Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

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Abstract

There is an increasing emphasis in Australia on agreement making as a means of dealing with issues surrounding native title. However, little is known about the impact of agreement making on Indigenous people. In this paper, Professor Ciaran O'Faircheallaigh discusses the value of identifying both the positive and negative outcomes of agreement making on Indigenous people, possible criteria for measuring such outcomes, and the difficulties involved in identifying and measuring outcomes.

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Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples[1]

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In terms of Indigenous interests, agreements resulting from the exercise of native title rights are of value to the extent that they generate positive outcomes, that is, positive effects on the material, cultural, social and political condition of Indigenous people. Yet since the introduction of the *Native Title Act 1993* there has been little systematic focus in Australia on outcomes from agreement making or on how positive outcomes for Indigenous people can be maximised.

This paper identifies and starts to explore key research questions and issues in relation to outcomes, positive and negative, that agreement making may generate for Indigenous people, focusing on agreements between Indigenous groups and mining companies. It does not claim to offer a definitive response to these questions and issues, but rather seeks to evaluate the current state of knowledge in relation to them and to illustrate the sort of research that is required if they are to be addressed in a systematic way.

The paper examines the different ways in which the term 'outcomes' can be conceptualised in relation to agreement making processes. It briefly discusses how outcomes can be measured and assessed, and summarises the limited information that is available about actual outcomes from agreements involving Indigenous groups and resource developers. Reflecting the nature

of the available information and the desire to obtain a general overview of agreement making in the mining industry, this discussion focuses heavily on the contents or provisions of agreements.

There are strong indications that in many cases intended outcomes are not being achieved. There are also indications that outcomes which have occurred have been highly variable, with certain Indigenous groups achieving substantial benefits and others actually experiencing net costs as a result of entering agreements. Some of the variability can be explained by the nature of prevailing legislative regimes. However, other factors are clearly at work, as indicated by wide variations in outcome between agreements negotiated under the same legislation and by the fact that in some cases strongly positive outcomes have been achieved in the absence of any legislative requirement for developers to negotiate. These findings indicate the importance of detailed case-study research to establish the reasons for positive and negative outcomes, providing a basis for more positive outcomes in the future.

Outcomes and native title

If we accept the proposition that native title is of value to Indigenous Australians to the extent that it generates positive outcomes for them, then, research, policy and public debate should focus on whether native title is generating positive outcomes for Indigenous Australians, and how to ensure that positive outcomes are maximised. In reality however, little research, policy or public debate has focused on these issues (see below).

This paper arises from a larger comparative project (involving Australia, Canada and the United States) that deals with one critical aspect of native title, agreement making, in a way that focuses attention squarely on the issue of outcomes. A focus on agreements is appropriate given the large amount of activity currently happening in this area, and the extent of resources being committed to the negotiation of agreements by native title groups, native title representative bodies (NTRBs), industry and government. This reflects a strong political consensus in Australia regarding the benefits of agreement making (as opposed to litigation or political action) as a way of addressing native title issues and potential conflicts between the interests of native title groups, developers and governments.[2] It therefore seems likely that if native title is to generate benefits for Indigenous Australians it will do so via agreement making, and so it is important to focus on outcomes from agreement making processes and from agreements themselves.

To encourage such a focus, this paper considers the following three questions in relation to agreements between resource developers and Indigenous peoples in Australia: What do we mean by outcomes from agreement making, and in what way do outcomes emerge from agreement making processes? How can we measure and assess outcomes? Are agreements leading to positive outcomes for Indigenous people?

What do we mean by 'outcomes' and how do they emerge from agreement making?[3]

We define outcomes in the current context as changes, positive or negative, to the material (economic), cultural, political and social status or conditions of Indigenous peoples. Examples of outcomes that might result from agreement making are changes in income, changes in economic assets, changes in cultural vitality, changes in personal satisfaction, changes in ability to influence government policy, changes in social cohesion, and changes in incidence of social trauma (for example, suicide, family violence).

