).

72 Section 100.

73 1 May 2004.

74 Sections 100(1)(a) and 100(1)(b).

75 The Charter defines 'Historically Disadvantaged South Africans' (HDSAs) as: 'any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act no 200 of 1993) came into operation.'

76 Section 100(2)(a).

77 Charter 2.



development, employment equity, procurement and rural development.<sup>78</sup>

It is important to note that the Charter recognises the fact that government plays mainly a facilitating role in the transformation process and that the industry will be allowed to manage its own affairs.<sup>79</sup>

The Charter defines broad-based socio-economic empowerment as a social or economic strategy, plan, principle, approach or act, which is aimed at:

- redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and
- transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the:
  - ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
  - participation in or control of the management of such operations;
  - development of management, scientific, engineering or other skills of HDSAs;
  - involvement of or participation in the procurement chains of operations; and
  - integrated socio-economic development for host communities, major labour sending areas and areas that, owing to unintended consequences of mining, are becoming ghost towns by mobilising all stakeholder resources.

This definition echoes elements of CSR such as skills development and the integrated socio-economic development of communities. The later regulations dealing with the social and labour plan included these elements as part of the contents of the plan. The expansion of the existing skills base of HDSAs in order to benefit the community is expressly stated as one of the objectives of the Charter. It seems evident that the industry has recognised the enormous benefit that skills development holds for the advancement of the social and economic welfare of communities affected by its operations. The importance of skills development is further stressed by the inclusion of human resource development as one of the undertakings to which the stakeholders to the Charter subscribe. In terms of this undertaking it is recognised that the South African labour market does not produce enough skills required specifically in the mining industry. The Charter proposes to

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78 These tiers of transformation are to a large extent similar to the pillars used on the BEE scorecard. It is, however, noticeable that CSR is not expressly mentioned at this stage, although again it might be implied through the reference to skills and rural development.

79 It is not the intention of the government to nationalise the mining industry (Charter 3).

close the skills gap through, inter alia, interfacing with bodies such as the Mines Qualifications Authority and other education authorities. The Charter also acknowledges that miners should be equipped with skills to enable them to improve their earning capabilities and to empower them to seek alternative employment after mine closure. In order to demonstrate their commitment to their social responsibility companies undertake to offer their employees the opportunity to become functionally literate and numerate,<sup>80</sup> to implement career paths to provide opportunities for their HDSA employees to progress in their chosen careers and to develop systems through which empowerment groups can be mentored as a means of capacity building.<sup>81</sup>

Parties to the Charter further undertake to strive towards the improvement of the standard of housing which would include the upgrading of hostels, conversions of hostels to family units and the promotion of home ownership options for mine employees.<sup>82</sup>

Annexure A to the Charter established a scorecard to measure the level of compliance of the industry with the tiers identified in the Charter. This scorecard differs vastly from, for instance, the generic BEE scorecard. Where the BEE scorecard provides for a specific weighting for each of the established criteria, the Charter's scorecard does not allocate a specific weighting to each of the descriptors. With reference to, for instance, the descriptor of human resource development, the level of compliance is measured by asking three questions, namely:

- (1) Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are employees being trained?<sup>83</sup>
- (2) Has the company implemented career paths for HDSA employees including skills development plans?
- (3) Has the company developed systems through which empowerment groups can be mentored?<sup>84</sup>

The outcome of each of these questions is assessed through a simple 'yes'

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80 This target was to be achieved by 2005, but has yet to be reached.

81 GN 1639 in GG 26661 of 13 August 2004.

82 GN 1639 in GG 26661 of 13 August 2004. See also F Cronje and C Chenga, 'Sustainable development in the South African mining sector', [www.engagingcommunities2005.org/abstracts/Cronje-Freek-final.pdf](http://www.engagingcommunities2005.org/abstracts/Cronje-Freek-final.pdf) (date of access 17 June 2007).

83 Note 1 of the scorecard indicates that the commitment of the mining companies is to have offered each employee the opportunity to become functionally literate and numerate. The critical test is if a human resource development strategy has been established and resourced so that people are being trained.

84 According to Note 2 of the scorecard, the mentoring of empowerment groups refers to that mining company's HDSA employees and HDSA linked partners at the levels of ownership and procurement.

or 'no' answer. No points are scored and the total level of compliance is not used to indicate whether or not the measured company is a poor contributor. The use of the scorecard is to be questioned. It is doubted whether or not the information contained in the scorecard would be of any real significance. However, some of the mining companies already publish their scorecards on their websites – so at least stakeholders or customers could determine the track-record of the mine.

### **Voluntary measures**

There are also voluntary measures that force mining companies to report on their CSR performance. In 2001, the *King Report on Corporate Governance for South Africa* was released. The Report recognises that in order to be granted a 'licence to operate', boards of directors need to consider a variety of aspects, including the regulatory environment, industry and market standards, the attitudes of customers, consumers, employees, investors and communities.<sup>85</sup> The attention paid to employees and especially communities in establishing a company strategy indicates the importance of striking a balance between economic and social goals and the need to align the needs of the company with that of society in order to promote sustainability.

The emphasis on the balance between economic and social goals is indicative of the move away from single to triple bottom line reporting.<sup>86</sup> The triple bottom line refers not only to the economic aspects of a company's activities, but also to non-economic aspects such as the environmental and social aspects of its activities. The Report identifies values, ethics and reciprocal relationships with stakeholders other than shareholders as primary social aspects signalling a conscious move towards CSR.<sup>87</sup> According to the report, social responsibility is one of seven primary characteristics of good corporate governance.<sup>88</sup> In

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85 Institute of Directors (IOD), *King II Report*, 9. Customers, consumers, employees, investors and communities are commonly referred to as 'stakeholders'.

86 IOD, *King II Report*, 12.

87 IOD, *King II Report*, 12.

88 The other characteristics are: discipline, transparency, independence, accountability, responsibility and fairness (IOD, *King II Report*, 13-14). Discipline refers to a commitment by company management to the underlying principles of good governance. Transparency represents the ease with which an outsider is able to make a decisive analysis of various aspects of the company, including its economic fundamentals and non-financial aspects. Independence refers to strategies put in place in order to minimise or avoid potential conflicts of interests. Accountability implies that persons making decisions within a company must be held accountable for their decisions and actions. Responsibility dictates that the company board must take responsibility for its behaviour and that it should act with responsibility towards all the company's stakeholders. Fairness requires the company to take into account all interested parties in decision-making and balancing the interests

dealing with social responsibility, the Report indicates:<sup>89</sup>

‘A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. By taking those factors into consideration, a company is likely to experience indirect economic benefits such as improved productivity and reputation.’

As a result of the Report, *inter alia*, there is growing pressure from society on companies to acknowledge their duty to act as responsible corporate citizens and to give effect to their duty by making social investments. The Report identifies the need for a greater social and ethical conscience among companies in order to insure long-term survival. A more socially responsible business sector will not only be beneficial to the sector itself but would also contribute to the general uplifting of – especially – those South Africans affected by the past discriminatory laws and practices.

As indicated above,<sup>90</sup> government has taken various legislative steps to encourage the business sector to become more socially responsible. The laws discussed have, to some extent, helped to facilitate change and to contribute towards the realisation of the goals set in the various governmental programmes. It is, however, important to note that stakeholders should be informed as to the extent to which a business is meeting the requirements laid down by law. One way is through the Johannesburg Securities Exchange (JSE) Socially Responsible Investment (SRI) Index. In 2004, the JSE launched the SRI Index in order to create a means through which companies’ efforts to apply the principles of the triple bottom line may be measured and benchmarked in order to attract investments to such companies.<sup>91</sup> The Index provides detailed criteria for each of the triple bottom line criteria in order to reflect the complex nature of social responsibility.<sup>92</sup> Only companies registered on the FTSE/JSE All Share Index are allowed participate in the Index. Reporting is, however, still voluntary and companies are invited to submit data to be assessed against the criteria.

As has been mentioned, one of the triple bottom line pillars is social sustainability.<sup>93</sup> Companies are required to ‘develop and maintain positive

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against each other. See also R Hamann and N Acutt, ‘How should civil society (and the government) respond to “corporate social responsibility”? A critique of business motivations and the potential for partnerships’ (2003) 20(2) *Development Southern Africa* 255-271.

89 IOD, *King II Report*, 14.

90 See ‘Corporate social responsibility (CSR)’ and ‘Legislation’ above.

91 JSE SRI Index 2.

92 This study will focus on the social aspect of the triple bottom line.

93 The other two pillars of the assessment are environmental sustainability and economic

relationships with a far wider structure of stakeholders, including staff, government and the community generally'.<sup>94</sup> In order to be regarded as good corporate citizens, companies need to indicate what their strategies for the promotion of social uplifting and poverty eradication are and the steps that are being taken to ensure that these strategies are implemented. If a company has no strategies in place to meet the three pillars or if the strategy is applied only sporadically, the company would score no points. If objectives/systems are in place, but the company does not meet the level set by the criteria or if evidence exists that regular/systematic efforts are being made to set objectives or to implement a system, the company would receive one point. Should the level set by the criteria be fully met, two points will be scored. If the objectives/systems that are in place exceed the level set, a company will score three points.<sup>95</sup>

In order to qualify for inclusion in the Index, a company must score at least 25 points in relation to social sustainability practices.<sup>96</sup> A company should strive towards continual development and improvement of its social and stakeholder relationships by inter alia recognising the stakeholders' rights to dignity and equality. Despite this recognition a company should also actively promote the development and empowerment of its employees and other stakeholders.<sup>97</sup> The social sustainability policies of a company should include the following:

- a demonstrated commitment towards uplifting and skills development and the creation of equal opportunities;
- a demonstrated commitment to stakeholder involvement on social sustainability issues;
- a demonstrated commitment to practices recognising the importance of partnerships in the implementation of corporate social responsibility strategies as well as a commitment to the implementation of corporate social responsibility strategies which are aligned to the company's overall business

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sustainability. Environmental sustainability measures the strategies that a company adopts in order to measure and monitor its impact on the environment. It also measures whether the systems that are implemented are of such a nature that it ensures that resources are consumed and used in a sustainable manner and to reduce the negative impacts to a minimum (JSE SRI Index 2). Economic sustainability measures whether the company has positioned itself for long-term growth rather than chasing short-term performance (JSE SRI Index 2).

94 JSE *SRI Index* 3.

95 JSE *SRI Index* 5.

96 In relation to corporate governance practices, a company must have a score of at least 16. A score of 21 for economic sustainability must be achieved, while the score for environmental sustainability practices will depend on the level of impact that the company has on the environment (JSE SRI Index 7).

97 JSE *SRI Index* 15.

strategy and which reflect an ongoing commitment from the company.<sup>98</sup>

The mere fact that a company has the above-mentioned policies in place does not imply that the company is actively implementing the strategies. The criteria for social sustainability also focus on management and performance of the company's policies. In order to determine the extent to which a participating company implements and manages its policies the following must be in place:

- documented targets, initiatives or programmes to address skills development, empowerment and equal opportunities as well as programmes or initiatives relating to corporate social investment and programmes addressing the impact of HIV/Aids on the company's activities;
- evidence of charitable donations, active community relations that include continued involvement of available company skills in uplifting programmes should be provided; and
- evidence of CSR schemes and programmes for employee involvement in the community should also be provided.<sup>99</sup>

Once the level of management and performance has been established, the participating company is scored on its reporting of the above-mentioned information. Reporting is measured against the public disclosure of data on social sustainability issues relevant to the company as well as stakeholder engagement.<sup>100</sup>

Once a company has met the qualifying score on all the pillars, it will be rated on the Index, depending on the score achieved. The Index and all its participants are reviewed annually in December, based on information provided by the end of September of each year. If, in terms of the Ground Rules for the Management of the JSE SRI Index,<sup>101</sup> a company no longer qualifies as a constituent of the All Share Index, it will be removed from the SRI Index as well. Removal will be simultaneous with removal from the All Share Index.

Although the JSE Index appears to be a move in the right direction in the sense that listed companies now take responsibility for the social aspects of their activities and that their responsibility is measured against set criteria, the system does not escape criticism. In the first instance, participation in the Index is purely voluntary. In its current form, companies listed on the JSE are not required by law to disclose their adherence to triple bottom line principles. If a company chooses not to be measured in terms of the Index it

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98 JSE SRI Index 15.

99 JSE SRI Index 16.

100 JSE SRI Index 17.

101 JSE 2004 [www.jse.co.za/sri/docs/sri\\_indices\\_ground\\_rules\\_170504.doc](http://www.jse.co.za/sri/docs/sri_indices_ground_rules_170504.doc) (date of access 19 June 2007).

will not face any form of penalty. It should further be noted that it is probable that only companies that do adhere to the principles of the triple bottom line would elect to be measured for the purposes of the Index. A company that has something to hide will not elect to be measured and yet its decision not to be measured will have no consequences.

In this regard it is submitted that at the very least all companies on the All Share Index should be required by law to be annually assessed on their levels of compliance with the set criteria. It is further suggested that a complete list of the performance of the listed companies should be published annually in prominent newspapers by way of a supplement. This step will insure that the public are informed about the contributions, or lack thereof, of the listed companies. In the publication it is suggested that not only should the overall scores be indicated, but the performance of each company on each of the three pillars should be mentioned. This step might not only be harmful to a company's reputation but might eventually lead to consumers deciding not to do business with a company that does not comply with the principles of the triple bottom line.<sup>102</sup>

Secondly, only companies listed on the All Share Index are invited to submit data in order to stand a chance of being included in the Index. There is currently no similar Index for companies listed on the Alternative Stock Exchange and thus the authors propose that the system be extended to include the Alternative Stock Exchange.

### **Current practices**

Although legislation and voluntary regulation of social responsibility are in place, the question is what practical steps mines take to ensure implementation of their social and labour plans as well as to report on their social responsibility. This section provides a brief overview of such practices.<sup>103</sup>

Initially, mining companies regarded fulfilment of their social responsibility obligation as contributions to charitable organisations or support of good causes without taking the surrounding community into account.<sup>104</sup> Black

102 A study published in 2006 indicated that there is a decline in environmental and social reporting by mines over the last nine years – see C De Villiers and C J Van Staden, 'Can less environmental disclosure have a legitimising effect? Evidence from Africa' (2006) 31(8) *Accounting, Organisations & Society* 763-781.

103 The information is based on literature found in articles and on the web – no empirical research has been undertaken. Research on this issue is currently being undertaken by the University of Melbourne.

104 See in this regard Hamann, (2004) *Natural Resources Forum* 278-290; R Hamann, 'Mining companies' role in sustainable development: the "why" and "how" of corporate



and poor local communities feel that they are ignored by mines as they do not have a voice to complain or cannot effectively participate in public participation processes.<sup>105</sup> They do not understand the mining processes or the impact that mining activities will have on their communities. The prospect of a mine is presented to them as an opportunity for job creation and wealth generation within the community, but in the end they are not the beneficiaries of mining.

The Royal Bafokeng Nation in South Africa is, however, an example of how a community used the royalties received from platinum mining companies on its land to ensure local development and empowerment of community members. The Royal Bafokeng Administration ensured service delivery to the community which should have been the responsibility of government. R2 billion was spent on infrastructural development over a period of ten years, which included the 'provision of 50 public schools, 10 clinics, two bulk water treatment plants and 17 reservoirs supplying water to the villages'.

Although infrastructure is built and provided by the Royal Bafokeng Administration, it is managed by government. Other infrastructure includes the roads, electricity, sewage systems, water provision and a sports centre while social uplifting includes the provision of bursaries for tertiary education and the establishment of small and medium-sized businesses within the community. The nation receives approximately R180 million per year from royalties and other commercial ventures. However, these ventures are undertaken by the community itself and are not inspired or provided for by mining companies.<sup>106</sup> It is the community itself that ensures that the royalties are used to ensure the uplifting of the Royal Bafokeng Nation.

Some of the success stories of other partnership projects include those dealing with HIV/Aids. In the Free State, Harmony Gold, workers and members of the community developed a project *Lesedi* (directly translated as 'we have seen the light') to promote awareness of HIV/Aids, effectively reduced the prevalence of sexually transmitted diseases, not only in the mine itself but also in the neighbouring area.<sup>107</sup>

In another instance Xstrata Alloys concluded an agreement with a

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social responsibility from a business perspective' (2003) 20(2) *Development Southern Africa* 237-255. Mines are also accused of greenwashing with regard to their triple bottom line reports, which is not always the case. See in this regard R Hamann and P Kapelus, 'Corporate social responsibility in mining in Southern Africa: Fair accountability or just greenwash?' (2004) 47(3) *Development* 85-92.

105 Hamann and Acutt (2003) *Development Southern Africa* 265-266.

106 S Mantshantsha, 'A classic case of mass empowerment' (2007) *Finweek* 29 March, 16-17.

107 Anon, 'Forging Multisectoral Partnerships to Prevent HIV and Other STIs in South Africa's Mining Communities', [www.fhi.org/en/HIVAIDS/pub/Archive/articles/IOH/loh21/loh21-6.htm](http://www.fhi.org/en/HIVAIDS/pub/Archive/articles/IOH/loh21/loh21-6.htm) (date of access 17 June 2007); see also [www.miningweekly.co.za/article.php?a\\_id=108196](http://www.miningweekly.co.za/article.php?a_id=108196) (date of access 18 June 2007).

traditional community, the Bakwena Ba Magopa, to invest and share in the profits of the Rhovan Vanadium Facility near Brits in South Africa in 2007. The community will have 26 per cent effective participation in the business venture. It is regarded as a R575 million BEE transaction. The community provides labour to the mine, but after the transaction community members will participate in the management of the mining operations. The community members will also be trained within skills development programmes.<sup>108</sup> A similar joint venture was established with regard to platinum in the Styldrift area between Canada's Platinum Group Metals' South African subsidiary, Anglo American and a BEE exploration and mining group, Africa Wide. Africa Wide will own 26 per cent working interest and the other two companies 37 per cent each.<sup>109</sup>

The Industrial Development Corporation, the Limpopo Economic Enterprise and Trade Investment Limpopo concluded an agreement to 'support and develop small and medium enterprises in the province'. The agreement includes assistance to communities or groups of previously disadvantaged people to enter the mining sector.<sup>110</sup> Although the Industrial Development Corporation is owned by government it is a positive step in providing financial and technical advice to miners of the future.

