Power, Culture, Economy

Indigenous Australians and Mining

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5. The governance of agreements between Aboriginal people and resource developers: Principles for sustainability

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Introduction

In February 2008, the Commonwealth Attorney General called for a new approach to resolving native title claims, unblocking the system through 'interests-based' negotiations between claimants and other parties, including governments, which can result in an array of 'non-native title' outcomes (McClelland 2008). More recently, in the 2008 Mabo Lecture the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs (Macklin 2008) called for 'a mindset which structures the governance of these arrangements to ensure financial benefits create employment and educational opportunities for individuals and are invested for the long term benefit of communities'.[1]

These Ministerial speeches raise a number of important questions. The first is that they do not engage with research in relation to major Australian mining agreements which argues that many do not in fact deliver substantive, meaningful benefits to the Aboriginal parties (for example, Cousins and Nieuwenhuysen 1984; O'Faircheallaigh 1988, 2006). Even when agreements do deliver such benefits, they would appear to have only minimal impact on the general socioeconomic status of the Aboriginal people in mine hinterlands (for example, Taylor and Scambary 2005).[2] Secondly, the speeches avoid reference to the important issue which arises where compensatory payments involve the substitution of monetary benefits with goods and services which arguably should be generally accessible to all citizens (Smith 2001: 44; see also, for example, Altman 1985b; Altman and Levitus 1999: 17–18; Toohey 1984).

Thirdly, there are questions relating to the 'distributive equity' of agreement payments (that is, ensuring that compensation is paid to the appropriate rights holders) and 'distributive spread' (for example, whether other Aboriginal people than just those whose native title rights are impacted, should also receive a portion of compensatory payments) (Smith 2001: 42). Fourthly, there is the issue

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[1] Such sentiments are far from novel—they have a history at least as long as that of land rights itself; see for example Turnbull 1978.
[2] Indeed, such factors as the lack of adequate baseline data in many regions, compounded by difficulties in obtaining quantitative data sets that relate to the specific groups who are the beneficiaries of an agreement (Taylor 2008a), make the monitoring of agreement impacts potentially quite difficult.

raised by the commonly inadequate attention typically paid to the implementation and monitoring stages of mining agreements (O'Faircheallaigh 2002a, 2003b). Lastly, and the subject of this chapter, are questions of the governance of mining agreements, which go to the ongoing ability of agreements to sustainably and effectively deliver the negotiated outcomes of any particular agreement. The significance of effective and sustainable agreement governance applies *irrespective* of these preceding factors, but little attention appears to have been paid to it as an issue, although attention has been paid to the governance of royalty associations and the like (for example, Altman 1985b; Altman and Smith 1999).

This chapter examines this core requirement of agreements to meet their objectives, making three key arguments: that inadequate attention is paid to the governance of agreements as *systems*; that agreement governance has to be explicitly understood and implemented as *transformative*; and that agreement governance should be seen as *intercultural*, a characteristic operating differentially across the various entities and relationships within any particular agreement.

These are not the only significant governance characteristics. For example, sustainable governance needs to incorporate an active recognition of the diversity amongst Aboriginal stakeholders, and between them and other parties (see Holcombe, Chapter 7; Scambary, Chapter 8). Indeed, the need to incorporate recognition of diversity is not unique to the case of Aboriginal people; there are arguments that it is an essential component of social sustainability more generally (Martin, Hondros and Scambary 2004; Western Australian Council of Social Services 2000). However, the three identified governance issues constitute case studies illustrating important principles for the negotiation, design, and implementation of large-scale mining agreements between Aboriginal people and major resource developers.