In terms of agreement making, there are four basic ways in which outcomes arise. These are:

1. From the process of seeking an agreement. Outcomes in this sense may arise before an agreement is signed and may occur even if the parties fail to reach agreement. Such outcomes could result, for instance, from the need to define the Indigenous parties to a proposed agreement and so to delineate land owning groups and their boundaries; or from debates in Indigenous communities about what would constitute an acceptable agreement.
2. Outcomes in terms of the content or provisions of an agreement. For example an agreement may provide that certain sums of money be paid annually, that specific numbers of apprenticeships be provided for Indigenous people, that a particular cultural heritage protection regime be put in place, or that native title parties consent to certain acts or to constraints on their exercise of native title or other rights.
3. Outcomes in terms of the putting into effect of provisions contained in agreements, that is, the actual payments of money, the filling of apprenticeships, the application of a cultural heritage protection regime. It is important to identify this as a separate dimension of 'outcomes' because agreement provisions, even where they are legally binding, are not always put into effect.[4]
4. Outcomes in terms of the final impact of provisions that are implemented, for example the effect of financial payments on the economic, social and cultural well-being of recipients and on social relations in an Indigenous community; or the impact of employment and training programs on the skill levels and labour force status of community members.

How can we measure and assess outcomes?

Measuring or assessing outcomes in any of these senses is difficult, in part because it is an inherently political process. All outcomes involve an allocation of costs and benefits to different parties, and interpretations or understandings of particular outcomes depend very much on whether or not one is a beneficiary of those outcome. For example, an outcome that results in a small number of Indigenous people receiving the major share of benefits from an agreement is unlikely to be regarded poorly by the recipients, but is almost certain to face criticism from other community members. In addition, political actors will seek to ensure that outcomes with which they are identified are regarded in a positive manner, and are likely to criticise any approach that defines these outcomes as negative. Finally, as in all communities there are underlying differences between individuals and groups depending on factors such as personal values, age, gender, and kin affiliations. For instance, various groups within an Indigenous community will differ in their assessments of an outcome that creates strong protection to cultural heritage or environmental values but does little to generate additional economic activity.

In addition, certain outcomes are by nature intangible and difficult to document, let alone measure. How do we gauge, for example, whether an agreement making process has had a positive or negative effect on community cohesion, or on cultural vitality? How do we measure *how much* of an effect it has had in these areas?

Another key issue involves the context within which individual agreements are made, particularly the goals being pursued by particular Indigenous groups, the nature of specific projects, the legal position of the native title parties, and the policy and legislative frameworks of specific States and Territories. An outcome that might be regarded as strongly positive in one context might be considered a poor outcome in another. For example, specific cultural heritage protection provisions may be regarded as delivering significant benefits in a State with weak cultural heritage legislation, but as bringing little net benefit in a State with strong legislation.

A final point arises from the fact that negotiation usually requires each party to trade off on individual objectives. Concessions are made on issues of lesser importance in order to achieve gains in relation to issues of critical importance. Thus an agreement that achieved a 'poor' outcome in relation to some specific issues might reflect a positive achievement overall because carefully-calculated concessions were made in order to get a positive outcome on issues of central importance to the Indigenous participants.

Yet, despite the difficulties, independent benchmarks are needed by both Indigenous participants and researchers to assess outcomes. Otherwise, how are Indigenous people to gauge whether a proposed agreement is likely to generate positive results for them? How are they to hold negotiators who act on their behalf accountable unless there is some basis on which to assess performance? How can Indigenous leaders and professional negotiators demonstrate that they have achieved optimum outcomes in specific contexts? How can Indigenous people evaluate the extent of concessions being proposed in one area or the gains being offered in another? In addition, researchers cannot gauge the impact on outcomes of system-level influences (such as the character of native title or land rights legislation), or of specific factors such as the effectiveness of Indigenous organisations or negotiating teams unless there is some basis on which to assess those outcomes. More generally, how is it possible to determine whether the current emphasis on agreement making is appropriate unless there are criteria for assessing the outcomes it generates?

In our research project we have started to develop criteria for assessing outcomes by focusing on the content or provisions of agreements, for two main reasons. First, while agreement provisions do not determine outcomes in the third and fourth sense outlined above (outcomes as implementation of provisions and as the final impact of agreements), they do determine the range of possible outcomes in these areas. For example, the financial provisions of an agreement directly determine what financial flows can occur. They also have a critical role in shaping the ultimate impact of these flows on recipients and communities, by determining the quantum of payments, the form in which they accrue and also, in many cases, to whom they will accrue in the first instance and how they will be spent. It can also be argued that people's assessment of agreement making processes is not independent of the content of agreements that emerge from particular processes. Thus, the content of agreements is of central relevance to the other three dimensions of outcomes from agreement making. Second, one objective of our research is to develop a national overview of the negotiation of mining agreements in Australia. Given the available resources an analysis of agreement provisions represents the only practicable way of achieving this.