Anglo-Gold Ashanti recognises its social responsibility by contributing to the uplifting of the communities in various African countries. In South Africa, the group focuses on local communities that provide labour to their mines. The funding of education projects is one of the mining group's priorities. The Boiteko School for the Severly Handicapped in Carletonville was housed in the backyard of a municipal property. R1.8 million was invested to provide a proper building, classrooms and other facilities. The initial phase was then extended to several other projects pertaining to the school in collaboration with the Gauteng Department of Education. Other projects include assistance to a school established by Xhosa miners who wanted to provide mother-tongue education to their children in Kanana, Klerksdorp – a predominantly Tswana-speaking community. The North-West Department of Education does not contribute financially to the school but with the assistance of the mining group a growing number of children can be accommodated.<sup>111</sup>

Other projects include: homes for street children and homeless people;

108 [www.infomine-africa.com/MAYMagazine.aspx?&Page=2](http://www.infomine-africa.com/MAYMagazine.aspx?&Page=2) (date of access 17 June 2007).

109 For similar joint ventures with traditional communities see [www.hemscott.com/ir/rdg/ir.jsp?page=csr](http://www.hemscott.com/ir/rdg/ir.jsp?page=csr) (date of access 18 June 2007); [www.implats.co.za/cr/files/socio-economic.pdf](http://www.implats.co.za/cr/files/socio-economic.pdf) (date of access 18 June 2007).

110 [www.infomine-africa.com/MAYMagazine.aspx?&Page=2](http://www.infomine-africa.com/MAYMagazine.aspx?&Page=2) (date of access 17 June 2007).

111 [www.anglogold.com/subwebs/InformationForInvestors/ReportToSociety05/pdf/community.pdf](http://www.anglogold.com/subwebs/InformationForInvestors/ReportToSociety05/pdf/community.pdf) (date of access 17 June 2007).

school support programmes;<sup>112</sup> job creation and art projects;<sup>113</sup> upgrading of hostels;<sup>114</sup> numeracy and literacy projects for workers;<sup>115</sup> employment share holdership programmes; home care projects and projects for informal traders; assistance to school children in mastering of sciences and mathematics; bridging programmes between school and university; training of traditional healers with regard to HIV/Aids; assistance to vulnerable and Aids orphaned children;<sup>116</sup> contributions to support HIV/Aids research; hospice projects; assisting in the training of South African Police Service officials; assistance to municipalities in delivering IDP projects; job creation;<sup>117</sup> local craft projects;<sup>118</sup> and the initiation of vegetable gardens for poor communities.<sup>119</sup>

Criticism of some of the companies' projects is that although the financial contribution and programmes are welcomed, they do not really address the underlying problems of communities.<sup>120</sup> Mining companies sometimes decide what the community needs without consulting the communities or only certain sections of the communities are consulted. Members of communities do not always appreciate the mines' efforts to improve their lives. The activities are either not visible or community members perceive such activities as the mines' responsibility. Some community members believe they do not benefit directly in monetary value; they do not receive any benefits from the mine. Such perceptions may have been created because of a lack of communication or as a result of no consultation with the communities at all. A mining company might think that the community needs water and electricity while the basic need of the community might be the need for a post office.<sup>121</sup>

Consultation is of the utmost importance before a mine embarks on a social

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112 [www.leboneservices.co.za/corp\\_resp.htm](http://www.leboneservices.co.za/corp_resp.htm) (date of access 17 June 2007); [www.sumocoal.co.za/w3/content/index.cfm?navID=7&itemID=7](http://www.sumocoal.co.za/w3/content/index.cfm?navID=7&itemID=7) (date of access 18 June 2007).

113 [www.xstrata.com/sustainability/policies/csi](http://www.xstrata.com/sustainability/policies/csi) (date of access 18 June 2007).

114 See also [www.goldfields.co.za/investor/annual\\_reports/annual2005/book\\_index.asp?bookmark=cor\\_saminingcharter.asp](http://www.goldfields.co.za/investor/annual_reports/annual2005/book_index.asp?bookmark=cor_saminingcharter.asp) (date of access 18 June 2007).

115 [www.drd.co.za/ir/files/annual/ar\\_2004/sustainable\\_development/sustainable\\_development.htm](http://www.drd.co.za/ir/files/annual/ar_2004/sustainable_development/sustainable_development.htm) (date of access 18 June 2007).

116 See also [www.angloamerican.co.za/article/?afw\\_source\\_key=3FF523CE-A5C4-4FE8-90CB-66798BF9280C&xsl\\_menu\\_parent=/cr/socialinvestment/casestudies/](http://www.angloamerican.co.za/article/?afw_source_key=3FF523CE-A5C4-4FE8-90CB-66798BF9280C&xsl_menu_parent=/cr/socialinvestment/casestudies/) (date of access 18 June 2007).

117 [www.implats.co.za/cr/files/socio\\_economic.pdf](http://www.implats.co.za/cr/files/socio_economic.pdf).

118 [www.angloamerican.co.za/article/?afw\\_source\\_key=C446AA4E-5306-4824-A6B2-DF8F27646F18&xsl\\_menu\\_parent=/cr/socialinvestment/casestudies/](http://www.angloamerican.co.za/article/?afw_source_key=C446AA4E-5306-4824-A6B2-DF8F27646F18&xsl_menu_parent=/cr/socialinvestment/casestudies/) (date of access 18 June 2007).

119 [www.angloamerican.co.za/article/?afw\\_source\\_key=C446AA4E-5306-4824-A6B2-DF8F27646F18&xsl\\_menu\\_parent=/cr/socialinvestment/casestudies/](http://www.angloamerican.co.za/article/?afw_source_key=C446AA4E-5306-4824-A6B2-DF8F27646F18&xsl_menu_parent=/cr/socialinvestment/casestudies/) (date of access 18 June 2007).

120 See, for example, R Hamann and P Kapelus, n 103 above.

121 See Traditional Authority Research Group (TARG), *North West Province Regional Report* (Volume 5 unpublished) 19.

responsibility project. Communities know their most basic needs and that must be addressed to effect a proper relationship between communities and mining groups. It must also be seen that the community as a whole benefits and not only a particular section thereof. If a traditional community is involved it might be necessary to call, in consultation with the traditional leader and his or her council, a *pitso* or traditional meeting to determine the community's needs. From personal experience where such meetings with communities were held in the North West Province, it was clear that the community will come to a consensus decision on what their basic needs are.<sup>122</sup>

Sasol in the EIA process leading to the construction of a gas pipeline between South Africa and Mozambique used the following process to determine community needs:<sup>123</sup>

(1) Determine needs:

- Determine at community level what the needs of the community are.
- Distinguish between apparent and real needs as well as the nature and magnitude thereof.
- Consult other stakeholders.
- Let the community prioritise their needs.

(2) Generate solutions:

- Generate solutions and determine cost-effective solutions by involving the community at grass-roots level.
- Consult other stakeholders and obtain commitment.

(3) Approval of project:

- By necessary authorities.
- Reporting in terms of good corporate governance.

(4) Project implementation:

- Within a specified timeframe, legal requirements and budget.
- In consultation with stakeholders.

(5) After care:

- Ensure sustainability of project.
- Implement after-care programme.
- Evaluate results, monitor and take corrective action.

Provision is also made for a community interface forum and a community complaints procedure and control system. Several task teams are also

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122 TARG, *Overview Report* (Volume 11 unpublished report) 22.

123 [http://w3.sasol.com/natural\\_gas/reports\\_docs/SDAP.pdf](http://w3.sasol.com/natural_gas/reports_docs/SDAP.pdf) (date of access 18 June 2007).

established to deal with the different projects.

If socially responsible projects are undertaken, it is the authors' submission that the community should be involved at all levels – from project identification to monitoring. This could be done by inclusion of community members in decision-making bodies and/or by establishing reporting and oversight committees. Training would also be necessary to ensure that the community members obtain the necessary skills to continue the project after the operator leaves.

## **Conclusion**

CSR has not yet been introduced by way of legislation – although traces of CSR are to be found throughout legislation. Adherence to the principles of CSR is still therefore largely voluntary but several companies listed on the JSE have committed themselves to report on their triple bottom line activities including their social responsibilities. There is no sanction except removal from the list if a company fails to adhere to its own standards.

However, there is CSR language included in legislation dealing with achievement of equality, poverty alleviation and the millennium development goals. Owing to the legacy of mining in South Africa, the MPRDA specifically provides for the inclusion of a social and labour plan in applications for mining authorisations. Mines must clearly indicate how they are going to address social issues not only pertaining to their labour force, but also with regard to surrounding communities or communities that supply labour to the mine. Specific questions are to be addressed. It is, however, not clear how the continued implementation of the social and labour plan will be monitored after the closure of a mine. It is also not a closure requirement that the social issues must have been addressed. There is also no sanction involved and no provision made for financial security once the mine closes. The BEE Act ensures that companies address social inequality issues pertaining to, inter alia, ownership and procurement issues.

There are various examples of how mines voluntarily address their social responsibility including literacy and housing projects and arts and crafts. Several traditional communities participate in mining operations or receive shares in mining companies. Other communities elect to initiate their own mining operations with the assistance of existing mining companies. The Royal Bafokeng Nation uses its royalties to improve its own community without the involvement of mining companies and by making its own decisions.

Communities and individuals perceive the social and labour plans of mining companies as well as the practical implementation of the CSR of

those companies differently. Whatever is done by a mine will never be seen as enough, as some individuals perceive that they should gain financially from the mining operations. In some instances, mines do not consult communities or individuals with regard to their needs but decide from their own perspective what will be best for the community.

It is important that regardless of whether mines are acting in response to their social and labour plans or CSR that a bottom-up approach is followed. Mines should not be seen as paternalistic in their actions but communities or individuals should participate from day one in the planning, implementation, monitoring and correction of the different projects and activities. It is also important that mines should refrain from benefiting one or two persons in a community (for example a traditional leader or a councillor of a municipality) – the community should be the beneficiaries not corrupt leaders or officials. Proper financial accounting should also be in place and the rules of good governance should be followed at all times.

The procedure used by Sasol in the case of the Mozambique pipeline might be applied as point of departure but it should also be adapted to address local issues. In short, it can be stated that corporate social responsibility is a tool that could effectively be used to address poverty alleviation but it should be seen as a tool to empower and not a tool to window dress a company's lack of action.

# **Development Forum in Papua New Guinea: Upsides and Downsides**

By Colin Filer<sup>1\*</sup>

*This article will review the circumstances in which the Development Forum was first established, and then show how the institution has been modified in response to political pressures emanating from inside and outside the extractive industry sector of the national economy. Specific attention will be paid to negotiations over the development of the Lihir gold mine between 1993 and 1995, to the ramifications of the Organic Law on Provincial Governments and Local-level Governments that was gazetted in 1995, to the provisions of the Oil and Gas Act that was gazetted in 1998 and to the unfinished business of creating a new regulatory framework for the mining industry.*

The Development Forum is an institution created by the Government of Papua New Guinea (PNG) in the course of negotiations for the establishment of the Porgera gold mine in 1988 and 1989. In its original form, it consisted of a series of tripartite discussions between representatives of the national government, the relevant provincial government and the local landowning community that were meant to secure their joint endorsement of a development proposal and a set of agreements that would spell out the future distribution of project-related benefits and responsibilities between the three parties. In the period of almost two decades since it was created, the institution has spread from the mining sector to other sectors of the national economy, has been enshrined in national legislation and has been

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modified to meet the political challenges posed by a succession of major resource projects. The Development Forum has achieved international recognition as a mechanism for ‘achieving a higher level of participation by local communities’ in the development of major mining projects.<sup>2</sup> Insofar as PNG’s local communities also count as indigenous communities, it could be treated as a model for indigenous participation as well. However, the history of this institution also reveals some of the fundamental obstacles to the achievement of sustainable development outcomes in a country afflicted by many symptoms of the so-called ‘resource curse’, where a resource-dependent economy has become the site of intense political conflict over the distribution of rents and revenues derived from extractive industry.<sup>3</sup>

### **Porgera forum and the basic mining package**

There are two widespread misconceptions about the origin of the Development Forum – first, that it was an immediate policy response to the outbreak of the Bougainville rebellion, and secondly, that it was always meant to be a way of securing local community participation in the negotiation of development agreements. When Rabbie Namaliu became prime minister in the middle of 1988, his government faced two distinct policy challenges in the mining sector. The challenge from Bougainville was the demand for K10 billion in compensation for environmental damage on the part of the ‘new’ Panguna Landowners Association.<sup>4</sup> The other challenge came from the Enga Provincial Government, whose premier persuaded the other members of the National Premiers Council to demand some role in the process of redrafting the country’s mining legislation.<sup>5</sup> The connection between these two challenges was not immediately obvious.

While officials in the Department of Minerals and Energy hired a team of consultants to investigate the complaints of the Panguna landowners,<sup>6</sup> they initially saw the Development Forum as a way of dealing with the second challenge rather than the first.<sup>7</sup> In other words, it was meant to secure broader

2 Mining Minerals and Sustainable Development Project, *Breaking New Ground: Mining, Minerals and Sustainable Development* (International Institute for Environment and Development, 2002), p 211.

3 Ian Bannon and Paul Collier (eds), *Natural Resources and Violent Conflict: Options and Action* (World Bank, 2003).

4 Colin Filer, ‘The Bougainville Rebellion, the Mining Industry and the Process of Social Disintegration in Papua New Guinea’ (1990) 13(1) *Canberra Anthropology* 1-39.

5 *Report of the Mining and Petroleum Working Committee of the PNG National Premiers Council* (1988).

6 Applied Geology Associates, *An Environmental Socio-Economic Public Health Review: Bougainville Copper Mine, Panguna* (report to the PNG National Executive Council, 1989).

7 Richard West, ‘Development Forum and Benefit Package: A Papua New Guinea Initiative’ (PNG Institute of National Affairs Working Paper 16, 1992).

political and bureaucratic support for the content of development agreements between the national government and mining companies – especially the agreement then being negotiated for development of the Porgera mine in Enga Province. By the time the National Executive Council approved the institution of the Development Forum in November 1988, immediately *before* the outbreak of the Bougainville rebellion, it was agreed that there should be at least one landowner representative involved in the process of consultation. But even then, its bureaucratic inventors thought it was primarily a way of securing greater participation in the review of development proposals from mining companies. It was only through the course of meetings between the parties to the Porgera development forum that it came to be seen as a way to negotiate benefit-sharing agreements that would not themselves be part of the mining development contract between the State and the developer.<sup>8</sup> The outbreak of the Bougainville rebellion served to strengthen the hands of the Enga Provincial Government and the Porgera landowners in this process of negotiation.<sup>9</sup> The three Porgera forum agreements were signed in May 1989, one day before Bougainville Copper Ltd finally closed its mining operations at Panguna amidst a fresh wave of attacks by militant landowners. The signatories to the three agreements between the two tiers of government and the local community were the Prime Minister,<sup>10</sup> the Minister for Minerals and Energy, the Premier of Enga Province, the elected members of the Porgera Local Government Council and 23 leaders or agents of the seven ‘clans’ recognised as customary owners of the land contained in the special mining lease which the State was about to issue to the Porgera joint venture.

The ambiguity embedded in the design of the Development Forum was preserved in section 3 of the Mining Act 1992, which requires the Minister to convene a forum before granting a special mining lease in order to ‘consider the views’ of the developers, the local ‘landholders’<sup>11</sup> and the two

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8 West, n 6 above; Harry Derkley, ‘Indigenous Communities, Major Mineral Projects and the Law: The “Porgera Agreements”’ (unpublished paper, University of Tasmania, 1999).

9 Richard T Jackson and Glenn Banks, *In Search of the Serpent’s Skin: The Story of the Porgera Gold Project* (Placer Niugini Ltd, 2002), p 156.

10 The Cabinet decision of 1988 had designated the Prime Minister as the Chairman of the Development Forum and the Minister for Minerals and Energy as its Secretary. See West, n 6 above, at 10.

11 Section 2 of the Mining Act subsumes customary landowners within a broader definition of the ‘landholder’ as ‘a person who is recognised as an owner of customary land’ or a person who ‘is in occupancy of Government land by virtue of an agreement with the State’ or ‘is the owner or lawful occupant of land other than customary land or Government land’. All of the ‘landholders’ who have so far been involved in the institution of the Development Forum have been the owners of customary land who simply call themselves ‘landowners’. See Colin Filer, ‘Compensation, Rent and Power in Papua New Guinea’, in *Compensation for Resource Development in Papua New Guinea* (Susan Toft ed, PNG Law Reform Commission Monograph 6, 1997).

levels of government. However, section 3 says nothing about the benefit-sharing agreements that might be derived from this process of consultation. National government officials involved in drafting the legislation were thus able to infer that provincial governments and local landowners still had no legal authority to influence the terms of a mining development contract, and that forum agreements themselves were not legally binding on the signatories.<sup>12</sup> Nevertheless, the same officials used the Porgera forum agreements to construct a template known as the ‘basic mining package’ in order to initiate development forums for the Ok Tedi and Misima mines, both of which were already in production, and for the Kutubu and Hides projects in the petroleum sector, both of which were awaiting the grant of petroleum development licences.<sup>13</sup>

The basic mining package had six basic economic components:

- (1) The *royalty redistribution* component increased the proportion of mineral royalties allocated to the customary owners of land from which mineral resources were to be extracted, and made a corresponding reduction in the proportion allocated to provincial governments. The national government has continued to maintain that it collects mineral royalties in its capacity as the ultimate resource owner, but in the course of renegotiating the Bougainville Copper Agreement in 1974, it agreed to repatriate an equivalent amount to the province from which they were derived. The royalty rate was then set at 1.25 per cent of the value of production. The proportion of this amount reserved for local landowners was now raised from five per cent to a minimum of 20 per cent.<sup>14</sup> This feature of the package was later given legal effect in section 173 of the new Mining Act. In the package (but not the Act), landowners would receive the original five per cent in cash, while the balance would be dedicated to community projects and future generations.<sup>15</sup>

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12 See West, n 6 above; Derkley, n 7 above; Glenn Banks, ‘Papua New Guinea Baseline Study’ (Mining, Minerals and Sustainable Development Project Working Paper 180, 2001); Colin Filer, ‘The Role of Land-Owning Communities in Papua New Guinea’s Mineral Policy Framework’, in *International and Comparative Mineral Law and Policy: Trends and Prospects* (E Bastida, T Wälde and J Warden-Fernández eds, Kluwer Law International, 2005).

13 The Prime Minister also tried to sell this package to the Bougainvillean rebels in order to save the Panguna mine from permanent closure, but his offer was declined.

14 The actual proportion allocated to local landowners and their representative bodies under the original Porgera forum agreements was 23 per cent. The proportion was increased to 50 per cent in 1995. See Mike Finlayson, ‘Sustainable Development Policy and Sustainability Planning Framework for the Mining Sector in Papua New Guinea – Working Paper 2: Benefit Stream Analysis’ (PNG Mining Sector Institutional Strengthening Project, 2002), p 37.