The governance of agreements as systems

Mining agreements are negotiated in complex and contested intercultural fields where the parties (Aboriginal groups, resource developers, and governments) bring potentially quite divergent interests and goals to bear on the negotiations, and indeed to subsequent implementation of the resulting agreement. There are substantial structural power and resource imbalances which disadvantage the Aboriginal parties in negotiations. This is despite the leverage which can be offered variously by the *Native Title Act 1993* (Cwlth) (NTA), land rights and heritage legislation, by corporate responsiveness to Aboriginal pressure (Trebeck, Chapter 6), and by the involvement of Aboriginal representative and advocacy organisations with statutory responsibilities (O'Faircheallaigh 2006; but compare Senior 1998: 9). All parties including Aboriginal people seek advice from a range of such specialists as lawyers, resource economists, environmental scientists, investment and tax experts, anthropologists, and others. While negotiations themselves may include varying levels of involvement by the Aboriginal people

concerned (Blowes and Trigger 1998; O'Faircheallaigh 2000; Senior 1998; Trigger 1997b), they and other parties are heavily dependent during negotiations on technical advisors, who overwhelmingly determine the form and structures of the resultant agreements.

This is not in any way to argue against the involvement of competent lawyers and other specialists; they are clearly essential for all parties, given such factors as the sometimes byzantine politics and strategic bargaining involved. There are also particular difficulties entailed in developing a common position amongst sometimes factionalised Aboriginal parties, and the complex legal frameworks (such as contract law, and that of the NTA) against which agreements are set, and the need for precision and clarity in their wording also pose challenges (for example, see accounts in O'Faircheallaigh 2000; Senior 1998). However, a failure to also include a specific consideration of governance issues can, I argue here, militate against long-term agreement sustainability. Similarly to the implementation of sustainable development principles more generally in the minerals industry (Brereton 2003), the development of effective and appropriate agreement governance requires a multidisciplinary approach.

The technical experts for each of the parties usually play a significant role in developing the broad terms and principles of a deal, and subsequently have major responsibility for the translation of that deal into a legally binding document which ensures the rights and obligations of the parties are specified sufficiently that they can be protected or enforced at law (O'Faircheallaigh 2000: 12). Key interlinked issues identified by Aboriginal parties are formulated against a background of concerns about the adverse potential impacts of the proposed development on country and culture, a wish to address the historic injustices which are reflected in continuing exclusion from meaningful participation in regional political and economic systems a desire for recognition of political autonomy and self-determination, a concern for capacity to control and access traditional country, and an often ambivalent recognition that mining agreements offer possibilities for leveraging change in their marginalised circumstances.

These concerns arise from within social fields which while intercultural (see discussion in the next section) are characterised by distinctive Aboriginal worldviews, beliefs and practices in which connections to country and kin are very significant (see, for example, Blowes and Trigger 1998; O'Faircheallaigh 2006; Scambary 2007; Sutton 2003; Trigger 1997b, 1998, 2005). There have been enormous impacts on the original economies of the Aboriginal groups now within Australian mine hinterlands, resulting from a whole range of historical factors including the development of the pastoral industry; the sedentarisation of people in towns and settlements; large-scale mining; and, in recent decades, the introduction of the welfare-based cash economy (see, for example, Edmunds 1989; Taylor and Scambary 2005). Aboriginal economies in these regions still

operate through dominant principles such as flexible, opportunistic and immediate-return foraging, strong pressure to share resources amongst kin, and (related to this) an anti-accumulation, immediate distribution ethos (Martin 2008a; Peterson 1993, 2005). Scambary (2007) details these matters in his doctoral thesis, summed up elegantly in its title 'My Country, Mine Country'.

The translation previously referred to is not simply a technical exercise in distilling issues raised by Aboriginal people into the legalese of an agreement (contra O'Faircheallaigh 2006). It entails the rendition of what may be quite different and indeed contested notions of cultural and economic futures (Scambary 2007; Trigger 1997a, 1998) into terms which can be recognised and enforced under Australian law—in a manner entirely analogous to the translation of the nature of Aboriginal people's connections to country under their laws and customs to rights and interests in the 'recognition' or 'translation' space of native title (Mantziaris and Martin 2000). What can with the best of intentions still be a rather impoverished translation entails the possibility of a degree of incommensurability between systems of values. Furthermore, the interests-based negotiation process together with standard legal methods combine to break down complex social realities and processes into defined components, and then to establish putative relationships between them. In this way the often generalised and interconnected matters raised by Aboriginal people in negotiations (such as those outlined previously), are distilled and disaggregated into distinct specific elements for which responsibilities may be assigned to particular parties and resources committed for implementation.