In relation to the content of agreements, it is possible to develop criteria for assessing, in terms of Indigenous interests, outcomes in relation to the major components of agreements. Within our project we are developing criteria for evaluating what are typically the critical components of agreements relating to resource development projects: rights and interests in land; environmental management; cultural heritage protection; financial benefits; employment and training; business development; and Indigenous consent and support.[5]

Different sorts of criteria are developed to address different components. In the case of financial payments, we recalculate outcomes to a standard measure (total expected payments over the life of a project as a percentage of the expected value of project output). In other cases a scale is employed. An example, which relates to environmental management, is provided in Figure 1. It is assumed that a key goal of Indigenous people is to have a real and substantial say in managing the environmental impact of projects on their traditional lands, however, it is not assumed that all Indigenous people attach equal priority to this goal. Each step in the scale reflects an increase in the likelihood that an agreement will allow that goal to

be achieved. Thus agreements that require people to refrain from exercising existing rights under environmental law, without offering alternative means of influencing the development and operation of a project, are given a negative (or minus) score. Absence of relevant provisions attracts a score of zero. As one moves upwards through the scale, there is an increasing likelihood that Indigenous people will be able to substantially influence environmental management and impacts.

Figure 1: Possible criteria for assessing environmental management provisions of agreements

-	**Provisions that limit existing rights**
0	**No provisions**
1	**Developer commits to Indigenous parties to comply with environmental legislation**
2	**Developer undertakes to consult with affected Indigenous people**
3	**Indigenous parties have a right to access information, independent expert advice**
4	**Indigenous parties may suggest enhanced EM systems, project operator must address**
5	**Joint decision-making on some or all EM issues**
6	**Indigenous parties have capacity to act unilaterally within specified limits**

In yet other cases (for example employment and training) we identify a series of measures that are complementary and cumulative in their impact, that is, the more of them that are included in an agreement, the more likely it is that favourable outcomes will be achieved.

An agreement does not have to score highly on all measures to be regarded as offering positive outcomes. As mentioned above, Indigenous communities may decide to concede in areas that are of less importance to them in order to achieve positive results in areas of high priority, and this will be reflected in the nature of outcomes. Context is also critical. An 'average' outcome in terms of a standard set of criteria may represent an excellent result in a context unfavourable to Indigenous interests. In other words, the criteria are not designed to be applied in a mechanistic, rigid or formulaic way. As long as they are not, they represent a useful basis on which Indigenous organisations and communities can, for example, assess what they are being offered by developers; how this compares to what has been achieved elsewhere; and what degree of compromise will be involved if they make concessions in one area in order to make gains in another. In addition, they facilitate an overall evaluation of whether an agreement represents a positive outcome for Indigenous parties. For example, if Indigenous people are expected to accept serious impairment of their native title and to give open-ended support to a project but are offered financial, employment and training, environmental and cultural heritage provisions that rank poorly, there are major doubts as to whether they should enter an agreement.

Additional work is required to develop criteria for measuring and assessing outcomes along the other three dimensions identified above (outcomes from agreement making processes; outcomes as implementation of agreement provisions; and outcomes as the final impact of those provisions). Extensive analysis is also required to establish an industry perspective on the various dimensions of outcomes from agreement making and to identify approaches that would maximize support from both Indigenous and developer interests in specific contexts.

What do we know about outcomes from agreements?

An extensive literature now exists in relation to agreement making between Indigenous, mining and other interests in Australia.[6] However little of it deals with the *outcomes* of agreements, either in the mining sector or elsewhere.[7] There has certainly been no systematic attempt to evaluate outcomes from a range of negotiations along any one of the four dimensions identified above.

Outcomes from agreement making processes

Our knowledge in this area is extremely limited. While there has been some work on the impact of native title on the internal dynamics of Indigenous groups, there has been no systematic study of the effects, negative or positive, of agreement making processes on native title groups or Indigenous communities.[8] There is an urgent need for more research in this area to provide Indigenous organisations, including NTRBs, with better information to use in designing processes that maximise the cultural and social benefits and minimise the social and cultural costs associated with making agreements.