15 West, n 6 above, at 16.

- (2) The *optional equity* component allowed provincial governments and local landowners each to acquire up to five per cent of the total equity in a resource project at a cost initially carried by the national government. The existing policy framework already gave the national government an option to purchase up to 30 per cent of the equity in a new mining project, so the new provision meant that the national government would henceforth agree to hold a portion of its equity in trust for provincial governments or local landowners until the accumulated dividends matched the original purchase price.<sup>16</sup> Although the merits of state equity in resource projects had been a subject of some debate,<sup>17</sup> the policy makers in Port Moresby realised that the allocation of shares to provincial governments and local landowners (unlike the allocation of royalties) should have the effect of giving them a vested interest in the profitability of the business.
- (3) The *special support* component established a new kind of transfer from the national government to the provincial government hosting a major resource project, equivalent to one per cent of the annual value of production. The special support grant was partly justified as a way of compensating the provincial government for the reduction in its share of the royalty grant, but its value was considerably more than would be necessary to achieve this goal. The additional amount was justified as a way of providing the provincial government with the means to meet the needs and expectations of the people affected by the process of resource development – including some of the items promised to local landowners through the Development Forum.
- (4) The *infrastructure development* component enabled provincial governments and local landowners to negotiate for additional grants from the national government to finance public infrastructure in the affected area. The separation of this component from the special support component was justified by the need to provide additional public infrastructure during the construction phase of a new resource project, because royalty and special support grants would not begin to flow until a project entered its operational phase.
- (5) The *economic opportunity* component required the developer to give preference in training, employment and business development

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16 Glenn Banks, 'Sustainable Development Policy and Sustainability Planning Framework for the Mining Sector in Papua New Guinea – Working Paper 5: Landowner Equity Case Studies' (PNG Mining Sector Institutional Strengthening Project, 2002).

17 In the Porgera case, the State initially opted to purchase a ten per cent stake in the project, the whole of which was carried on behalf of the provincial government and the local landowners.

opportunities to local landowners, followed by people of the affected area, followed by people of the host province, followed by other PNG citizens. In effect, this was an undertaking by the national government to apply what is sometimes known as its 'preferred area policy' in the process of approving a company's proposal for development. This policy had first been articulated in clauses 30 and 32 of the Mining (Ok Tedi Agreement) Act 1976, which said that Ok Tedi Mining Ltd would, where 'practicable', give first preference in project employment and local business development to 'the landowners in and other people originating from the Kiunga and Telefomin sub-provinces' (now districts). The policy was originally justified in terms of a broader national policy to provide special assistance to 'less developed areas', but its reappearance in the basic mining package could not be justified in this way. It might indeed be inconsistent with section 55 of the National Constitution, which says that 'all citizens have the same rights, privileges, obligations and duties' regardless (among other things) of where they happen to live,<sup>18</sup> but the application of the policy in the mining and petroleum sectors has not so far been challenged on these grounds.

- (6) Finally, the seed capital component required the national government to guarantee a loan to help one landowner company in each affected area to take advantage of new business development opportunities created by means of the economic opportunity component of the package. The amount of the loan was set at K500,000 when the kina had roughly the same value as the US dollar.

In practice, the forum agreements negotiated after the conclusion of the Porgera development forum varied primarily in respect of the items specified in the infrastructure development component of the basic mining package, for the simple reason that the other components did not seem to leave much room for negotiation. The Misima forum showed that there was some scope for the participants to trade one component for another, because the Milne Bay Provincial Government and the local landowners were able to bargain for additional infrastructure in the mine-affected area by turning down the option of project equity.<sup>19</sup> The Ok Tedi forum explored the flexibility of the royalty redistribution component when the Premier of Western Province, whose constituency included the local landowners, proposed to give the landowners 50 per cent of the royalty grant. The landowners finally settled for 30 per cent of the royalties in exchange for a 20 per cent share of projects funded by the special support grant, while the rest of this grant was earmarked

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18 Filer, n 11 above, at 920.

19 West, n 6 above, at 19-20.

for other parts of the province that were directly affected by the mining operation.<sup>20</sup> The Kutubu forum had to deal with the problem of dividing the various components between Southern Highlands Province, which contained the oilfield itself, and Gulf Province, through which a pipeline would carry the oil to an export terminal. While the royalties were shared between the Southern Highlands Provincial Government and the customary owners of the area covered by the petroleum development licence, the other components were shared between the two provinces in proportion to the capital invested in the development of project facilities, and that is how the customary owners of the pipeline easement came to get a share of the benefits allocated to Gulf Province.<sup>21</sup> The trade-offs made in the agreements for each major project left one outstanding question for each of them, which was whether and how the national and provincial governments would keep their promises to provide additional public goods and services to local landowners and other people in the affected areas.

Once the Porgera mine became operational in 1991, its managers faced a serious dilemma. They knew that the infrastructure development component of the forum agreements included a national government commitment to persuade the operator to phase out the practice of commuter mining over a seven-year period by funding the establishment of a 'socially integrated' township in the Porgera Valley.<sup>22</sup> On the other hand, there was no such commitment in the mining development contract because company managers and national bureaucrats had three good reasons to think that it did not make economic sense: first, it would add to the overall economic cost of the project, whether that cost was borne out of company profits or government revenues; secondly, it was doubtful whether members of the commuting workforce would want to bring their families to live in such a remote and inhospitable place on a semi-permanent basis; and thirdly, a new set of 'bright lights' might only serve to swell the number of unemployed and unemployable immigrants from neighbouring areas.<sup>23</sup> The third of these considerations had been one of the key factors in motivating the delivery

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20 In effect, this made the special support grant look like a form of compensation for environmental damage. See Colin Filer, 'West Side Story: The State's and Other Stakes in the Ok Tedi Mine', in *The Ok Tedi Settlement: Issues, Outcomes and Implications* (G Banks and C Ballard eds, Australian National University, National Centre for Development Studies, Pacific Policy Paper 27, 1997), pp 69-70.

21 No agreements emerged from the first round of forum negotiations for the Hides gas project, which would supply power to the Porgera mine, because of litigation over the identity of the customary landowners.

22 Derkley, n 7 above.

23 See S I Andrew and C Kannapiran, *Feasibility Study to Establish a Township at Porgera Mine Site* (National Research Institute and Tauwala Consultants Pty, unpublished report to Mineral Resources Development Company, 1995).

of a special support grant to the Enga Provincial Government, but there were also good reasons to doubt the willingness and ability of the provincial authorities to spend this money on the effective delivery of public goods and services in other parts of the province, let alone to keep the promises that they had made to members of the Porgeran community. If local community leaders were to feel that they had been cheated by the other parties to the forum agreements, they would cause more problems for the developer on their doorstep.<sup>24</sup>

The solution to this dilemma was to persuade the national government to introduce an 'infrastructure tax credit scheme' in the budget passed at the end of 1992. This entailed an amendment of the Income Tax Act which would allow the developers of large-scale mining and petroleum projects to spend up to 0.75 per cent of their gross revenues on the construction of social and economic infrastructure, and to have this counted as corporate income tax already paid to the government. This meant that Placer Niugini, as operator of the Porgera mine, could use its own engineering capacities to satisfy some of the local community's demands for urban infrastructure, while also doing 'good works' for people in adjoining areas, and then bill the government for their achievement. The Engan members of the national parliament were quite happy with this arrangement because they were party to the process by which the national government approved tax credit project proposals, but the provincial government now had additional reason (if any were needed) to mismanage or misappropriate its own share of mineral revenues, and when it seemed to be doing so, the national government closed it down.<sup>25</sup> The developers of the Porgera mine had thus entered into an arrangement with the national government which fundamentally altered the relationship between the infrastructure development and special support components of the basic mining package – not only in respect of this one project but also in respect of the wider policy regime.

### **Lihir integrated benefits package**

Disputes about the implementation of the Porgera forum agreements undoubtedly had some impact on the conduct of the Lihir development forum that was initiated towards the end of 1993. But the negotiating positions taken by the New Ireland Provincial Government and the Lihir Mining Area Landowners Association were also influenced by a change in

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24 Filer, n 11 above, at 923.

25 The Enga Provincial Government was suspended from March 1993 to June 1994, but the provincial politicians showed no sign of mending their ways when it was reinstated. See Jackson and Banks, n 8 above, at 213-218.



the national government's position on the value of state equity in major resource projects. The government that came to power after the national election of 1992 insisted on purchasing an additional 15 per cent equity stake in the Porgera mine – five per cent from each of the other three partners in the Porgera joint venture – on the grounds that Placer Niugini had deliberately undervalued the resource in its feasibility studies.<sup>26</sup> The government then announced that it would take up its full entitlement to a 30 per cent equity stake in the prospective gold mine on the island of Lihir, and would take another 20 per cent 'at cost' if Rio Tinto Zinc, then the holder of the exploration licence, refused to sell that 20 per cent stake to a third party. Neither of these moves had the support of public servants in what was now the Department of Mining and Petroleum, but they did have the effect of turning the Lihir development forum into a debate about the optional equity component of the basic mining package.

On the second day of the first forum meeting, the provincial premier tabled a 'non-negotiable' demand for his government to take one-third of the State's 30 per cent equity stake, and for the remainder to be allocated to the people of Lihir on the grounds that this was really a form of compensation for 'the loss of their resources, their livelihoods and the damage that would be caused to the island and the sea'.<sup>27</sup> No further negotiation took place until February 1995, by which time another change of government in Port Moresby had created a new sense of urgency about the need to get the Lihir mine into production in order to alleviate a national fiscal crisis. The Minister for Mining and Petroleum was now prepared to offer the Lihirians a 15 per cent stake in the Lihir joint venture, but only if the provincial government would abandon its own equity option and all parties to the joint venture would then dilute their shareholdings by means of a public share float in order to raise additional capital for mine construction. But the Lihirians felt they were on strong ground, not least because the Prime Minister, Sir Julius Chan, was their own Member of Parliament. They had already secured an undertaking from both tiers of government that 30 per cent of the special support grant and 30 per cent of royalties from the mine would be transferred direct to their own local authority, the Nimamar Development Authority, in order to fund 'community projects'. But they only agreed to reduce their equity stake in the project when the Prime Minister agreed to raise the overall royalty rate

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26 Jackson and Banks, n 8 above, at 186-202.

27 Colin Filer, 'Participation, Governance and Social Impact: The Planning of the Lihir Gold Mine', in *Mining and Mineral Resource Policy Issues in Asia-Pacific: Prospects for the 21st Century* (D Denoon, C Ballard, G Banks and P Hancock eds, Australian National University, Research School of Pacific and Asian Studies, Division of Pacific and Asian History, 1995), p 68.

from 1.25 per cent to two per cent of the total value of production.<sup>28</sup>

This increase in the royalty rate was not just a modification of the basic mining package to fit the special circumstances of one major project. Like the tax credit scheme, it was a modification of the entire mineral policy framework that would affect all existing resource projects as well as those yet to be negotiated and developed. When the new deal was announced in March 1995, the national government tried to reassure nervous foreign investors by saying that it would treat the extra royalty as a tax credit and raise the limit of expenditure under the tax credit scheme from 0.75 per cent to two per cent of their gross income.<sup>29</sup> However, this financial sleight of hand could not conceal the fact that the Lihir landowners had used the Development Forum to achieve changes in the mineral policy regime against the wishes of national government officials – and that is something which no other group of landowners had previously managed to achieve.

What actually emerged from the Lihir development forum was not just a set of variations on the basic mining package, but another kind of package altogether, which the Lihirians insisted on calling an ‘integrated benefits package’. This is a book whose division into four chapters reflects a Lihirian argument that each type of landowner benefit derived from the mining operation would also be a form of compensation: one called ‘compensation’ *for* ‘destruction’, and the other three called ‘compensation’ *as* ‘development’, ‘security’ and ‘rehabilitation’ respectively.<sup>30</sup> The forum agreements between the local landowners, their local authority and the two levels of government above them were all contained in the second chapter of this document, along with the local business development programme which the mining company had been obliged to produce under the terms of the mining development contract with the State. But the title of the book itself says that it is an agreement between the Lihir Management Company (then a subsidiary of Rio Tinto) and ‘the people of Lihir represented by the Lihir Mining Area Landowners Association and the Nimamar Development Authority’, so the State did not appear to be a party to the bigger package which contained its own promises to the local community.

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28 Filer, n 26 above, at 69.

29 Unfortunately for them, Treasury officials ‘forgot’ to include this latter measure in the 1996 Budget, and although the extension was finally granted in the 1998 Budget, this act of belated generosity was offset by the simultaneous requirement for companies to pay the full two per cent royalty out of their own pockets, rather than claim 0.75 per cent of it as an additional tax credit. See Filer, n 11 above, at 926.

30 Filer, n 10 above, at 160. Although the integrated benefits package takes the physical form of a book, it has not been published as such. There is no legal requirement for development forum agreements to be placed in the public domain, and nearly all of them remain among the grey literature of PNG’s extractive industry sector.

The first chapter of the book contains a set of compensation agreements between the operating company and various groups of landowners, of the kind required under section 154 of the Mining Act; the third chapter contains a short summary statement of the operator's commitment to collaborate with the landowners in development planning and capacity building activities; and the fourth chapter contains a draft of the environmental management and monitoring programme which the Lihir Joint Venture had submitted to the national Department of Environment and Conservation in order to comply with the Environmental Planning Act 1978. From this it should be evident that the Lihir integrated benefits package was a sort of bureaucratic nightmare – or at least a very serious headache – because of the way in which it reconfigured the responsibilities for implementing different components of the national policy framework. Yet this may well have been the intention of the landowner association's chairman, who famously declared, during the course of the forum negotiations, that 'the State is only a concept'.<sup>31</sup>

Officials in the Department of Mining and Petroleum had long since come to accept that they would need to bend their own rules in order to accommodate some of the demands made by the Lihirian leadership. Indeed, they made a virtue of necessity by suggesting that the binding of the integrated benefits package was itself evidence of the flexibility inherent in the institution of the Development Forum, and therefore proof of its success as an instrument of national policy.<sup>32</sup> The Lihir package could be seen as an advance on previous variations to the basic mining package because of the way in which it clearly distinguished between the benefit streams allocated to the mine-affected community – the indigenous population of the Lihir island group – as opposed to that segment of the community which held customary lands rights in the mine lease areas. It could also be seen as an advance on the tax credit scheme because of the way in which it made the developer even more responsible for keeping promises that had in fact been made by the government, thus granting a new kind of legitimacy to the role of mining companies as shadow states. However, the departures made from the original design of the basic mining package were now so great that the Lihir package itself became the benchmark, if not exactly the template, for the next generation of resource development agreements. Since the Lihir package involved a substantial increase in the proportion of mineral wealth allocated as benefits or 'compensation' to the local community, the key policy issue for the public servants in Port Moresby was where and how to hold the line against any further transfers from the national budget to local interest groups.<sup>33</sup>

31 Filer, n 25 above, at 68.

32 See G E Hancock and T J Omundsen, 'The Development Forum Process and the Approval of Large Mining Projects in Papua New Guinea' (paper presented to conference on Mining and the Community for Asian and Pacific Nations, 26-29 July 1998, Madang).

33 Colin Filer, 'Resource Rents: Distribution and Sustainability', in *Papua New Guinea: A*

## New Organic Law

This policy issue was complicated by the Organic Law on Provincial Governments and Local-level Governments, which came into effect shortly after the Lihir development agreements had been signed.<sup>34</sup> The main purpose of this new law was to get rid of elected provincial assemblies and put the control of provincial governments firmly in the hands of national MPs.<sup>35</sup> The disputes that had previously led to the suspension, reinstatement and re-suspension of the Enga Provincial Government were prominent among the factors that provoked the passage of the new law. But this was a law devised by politicians and political advisers, not by public servants, and certainly not by those public servants who were responsible for the administration of extractive industry or the distribution of mineral wealth. Section 98 of the new law dealt with the distribution of ‘benefits derived from natural resources’, including ‘minerals, petroleum, gas, marine products, water, timber (including forest products), fauna, flora and any other product determined by law to be a natural resource’, and section 116 said that any other legislation pertaining to the development of natural resources should be amended to include a provision for ‘natural resource development forums’ to be convened by the appropriate minister. This reference to ‘development forums’ was clearly inspired by section 3 of the Mining Act and the actual practice of forum negotiations in both the mining and petroleum sectors. However, section 98 was informed by the policy process in the *forestry* sector, and was clearly inconsistent with the basic mining package and the Lihir integrated benefits package.

Section 98 originally stated:

‘All royalties shall be paid to the landowners less deduction only of nominal personal tax (if applicable) and any recoveries for the cost incurred by the National Government.’

It was then amended to state:

‘All land owners benefits in the form of royalties, land owners premiums, compensation and other assistance, established by law or in accordance

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*20/20 Vision* (Ila Temu ed, Australian National University, National Centre for Development Studies, Pacific Policy Paper 20, 1997).

34 The law was gazetted in February 1995, certified in July and amended in September.

35 This explains why it was passed with only one dissenting voice. The national MPs representing the 20 provincial electorates in the country (including the National Capital District) would henceforth become the governors of their respective provinces unless they were appointed as ministers of the national government, in which case the position of governor would devolve to an MP representing one of the ‘open’ electorates in that province. The legislative arm of each provincial government would henceforth be a combination of elected national MPs, local government council presidents and an appointed women’s representative. Since the national MPs are now able to control the funding allocated to local councils, the council presidents tend to be their local henchmen.

with an agreement, shall be paid to the land owners less deduction only for nominal tax (if applicable) and any recoveries for the cost incurred by the National Government, Provincial Governments or Local-level Governments, as the case may be.'

If that were not sufficiently confusing for the mining industry, section 98 also said that resource developers should pay 'development levies' in the form of 'infrastructural development levies', 'economic development and land use follow-up levies', 'community and social development levies' and 'any other levies as are from time to time determined by national law or by agreement' to 'the Provincial Governments and Local-level Governments of the province or area in which the development is situated'. It also placed an obligation on the developer to provide 'expertise and professional advice' on the use of these development levies to all three levels of government. Needless to say, companies that had just been burdened with an increase in the royalty rate were not amused by the prospect of having to pay an entirely new kind of tax into the bargain. The only sense they could get out of relevant government officials was that these 'development levies' could somehow be treated as transfers already covered by the combination of special support grants and the tax credit scheme.<sup>36</sup> However, section 98 would not apply to any projects covered by existing development agreements, and even the developers of projects still under negotiation could take some comfort from another clause which said that 'the rates, management, sharing arrangement, and application of the development levies' would have to be determined by sector-specific legislation.