For example, concerns about the impacts of mining on country are translated into mechanisms for the protection of its cultural heritage and environmental values; historic exclusion and ongoing socioeconomic marginality are translated into financial benefits, employment and training, and business development provisions. Equally, desires for return to and control of traditional country are met with provisions such as return of mined areas, divesting pastoral stations in the mining hinterland to Aboriginal people, and support for outstation development. Demands for political autonomy and self-determination transmute to self-management and result in the establishment of Aboriginal-controlled entities such as trustee corporations and representative/advocacy bodies, and Aboriginal representation on the raft of committees usually set up under agreements.

This analysis is not meant to imply that there is an alternative set of more culturally appropriate principles by which mining agreements should be negotiated. By their very nature, agreements involving the Aboriginal people of Australian mine hinterlands are intercultural phenomena which must necessarily involve processes of translation (albeit with some inevitable level of incommensurability with Aboriginal values and aspirations) in order to have

the intended *practical* effects within the dominant society's legal, political and economic systems. However, I argue that in the negotiating phase inadequate attention is paid to both the governance of agreements as *systems* comprised of the disaggregated components resulting from the negotiation process, and to the implications of agreements as intercultural institutions. In my view these problems arise in part because the technical experts and the parties they represent are not necessarily alert to the complexities and implications of intercultural issues, including those pertaining to agreement governance.

Through the processes discussed above, both the structure of an agreement—and the institutions which may be set up under it—reflect issues identified and agreed to in principle within a translation space established between the values and aspirations of the Aboriginal parties and those of the other parties through the negotiation process and the legal drafting of the agreement. This can be seen particularly clearly in the structures set up under the Century Mine Agreement.

This agreement was signed in May 1997 between representatives of three native title groups, Century Zinc Limited (CZL), then a subsidiary of CRA Limited, and the State of Queensland. The agreement concerned a proposal to open cut mining of a very large zinc deposit north-west of Mt Isa. The formal signing followed protracted and frequently bitter regional negotiations (Blowes and Trigger 1998; Trebeck 2007a; Trigger 1997b) which were initially outside the ambit of the NTA and involved the broader gulf Aboriginal community as well as those asserting native title in the mine site area, the pipeline route, and the port at Karumba.[3] With a breakdown in negotiations leading to the issuance of s.29 Notices under the NTA, there was a consequent change in focus to negotiating with the registered native title claimants under the Right to Negotiate provisions of the Act. Ultimately, final agreement was precipitated by arbitration procedures commenced in February 1997 with strict timeframes under the Act. CZL was purchased from CRA by Pasminco prior to mine site construction beginning, and the Century agreement was renamed the Gulf Communities Agreement (GCA). In 2002, a cash-strapped Pasminco was reconstituted as Zinifex. The terms of the GCA binds all future owners and operators of the mine, including subcontractors.

Benefits from the agreement are directed to members of the three native title groups wherever they may live, and to Aboriginal residents of designated communities in the region, including Doomadgee, Burketown, Mornington Island and Normanton. The GCA and its associated schedules are structured around specific categories of issues and benefits negotiated with the native title

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[3] This account is drawn from Martin (1998a) which is based on my own knowledge and experience gained during the period when I was engaged by the three native title groups to assist in implementing the terms of the agreement, from information gathered during a short period of fieldwork as part of the CAEPR Mining Project, and from the information provided in Scambary (2007).