It is also important to consider the impact of agreement making processes on relationships between Indigenous people and resource developers. A legal agreement represents only one aspect of that relationship, and the nature of the relationship as a whole will be important in determining the balance of benefits and costs experienced by Indigenous people as a result of resource development. In addition, the fact that benefits are in theory available to Indigenous people under an agreement does not guarantee that they will materialise in practice (see below), and the nature of the relationship between Indigenous parties and resource developers is an important factor in determining whether they do so. The agreement making process can serve to build, or to undermine, the broader relationship between Indigenous parties and resource developers. However its impact in this regard is not transparent or easily accessible to the researcher and requires detailed case studies of individual negotiations using qualitative methodologies.

Outcomes as contents of agreements

Confidentiality provisions represent a major problem in analysing the contents of agreements. A degree of confidentiality may be essential to protect the commercial interests of companies and the privacy of Indigenous parties, but it can be argued that excessive secrecy surrounds the content of many agreements in contemporary Australia. It is in fact feasible to release substantial information about an agreement without compromising the parties' interests. To some extent reluctance to release information may reflect a fear of criticism. The existence of clear criteria on which to assess outcomes, of the type discussed earlier, might help to allay such fears.

In our current research we have sought access to a sufficiently large number of resource development agreements to enable presentation of aggregate findings about their content without revealing the identity or the content of individual agreements. We currently have access to information on 66 agreements for mining projects and 7 for gas or/and oil pipeline projects,[9] and of the 73 projects involved we have access to full copies of 46 agreements and to relevant extracts of a further 8 agreements. The agreements were negotiated under a variety of legislative and policy regimes over the period 1978-2003 but, reflecting the increase in agreement making since the introduction of the *NTA*, about half have been signed since 1998. No comprehensive record of resource development agreements exists in Australia, so we cannot be certain of what proportion of all agreements our sample represents. However searches of relevant databases and of media sources indicate that we are close to having full coverage of agreements in New South Wales, Victoria and in many of Australia's

major resource producing regions, including the Pilbara, the Kimberley, the Top End of the Northern Territory, Cape York and Central Queensland.

Employing the sorts of benchmarks discussed in the previous section, the overwhelming picture that emerges from our analysis to date is of great variability across agreements. 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 legislation, while in some cases the exercise of rights that Indigenous parties possess under legislation are restricted. Where benefits are slight and the exercise of existing rights restricted, Indigenous parties may actually be worse off than in the absence of an agreement.

Variations in outcome do not reflect project scale and the developer's 'ability to pay' for benefits accruing to Indigenous parties. For instance while in absolute terms the highest figures for financial compensation have certainly been negotiated for large projects, in relation to the value of mineral output, payments under agreements for some 'small' mines are among the highest we have found. Further, certain agreements for smaller projects have some of the strongest provisions in relation to cultural heritage and environmental protection.

Financial provisions illustrate well the degree of variability found in agreements. Some agreements do not contain any financial consideration, while others provide for payments in excess of 3 per cent of the value of production. In absolute terms the difference between these two alternatives can be very great. For a large project with output valued at $600 million, for example, a 3 per cent royalty equates to $18 million per annum.

The sorts of financial outcomes being delivered by agreements concluded under the Right to Negotiate (RTN) provisions of the *NTA* are in general much more modest than those delivered by the Northern Territory land rights legislation, Queensland's *Mineral Resources Act*, or by 'policy-based' negotiations where there is no legislative requirement for mining companies to negotiate agreements. It could be argued that Indigenous groups are going through a learning process and that future outcomes may be more substantial. However our research indicates that RTN agreements concluded in the period 2000-2003 do not contain financial provisions more substantial than those negotiated in the second half of the 1990s, undermining the view that a learning process will result in more favourable outcomes.

An important finding is that while financial outcomes in RTN agreements may be generally more modest than from other categories of agreements, there is also considerable variation within the group of RTN agreements we have reviewed. Payments provided in agreements at the upper end of the range are many times greater than those at the lower end. It is important to stress again that these variations are significant, especially in relation to large projects. For example, in this category we have found payments that range from the equivalent of a 0.001 per cent royalty to a 0.5 per cent royalty. Applied to a mine with annual output worth $400 million, the former yields only $4,000 per year, the latter $2 million per year.

The variability evident in relation to financial outcomes is just as significant in relation to the other aspects of agreements we are currently examining. A very wide range of outcomes are being achieved; agreements reached under the RTN are generally not as favourable as those reached under other legislative regimes; and there is considerable variation among agreements negotiated under the RTN. In relation to employment and training, for example, some agreements include little more than a general statement that the developer intends to employ and train Aboriginal people, while others make funding commitments, set targets for

employment, create specific numbers of apprenticeships and scholarships, include appointment of dedicated training or liaison staff and provide a range of measures designed to create an appropriate work environment.