The *more immediate problem* was that the new Organic Law threatened to abolish the 'development authorities' which had been established at Porgera and Lihir as vehicles for the collection and disbursement of mineral revenues earmarked for the benefit of the two mine-affected communities. The Porgerans were so incensed by this prospect that they threatened to close down the mining operation in protest. Their wishes were duly accommodated under Part VII of the Local-level Governments Administration Act 1997, which allows for the national government to establish 'special purposes authorities' to carry out some of the functions that would otherwise be the responsibility of local-level governments.<sup>37</sup> Unlike the Porgerans, who already had a local government council as well as a development authority, the Lihirians only had the one representative body, so the Nimamar Development Authority had to become the Nimamar

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36 The special support grant appeared to be covered by the clause in s 99 which said that the National Government 'may, in accordance with an Act of Parliament or by contract, share with Provincial Governments and Local-level Governments the revenues of the National Government generated from the sources within a province and a local-level government area'. See Filer, n 32 above, at 248.

37 See Colin Filer, 'Horses for Courses: Special Purpose Authorities and Local-Level Governance in Papua New Guinea' (Australian National University, State, Society and Governance in Melanesia Project, Discussion Paper 2004/6).

Local-level Government before some of its functions could be delegated in this way. However, this did not affect the status of the local authority as a party to the integrated benefits package, and section 115 of the new Organic Law went further than the Mining Act in granting local-level governments the right to participate in any future ‘natural resource development forums’.

## **Oil and Gas Act**

After the national election of 1997, the Ministry and Department of Mining and Petroleum was cut in two, mainly because the Petroleum Act of 1977 was in urgent need of revision to cope with proposals to develop the country’s gas reserves. In addition, the passage of the new Organic Law in 1995 had been followed by a series of contentious negotiations over the distribution of benefits derived from the Hides gas project, the Kutubu oilfield and the new Gobe oilfield (see Table 1), and the agreements arising from these negotiations could no longer be treated as variations on the basic mining package. The ‘interrelationships, roles, responsibilities and authorities of sectoral participants in relation to issues affecting the involvement of landowners in petroleum projects’ were initially reviewed by a pair of lawyers engaged as consultants to the new Department of Petroleum and Energy, and their report<sup>38</sup> led to the formation of a ‘Government Policy on Landowner Benefits Action Team’ whose members were drawn from several national government agencies and all key industry players. This body deliberated at length on the principles that should inform the distribution of petroleum project benefits to provincial and local-level governments, as well as to ‘landowners’, and most of its recommendations were incorporated into the Oil and Gas Act passed at the end of 1998.

Section 48 of the Oil and Gas Act defines the development forum for a petroleum project as ‘a meeting to which are invited persons who, in the view of the Minister, fairly represent all persons or organisations which the Minister believes will be affected by that petroleum project’. These are to include the three parties to the development forum prescribed under the Mining Act, along with the developers, the relevant local-level government(s) and ‘any other persons or organisations which the Minister considers would be affected by the petroleum project if the application is granted’. Notwithstanding the precedent set by the Lihir integrated benefits package, the Oil and Gas Act defines a ‘development agreement’ as an agreement between the national government and a lower level of government or a group of ‘project area landowners’. The ground rules for the distribution of benefits between the parties to such agreements are set out in Part IV of the Act (Box 1).

<sup>38</sup> M Taylor and K Whimp, *Report on Land Issues and Hydrocarbon Framework Study* (unpublished report to PNG Department of Petroleum and Energy, 1997).



**Box 1: Principles of benefit distribution under the Oil and Gas Act**

- Section 167 says that the national government will divide an 'equity benefit' (for new projects only) between project area landowners and affected local-level governments in proportions to be agreed between them or (if there is no agreement) in proportions determined by the Minister.
- Section 168 makes the same provision for the distribution of a 'royalty benefit', but includes affected provincial governments among the beneficiaries who need to agree on the division of the spoils.
- Section 170 says that equity and royalty benefits granted to project area landowners shall be shared among them in proportions that are also determined by a development agreement, but makes separate provision for the Minister to skew this distribution in favour of those landowners who have a 'greater or more substantial occupation or right of occupation or are more adversely impacted by the petroleum project'.
- Section 171 allows the national government to provide additional grants 'for the benefit of project area landowners or the people of the project area or the people of the region' under the terms of a development agreement.
- Section 172 says that the royalty benefits granted to more than one provincial government, or the equity and royalty benefits granted to more than one local-level government, in respect of a single project, shall be divided between them 'in proportion to the number of project area landowners who receive those benefits in respect of that project who reside within the jurisdiction' of the different governments.
- Section 173 allows the national government to make additional grants to affected provincial and local-level governments by means of a development agreement, whether 'in the form of monetary payments or in the form of provision of infrastructure or services or other benefits', and treats any spending under the tax credit scheme as a grant of this kind.
- Section 174 limits the total value of the package delivered by the national government to project area landowners and lower levels of government or 'any other persons or organisations' to 20 per cent of the total net benefit which the State derives from a petroleum project.
- Section 176 says that equity benefits granted to project area landowners shall be divided between their incorporated land groups or other representative bodies in proportion to the number of individuals which each one represents.
- Section 176 also says that a minimum of 30 per cent of the net income of the trust set up to hold the equity benefit granted to project area landowners shall be reserved for the benefit of future generations, and a minimum of 30 per cent shall be applied to the provision of public goods and services.



The lawyers who drafted the Oil and Gas Act evidently took the view that the amendments previously made to section 98 of the Organic Law would allow for the 'royalty benefit' derived from a petroleum project to be shared between project area landowners and the other parties to a development forum. On the other hand, when the Act was first gazetted in 1998, section 160 required the developers of new projects to pay 'development levies' to provincial (but not local-level) governments at the rate of two per cent of the value of production. This was equivalent to the value of the special support grant which the national government had previously agreed to divide between the Southern Highlands and Gulf provincial governments in the review of the Kutubu forum agreements in 1996. The wording of the Oil and Gas Act was sufficiently vague to allow for the possibility of either treating these development levies as a substitute for the special support grant or for keeping this type of grant as one of the transfers allowed under section 173. The size of the equity benefit was not specified in the legislation, but the national government had already announced that it would be a two per cent share of any new project, and while it would be held in trust for the beneficiaries, they would not have to pay for it, so would therefore be entitled to receive dividends straight away. The question then was how to work out whether the royalties, development levies, special support grants and tax credit expenditures, all then likely to account for a two per cent share of the value of production, along with the dividends payable on the 'free' two per cent equity share in a new project, would amount to less than 20 per cent of the total revenues collected by the State. Section 174 says that the answer to this question will be provided by a 'cost-benefit analysis' of intergovernmental transfers in accordance with section 116 of the Organic Law. But there was clearly a good deal of space for one two per cent to get confused with another two per cent in the minds of some of the forum participants.

The ground rules for negotiating the distribution of benefits by means of development agreements were less contentious aspects of the new legislation than those clauses that related to the representation of 'landowners' and the management of benefits granted by the State. According to sections 47 and 49, the Minister's decision about who should be invited to represent landowners in a development forum should be guided by 'full-scale social mapping and landowner identification studies'. In its original wording, section 48 defined the landowner participants in a development forum as 'the persons who would be the project area landowners of the petroleum project if the application is granted'. When the Act was amended in 2001, they became 'the persons, incorporated land groups or other entities' (aside from provincial or local-level governments) whom the Minister determines to be the appropriate recipients of royalty and equity benefits under section 169.

At the same time, a new section 169A was added to the Act, which requires the Minister's determination to:

'consider any agreements by persons who are or claim to be project area landowners, the decisions of courts of Papua New Guinea as to ownership of land or rights in relation to land in the vicinity of the petroleum project in question, the results of social mapping and landowner identification studies that have been carried out in accordance with this Act, and submissions from affected Local-level Governments or affected Provincial Governments of the petroleum project in question or from any other person claiming an interest or to be affected by the decision of the Minister.'

These long-winded amendments were themselves evidence of a long series of disputes about the identification, organisation and representation of 'project area landowners' that have surrounded all the petroleum projects in PNG, and have only been exacerbated by the growing value and variety of landowner benefits.<sup>39</sup>

The misrepresentation of landowners and the misappropriation of landowner benefits have also been a problem in the mining sector. The peculiar feature of the petroleum sector is the way in which politicians claiming to be 'project area landowners' have played a leading role in the misappropriation of benefits earmarked for provincial and local-level governments.<sup>40</sup> Section 178 of the Oil and Gas Act says that all grants made in accordance with section 173, and the net income from the equity benefit held in trust for a local-level government, shall only be spent with the approval of

39 See Samuel K Koyama, 'Reducing Agency Problems in Incorporated Land Groups' (2004) 19(1) *Pacific Economic Bulletin* 20-32, and "Black Gold or Excrement of the Devil"? The Externalities of Oil Production in Papua New Guinea', *Pacific Economic Bulletin* 20(1): 14-26. Also Colin Filer, 'Local Custom and the Art of Land Group Boundary Maintenance in Papua New Guinea'; Laurence Goldman, 'Incorporating Huli: Lessons from the Hides Licence Area'; and James F Weiner, 'The Foi Incorporated Land Group: Group Definition and Collective Action in the Kutubu Oil Project Area, Papua New Guinea'; all in *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (J F Weiner and K Glaskin eds, ANU E Press, 2007).

40 In August 2006, the national government declared a state of emergency in Southern Highlands Province after the Ombudsman had referred Governor Hami Yawari to the Public Prosecutor for the misappropriation of benefits payable to local landowners and local-level governments under the terms of the Oil and Gas Act (*The National*, 2 August 2006). The governor's public defence of his own actions rested in part on the claim that he was himself the 'principal landowner' of the Kutubu oilfield, and thus entitled to receive the funds in question (*The National*, 4 August 2006). This claim was strongly denied by other 'landowners' who were local-level politicians aligned with one of the other national MPs from Southern Highlands Province, all of whom supported the state of emergency. Claims and counterclaims were aired in the national press throughout the period preceding the national election of June 2007, when the governor lost his seat.

a national Expenditure Implementation Committee and in accordance with the development plans of the relevant provincial or local-level governments. When the Act was amended in 2001, section 160 was revised to say that development levies should *not* be paid direct to provincial governments but should be paid into a ‘trust fund’ established on behalf of the provincial and local-level governments that would be entitled to this type of benefit. This was another sign of the State’s intent to limit the options for misappropriation at the provincial level, though not one that seems to have had much effect – especially in Southern Highlands Province.

### **New mining packages**

When a separate Department of Mining was created in 1997, its officials took the view that there was no immediate need to amend the Mining Act in order to reflect the innovations of the new Organic Law. During the period in which the Oil and Gas Act was being drafted and amended, the only new mining project for which a development forum had to be convened was the Ramu nickel project in Madang Province. The Ramu Project Memorandum of Agreement (MOA) that was signed in 2000 resembled the Lihir integrated benefits package in the sense that it was signed by the project proponent as well as the other parties to the forum process, but national government officials made sure that it was only concerned with the distribution of ‘benefits’, and did not confuse this with the payment of compensation to local landowners under section 154 of the Mining Act. The Ramu MOA was also a better template for the next generation of mining agreements<sup>41</sup> because it made provision for the payment of development levies required under section 98 of the new Organic Law. This partly explains the willingness of the Madang Provincial Government and the four local-level governments in areas affected by the project to consign 65 per cent of the mining royalties to local landowners, and keep only 35 per cent for themselves.<sup>42</sup> But the more distinctive innovation was the agreement of the parties to assign 80 per cent of the special support grant to the Ramu Nickel Foundation during the first five years of the mining operation. This body would have the same

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41 Most notably the agreements made in respect of the Kainantu and Hidden Valley projects in 2004 and 2005 respectively (see Map 1 and Table 1).

42 The only precedent for this level of generosity was the agreement of the Central Provincial Government (in 1994) to grant local landowners 80 per cent of the royalties from the Tolukuma mine. This was justified by the relatively small size of the project, which meant that local landowners would only be getting a larger share of a smaller pie. See Graeme Hancock, ‘Mining and Sustainable Development: The Status of Mineral Policy in Papua New Guinea’ (paper presented to the PNG Geology, Exploration and Mining Conference, 22-24 June 2001, Port Moresby).

relationship to the Madang Provincial Government as a 'special purposes authority' has to a local-level government: in other words, it would be a statutory body funded out of a range of benefit streams over the course of the mining project cycle, with a mandate to produce and implement development plans for the mine-affected area. Since all the parties to the forum process would be represented on the board, the Development Forum would thus acquire a new kind of institutional expression and a new set of public responsibilities.

Construction of the Ramu nickel mine did not begin until 2006 because the original proponent (Highlands Pacific) had been unable to raise the necessary capital. The PNG government struck a new deal with China's Metallurgical and Construction Corporation whereby the latter would build and operate the mine, and the new operator's commitment to the Ramu MOA remains in doubt. Nevertheless, the consultants who designed the Ramu Nickel Foundation went on to design the Ok Tedi Development Foundation whose establishment was mandated by the Mining (Ok Tedi Mine Continuation (Ninth Supplemental) Agreement) Act of 2001. This was the legislation by which the PNG government excused BHP Billiton from its previous responsibility (and legal liability) for the operation of the Ok Tedi mine while enabling Ok Tedi Mining Ltd (OTML) to sign Community Mine Continuation Agreements with village representatives from six different zones within the mine-affected area. The process by which these agreements were negotiated was not officially regarded as a type of development forum because they were essentially compensation agreements between OTML and the nominated village representatives, but the agreements still bore some resemblance to the Lihir integrated benefits package because each was called an 'Additional Compensation and Benefits Package Agreement'. This title concealed an important difference between the package that already existed in the zone containing the customary owners of the original mining leases and those that existed in the other five zones downstream of the mining operation. The original 'landowners' were directly represented in the forum agreements of 1991, while the people in the other five zones were represented by the Fly River Provincial Government, which promised to use 80 per cent of its special support grant to fund development projects in these areas as if this benefit were a form of compensation for the mine's environmental impact. The Restated Eighth Supplemental Agreement of 1995 made explicit provision for the payment of K110 million in additional compensation to people resident in four of the five downstream zones because of the damage actually caused to the Ok Tedi and Fly River systems, but the original 'landowners' and the people living in one of the 'downstream' zones were excluded from this arrangement because their livelihoods were not directly affected. The

Ninth Supplemental Agreement now put all these people back in the same basket by making the Ok Tedi Development Foundation responsible for spending another K180 million on all the mine-affected communities over the remaining life of the mine.<sup>43</sup>

Since the Ok Tedi mine was then expected to close within a decade, as were the mines at Porgera and Misima, it was now evident that the Development Forum would need to be adapted to the task of negotiating the conditions of mine closure.<sup>44</sup> In 2000, the Department of Mining produced a draft policy document which proposed a new kind of forum to plan the 'social aspects' of mine closure and extended the range of participants to include the representatives of mine-affected communities and 'appropriate NGOs', as well as the 'landholders' in the mine lease areas. The draft policy said that the aim of this exercise would be to sustain 'as many benefits as possible' beyond the life of the mine, but it did not say how this goal would be achieved. A Misima Mine Closure Committee began meeting in 2001, but was evidently unable to reach any agreement on the redistribution of existing benefit streams, let alone to produce a viable plan for sustaining them.<sup>45</sup> Most of the streams dried up when the mine actually closed in 2004.

The operation of the Development Forum in the mining sector was also one of the many policy issues reviewed by a team of consultants engaged to produce a Sustainable Development Policy and Sustainability Planning Framework under the terms of a US\$10 million loan to the PNG government for the Mining Sector Institutional Strengthening Project.<sup>46</sup> Most of this work took place in 2002 and resulted in the production of a green paper at the beginning of 2003.<sup>47</sup> Specific attention was paid to the effectiveness of the forum agreements covering the four large-scale mines then in operation – Ok Tedi, Porgera, Lihir and Misima.<sup>48</sup> Although the green paper included various proposals for improving the management of the forum process and

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43 From this total, 16 per cent was to be paid in cash to community members, 58 per cent to be provided in the form of development projects, and 26 per cent to be invested in trust for future generations.

44 Richard T Jackson, 'Capacity Building in Papua New Guinea for Community Maintenance during and after Mine Closure' (Mining, Minerals and Sustainable Development Project Working Paper 181, 2002).

45 Gary Simpson, 'Sustainable Development Policy and Sustainability Planning Framework for the Mining Sector in Papua New Guinea – Working Paper 6: Institutional Analysis' (PNG Mining Sector Institutional Strengthening Project, 2002).

46 'Project Appraisal Document on a Proposed Loan in the Amount of US\$10 Million Equivalent to the Independent State of Papua New Guinea for a Mining Sector Institutional Strengthening Technical Assistance Project' (World Bank, 2000).

47 'Sustainable Development Policy and Sustainability Planning Framework for the Mining Sector in Papua New Guinea: Green Paper' (PNG Department of Mining, 2003).

48 Since the author was the member of the team responsible for drafting the green paper itself, his summary of the findings will be reserved for the conclusion of this article.

the ‘sustainability’ of its outcomes, the Department of Mining was unable to secure the political and bureaucratic support required to give them some legislative teeth. In 2006, the National Executive Council appointed a new Secretary for Mining who had a history of resisting most of the ‘institutional strengthening’ measures recommended by the World Bank’s various teams of consultants, including the corporatisation of his own department under the terms of the Mineral Resources Authority Act 2005.

One effect of the new Secretary’s rearguard action was to delay the drafting and gazettal of a new Mining Act that should have been accomplished within the framework of the institutional strengthening project. In the most recent draft Bill of March 2006, the new version of section 3 extends the list of automatic forum participants to include:

- the Local-level Governments, if any, within the areas of whose jurisdiction the land the subject of the application for the mining lease is situated; and
- affected communities (including women) for the mining lease and other tenements to which the applicant’s proposals relate; and
- such other persons or bodies prescribed by the regulations.

It also grants the Minister the option of inviting:

‘recognised non-government organizations whose objectives include the protection of affected communities or other similar social or environmental objectives and which organizations are representative of the views of the people of Papua New Guinea.’