groups, and the structures established to address them. CZL is required to provide employment opportunities; provide training programs to assist Aboriginal people in developing the relevant skills; resource and provide financial resources to assist the native title groups and the designated communities to develop small businesses, joint ventures and contracting opportunities; provide monetary payments for the benefit of the native title group; provide assurances about environmental protection in the project area and about the identification, protection and management of culturally significant sites; and access to and interests in pastoral leases held by CZL for the relevant native title groups (Scambary 2007: 109–12).
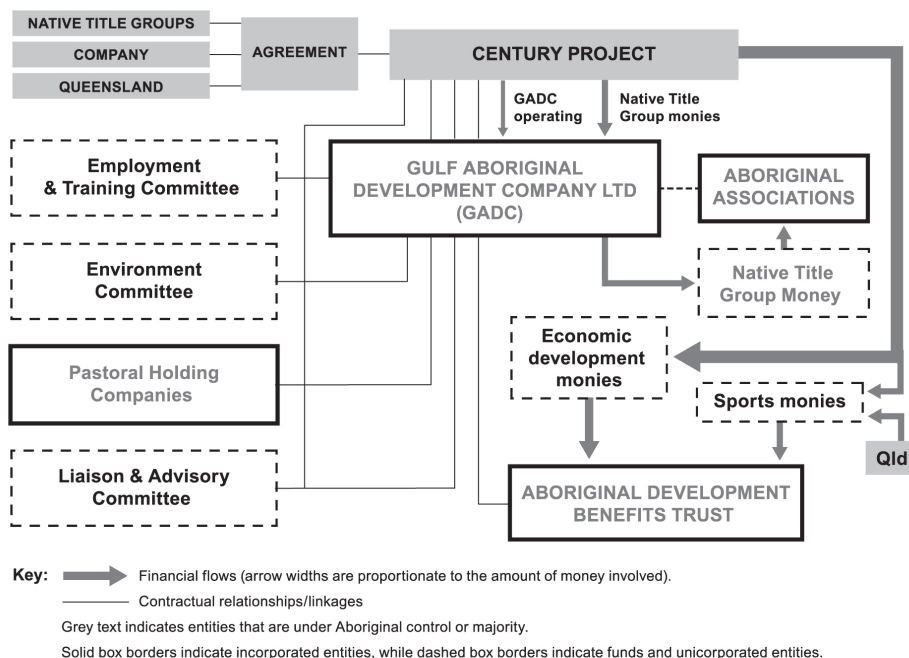
The bulk of the community benefits package is delivered to the Aboriginal parties through two special purpose organisations established pursuant to the GCA: the Gulf Aboriginal Development Company Ltd (GADC), and the Aboriginal Development Benefits Trust. GADC is a company limited by guarantee whose members are drawn from each of the three native title groups. Its establishment resulted from a political compromise during the latter stages of negotiations, necessitated by entrenched opposition to the regional native title representative body both from the Queensland Government and CZL as well as a degree of distrust of the native title representative body amongst a substantial proportion of the Aboriginal people of the region. GADC was clearly envisaged as playing a significant role in administering the GCA on behalf of the native title groups, and ensuring benefits are delivered in accordance with the intent of the Agreement. After its incorporation, GADC became a formal party to the GCA on behalf of the native title groups. Its functions include distributing monetary payments from CZL directly to Aboriginal corporations representing the native title groups under a formula specified in the GCA, employing a Liaison Officer to assist the Environment Committee and the native title groups in monitoring the project's environmental management regime, an important coordinating role in employment, training and business development, seeking additional resources from government to assist implementation of the Century Employment and Training Plan, providing advice to CZL on contracting and joint venturing possibilities, facilitating the appointment of native title group representatives on the various committees organisations, and assisting in the monitoring and review of the Agreement (Martin 1998a; Scambary 2007: 109–12).

The primary function of the Aboriginal Development Benefits Trust is to promote economic development for members of the native title groups and residents of the designated communities through providing loans or grants for business skills training, start-up finance for small businesses, and financial equity in joint ventures and land purchases. The Trust's principal funds derive from CZL under a formula set out in the Agreement, and at the time the GCA was signed were expected to total around $20 million over the then anticipated 15-year life of

the mine. The Trust is also responsible for delivering a relatively small program for sporting development with funds provided by CZL and Queensland.