A significant finding of our research to date is that agreements that are strong (from the perspective of Indigenous interests) in one area tend to be strong in others; weaker agreements tend to be weaker across the board. For example, agreements that tend to involve substantial financial payments also tend to have extensive and detailed employment and training provisions, provide for Indigenous involvement in environmental management and have cultural heritage provisions that exceed legislative requirements. Those with limited or no financial compensation tend to have only general commitments in relation to employment and training, often fail to provide for Indigenous participation in environmental management and frequently have cultural heritage provisions designed mainly to achieve the assistance of traditional owners in allowing developers to meet their legislative obligations. This is an important and indeed critical finding. It indicates that variations in outcome do not reflect deliberate trade offs undertaken by Indigenous parties through the negotiation process, for example by choosing a lower level of financial payments in return for stronger provisions on cultural heritage, or by trading off the opportunity to influence environmental practices for higher financial payments.

It is obviously critical to explain the variability in outcomes across agreements as a first step towards identifying policy or other measures that might result in more equitable outcomes. In the absence of such outcomes, agreement making will serve to replicate among Indigenous peoples the inequalities that currently exist between them and non-Indigenous Australians.

Legislative and administrative structures, such as the operation of the RTN and the application of the arbitration provisions of the *NTA* by the National Native Title Tribunal, clearly have a significant impact. In particular, the RTN places native title parties in a relatively weak negotiating position. The inability of native title parties to exercise a 'veto' over exploration or mining, combined with the arbitration provisions of the *NTA* and the manner in which they have been applied by the NNTT, are especially important in this regard. This significance of the first point should be clear; the second point warrants some detailed discussion.

Under section 33 of the *NTA*, agreements reached in relation to native title approval of a future act within the relevant negotiation period (initially six months) can include payments to native title parties worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party as a result of the proposed 'act'. However under section 38 (2), if an agreement is not reached within the negotiation period and the matter goes to arbitration, the arbitral body must not determine a condition that entitles native title parties to payments worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party. This places native title holders under considerable pressure to conclude an agreement within the six month negotiation period, which could help explain the lower financial outcomes achieved in RTN agreements.

In theory this pressure on the native title holders to reach agreement is balanced by the pressure on developers to do the same. Arbitration is potentially uncertain given that the arbitral body might not allow a future act to occur or might only allow it to occur under stringent conditions. Thus, in theory, *both* sides are under pressure to do a deal, speeding up the process of reaching agreements and ensuring that the agreements reached would be equitable to both parties.[10]

However a number of assumptions are involved here. First, it is assumed that developers are operating under tight time constraints. Although this is sometimes the case, frequently it is not. This might be because developers are expanding existing operations and seek to secure additional ore reserves on new mining leases well ahead of the time they are needed or because time frames for other statutory processes are longer then those for native title negotiation and arbitration.

Second, it is assumed that the arbitral body may not allow some future acts to proceed in order for arbitration to be a significant risk to developers. In fact, the NNTT has made no decisions under s 38(1)(a) that an act must not be done, and there is little indication from recent decisions that this situation is likely to change.

Third, it is assumed that in a significant proportion of cases where approval is given for a future act to occur, stringent conditions will be attached. Recent decisions by the NNTT indicate that this assumption also may not be justified. In a number of cases, for instance, *WMC Resources* (23 December 1999), the NNTT decided not to attach conditions relating to cultural heritage to approvals for acts to be done, arguing that state cultural heritage legislation provides sufficient protection. This is despite the fact that there have been cases in all the major mineral producing states where state legislation has failed to offer such protection, and that in other circumstances, such as decisions as to whether the expedited procedure should apply, the Tribunal has recognised shortcomings in state legislation.[11].

A further issue is the extent and detail of the NNTT requires in relation to enjoyment of native title rights before it will consider placing conditions on, and determining compensation for, a future act. There may be problems for native title parties in providing this evidence because they lack the resources to document relevant practices, the limited time available and, in some cases, the separation of native title holders from their traditional lands during recent decades. Where native title parties fail to submit relevant evidence the Tribunal is tending to impose minimal or no conditions in approving future acts (see for example *WMC Resources* 23 December 1999).