‘Affected communities’ are defined as those whose ‘lifestyles, living conditions, welfare or income’ will be affected by a proposed mining operation. The specific mention of women (in brackets) is a concession to the World Bank’s decision to make ‘women and mining’ into a major policy issue by organising two national conferences on the subject in 2003 and 2005.<sup>49</sup>

Part IVA of the draft Bill deals with the MOAs that are meant to be derived from the Development Forum. It is proposed that each new mining project should be the subject of a single agreement between the developer, ‘representatives of the landholders’, and the three levels of government represented in the forum process. This would simply be legal confirmation of the precedents set by the Ramu, Kainatu and Hidden Valley agreements. In contrast to the precedent set by the Lihir integrated benefits package, compensation agreements between the developer and local landowners would be excluded from an MOA. Unlike the Oil and Gas Act, the draft Bill does not say anything about the proportions in which specific types of benefit should

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49 In a previous draft Bill, women living with the area of a proposed mining lease and women of other mine-affected communities were to be granted separate representation in a development forum. Women do not make any other appearance in the draft Bills aside from the wording that allows for the possibility that the Minister may be female.



be distributed between the beneficiaries, but leaves this to be determined by means of a regulation similar to the basic mining package, which is described as a ‘standard form ... which shall be used as a basis for negotiation’. However, the draft Bill says that an MOA, unlike the forum agreements of old, ‘shall take effect, as a legally enforceable contract binding upon the parties to it, from the date of its approval’ by the national government.

### **Conclusion: upside and downsides**

In order to evaluate the effectiveness of the Development Forum as an institution, we need to go back to the question of what it is actually intended to achieve. In the course of preparing a Sustainable Development Policy and Sustainability Planning Framework for the PNG mining sector in 2002, we identified ten key policy issues that would need to be addressed (Box 2). These are comparable to the nine ‘challenges’ addressed in the Mining, Minerals and Sustainable Development project<sup>50</sup> or the ten ‘principles’ in the Sustainable Development Framework adopted by the International Council on Mining and Metals,<sup>51</sup> but they also demonstrate a specific concern with the governance of the mining sector which relates to the fact that this was part of an institutional strengthening project funded by the World Bank. It was understood that a ‘sustainable development policy’ would need to focus on the first five issues, while a ‘sustainability planning framework’ would need to focus on the remaining five issues. The question then is how these issues have or have not been addressed through the institution of the Development Forum, and how that institution might be modified to address them more effectively.

#### **Box 2: Ten key policy issues for the mining sector in PNG**

- (1) The *industry viability* issue asks: ‘What principles should govern relationships between *private investors, the National Government, and civil society* in order for the mining industry to be sustained in a form which makes the most effective possible contribution to sustainable development?’
- (2) The *stakeholder engagement* issue asks: ‘How should *project area stakeholders* in the mining sector be *identified and classified*, and how should their *interests be accommodated* throughout the different stages of the mining project cycle, from exploration through to closure and beyond?’

50 Mining Minerals and Sustainable Development Project, n 1 above.

51 See [www.icmm.com/sd\\_framework.php](http://www.icmm.com/sd_framework.php).



- (3) The *collective benefit* issue asks: ‘What principles should guide negotiations about the distribution of *mineral wealth* between people who belong to the *current generation* of the national population in order for mineral wealth to make the most effective possible contribution to sustainable development?’
- (4) The *future generations* issue asks: ‘What principles should guide negotiations about the distribution of mineral wealth between the current generation and future generations of the national population in order for mineral wealth to make the most effective possible contribution to sustainable development?’
- (5) The *decentralisation* issue asks: ‘What principles should guide negotiations about the distribution of *mineral revenues* between different *levels of government* in order for mineral revenues to make the most effective possible contribution to sustainable development?’
- (6) The *project planning* issue asks: ‘What should be the roles and responsibilities of developers, government agencies, and other stakeholders in *planning the contribution of individual mining projects* to sustainable development in PNG throughout the different stages of the mining project cycle?’
- (7) The *benefit management* issue asks: ‘What should be the roles and responsibilities of developers, government agencies, and other stakeholders in managing the investment of mineral wealth for purposes of sustainable development in the provinces or areas which host major mining projects?’
- (8) The *transparency* issue asks: ‘What should be the roles and responsibilities of developers, government agencies, and other stakeholders in *disseminating information about the distribution and management of mineral wealth* in order for mineral wealth to make the most effective possible contribution to sustainable development?’
- (9) The *dispute resolution* issue asks: ‘What should be the roles and responsibilities of developers, government agencies, and other stakeholders in *resolving disputes arising from the development of major mining projects* in order for the mining industry to make the most effective possible contribution to sustainable development?’
- (10) The *capacity building* issue asks: ‘What should be the roles and responsibilities of developers, government agencies, and other stakeholders in *building the capacity of national and local institutions to manage the mining industry and mineral wealth* for the achievement of sustainable development outcomes?’

Source: PNG Department of Mining, n 45, p 9.

Insofar as the Development Forum opened up the negotiation of development agreements to a wider range of interests at different levels of political organisation, it may have added to the sense of political risk that followed the outbreak of the Bougainville rebellion in 1989 and the litigation that blew up around the Ok Tedi mine in 1995. The result of the Lihir forum negotiations was especially alarming for the mining industry because it showed that the government's fiscal regime could be changed without notice in order to satisfy the demands of one small group of landowners. The amounts of 'compensation' contained in the Lihir integrated benefits package were also unprecedented by both national and international standards. On the other hand, national government officials have made strenuous efforts to limit the impact of forum agreements on corporate bottom lines by using the government's own mineral revenues to meet provincial and local demands for a bigger slice of the mineral pie. The history of the tax credit scheme illustrates the way in which the government has tried to compensate developers for the growing cost of being 'socially responsible' to people in the areas affected by their operations. But the history of the Ok Tedi mine illustrates another point about the cost of mitigating social and environmental damage. This cost has as much to do with uncertainties inherent in PNG's physical environment as with those attached to its fiscal regime or its mineral policy framework. Since the very high cost of transport and communications in this physical environment already adds to the basic cost of production, PNG is unlikely to attract significant foreign investment in the mining and petroleum sectors except in times when commodity prices are also very high or in places where the quality of the resource offsets the total cost of extracting it. From this point of view, the Development Forum has only a marginal impact on the costs and risks of foreign investment.

If the Development Forum is essentially a way of negotiating the redistribution of the government's mineral revenues between different segments of the national population, there is still some uncertainty about the principles which should – or actually do – inform the outcome. The green paper produced for the Department of Mining identified four competing principles behind the actual distribution of mineral wealth between national stakeholders, both within and beyond the institution of the Development Forum (Box 3). In effect, these constitute four possible ways of resolving the 'collective benefit', 'future generations' and 'decentralisation' issues identified as key issues for a sustainable development policy (Box 2).

**Box 3: Principles informing the distribution of mineral wealth between national stakeholders**

- The *compensation* principle says that people who suffer damage to their property, standard of living or quality of life as a direct result of an economic activity should receive a share of the wealth created by that activity which is more than enough to compensate them for their losses.
- The *insurance* principle says that people who have the motivation, capacity and opportunity to disrupt or halt an economic activity should receive a share of the wealth created by that activity which is more than enough to prevent or discourage them from doing so.
- The *fairness* (or equity) principle says that wealth should be divided between the people who are entitled to a share of it in proportions which reflect the extent of their own material needs or the extent of their capacity to use it in ways which meet the needs of other people who are also entitled to a share of it.
- The *derivation* principle says that a national government should transfer some of the revenue which it derives from an economic activity to the lower levels of government responsible for the area where the activity occurs so that these lower levels of government will have an incentive to support that activity.

*Source:* PNG Department of Mining, n 45, p 32.

The green paper suggested that the Development Forum has created an additional space for the national government to make a considerable but variable sacrifice of the principle of fairness to the principles of compensation, insurance and derivation. At the level of formal policy, the contest tends to be represented as a trade-off between the fairness and derivation principles because the compensation and insurance principles cannot be legally applied to the distribution of government revenues. However, when government officials praise the ‘flexibility’ of the forum process, they are tacitly acknowledging the fact that different local interest groups have a differential capacity to bargain for additional benefits by invoking one or other of these principles. Once this point is granted, the application of the derivation principle can hardly be justified at all, since it only generates a huge disparity between the amounts of money promised by the national government to those provincial governments that happen to be hosting a major resource project and the amount allocated to those that have not had such a lucky break. One of the more progressive aspects of the

new Organic Law was its apparent repudiation of the derivation principle, but provincial governments have continued to collect mineral royalties and special support grants from the national government as ‘under-the-table’ payments warranted by forum agreements but not covered by the national budget. Public servants have tried to halt or delay some of these flows, but most Members of Parliament prefer the smell of a pork barrel to a more transparent and equitable allocation of government revenues.<sup>52</sup>

The social construction of the Development Forum as a periodic dispute about the distribution of mineral wealth has if anything been an obstacle to the achievement of broader participation in the process of planning and managing the use of these contested resources. The national policy framework is fairly clear about what needs to be done at different stages in the resource project cycle and what criteria should be applied to the measurement of success, but the components of a ‘sustainability planning framework’ have not actually been joined together in a way that makes it clear how each is related to the rest or where there are gaps that need to be filled by additional institutions. The green paper noted the disconnection between the Development Forum and the process of social impact assessment and monitoring required under the Environment Act. It also observed that the forum could not become a planning institution unless it could deal with a ‘baseline planning study’ of the area to be affected by a project and then take some responsibility for sustainable development plans to be implemented during the project’s operational life (see Figure 1). As matters stand, the nearest approximation to ‘community sustainable development plans’ are the plans made by developers to meet their own social responsibilities. Even the district and local government planning process enjoined by the new Organic Law is normally revealed as a hollow form of wishful thinking when it takes place in the vicinity of a major resource project.

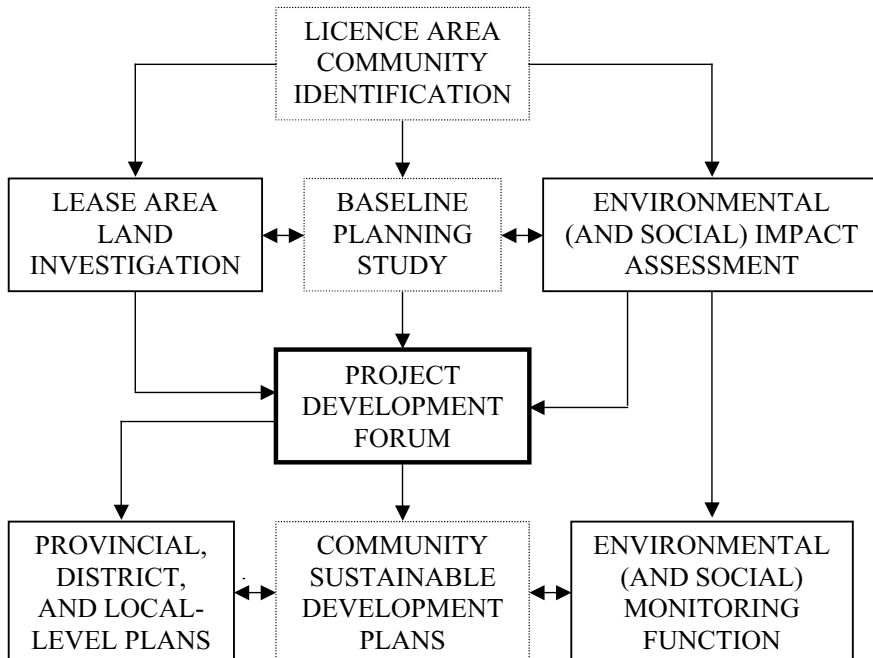
Of course, it is no easy matter to integrate an institution designed for the negotiation of benefit-sharing agreements with those designed for the production and implementation of development plans at any level of political organisation. But no agreement made as part of the development approval process can be treated as a substitute for the transparent and effective management of benefit streams that begin to flow at the end of the project construction phase. While company managers can be held to account for the way they implement social and economic development programmes for local communities, community members are generally unable to hold their

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52 The PNG chapter of Transparency International now estimates that more than one-third of the national government’s total domestic revenues is ‘stolen’ by politicians *and* public servants, and that much if not most of this money is diverted to the business of getting elected or re-elected to the national parliament (*Post Courier*, 7 December 2007).

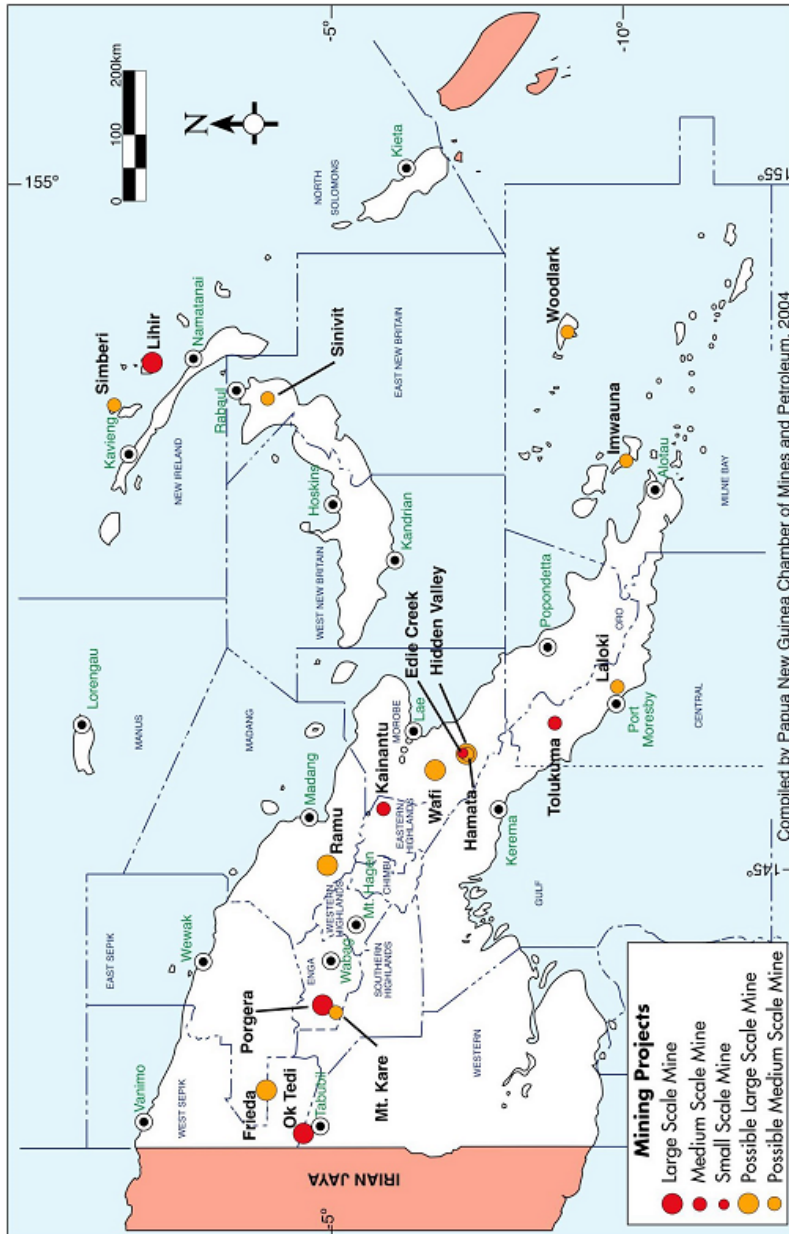
own leaders to account for the management of any cash benefits bestowed on them by the government. At the same time, national government officials have often been unable to prevent the misappropriation of mineral revenues devolved to accounts controlled by provincial governors and their political allies, some of whom may be community representatives involved in the diversion of benefit streams at a smaller political scale. As the actual distribution of benefits comes to diverge from that envisaged in the original forum agreements, disaffected community members may seek alternative representation in a second or third forum convened to review the substance of those agreements, but the former batch of community leaders can rarely be dislodged if they are still alive and well. The normal strategy of the ‘old hands’ is to counter popular discontent by demanding an increase in the size of the benefit streams which they have previously been manipulating to their own personal advantage. Government officials have found it very hard to construct a forum review process that does anything more than grant some concession to these demands.

**Figure 1: The place of the Development Forum in a sustainability planning framework**

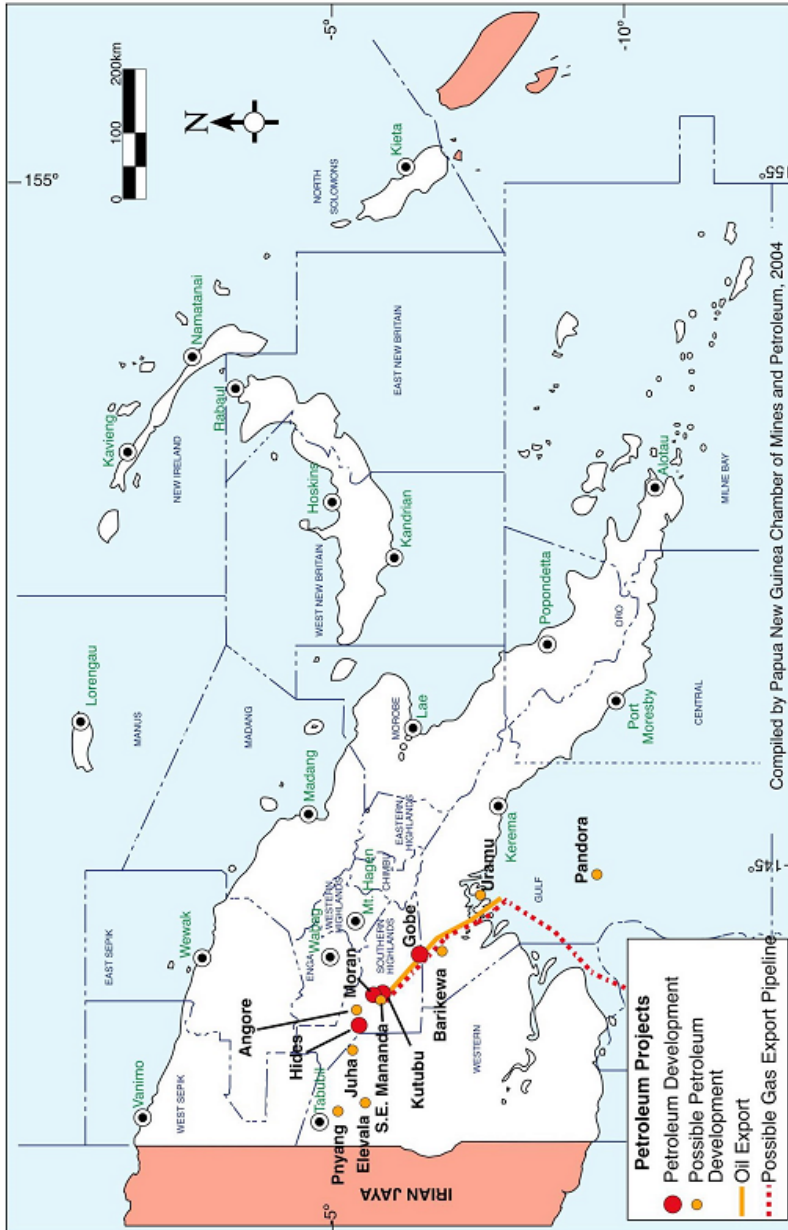


Source: PNG Department of Mining, n 45, p 46.