Other special purpose organisations and committees were established under the GCA. Various pastoral property holding and management companies were set up to enable the gradual transfer of ownership and control of five hitherto CZL-owned properties to the relevant Aboriginal groups—three to Waanyi people, and two to Ganggalida. The Century Employment and Training Committee is an advisory body with representation from each of the native title groups, the designated Aboriginal communities of the gulf, CZL, and government. It has a key role in developing the Century Employment and Training Plan which, along with the Aboriginal Development Benefits Trust, lies at the heart of the GCA's economic development mechanisms. As well, an Environment Committee was set up with the intended role of providing direction to the environmental Liaison Officer and acting as a clearinghouse between the Aboriginal parties and the mine on environmental matters. Finally, a Liaison and Advisory Committee was established for general liaison, reviewing project plans and operations, and as a conduit for information exchange between the project (see above comment) and the members of the native title groups, and designated communities.

Fig. 5.1 Gulf Communities Agreement structure

Key: ——▶ Financial flows (arrow widths are proportionate to the amount of money involved).
—— Contractual relationships/linkages
Grey text indicates entities that are under Aboriginal control or majority.
Solid box borders indicate incorporated entities, while dashed box borders indicate funds and unicorporated entities.

Source: Martin (1998b), Scambary (2007).

The various entities established under the GCA and aspects of the connections between them are shown in Fig. 5.1. It illustrates an archetypical case of the isomorphism discussed previously, in which responsibilities for particular issues and processes are mapped onto function-specific entities. The viability and effectiveness of this complex and interlinked set of entities is essential to the successful implementation of the Agreement, including delivery of benefits to the Aboriginal parties, as well as the certainty and risk management sought by the resource developer (Pasminco, The State of Queensland and GADC 2002: 7). O'Faircheallaigh (2002a, 2004b) has strongly argued that the implementation phase is given completely inadequate attention in Australian (and Canadian) mining agreements. The GCA provides an instance of another crucial implementation issue to which inadequate attention is paid in negotiating and designing Australian mining agreements—the governance of agreements *as systems*. This is a first order implementation issue because no matter how advantageous to the Aboriginal and other parties a negotiated set of outcomes may be, unless there is sustainable, coordinated, robust and effective governance across an agreement as a whole, there will be a strong likelihood of it failing to meet either mandated outcomes or the expectations of the parties, particularly the Aboriginal ones. This is in fact what occurred in the case of the GCA.

The first five-yearly review of the GCA (Pasminco, The State of Queensland and GADC 2002) found that its institutional arrangements have proved to be uncoordinated, unwieldy, inefficient and far more resource intensive for all parties (in both human and capital terms) than was originally envisaged when the agreement was negotiated. The requirement for Aboriginal representation on the plethora of boards and committees has placed particular strain on the subset of Aboriginal people who are able, willing and deemed by the relevant Aboriginal groups as being structurally appropriate to serve on them. Critically, the central role to be played by the GADC in implementing the Agreement and representing the interests of the Native Title Groups could not be undertaken in part because of a lack of the resources necessary to meet its contractual obligations (Pasminco et al. 2002: 94; Scambary 2007: 111–12). While its initial establishment was reasonably resourced, after the first two years CZL was required to provide an annual grant of only $50 000 (indexed) for GADC's operations (Scambary 2007: 112), not even enough to pay the salary of one appropriately qualified staff member, let alone undertaken any of its functions.