The end result of these various factors is that for many developers arbitration holds little fear and has the advantage that the requirement to pay a profit or production-based royalty is avoided. For native title parties arbitration removes the prospect of securing a royalty and increasingly offers little prospect of securing significant compensation in another form or of having substantial conditions imposed on proposed developments. Thus, in many cases Indigenous parties to negotiations are under pressure to settle, whereas developers are not. This in turn is more likely to produce favourable outcomes for developers, and helps explain why provisions of RTN agreements are generally inferior from the perspective of Indigenous interests.

However the operation of the *NTA* cannot explain variation *between* RTN agreements, and as noted earlier, this variation is substantial both in relation to financial provisions and to the other areas we have examined. The best RTN outcomes may be inferior to outcomes in the Northern Territory or Cape York, but they offer substantial benefits in comparison to the poorer RTN outcomes. In addition, the operation of the RTN cannot explain why policy-based agreements, where there is *no* requirement on the developer to negotiate, should often contain outcomes more favourable than RTN agreements (except, importantly, that in policy-based negotiations the native title parties are not subject to the negative aspects of the RTN).

To address these questions we need to examine other factors that impinge on the negotiating potential and performance of native title parties. These include wider policy and legislative

frameworks (such as state government policies and state cultural heritage legislation); the relative access to resources of different Indigenous groups; Indigenous organisational and community capacity; community cohesion; and the policies and practices of companies with whom Indigenous people negotiate. Our research project will include a number of detailed case studies, designed to examine how these (and possibly other) factors interact to bring about different outcomes.

Outcomes as implementation of agreements

Turning to implementation of agreement provisions, the limited information available suggests that there are major problems in this area.[12] This is not surprising, given that agreements between Indigenous people and mining companies in Australia (and indeed elsewhere) are generally remiss in addressing implementation issues.

For example, a review of 40 agreements negotiated in Australia and Canada during recent years concluded that in general the agreements deal poorly with such issues or ignore them entirely. A critical point involves the issue of resources. Only 7 agreements or less than 20 per cent of the total allocate any resources to the general task of implementing the agreement. There is a general lack of provisions designed to ensure that key decision-makers within organisations party to agreements are involved in implementation. With a single exception, none of the agreements provide for penalties or sanctions for failure to honour specific commitments made by the parties. Few agreements contain the sort of specific and unambiguous goals that facilitate implementation. It is critical to successful implementation that agreements be reviewed on a regular basis and amended to ensure that goals are still relevant, to amend provisions that have proved ineffective or have served their purpose and to adjust to changes in the external environment. Half of the agreements do not include any provision allowing for a formal review of their provisions. Critically, no agreement provides separate funding to support review processes; specifies who should be involved in the review; how long it should take; what method of review should be employed; what information will be required to support the review; or what process will be used to deal with review findings.[13]

Outcomes as the final impact of agreements

In terms of the final impact of agreements on the economic, social and cultural well being of recipients and on social relations in Indigenous communities, our knowledge is very limited. Indeed it is largely restricted to the effects of the Nabarlek and Ranger Agreements (signed in 1978 and 1979 respectively) on Aboriginal peoples and communities in the Kakadu/West Arnhem region during the 1980s and early 1990s.[14] Research into these agreements has found that the benefits they promised frequently failed to be realised, in particular where positive interventions by Indigenous and non-Indigenous parties were required to make them materialise.

The manner in which financial resources are used and the way in which financial benefits are distributed to Indigenous parties to agreements is a major factor in determining their impact. In some cases agreements have added significantly to inequality and to social tension within groups, in others they have had the opposite effect. Unanticipated impacts (positive and negative) occur frequently, in part because those who negotiate agreements underestimate the power of Indigenous political agency. The histories, experiences, organisational capacity and social vitality of individual groups has a major bearing on outcomes, with agreements containing similar provisions having quite different effects in different cultural and social contexts. Problems occur because of the difficulty of reviewing and amending agreements to take account of changing circumstances. The reactions of third parties has an important bearing on outcomes, as for example where public agencies reduce funding under 'standard'

programs in the belief that resources provided under agreements reduce the need for government funding.

There is an urgent need for additional work in this area to examine the impact of agreements negotiated in other legal, political and social contexts and during more recent time periods, so as to broaden the empirical base on which to build policy recommendations

Conclusion

Agreement making is an established and indeed central feature of relations between Indigenous and commercial interests in contemporary Australia, while it is also increasingly used as a mechanism for managing relations between Government and Indigenous Australians. Given its centrality, it is obviously important to establish the sorts of impacts that agreement making is generating for Indigenous participants. However to do so raises complex issues, as illustrated by this broad and preliminary analysis of outcomes from agreements.