Map 1: Actual and potential mining projects in Papua New Guinea



**Map 2: Actual and potential petroleum projects in Papua New Guinea**







# **Five Principles for the Management of Natural Resource Revenue: the Case of Timor-Leste's Petroleum Revenue**

By Jennifer Drysdale<sup>1</sup>

*Natural resource revenue management is a challenge for poor countries dependent on the exploitation of their natural resources to achieve sustainable development. A review of the literature reveals that five principles for the management of natural resource revenue recur in the discussion: responsibility for petroleum revenue management is defined; all natural resource revenue is received by the state; natural resource revenue is invested wisely; natural resource revenue is managed transparently; and some natural resource revenue benefits future generations. Countries that manage their natural resource revenue based on these five principles are more likely to avoid the problems associated with an influx of natural resource wealth and achieve sustainable development. Timor-Leste is used as a case to explore these five principles. Timor-Leste is dependent on its petroleum revenue, and established a Petroleum Fund Law with the aim of managing its wealth wisely, and for the benefit of future generations. But Timor-Leste has all the hallmarks of a country that would be unable to manage its natural resource revenue wisely. Timor-Leste's troubled history has rendered its state institutions weak, and conflict, corruption and financial mismanagement exist. This article explores whether the Government of Timor-Leste's plans to manage its petroleum revenue fulfil the five principles of natural resource revenue management.*

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Poor countries that are dependent on natural resource revenue are often hampered in their pursuit of sustainable development owing to weak formal institutions and governance. Such institutional deficiencies may exist regardless of the presence of natural resource wealth. But an influx of natural resource wealth into such an institutional environment can also be the cause of corruption, conflict and an increase in financial and macroeconomic mismanagement, which leads to economic decline. For these reasons, great natural resource wealth is often considered a curse. As a result of the problems caused by natural resource wealth in poor countries, experience and knowledge about mechanisms to manage natural resource revenue has increased. The discussion has revealed five principles that appear common to countries' attempts to manage their natural resource revenue to achieve sustainable development. Thus, this article proposes that a natural resource revenue-dependent state must observe five principles of natural resource revenue management in order to achieve sustainable development. Those five principles are that:

- (1) responsibility for petroleum revenue management is defined;
- (2) all natural resource revenue is received by the state;
- (3) natural resource revenue is invested wisely;
- (4) natural resource revenue is managed transparently; and
- (5) some natural resource revenue benefits future generations.

Timor-Leste is a poor country and is dependent on its petroleum resources to sustain its development. Timor-Leste established a Petroleum Fund Law in August 2005 to institutionalise some mechanisms that may assist the country to manage its petroleum revenue wisely.<sup>2</sup> A recent review of 32 sovereign wealth funds ranked Timor-Leste's Petroleum Fund third (following New Zealand and Norway) based on its structure, governance, transparency and accountability, and behaviour.<sup>3</sup> Timor-Leste's mechanisms to manage its petroleum revenue may be well regarded but, in general, its state institutions are weak. Timor-Leste's troubled history of colonisation and occupation has provided it with a poor track record of conflict, corruption and financial mismanagement, regardless of its natural resource wealth. After five years of independence, despite much progress, its formal institutions are still being developed.

This article begins by providing a summary of the institutional setting in which petroleum revenue management decisions are made in Timor-Leste, the contribution of petroleum resources to Timor-Leste's economy, an overview of petroleum revenue management in Timor-Leste and its institutions today. Then, each of the five principles of natural resource revenue management

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2 Democratic Republic of Timor-Leste, Petroleum Fund Law (Dili, 2005).

3 Edwin M Truman, *A Scoreboard for Sovereign Wealth Funds* (Peterson Institute for International Economics, Washington, DC, 2007).

is explored in terms of how Timor-Leste's Petroleum Fund Law and its other institutions attempt to address them. Ultimately, the article provides an overview of five aspects of petroleum revenue management to which stakeholders must pay attention to ensure Timor-Leste's sustainable development.

### **Timor-Leste's institutional history**

To understand a state's potential to manage its natural resource wealth wisely, it is necessary to explore its institutional dynamics over time, particularly if there have been significant impacts or watershed moments that have defined those institutions. The Portuguese colonised Timor-Leste for over 450 years, the Indonesians occupied Timor-Leste for 24 years and the United Nations administered Timor-Leste for two-and-a-half years. Although Timor-Leste's petroleum resources were not exploited to any great extent until it gained independence in 2002, both the Portuguese and the Indonesians left profound institutional legacies (both formal and informal) which will affect the way Timor-Leste manages its petroleum revenue today.<sup>4</sup>

As the most distant of Portugal's colonies, Timor-Leste, its administration and its people were neglected by their colonisers. Portugal brought Catholicism to Timor-Leste, exploited its sandalwood and coffee resources, and perpetuated a system that distinguished an 'elite'. Then, in 1974, a coup in Lisbon brought the end of the Salazar-Caetano regime and Portugal left its colonies to their own devices. Timor-Leste was left with little in the way of a functioning state, and it was not long before conflict between local political parties erupted. Today, Timor-Leste is evidently a former Portuguese colony. Several institutional, social and cultural connections confirm that Timor-Leste's ties to its former coloniser are strong. For example, Portuguese is one of Timor-Leste's two official languages, and the constitution is based on Portugal's. Further, a Portuguese-Timorese elite remains, which distinguishes a divide between the rich and the poor. Some suggest the mismanagement of natural resource wealth is more likely when the distribution of wealth is less diffuse, so this divide may be problematic.<sup>5</sup>

Indonesia's occupation of Timor-Leste was shorter than Portuguese

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4 Although petroleum was identified in Timor-Leste in the 1940s, the Portuguese and the Indonesians only got so far as to negotiate with Australia over who had rights to exploit the resources. Some onshore seeps were exploited by local communities prior to independence and it is suggested that the Japanese used these seeps during World War II. See Jennifer Drysdale, *Sustainable Development of Resource Cursed? An Exploration of Timor-Leste's Institutional Choices*, PhD Thesis, Fenner School of Environment and Society, Australian National University, Canberra.

5 See Michael Woolcock, Lant Pritchett and Jonathan Isham, 'The Social Foundations of Poor Economic Growth in Resource-rich Countries', in Richard Auty (ed), *Resource Abundance and Economic Development* (Oxford, 2001).

colonisation, but because of the scale of violence and oppression perpetrated more recently, the ramifications of Indonesian occupation are felt more acutely today. Estimates of the number of East Timorese killed vary, but range between 100,000 and 200,000 (around one-fifth of the population).<sup>6</sup> Many East Timorese bore witness to the atrocities of this period of Timor-Leste's past and a lack of justice for the serious crimes that were committed then remains a thorn in the side for many today.

The trauma and tension among the East Timorese community have resulted in several instances of conflict in the period of independence, such as the riots of December 2004, in which several businesses and houses were burned. Then, in April 2006, a civil crisis erupted in Timor-Leste. The extent of the conflict took some by surprise, including the horror of an armed confrontation between soldiers of the Defence Force of Timor-Leste and East Timorese police, which left nine people dead and 27 injured. Investigations revealed that the institutions of security were too weak and unable to address the problems, and that 'political competition within Timor-Leste has been historically settled through violence'.<sup>7</sup> The unfortunate reality is that the violent form of dispute resolution, preferred by aggressive male-dominated factions, is well-entrenched in Timor-Leste's culture. A correlation between conflict and natural resource wealth has been well made by several authors.<sup>8</sup> Thus, it is important to consider that the existing conflict and forms of dispute resolution resorted to in Timor-Leste may ultimately be detrimental to the wise management of its petroleum revenue.

Resource-rich economies have also been identified as more subject to corruption than resource-poor economies.<sup>9</sup> At the time Indonesia occupied Timor-Leste (in 1999), Indonesia was ranked 97th of 99 countries in Transparency International's Corruption Perceptions Index, followed by two other resource-rich economies, Nigeria and Cameroon.<sup>10</sup> The Indonesian

6 Dunn estimates that during 24 years of Indonesian occupation 200,000 East Timorese people were killed. See James Dunn, *East Timor: A Rough Passage to Independence* (Sydney, 2003). The Commission for Reception, Truth and Reconciliation reported that 'The minimum figure for the number of conflict-related deaths during the Commission's reference period 1974-1999, is 102,800 (+/- 12,000)'. See Commission for Reception Truth and Reconciliation, *Chega! The Report of the Commission for Reception, Truth and Reconciliation Timor-Leste Executive Summary* (Dili, 2005).

7 United Nations, *Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste* (Geneva, 2006).

8 Ian Bannon and Paul Collier, *Natural Resources and Violent Conflict* (Washington, 2003); Thandika Mkandawire, 'The Terrible Toll of Post-colonial "Rebel Movements" in Africa: Towards an Explanation of the Violence Against the Peasantry' (2002) 40(2) *Journal of Modern African Studies* 181-215.

9 Aaron Tornell and Philip R Lane, 'The Voracity Effect' (1999) 89(1) *American Economic Review* 22-46.

10 Transparency International, 'Corruption Perceptions Index', [www.transparency.org/](http://www.transparency.org/)

way of conducting business and government known as 'KKN' (corruption, collusion and nepotism) is also apparent in Timor-Leste today.<sup>11</sup> For example, Guterres explains that the Fretilin Government politicised the bureaucracy by employing party members without proper recruitment procedures.<sup>12</sup>

Timor-Leste's stocks of human capital were also affected by Indonesian occupation as the majority of the senior positions in the government were held by Indonesians. When independence arrived there were few East Timorese with the skills to run, let alone establish, a government, and this affected the development of Timor-Leste's formal institutions. As a result, the implementation of government programmes has been slow, and budget execution has been poor with general weaknesses in areas of financial management, such as procurement. The lack of human capital is also particularly acute in terms of petroleum resource and petroleum revenue management, thus these areas are heavily supported by foreign advisers.

Despite their troubled history, the East Timorese people have shown great courage, strength and determination in pursuing their country's independence. They have succeeded in establishing many of the institutions of state (eg a constitution, the Parliament) and put in place complex bureaucratic mechanisms (eg a census, car registration). In general, Timor-Leste's institutions exhibit weaknesses because of their nascent nature, but the mechanisms established to manage petroleum revenue appear relatively robust. An indication of the strength of the Petroleum Fund as an institution is that petroleum revenue management did not become the focus of grievances, and mechanisms to manage petroleum revenue were not subverted during the 2006 crisis.

In June 2007, Parliamentary elections were held in Timor-Leste and an alliance of smaller parties (the Parliamentary Majority Alliance) won control of the government, placing the previous majority party, Fretilin (responsible for developing the Petroleum Fund Law), in opposition. Members of the new government, including the Prime Minister, Xanana Gusmão, announced during the election campaign that they would manage Timor-Leste's petroleum revenue differently to Fretilin. This period in Timor-Leste's history will highlight the quality of its institutions and demonstrate, in particular, whether the petroleum revenue management institutions that Fretilin established can withstand political change.

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policy\_research/surveys\_indices/cpi (accessed 5 November 2007)

11 Although there is no evidence of large-scale corruption, Timor-Leste is currently ranked 123rd of 179 countries in Transparency International's 2007 Corruption Perceptions Index. See Transparency International, n 9 above.

12 Francisco da Costa Guterres, *Elites and Prospects of Democracy in East Timor*, Masters Thesis, Department of International Business and Asian Studies, Griffith University, Griffith Business School.

## Timor-Leste's petroleum resources, petroleum revenue and institutions today

Timor-Leste is blessed with oil and gas deposits both on and offshore; however the development of its various petroleum provinces differs in terms of their size, development status and the nature of their institutional and administrative arrangements. To date, Timor-Leste's petroleum revenue has been earned from the exploitation of petroleum resources in an area of the Timor Sea jointly managed by Timor-Leste and Australia, the Joint Petroleum Development Area (JPDA). The history of negotiations over Timor-Leste's petroleum resources is relevant to this discussion but has been explored elsewhere.<sup>13</sup> Most important to note is that a permanent maritime boundary has never been established between Timor-Leste and Australia. Instead, the Timor Sea Treaty prescribes the management of revenue from the JPDA.<sup>14</sup> Timor-Leste receives 90 per cent and Australia ten per cent of the revenue from petroleum field production within the JPDA. Elang/Kakatua/Kakatua North and Bayu-Undan petroleum fields sit entirely within the JPDA. Elang/Kakatua/Kakatua North is almost exhausted while Bayu-Undan is estimated to contain 400 mm bbls of liquids and 3.4 tcf of gas.<sup>15</sup>

A larger field, the Greater Sunrise gasfield, sits 20 per cent inside the JPDA, which means, in theory, Timor-Leste would receive just 18 per cent of the production revenue from this field under the Timor Sea Treaty. However, the Government of Timor-Leste did not accept this arrangement and negotiated forcefully with Australia to achieve a better deal. Ultimately, Timor-Leste and Australia agreed, pursuant to the Certain Maritime Arrangements in the Timor Sea Treaty, to share the revenue from Greater Sunrise equally between Timor-Leste and Australia.<sup>16</sup> Greater Sunrise is the largest of Timor-Leste's petroleum fields identified to date, and is estimated to contain 350 mm bbls of liquids and 7.7 tcf of gas.<sup>17</sup> Timor-Leste also has petroleum resources both onshore and in offshore areas, which are yet to be formally exploited and the

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13 Alex Munton, *A Study of the Offshore Petroleum Negotiations Between Australia, the UN and East Timor*, PhD Thesis, Department of International Relations, Research School of Pacific and Asian Studies, ANU, Canberra.

14 Government of East Timor and Government of Australia, *Timor Sea Treaty* (2002).

15 Amandio Gusmão Soares, 'Timor-Leste Petroleum Sector – an Overview of Timor-Leste's Resources', *From the Wellhead to the Budget Petroleum Revenue Workshop* (Dili, 2006).

16 This agreement was reached because Timor-Leste and Australia could not agree to a permanent maritime boundary. Under the CMATS Treaty, the resolution of a permanent maritime boundary will be deferred for at least 50 years. See Government of the Democratic Republic of Timor-Leste and Government of Australia, *Certain Maritime Arrangements in the Timor Sea (CMATS) Treaty* (2006).

17 Amandio Gusmão Soares, 'Timor-Leste Petroleum Sector – an Overview of Timor-Leste's Resources', *From the Wellhead to the Budget Petroleum Revenue Workshop* (Dili, 2006).



revenue from these fields would be 100 per cent East Timorese.<sup>18</sup> Timor-Leste can expect to receive a great deal more revenue from the exploitation of its petroleum resources in the future, which supports the case for its government to establish strong institutions for petroleum revenue management now.

The Government of Timor-Leste is heavily dependent on petroleum revenue to fund its minimal budget. In the last full financial year the state budget was US\$316 million and US\$260 million (82 per cent) of that budget was withdrawn from the Petroleum Fund.<sup>19</sup> During the six-month transitional budget (July-December 2007), the government expects to receive approximately half a billion dollars in petroleum revenue, while domestic receipts are expected to total just US\$19 million. As at 30 September 2007, Timor-Leste's Petroleum Fund had accumulated US\$1.8 billion from the exploitation of these fields.<sup>20</sup> Based on the revenue expected to be earned from the petroleum fields currently in production, Timor-Leste expects to earn US\$8.9 billion over the next 20 years or so.<sup>21</sup> The scale of Timor-Leste's petroleum dependency is proportionate to the challenge it faces in managing its petroleum revenue sustainably; both are enormous.

The Government of Timor-Leste aims to manage its petroleum revenue sustainably and, following an extensive period of consultation, established its Petroleum Fund Law to achieve that aim.<sup>22</sup> The Law specifies that management of the Petroleum Fund shall be in accordance with the principle of good governance for the benefit of current and future generations, and was promulgated by the President, without amendment, on 3 August 2005, almost five years after Timor-Leste received its first petroleum royalty payment. This was the first occasion on which an Act had been passed unanimously by the Parliament of Timor-Leste, thereby symbolising parliamentary unity on this

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18 In 2005, 11 acreage areas were released for exploration in Timor-Leste's offshore area. Five areas have since been awarded to companies for exploration. Exploration began in some areas in 2006 with production (dependent on discovery) expected in 2013. See Amandio Gusmão Soares, *Media Release: Timor-Leste Offshore Bid Round* (Ministry of Natural Resources, Minerals and Energy Policy, Democratic Republic of Timor-Leste, 2006).

19 The most recently presented budget (by the new Government of Timor-Leste) is a transitional one that applies for only six months until the end of December 2007. The transitional budget is US\$117 million and the Parliament has proposed that US\$40 million of that be withdrawn from the Petroleum Fund. See Republic of Timor-Leste, *State Budget for the Transition Period 1 July to December 2007* (Ministry of Finance, 2007).

20 Venâncio Alves Maria and Abração de Vasconcelos, *Quarterly Report: Petroleum Fund of Timor-Leste for the Quarter Ended 30 September 2007* (BPA, 2007).

21 In addition to the current value of the Petroleum Fund, Timor-Leste's estimated petroleum wealth includes the net present value of future petroleum revenue of US\$7.5 billion. See Republic of Timor-Leste, n 17 above.

22 An analysis of this consultation process can be found in Jennifer Drysdale, 'Portrait of a Petroleum Fund Consultation', in Damien Kingsbury and Michael Leach (eds), *East Timor Beyond Independence* (Melbourne, 2007).

important issue of petroleum revenue management. The Petroleum Fund Law establishes the Petroleum Fund for Timor-Leste, which sets the parameters for operation and management of the Petroleum Fund, governs the collection and management of receipts associated with petroleum wealth, regulates transfers to the state budget, and provides for government accountability and oversight of these activities.

Other institutions are designed to investigate corruption and hold government officials to account. The Office of the Inspector General was established in July 2000 and sits under the Office of the Prime Minister. The Inspector General's role is to conduct reviews and examinations of maladministration and corruption within the government. The institution of the Office of the Inspector General remains weak. A former Prime Minister (Jose Ramos Horta) cited 'major hurdles', the lack of an Organic Law and a lack of office space as examples of its weaknesses.<sup>23</sup> The Office of the Ombudsman for Human Rights and Justice is another institution designed to enhance accountability. The Statute of the Office of the Ombudsman for Human Rights and Justice was enacted in May 2004.<sup>24</sup> Under article 5.3, the stated purpose of the Office of the Ombudsman (also known as the Provedor) is 'to combat corruption and influence peddling, prevent maladministration and protect and promote human rights and fundamental freedoms of natural and legal persons throughout the national territory'. The Offices of the Inspector General and the Ombudsman are supposed to work closely together; however there is no formal arrangement as to the distinction of their responsibilities. The Ombudsman appears to have a more independent and wide-ranging role and the Inspector General more of an internal mechanism within the government, but the review of the Alkatiri Initiative noted that these two institutions overlapped in their responsibilities.<sup>25</sup> Of further concern are the widely reported weaknesses<sup>26</sup> of the judicial system and recent reports of abuse of the position of the Prosecutor General.<sup>27</sup> In theory, these institutions

23 Joel Maria Pereira, *Media Release: Singapore Cooperation Program to Support the Office of the Inspector General* (Office of the Prime Minister, Democratic Republic of Timor-Leste, Dili, 2006).