The risks posed by the potential non-viability of GADC were identified by GADC itself in the early stages of agreement implementation, but virtually all attempts to seek additional funding, or alternative sources of funds, failed. The author was engaged to work for the three native title groups in setting up the GADC and undertaking its formal functions under the GCA until it had been incorporated and had recruited a staff member to undertake its work. In this role, the author expended considerable effort in seeking to persuade CZL, the

Aboriginal and Torres Strait Islander Commission, various State agencies and others of the implications for the Agreement should GADC not be adequately resourced. Some short-term additional funds were provided by a State agency, but apart from this all efforts proved unsuccessful. CZL in particular argued that meeting any shortfall was the responsibility of the Native Title Groups, and that they should dedicate a portion of the benefit monies received by their eligible corporations to GADC's administration. Not unsurprisingly, this was not supported by the relevant Aboriginal people as they saw these monies as compensation for the damage done to their country, and the impasse could not be resolved. By 2000 GADC was essentially a hollow shell of an organisation with little capacity to undertake its specified functions and little active support from its nominal constituency.

The de facto capacity failure of GADC was compounded by compliance failures in the small Aboriginal corporations receiving the monetary payments from CZL. As previously outlined, one of GADC's functions was to receive an aggregate annual payment from CZL, and hold it in trust pending disbursement to each of six 'eligible' Aboriginal corporations, in accordance with a formula set out in the Agreement. In order to be eligible to receive its payment, each corporation had to maintain compliance with the reporting requirements of its incorporating act, the then *Aboriginal Councils and Associations Act* 1976 (Cth). Within two years, four of the six Aboriginal corporations were ineligible to receive these funds (Martin, Hondros and Scambary 2004: 8) and, of these, three had their memberships drawn from the Waanyi Native Title Group, on whose traditional lands the actual mine was located. Furthermore, recognising the fact that there were many Waanyi people who were not members of or associated with any of the existing four Waanyi corporations, there was an unallocated amount designated for the Waanyi Native Title Group which was received each year by GADC, but which it could not distribute until it had obtained the informed consent of the group as a whole.

The consequence of these entirely predictable compliance failures was that by 2002 a quite substantial sum of money had accrued for the Waanyi Native Title Group which could not legally be distributed by GADC under the terms of the Agreement. However, as explained above, GADC did not have the staff or financial resources to undertake the necessary consultations with Waanyi people about how to resolve this situation, or what to do with the unallocated Waanyi funds. Indeed, it had never had the resources to assist the corporations to maintain regulatory compliance (which would have avoided this problem). The frustration of Waanyi people with the inability of the GADC to pay what they saw as their compensatory monies has been identified as one of the key reasons which led to the 2002 sit-in at the mine site kitchen by Waanyi people, which exposed the operation to serious financial risk at a particularly vulnerable time (Scambary 2007: 236).

This case study provides an unfortunate example of the problems which may arise if agreement implementation structures and processes are not viewed as a system, and agreement governance is not established and implemented systematically. As Fig. 5.1 and the above discussion illustrate, in common with many major mining agreements the GCA constitutes a system comprised of complex, interlinked, and interdependent structures and relationships which are more than just an aggregation of separately negotiated components. However, recognition of this systemic character was not incorporated into its governance or implementation. In such circumstances, an agreement is prone to failure at crucial and unexpected points, and this failure may pose major risks to the interests of *all* parties. It is significant in this context that in the events which led up to the sit-in at the Century mine (which potentially threatened the project), the element of the GCA which failed (monetary payments to the native title groups) was a relatively minor component of the Agreement of little direct concern to the miner or to government. However, these payments were both highly politically symbolic and of intense practical interest to the Aboriginal people concerned.

Governance for transformation

Many (but not all)[4] agreements between Aboriginal people and resource developers are based on procedures set out in the NTA, in particular its Right to Negotiate provisions, precipitated by the successful registration of a claim for native title. To pass the registration test, claimants are obliged to construct an account of their present society and culture in terms of essentially unbroken connections to their pre-sovereignty past—as arising through adaptation to the wider society, not transformation by it. This process becomes even more exacting if claims are to result in a successful determination of native title. From this perspective, the native title claims regime can be seen as a state resourced and mandated project of 'traditionalism'—the reconstruction of an idealised representation of the present as it allegedly is, in terms of how it supposedly was in the past (Merlan 1998: 231). On the other hand, agreements such as Indigenous Land Use Agreements under s.24 of the NTA offer possibilities for Aboriginal people to construct their futures through explicitly transformative processes involving engagement with the institutions of the dominant society.[5] Such processes can enable claimants to negotiate ways to have their interests and certain of their rights recognised and aspirations met (including for development), without these having to be refracted through the distorting lens