The concept of outcomes is itself complex and multi-dimensional. As indicated above, there are difficulties in examining even what is probably the simplest dimension of outcomes in conceptual terms, the content or provisions of agreements. Analysis of other dimensions of outcomes adds further complexity. Detailed studies of specific negotiations are needed, as well as the sort of broad survey attempted here. Only through such studies can we gain an understanding of the impact of negotiation processes; of how agreements are actually implemented on the ground; of the final impacts of agreements in cultural, economic, social and political terms; and of how various factors that influence agreement making interact to produce specific outcomes. This last point is critical. We must be able to explain existing outcomes if we are to offer conclusions about how more positive outcomes can be achieved.

Our research to date indicates that at least in the mining sector there is, in many cases, an urgent need to find ways of achieving more positive outcomes from agreement making. A substantial proportion of agreements between Indigenous people and mining companies appear to offer limited net benefits to the Indigenous parties. There are certainly wide disparities in the benefits being achieved as between different legislative regimes and as between different Indigenous groups operating under the same regime. There is thus a real danger that agreement making will both fail to assist in reducing inequalities between Indigenous and non-Indigenous Australians and create a new set of inequalities among Australia's Indigenous peoples.

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[1] Based on a paper delivered to the Native Title Conference, Alice Springs, 3-5 June 2003.

[2] See for example John Basten 2002, *Recent Developments in Native Title Law and Practice: Issues for the High Court*, Native Title Research Unit Issues Paper, vol 2, no 13, AIATSIS, Canberra, p 11; Patrick Dodson 1996, 'Welcome on Behalf of Organisers', in G Meyers (ed), *The Way Forward: Collaboration "In Country", Proceedings of the Indigenous Land Use Agreements Conference*, 26-29 September 1995, Darwin, NNTT/AGPS, Perth; R. S. French 1996, 'Pathways to Agreements', in G Meyers (ed) *op.cit.;* Manzie 1996, 'Welcome by Nothern Territory Government', in G Meyers (ed) op. cit.,4; P Wand 1998, 'Negotiating with Aboriginal People for Land Access', paper presented to the Symposium on Native Title: Facts, Fallacies and the Future, UNSW, 20 May.

[3] This and the following section draw on a substantially longer paper that established criteria for evaluating outcomes from agreements between Indigenous people and mining companies. Ciaran O'Faircheallaigh 2004, 'Evaluatign Agreements between Indigenous Peoples and Resource Developers', in M Langton, M Tehan, L Palmer and K Shain (eds), *Honour Among Nations?*, Melbourne University Press, forthcoming.

[4] S. Phillips, 2000, 'Enforcing Native Title Agreements: Carriage v Duke Australia Operations', *Indigenous Law Bulletin*, vol 5, pp14-16.

[5] For a detailed discussion of each of these areas see Ciaran O'Faircheallaigh 2004 op cit

[6] See for example P Agius, et al. 2002. *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia*, NTRU Issues Paper, vol 2, no 20, AIATSIS, Canberra; R Blowes, and D Trigger 1999, 'Negotiating the Century Mine Agreement: Issues of Law, Culture and Politics', in M Edmunds (ed), *Regional Agreements in Australia: Vol 2: Case Studies*, AIATSIS, Canberra; M Edmunds (ed), 1999, *Regional Agreements in Australia: Vol 2: Case Studies*, AIATSIS, Canberra; A Holden and R Duffin 1998, *Negotiating Aboriginal Interests in Tourism Projects*, Aboriginal Politics and Public Sector Management Research Paper No 4, Griffith University, Brisbane; M Holmes 2001, 'Native Title Negotiation in the New Legislative Environment', Deacons, Perth; B Horrigan and S Young 1997 (eds), *Commercial Implications of Native Title*, The Federation Press, Sydney; Indigenous Support Services/ACIL Consulting 2001, 'Agreements between Mining Companies and Indigenous Communities: Report to the Australian Minerals and Energy Environment Foundation', Final Draft, December; S McKenna 1995, 'Negotiating Mining Agreements under the Native Title Act 1993', *Agenda*, vol 2, no 3, pp 301-12; G Meyers 1996 (ed), *Implementing the Native Title Act: First Steps, Small Steps*, NNTT, Perth; C O'Faircheallaigh 1996, 'Negotiating with Resource Companies: Issues and Constraints for Aboriginal communities in Australia', in R Howitt, J Connell and P Hirsch (eds), *Resources, Nations and Indigenous Peoples*, Oxford University Press, Melbourne; C O'Faircheallaigh 2000, *Negotiating Major Project Agreements: The 'Cape York Model'*, AIATSIS Discussion Paper No 11, Canberra; M Stephenson 1997, 'Negotiating Resource Agreements with Indigenous People: Comparative International Lessons', in B Horrigan and S Young (eds) *Commercial Implications of Native Title*, The Federation Press, Sydney; M Teehan 1994, 'Practicing land rights: The Pitjantjatjara in the Northern Territory, South Australia and Northern Territory', in M.Goot and T. Rowse (eds), *Make a Better Deal: The Politics of Mabo*, Pluto Press, Leichhardt; and numerous papers published under the auspices of the NNTT and the AIATSIS.