24 Democratic Republic of Timor-Leste, *Statute of the Office of the Ombudsman for Human Rights and Justice* (Dili, 2004).

25 Shabbir Cheema, Bertrand de Speville, Terhi Nieminen-Mäkynen, David Matiske and Peter Blunt, *Strengthening Accountability and Transparency in Timor-Leste: Report of the Alkatiri Initiative Review* (World Bank and UNDP, 2006).

26 See Mary Greer, Alexander Gupman, Paul Keogh and Susan Pologruto, *Rule of Law in Timor-Leste* (American Bar Association, Freedom House, AusAID and USAID, 2007); United Nations Integrated Mission in Timor-Leste, *Report on Human Rights Developments in Timor-Leste: August 2006 – August 2007* (Human Rights and Transitional Justice Section, Dili, 2007).

27 On 24 October 2007 a local East Timorese newspaper, the *Timor Post*, reported that

should support, but their current weaknesses are more likely to hamper, the wise management of Timor-Leste's petroleum revenue.

### **Five principles of wise natural resource revenue management**

This section measures the performance of Timor-Leste's Petroleum Fund Law and its other institutions against each of the five principles of natural resource revenue management. There is an assumption that a Natural Resource Fund (NRF) can ensure the wise management of natural resource revenue, but research has shown that in a weak institutional setting, the establishment of an NRF is not a guarantee of wise natural resource revenue management.<sup>28</sup> Thus, it is important that Timor-Leste's petroleum revenue managers, decision-makers and civil society are aware of the problems and pitfalls that can occur within a weak institutional setting.

#### ***Principle 1 – responsibility for petroleum revenue management is defined***

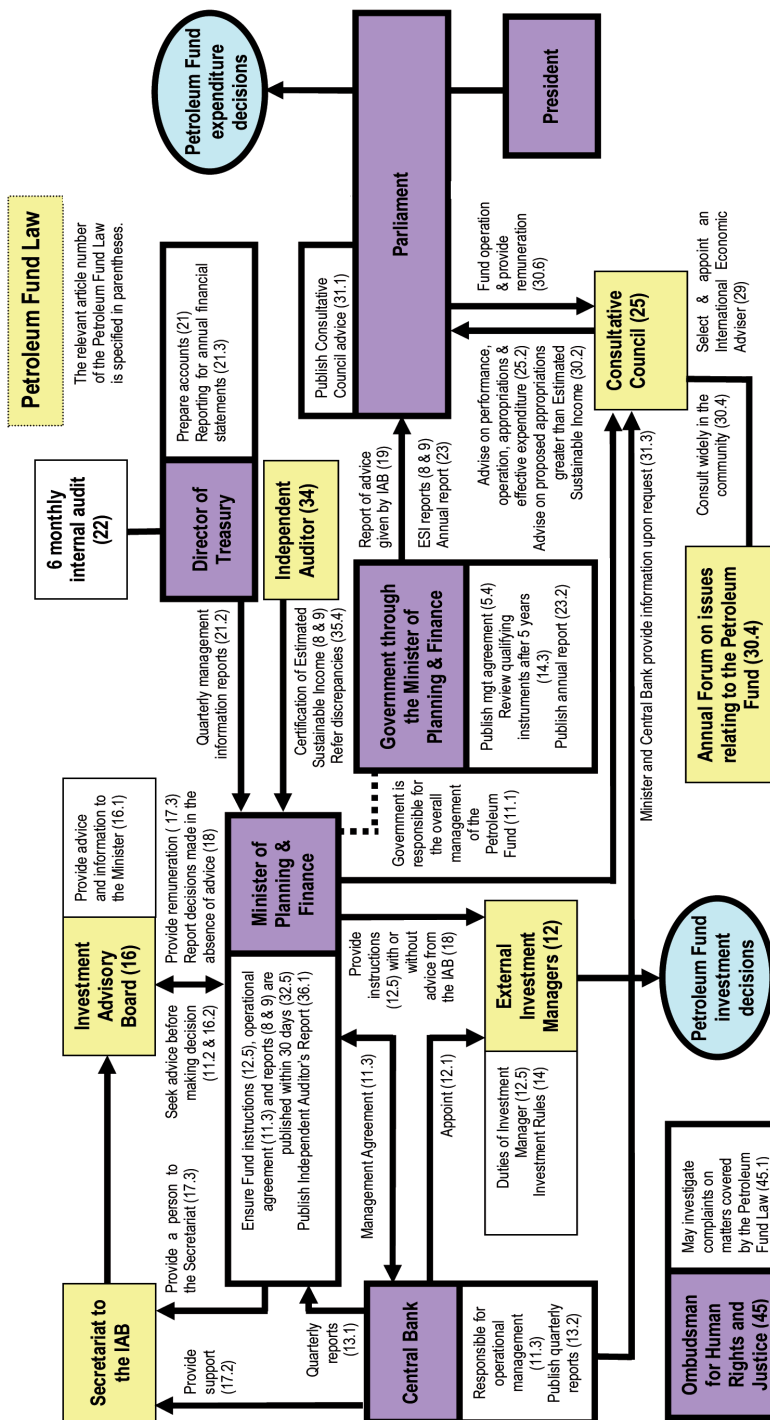
The links between Timor-Leste's institutions and their responsibilities under the Petroleum Fund Law are identified in Figure 1. The Ministry of Planning and Finance, the Treasury, the Parliament, the Central Bank and the Ombudsman for Human Rights and Justice are all separately established government institutions that have responsibilities under the Petroleum Fund Law. The Investment Advisory Board (the IAB, and its secretariat), the external investment managers appointed by the Central Bank, the Consultative Council and the Independent Auditor are institutions specifically established under the Petroleum Fund Law. Figure 1 specifies the relevant article of the Petroleum Fund Law to which each institution pertains.

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the Parliament had 'recommended that the court undertake an in depth investigation of the Prosecutor General of the Republic Longuinhos Monteiro in relation to his involvement in a political conversation with former Member of Parliament Leandro Isaac'. A transcript of the mobile telephone conversation had been circulated and members of Parliament allege the Prosecutor General had made comments that were 'contrary to his supposedly independent position in delivering justice and to undertake his role with impartiality'; Anon, 'National Parliament recommends investigating Longuinhos' in *Timor Post* (Dili, 2007).

28 U Fasano, *Review of the Experience with Oil Stabilization and Savings Funds in Selected Countries* (IMF, Washington DC, 2000); Macartan Humphreys and Martin E Sandbu, 'How Natural Resource Funds Can (and Cannot) Help', in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds), *Escaping the Resource Curse* (New York, 2007); J M Davis, R Ossowski and O Fedelino, *Fiscal Policy Formulation and Implementation in Oil-producing Countries* (2003).

**Figure 1: Linkages between Timor-Leste’s institutions and their responsibilities under Timor-Leste’s Petroleum Fund Law**



The figure illustrates that all of these institutions are ultimately bound by commitments to the Minister of Planning and Finance who is a central figure in the management of Timor-Leste's petroleum revenue. The majority of actions taken under the Petroleum Fund Law are taken by the Minister, or on the Minister's behalf. The government departments responsible for actions under the Law are accountable to this Minister. The Minister also has enormous power in terms of the decisions that are made with regard to petroleum revenue management.<sup>29</sup> With regard to the actual Petroleum Fund, the Central Bank remains responsible for the operational management of the Petroleum Fund, but under a management agreement with the Minister of Planning and Finance (Article 11). The Minister, along with the Prime Minister, are both signatories to the Petroleum Fund account held in the Federal Reserve of the United States.

Despite the power of the Minister and the Prime Minister with respect to petroleum revenue, neither is specifically held accountable under the Petroleum Fund Law. In the draft Petroleum Fund Act, the Minister of Planning and Finance had overall responsibility for the management of the Petroleum Fund and reported to the Prime Minister. However, under the Petroleum Fund Law that was subsequently promulgated, 'The Government is responsible for the overall management of the Petroleum Fund' (Article 11.1). The Petroleum Fund Law defines a limited number of penalties (in Chapter VII) but, to date, despite several transgressions of the Law (for example, the timeliness of publication of reports and delays establishing institutions such as the Investment Advisory Board and the Consultative Council) no matters have been brought to the attention of either the Ombudsman or the Inspector General, let alone proceeding to court.

### ***Principle 2 – all natural resource revenue is received by the state***

A natural resource fund is an institution that distinguishes natural resource revenue from other revenue. In theory, by establishing a natural resource fund a state illustrates its intention to distinctly manage the revenues from the exploitation of its natural resources, and this is a first step in accounting for such revenue separately. Where no natural resource fund exists, it is more difficult to determine how much revenue is received from the exploitation

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29 For example, Art 11.2 states that the Minister shall not make any decisions in relation to the investment strategy or management of the Petroleum Fund without first seeking the advice of the Investment Advisory Board (IAB). However, Art 18 explains that in the absence of advice from the IAB, or if there is insufficient time to seek their advice, the Minister is able to proceed with making her decision. If this were to happen, the Minister is required to report the making of the decision to the IAB (Art 18.3).

of natural resources, or how the revenue is spent (or misspent), particularly where institutions are weak.

Timor-Leste's Petroleum Fund Law stipulates that all petroleum revenue should be deposited into the Petroleum Fund, which is an earmarked receipts account held by the Central Bank (Article 6). Other than management expenses paid to the Central Bank, the only transfers out of the Petroleum Fund are electronic transfers 'to the credit of a single State Budget account' (Article 7.1). These transfers (or appropriations) must be approved by Parliament, and take place only after the publication of the Budget Law (Article 7). The fact that the Petroleum Fund is integrated with the budget means the mechanism is clear, and therefore simple for civil society to understand and to monitor. Other countries have developed much more complex models that hamper wise petroleum revenue management. Under Timor-Leste's Petroleum Fund Law, petroleum revenue is called 'petroleum fund receipts' and defined under Article 6 (Figure 2). Timor-Leste's definition of petroleum revenue appears to be encompassing. However, the definition assumes that all petroleum revenue is received by Timor-Leste (the Government).

The definition of what constitutes petroleum revenue must be known and commonly understood, and the definition should be as comprehensive as possible, or rent-seekers will exploit loopholes to achieve their ends. Definitions of petroleum revenue or, rather, the revenue that must be deposited into a country's petroleum fund, can differ markedly. Gary and Reisch<sup>30</sup> claim that in Chad, much of the oil revenue falls outside the law because Chad's Revenue Management Law applies to only three fields (Komé, Miandoum and Bolobo).<sup>31</sup> Further, only direct revenue (dividends and royalties) must be deposited into Chad's Petroleum Fund, while so-called indirect revenue (taxes and customs duties on oil production) goes into the nation's public accounts (in theory). Potential gaps in Timor-Leste's definition of petroleum revenue are yet to be tested. But scenarios exist in which revenue that might be considered petroleum revenue by some, under Article 6, will not be deposited into the Petroleum Fund. For example, petroleum companies and countries working bilaterally with Timor-Leste contribute revenue to 'local content' projects under production sharing contracts and memorandums of understanding but the revenue from these projects does not flow through the Petroleum Fund.<sup>32</sup> To the government and their partners in these projects this revenue may appear distinct from

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30 Ian Gary and Nikki Reisch, *Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State* (Catholic Relief Services and Bank Information Center, 2005).

31 Government of Chad, Revenue Management Law (1999).

32 See Drysdale, n 3 above.

‘petroleum fund receipts’ under the Petroleum Fund Law but, in practice, with less well-intentioned decision-makers, this arrangement could provide an opportunity for petroleum companies and states with which Timor-Leste has bilateral relationships to provide funds to corrupt decision-makers to achieve their own ends under the auspices of a ‘local content’ project. Thus, additional mechanisms to monitor and report revenue associated with such projects may be required.

### **Petroleum Fund Law – Article 6**

6.1 The following amounts are Petroleum Fund gross receipts:

- (a) the gross revenue, including Tax Revenue, of Timor-Leste from any Petroleum Operations, including prospecting or exploration for, and development, exploitation, transportation, sale or export of petroleum, and other activities relating thereto;
- (b) any amount received by Timor-Leste from the Designated Authority pursuant to the Treaty;
- (c) any amount received by Timor-Leste from the investment of Petroleum Fund Receipts;
- (d) any amount received from direct or indirect participation of Timor-Leste in Petroleum Operations; and
- (e) any amount received by Timor-Leste relating directly to petroleum resources not covered in paragraphs (a) to (d) above.

6.2 In the event that Timor-Leste participates in Petroleum Operations indirectly, as provided for in paragraph 6.1(d), through a national oil company, the receipts of the Petroleum Fund shall include the following:

- (a) any amount payable by the national oil company as tax, royalty or any other due in accordance with Timor-Leste law; and
- (b) any amount paid by the national oil company as dividend.

6.3. From the amount received in accordance with Section 6.1, the Central Bank shall be entitled to deduct, by direct debit of the Petroleum Fund account, any reasonable management expenses, as provided for in the operational management agreement referred to in Section 11.3.

**Figure 2: The definition of petroleum fund receipts under Timor-Leste’s Petroleum Fund Law**



In addition, the Petroleum Fund Law does not require companies to publish what they pay to the government, or to individuals (inside or outside the government). Thus, it is not possible to audit any such amounts received under this Law. If an individual were to receive a payment from a petroleum company, the individual could argue that it was not a petroleum fund receipt under the definition. The Timor Sea Designated Authority (TSDA) (responsible for managing the JPDA) does publish the amounts it receives from companies exploiting petroleum resources in the JPDA, and the government, in turn, publishes what it receives from the TSDA (via the quarterly reports on the Petroleum Fund produced by the Central Bank).<sup>33</sup> However, Conoco Phillips (the only operator currently paying revenue to the TSDA) does not, in turn, publish what it pays to the TSDA, so it is not possible for civil society to compare the amounts received with the amounts paid, nor to ensure that all natural resource revenue is received by the State.

### *Principle 3 – natural resource revenue is invested wisely*

Another important aspect of managing natural resource revenue wisely is how that revenue is financially invested. The revenue in Timor-Leste's Petroleum Fund will be invested entirely offshore (Articles 14 and 15), which has three benefits. First, it allays concerns there might be bias in investment choices (for example, political elites investing in family businesses). Secondly, investing offshore can help to avoid corruption, because investing in Timor-Leste would provide more opportunities for corruption and nepotism (with businesses competing for contracts, for example). Thirdly, there are currently few opportunities to invest revenue (certainly not billions of dollars) in Timor-Leste because industry and infrastructure are not yet well developed. For these reasons, to invest in Timor-Leste at this time would entail higher risk and lower return, and thus investing the revenue offshore offers a conservative approach to investment. Timor-Leste is not unique in choosing to invest its revenue offshore; Norway, São Tomé e Príncipe and Chad also invest their petroleum funds entirely offshore.

Timor-Leste's choice of investment strategy is also conservative. The Petroleum Fund Law specifies that not less than 90 per cent of the revenue will be invested in 'qualifying instruments' (Article 14). Such instruments

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<sup>33</sup> The Timor-Leste share of tax revenue is paid directly by companies into the Timor-Leste Petroleum Fund while production shares are paid to the TSDA as a production sharing contract partner and then forwarded to the Petroleum Fund National Directorate of Oil and Gas, 'National Directorate of Oil and Gas Website', Democratic Republic of Timor-Leste, [www.timor-leste.gov.tl/emrd/](http://www.timor-leste.gov.tl/emrd/) (accessed 1 December 2006).

are extensively defined under Article 15. In brief, 'qualifying investments' are conservative investments. Such investments are likely to carry a lower risk of loss (than if revenue was invested elsewhere) but also to provide a lower financial return (eg triple A rated debt instruments such as US federal bonds). The other ten per cent (or less) of the Petroleum Fund may be invested in other instruments so long as they are 'issued abroad, liquid and transparent, and traded in a financial market of the highest regulatory standard' (Article 14). These investments could potentially provide a higher return, but may also incur a greater risk of loss. The reason the Petroleum Fund Law provides for ten per cent of the Petroleum Fund to be invested in a wider range of instruments is to limit the risk while capacity to manage investments in a wider range of instruments grows. The government and the Central Bank have not yet taken the option to invest any of the Petroleum Fund in a wider range of instruments. The Petroleum Fund is currently invested entirely in US federal bonds. As the capacity of the staff of the Central Bank managing the Petroleum Fund grows and investments in other instruments are introduced, the return on investments may increase and is likely to vary more than the relatively constant return on US federal bonds.

There are examples of countries that had plans in place to manage their natural resource wealth well, but failed. Nauru is a country that was once rich with the revenue earned from exploitation of its phosphate resources. In 1968, each Nauruan man, woman and child was worth US\$3.5 million as a result of their good phosphate fortune.<sup>34</sup> Their resource revenue was invested in a portfolio, the investments proved to be high risk and within a matter of decades much of the revenue was lost. The Nauruans have gone from having the highest per capita income in the world to having one of the poorest and their institutions have progressively weakened.<sup>35</sup>

Another weakness of Timor-Leste's Petroleum Fund Law is that Timor-Leste's Central Bank could appoint just one investment manager to be responsible for the entire fund (Article 12). At the present time only ten per cent of the Petroleum Fund can be invested in instruments other than those designated qualifying instruments, but in future this portion could be much

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34 In 2003, US\$3.5 million was the equivalent of US\$500,000 in 1968. See Helen Hughes, 'Way Out for Poor Little Rich Island' in *The Australian* (Sydney, 2003).

35 In 2004, *The Australian* newspaper reported that the Nauruan Government was in crisis; the Nauruan Parliament could not stand because the two sides could not agree on a speaker. Mining has left much of Nauru uninhabitable and they had plans to make the island an offshore banking centre (at one time 400 offshore banks were registered to one government mailbox), but rumours of money laundering caused the Group of Seven countries to consider sanctions. Nauru bowed to international pressure and revoked the banking licences. See Emily Pettafor, 'The Pacific Dissolution' in *The Australian* (Sydney, 2004).

higher (if the Petroleum Fund Law is changed). If one investment manager was responsible for a large portion of Timor-Leste's Petroleum Fund and made a poor investment decision this could have disastrous implications for Timor-Leste. Regardless of how conservative Timor-Leste's plans to invest are now, the Petroleum Fund Law provides for the range of qualifying instruments to be reviewed after five years and the Law can be amended by Parliament at any time.