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[4] For example, the Yandicoogina agreement in the Pilbara is a private contract, not an Indigenous Land Use Agreement under the NTA (Scambary 2007: 97, this volume Chapter 8). Also, many agreements have been negotiated in the Northern Territory under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (ALRA).
[5] Smith (1998) still offers the most comprehensive account of the Indigenous Land Use Agreement provisions of the Act.

of traditionalism. That is, in contrast to native title claims, agreements are potentially privately resourced[6] and optional projects of modernism.

Native title has been placed in something of a traditionalist policy enclave over the decade since the so called 'Wik' amendments to the NTA. In no small part as a direct result of those amendments, successive Federal and High Court decisions have led to a progressive diminution of what can be recognised as native title, and progressively higher evidentiary thresholds for its proof. As a consequence, native title has become an increasingly attenuated property right, with little direct fungibility to other forms of capital and thus difficult to leverage as an effective base for sustainable development (Pearson and Kostakidis-Lianos 2004, referring to the work of Peruvian development economist de Soto 2000).[7] Native title is also a very legally fragile form of property right. Its existence depends upon continuing adherence by the native title holders to the laws and customs from which their native title derives. Post-determination socio-cultural changes—including indeed those which would logically result from the positive impacts of engagement with the mining industry—could result in a government seeking to have the determination that native title exists revoked, on the basis that the particular groups' laws and customs are no longer traditional.

Paradoxically therefore, while native title (or its assertion) can provide leverage for agreements, its legal fragility provides a poor substrate for agreements in terms of their long-term sustainability. More broadly, an increasing gap has developed between Aboriginal goals and aspirations beyond economic development and what can actually be delivered by the recognition of native title (Strelein 2003). Yet, in the face of overwhelming and continuing disadvantage, under the Howard coalition government Aboriginal affairs policy rhetoric more generally was focused on social and economic engagement, through individual participation in what has been termed (following Pearson 2000a) the 'real economy'—an archetypical modernist project.

There are signs that the Rudd Labor Government may be seeking to move native title out of this enclave, linking it through agreement making into such developing policy frameworks as 'closing the gap' and social inclusion. As discussed at the beginning of this chapter, in February 2008, the Commonwealth Attorney General called for a new approach to resolving native title claims, through 'interests based' negotiations between claimants and other parties resulting in an array of 'non-native title' outcomes (McClelland 2008). More recently, in the 2008 Mabo Lecture the Commonwealth Minister for Families,

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[6] Although many are also funded by native title representative bodies, most of the large-scale agreements are resourced by the relevant mining company.
[7] While the Right to Negotiate provisions of the NTA, and the veto provisions of the ALRA provide forms of de facto fungibility, it nonetheless is the case that native title rights and interests and those arising from the inalienable freehold issued under the ALRA are not directly fungible to other forms of capital.

Housing, Community Services and Indigenous Affairs argued that benefits from mining agreements should create employment and educational opportunities for individuals and be invested for the long-term benefit of communities. Macklin (2008) observed:

> The challenge here is to ensure that financial flows to native title holders—and indeed landholders under other land rights legislation—contribute positively to improving Indigenous economic status. To do this, these financial transfers must be structured to increase wealth and capital assets within Indigenous communities.

Given that agreements are essentially private contracts between the parties, albeit given certain legal characteristics if negotiated and registered as Indigenous Land Use Agreements, it is difficult to see how government could insist that agreement benefits be structured in certain ways, unless there is the intention to establish Indigenous Land Use Agreements as statutory contracts.