[7] For some partial exceptions see F Flanagan, 2002, *Pastoral Access Protocols: The Corrosion of Native Title by Contract*, NTRU Issues Paper vol 2, no 19, AIATSIS, Canberra, 2003; C O'Faircheallaigh 1995, *Mineral Development Agreements Negotiated by Aboriginal Communities in the 1990s*, Discussion Paper No. 86/1995, CAEPR, ANU, Canberra; C O'Faircheallaigh 2002, *A New Model of Policy Evaluation: Indigenous People and Mining*, Ashgate Press, Aldershot; M Riley 2002, *'Winning Native Title: The Experience of the Nharnuwangga, Wajarri and Ngarla People'*, NTRU Issues Paper Vol 2 no 19, AIATSIS, Canberra; C Senior 1998, *The Yandicoogina Process: A Model for Negotiating Land Use Agreements*, Regional Agreements paper no. 6, AIATSIS.

[8] For examples of work done on the impact of native title on the internal dynamics of Indigenous groups, see D E Smith and J Finlayson (eds) 1997, *Fighting Over Country: Anthropological Perspectives*, CAEPR, ANU, Canberra.

[9] All of the agreements relate to existing or planned projects and cover a range of issues related to the development and operation of the projects concerned. None are limited to exploration or to single issues.

[10] J Altman, 1995, *The Native Title Act 1993: Implementation Issues for Resource Developers*, Discussion Paper 88/195, Centre for Aboriginal Economic Policy Research (CAEPR), Australian National University, Canberra.

[11] For example, *Dann No 2* (10 June 1997), *Barnes v WA* (20 September 1999), *Brownley v WA* (4 November 1999).

[12] C O'Faircheallaigh and L Bygrave 1997, 'Social Audit of the Ranger Agreement and Mine Conducted for the Northern Land Council', Griffith University, Brisbane; C O'Faircheallaigh and R Kelly 2001, 'Corporate Social Responsibility, Native Title and Agreement Making: Report to the Human Rights and Equal Opportunity Commission', Griffith University, Brisbane; S Phillips 2000, 'Enforcing Native Title Agreements: Carriage v Duke Australia Operations', *Indigenous Law Bulletin*, Vol 5, 14-16; Riley, M., 2002. *'Winning Native Title: The Experience of the Nharnuwangga, Wajarri and Ngarla People'*, NTRU Issues Paper Vol 2 no 19, AIATSIS.

[13] For a detailed discussion of these findings and of how implementation issues might be dealt with more successfully by building them into negotiation processes from the start, see C O'Faircheallaigh 2003. *Implementation of Mining Agreements in Australia and Canada*, Aboriginal Politics and Public Management Research Paper No. 13, Griffith University, Brisbane.

[14] See for example AIAS (Australian Institute of Aboriginal Studies) 1984, Aborigines and Uranium: Consolidated Report to the Minister for Aboriginal Affairs on the Social Impact of Uranium Mining on the Aborigines of the Northern Territory, AGPS; J Altman and D Smith 1994, The Economic Impact of Mining Moneys: The Nabarlek case, Western Arnhem Land, Discussion Paper 63/1994, CAEPR, ANU, Canberra; Kakadu Region Social Impact Study, 1997. Community Action Plan: Report of the Study Advisory Group, Darwin, July; C O'Faircheallaigh 2002, A New Model of Policy Evaluation: Indigenous People and Mining, Ashgate Press, Aldershot.

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