#### *Principle 4 – natural resource revenue is managed transparently*

The misuse of petroleum revenue cannot be prevented without transparency. Transparency, or transparent accounting, is widely regarded as the key to resolving issues of waste and corruption.<sup>36</sup> Independent reporting of transactions is now widely demanded of countries that have problems with corruption. Governments and non-governmental organisations have also established a number of initiatives in order to improve accounting mechanisms between energy companies and governments, thereby enhancing transparency. Such initiatives are designed to improve accountability in government, and to promote better fiscal management.

Timor-Leste has adopted transparency as a fundamental principle of the Petroleum Fund Law. Article 32.1 states: 'The management of the Petroleum Fund shall always be carried out, and the related duties of all relevant parties shall be discharged, with the highest standard of transparency.' Timor-Leste's Petroleum Fund Law scores second highest of 32 countries' sovereign wealth funds when compared in terms of transparency and accountability.<sup>37</sup> Transparent management of petroleum revenue requires three actions: the preparation of relevant information by the responsible authority; the publication of that information; and the cognisant observation of that information. Timor-Leste's Petroleum Fund Law institutionalises mechanisms to facilitate these actions, and additionally, the Government of Timor-Leste has made statements that government, more broadly, will be managed transparently. A former Prime Minister, Mari Alkatiri, emphasised the need to strengthen the institutions of governance and established the Alkatiri Initiative to prevent corruption, nepotism and collusion.<sup>38</sup> Alkatiri also signed Timor-Leste up to the Extractive Industries

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36 Department for International Development, 'The Extractive Industries Transparency Initiative (EITI)', [www.dfid.gov.uk/news/files/extractiveindustries.asp](http://www.dfid.gov.uk/news/files/extractiveindustries.asp) (accessed 30 June 2007).

37 See n 2 above.

38 Shabbir Cheema, Bertrand de Speville, Terhi Nieminen-Mäkynen, David Matiske and Peter Blunt, *Strengthening Accountability and Transparency in Timor-Leste: Report of the*

Transparency Initiative.<sup>39</sup>

Under Timor-Leste's Petroleum Fund Law, a range of information and reports are required to be published. As an example, Timor-Leste's Central Bank is required to prepare and publish quarterly reports on the performance and the activities of the Petroleum Fund (Article 13), and the government is required to publish an annual report (Article 23). Civil society has the opportunity to monitor the Petroleum Fund's investments via these reports, which have, so far, been informative in explaining how the Petroleum Fund investments perform. Reporting on the management of petroleum revenue separately to other government funds in this way is useful because the state budget plans and the quarterly treasury reports for whole of government expenditure are much more cumbersome and time-consuming to prepare (not to mention dependent on a much wider range of institutions of varying quality). This means that the whole of government information is not as readily accessible or available in a timely manner. However, there are also constraints on access to information and reports about the Petroleum Fund.

One constraint is that Article 32 of the Petroleum Fund Law provides for some information to be declared confidential. The definition of what information can be declared confidential (provided in Figure 3) is open to interpretation and could result in information being kept from publication. To date no such declaration has been made and the process by which 'a clear reasoning on the motives for treating such information as confidential' (Article 32.2) would be provided or accessed is not specified. Another constraint surrounds the timeliness of information being made publicly available. The usefulness of information that is not available in a timely fashion is limited. Much of the Petroleum Fund information is provided in the Petroleum Fund's annual report, which means it can be up to 12 months (or more) before some information is available. The institution responsible for preparation of the information must ensure that the published form does not include 'confidential' information, and information declared confidential is made available only after five years (Article 32.3).

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*Alkatiri Initiative Review* (World Bank and UNDP, 2006).

39 Established by the then British Prime Minister, Tony Blair, following the World Summit on Sustainable Development in Johannesburg in 2002, and known as the Blair Initiative, the Extractive Industries Transparency Initiative is a programme designed to promote transparency in the transfer of revenue from exploitation of natural resources between companies and government officials through publishing amounts paid, received and later debited. See n 35 above.

### **Petroleum Fund Law – Article 32.2**

Information or data whose disclosure to the public could, in particular:

- (a) prejudice significantly the performance of the Petroleum Fund;
- (b) be misleading, as it relates to:
  - (i) incomplete analysis, research or statistics;
  - (ii) to frankness and candour of internal discussion;
  - (iii) the exchange of views for the purposes of deliberation; or
  - (iv) the provision of confidential advice;
- (c) significantly affect the functioning of the Government;
- (d) amount to the disclosure of confidential communications;
- (e) substantially prejudice the management of the economy;
- (f) substantially prejudice the conduct of official market operations; or
- (g) result in or lead to improper gains or advantages;

may be declared as confidential. The declaration of confidentiality shall, taking into account the principle of transparency and the right of the public as regards to access to information, provide a clear reasoning on the motives for treating such information or data as confidential.

### **Figure 3: The definition of confidential information under Timor-Leste’s Petroleum Fund Law**

In addition to these constraints, although information about the Petroleum Fund Law is publicly available, the Law does not specify where or how information about Timor-Leste’s petroleum revenue should be made available. Most information is available on the internet, but the majority of East Timorese people do not have access to the internet. The Central Bank makes copies of the Petroleum Fund reports available to the public, but the government has not yet established information offices to make Petroleum Fund information accessible to people in all districts. In addition, a culture of secrecy often prevents government employees providing information to the public that should be freely available. Access to information is also hampered by issues of communication. Over 20 languages are spoken in Timor-Leste, but not one language is spoken and read by all East Timorese. To date, the government has generally provided information in several languages, even though it is not required to do so by law. However, another effective barrier to communicating the information is the low literacy rate, and the low level

of education of the wider East Timorese population. For these reasons, access to information about the Petroleum Fund is also hampered by civil society's capacity to understand the information and reports that are provided. At this point, it might be relatively easy (for an educated person) to understand that all of Timor-Leste's petroleum revenue is invested in the US Federal Reserve and to estimate what the financial return on that investment might be. However, once a portion of Timor-Leste's Petroleum Fund is invested in a wider range of instruments, it will be some time before patterns of financial return emerge and East Timorese (with the capacity) build an understanding of the way in which financial markets work.

The skills and knowledge of most East Timorese are too limited to interpret and debate their concerns about the investment and management of Timor-Leste's Petroleum Fund at this time. This lack of capacity of civil society is an issue for the wise management of Timor-Leste's petroleum revenue. In order for the mechanisms of transparency and accountability to work, the citizens of Timor-Leste must bring contraventions of the Petroleum Fund Law, and instances of petroleum revenue mismanagement, to the attention of the Office of the Ombudsman for Human Rights and Justice or the Office of the Inspector General. At this time, there are few individuals in civil society, or the media, who understand the mechanisms and institutions that Timor-Leste has established to manage its petroleum revenue, let alone interpret and analyse the information that the government publishes. The weak capacity of Timor-Leste's media is a particular concern. Journalists sometimes report rumours without corroboration. The media industry itself is very underdeveloped (like all sectors) in Timor-Leste. Community radio is the medium that reaches most of the population (television and newspapers are limited, primarily, to Dili), but 'Community radio in East Timor is still a work in progress'.<sup>40</sup>

The Petroleum Fund Law does establish a Consultative Council to advise Parliament regarding the performance and operation of the Petroleum Fund (Chapter V). The Consultative Council may be crucial to Timor-Leste's ability to manage its petroleum revenue wisely, and may potentially be able to compensate for the wider lack of capacity in civil society, in the short term at least. The Council's role is to advise Parliament regarding the performance and operation of the Petroleum Fund (Article 25), and

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40 James Scambary reports that community radio's needs, in terms of training and management, are many and varied. However, radio is well placed, particularly given the high rates of illiteracy in Timor-Leste and because a number of stations broadcast in several local languages, to debate crucial issues, particularly in relation to management of Timor-Leste's petroleum revenue. See James Scambary, *UNDP Report on Community Radio* (2004).

membership of the Council includes representatives from civil society, business and religious organisations as well as ex-government or former state institution officials (Article 26). The Consultative Council must in the context of the budgetary process advise the Parliament, of its own motion or at the request of Parliament, ‘whether the appropriations are being used effectively to the benefit of current and future generations’ (Article 25.2). The Consultative Council, in addition to the Parliament, provides input into decisions made about petroleum revenue management on behalf of civil society. To this end, the Consultative Council is instructed to ‘consult widely in the community’ and to ‘hold an annual forum on issues relating to the Petroleum Fund’ (Article 30.4).

In the interests of transparency and accountability, prior to the elections in June 2007, the Parliament had always sought the opinion of the Consultative Council in making a decision to withdraw from the Petroleum Fund. When the new government proposed its first (transitional) budget in October 2007, the Parliament of Timor-Leste approved the budget and a withdrawal from the Petroleum Fund without seeking the advice of the Petroleum Fund Consultative Council and the President then promulgated the budget law. This lack of consultation sets a poor example for the future of transparent and accountable management of Timor-Leste’s petroleum revenue.

### ***Principle 5 – some natural resource revenue benefits future generations***

A natural resource fund that is designed to assist a government to create a store of wealth for future generations is sometimes called a ‘savings fund’. The rationale for saving is that non-renewable resources are finite and, based on that rationale, a state must recognise and plan for the eventual decline and exhaustion of this natural resource income.<sup>41</sup> A natural resource fund has the potential to meet the needs of both current and future generations if the mechanism that determines expenditure results in enough revenue to do so. Timor-Leste’s Petroleum Fund can be described as a savings fund as it establishes a mechanism by which the government can potentially ensure revenue is shared equitably between current and future generations. That mechanism is called estimated sustainable income (ESI) and it potentially has the function of stabilising the flow of petroleum revenue.

Timor-Leste’s Petroleum Fund Law states that before Parliament decides to withdraw revenue from the Petroleum Fund it must be informed of the value of ESI (Article 8). ESI is the amount of revenue (based on current

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41 J M Davis, R Ossowski and O Fedelino, *Fiscal Policy Formulation and Implementation in Oil-producing Countries* (2003).



projected revenue) that can be withdrawn such that the same amount could be withdrawn every year thereafter and the Petroleum Fund would never have a nil balance. The formula for ESI is set out in Schedule 1 to the Petroleum Fund Law. The calculation of ESI is revised each year because it depends on the total expected petroleum revenue (and this is affected by various factors such as oil price, production, etc). The value of ESI also depends on how much revenue is actually withdrawn from the Petroleum Fund each year. Timor-Leste's Petroleum Fund Law has no ceiling on withdrawals and no minimum balance. Indeed, the Law lacks a mechanism or a rule to regulate expenditure above ESI. Rather, the Petroleum Fund is designed such that the value of ESI is provided as a guide to the Parliament's decision-making. If less than the value of ESI is withdrawn each year, the value of the Petroleum Fund will increase (all else being equal). Alternatively, the Parliament could approve, and continue to withdraw, an amount that is greater than the value of ESI (even the entire Fund), in which case the value of the Petroleum Fund may decline until eventually (sooner or later, depending on the extent of expenditure) there is no revenue left in the Fund.<sup>42</sup> Thus, ensuring the amount of revenue withdrawn from the Petroleum Fund each year is sustainable does not depend on the Petroleum Fund Law, but on good governance and the strength of institutions; the Parliament in particular.

Another way that natural resource revenue can benefit future generations is by spending it on projects that will provide a return over the long term. For example, spending natural resource revenue on infrastructure may provide a financial return through enhanced business development, or spending natural resource revenue on health and education may improve the level of human capital that contributes to economic development. The important thing is to ensure that if expenditure of petroleum revenue does exceed sustainable levels, then that expenditure must benefit future, as well as current generations.

In April 2007, in the lead-up to the recent parliamentary elections, Xanana Gusmão (now Prime Minister) announced that he would 'unlock' the revenue from the Petroleum Fund, suggesting that withdrawals from the Petroleum Fund would exceed those that Fretilin had made, in order to increase government expenditure.<sup>43</sup> Gusmão has previously described what

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42 If the government or the Parliament proposes to make a transfer that exceeds ESI, under Art 9, the government must provide the Parliament with a report estimating the amount by which ESI would be reduced for that fiscal year as a result. The independent auditor must also certify this report. The government must also provide a detailed explanation of why it is in the long-term interests of Timor-Leste to transfer from the Petroleum Fund an amount in excess of the ESI.

43 *The Australian* newspaper reported that 'Gusmão has promised he will unlock hundreds of millions of dollars in oil revenue held in a New York escrow bank account if he is elected Prime Minister'. Gusmão is reported to have said 'Democracy will not work if

he imagines would happen if too much revenue were saved:

‘If we think only of hoarding it [the petroleum revenue] we will maintain the traditional life where people have food – pigs, chooks, goats, cows, buffaloes – they can not afford to seek medical treatment, the person dies, they kill all the animals at the burial to feed the people that come to cry. The children have no money left because they killed all the animals and they can’t afford to go to school. This is not a good notion of richness.’<sup>44</sup>

Gusmão’s comments suggest that he believes meeting the needs of the current generation are more important than saving petroleum revenue for future generations, but the new government has not yet fulfilled its promise to withdraw larger amounts from the Petroleum Fund.<sup>45</sup> If the new government does withdraw an amount greater than ESI, and continues to do so, and that expenditure favours current generations, it may jeopardise the ability of the government to provide for future generations.

Establishing a mechanism that prevents all natural resource revenue from being spent now and leaving none for future generations is an option. However, the experience of other countries indicates that having a rule for withdrawals does not stop increasing amounts of revenue being withdrawn from a natural resource fund. Elek<sup>46</sup> explains that Papua New Guinea established a Mineral Resources Stabilisation Fund (MRSF) in 1974, including rules for withdrawal which would, in theory, provide a stable flow of revenue. However, as time passed the fiscal discipline weakened and withdrawals from the MRSF increased.

Other natural resource funds have used different mechanisms to ensure revenue is available to future generations. For example, Chad’s Revenue Management Law<sup>47</sup> puts ten per cent of its revenue into a ‘Future Generations’ Fund, and the Oil Revenue Management Law of São Tomé e

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the people are hungry. We have so much money in an account in New York, while here in Timor people are struggling and living in misery’: Stephen Fitzpatrick, ‘I’ll Bring Home Oil Millions: Gusmão’ in *The Australian* (Dili, 2007).

44 Gusmao is quoted on p 158 of Drysdale, n 3 above.

45 In September 2007, the new government proposed a transitional (six-month) budget that reportedly required a US\$40 million withdrawal from the Petroleum Fund. Despite the budget being of shorter term, the Petroleum Fund withdrawal proposed was far less than that which Fretilin withdrew in the Fund’s first full year of operation (US\$260 million) and much less than the value of ESI for that period (US\$133 million) Republic of Timor-Leste, *State Budget for the Transition Period 1 July to December 2007* (Ministry of Finance, 2007).

46 Andrew Elek, ‘The Papua New Guinea Experience: Some Issues for the Early Years of East Timor’, in Helen Hill and Joao Saldanha (eds), *East Timor: Development Challenges for the World’s Newest Nation* (Singapore, 2001).

47 Government of Chad, Revenue Management Law (1999).

Príncipe requires that a portion of the oil revenue be transferred to a sub-account, the Permanent Fund, for the benefit of future generations of São Toméans. In theory, these special funds would provide some revenue for future generations in the event that other accounts were misused.

Whether to establish a rule or another mechanism is a core challenge for the East Timorese Government. While institutional capacity remains weak, the temptation exists to create institutional mechanisms to prevent poor decisions being made. However, having such mechanisms in place might prevent better decisions being made, once capacity is built. Regardless of which model is followed, mechanisms can be changed or disregarded (either legally or illegally depending on the strength of the institutions of the day).

Another difficulty with using the value of ESI as a guide (or a rule for that matter) is that it assumes other variables are constant. This model of petroleum revenue management assumes that variables such as the spending requirements of government and the size of the population are constant from year to year, which they are not. Timor-Leste's population growth is the highest in the world at 4.7 per cent, which means that the population of Timor-Leste will increase significantly in the next few years. This is not an insignificant factor in terms of planning the State's expenditure, particularly in areas such as health and education.

## **Conclusion**

Timor-Leste is dependent on its petroleum resource revenue and has established a Petroleum Fund Law to manage that revenue, to alleviate poverty and sustain development. But Timor-Leste's state institutions remain weak and affected by legacies of the past. Corruption, attempts to use violence as a form of dispute resolution and a severe lack of human capital all exist. Withdrawals from Timor-Leste's Petroleum Fund have not yet exceeded a value that would see the Fund exhausted, but it is clear that the way Timor-Leste's petroleum revenue is managed is affected by a range of institutional weaknesses.

Timor-Leste's Petroleum Fund Law includes mechanisms that may satisfy the five principles of managing natural resource revenue. However, there are some issues to which stakeholders should pay attention to ensure the wise management of Timor-Leste's petroleum revenue. The Petroleum Fund Law defines which institutions are responsible for management of Timor-Leste's petroleum revenue, although it is not clear how civil society can hold those institutions to account. A distinct mechanism exists for petroleum revenue to be received and invested distinctly from other state revenue, yet there appears to be gaps in the definition of what constitutes petroleum revenue

that could be circumvented by less well-intentioned decision-makers. As an example, revenue invested in 'local content' projects may fall outside the definition. Civil society will need to be wary of these potential gaps and ensure that mechanisms to monitor such revenue are established.

Timor-Leste has established a conservative policy for investing its petroleum revenue and pursued that to date, but further caution will be required as decision-makers opt for greater investment risk in the hope of higher returns. Timor-Leste's Petroleum Fund Law is well regarded in terms of its mechanisms to manage revenue transparently but access to the information may be constrained by forms of communication, limits to human capacity and the opportunity (not taken to date) to declare some information confidential. The establishment of a Consultative Council is potentially an effective means of holding the government to account, but the new government recently ignored this institution when making its first withdrawal from the Petroleum Fund, which does not augur well for the future. Finally, Timor-Leste's Petroleum Fund Law provides a guide to enable some petroleum revenue to be saved for future generations, but does not prevent the Fund being depleted.

Timor-Leste wants to tread where most natural resource rich poor countries have not, along the path to sustainable development. Unfortunately, Timor-Leste's Petroleum Fund can only support the wise management of natural resource revenue if its state institutions are strengthened, and all stakeholders take responsibility for managing the revenue and upholding the rule of law. In some cases, new institutions may be required to support the mechanisms established by the Petroleum Fund Law to ensure that Timor-Leste can address the challenges of managing its natural resource revenue.