This chapter does not address the question of whether Australian agreements between Aboriginal people and resource developers have historically delivered the benefits which Aboriginal parties expected of them (for example, O'Faircheallaigh 2006),[8] nor the enormous structural and other impediments to their doing so (for example, Taylor 2004a, 2008b; Taylor and Scambary 2005). There are also complex challenges to the policy frameworks of 'closing the gap' and social inclusion posed by the well-documented maintenance of particular Aboriginal worldviews which may be inimical to certain forms of participation in the wider society. Further challenges are posed by evidence that there are many Aboriginal people who, while they seek better access to the goods and services of the wider society, nonetheless have no desire to be assimilated into it or to share all of its values, lifestyles and locales (Altman, Biddle and Hunter 2008; Martin 2005b; Scambary 2007; Sullivan 2007; Sutton 2001).

Whether effectively negotiated and implemented or not, all agreements are explicitly transformative institutions. This is irrespective of whether the aims include the protection and maintenance of Aboriginal culture. An example of this is the GCA, which establishes one of the goals and aspirations of the Aboriginal parties as being:

> … to ensure that the material benefits do not corrupt indigenous cultures but enable people to re-affirm the cultures and enhance the lifestyles of the members of the Native Title Groups and other members of the Communities through community and cultural development initiatives (GCA 1997: 6).

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[8] As noted at the beginning of this chapter, there are real issues with the availability of appropriate data for benchmarking and measuring agreement impacts.

Objectives of mining agreements—such as financial benefits and economic development through employment, training and business development—are predicated precisely upon the transformation of the Aboriginal parties' existing socioeconomic status. It is clear in fact that irrespective of the efficacy of mining agreements, or that of government policies, Aboriginal people in mine hinterlands are undergoing profound, and arguably accelerating, transformation. There are significant and ongoing demographic changes in Aboriginal populations in Australian mine hinterlands, as elsewhere in remote and rural Aboriginal Australia. For example, Taylor and Scambary (2005) have produced a major baseline study for Aboriginal participation in the Pilbara mining boom. They showed that in the absence of substantial out-migration the Pilbara Aboriginal population is set to expand for decades to come, with the largest growth being in younger age groups, although there will be a greater proportion of older people than is currently the case. In combination, Taylor and Scambary (2005) argue, these expanding cohorts present significant challenges for social and economic policy. Arguably, they also have major implications for cultural reproduction, with enculturation into a distinctively Aboriginal social and cultural milieu taking place within generational age cohorts—such as peer groups—rather than through transmission from senior to junior generations (Martin 2003, 2008b).

There are other very significant demographic changes taking place. The majority of Aboriginal people associated with any given traditional country are now usually living in polyglot townships along with non-Aboriginal people and members from other Aboriginal groups. These townships may be situated on the country of the group concerned (as Tom Price is for its Eastern Gurrama residents), on or near its periphery (as Aurukun is for its Wik Way residents), or at some remove from it (as is Mornington Island for its Waanyi residents). Those Aboriginal people from a particular country are thus typically dispersed across wide regions, may have only intermittent contact with other members of the group (for example, at funerals and other such ceremonial occasions), and more generally are living in situations where younger generations are exposed to a considerable diversity of values and worldviews. In the terms of French sociologist Pierre Bourdieu (1977: 166) that is, they have moved from a situation of 'doxa' in which the established order had not been perceived as arbitrary and one possible order among many, but as a self-evident and natural one which went unquestioned, to 'heterodoxy' in which there are many possibilities, including those of dissent and rejection.

These factors clearly have major implications for being able to prove native title, in terms of the legal requirements to demonstrate such matters as continuity of the relevant society under whose laws and customs the claimants assert they hold native title, continuing adherence to and practice of those laws and customs through the generations since sovereignty, and the traditional nature of those

laws and customs which can allow for adaptation but not transformation. The kinds of changes and transformations outlined above, common across virtually all Aboriginal groups and societies, do not mean that native title cannot be proved or demonstrated, but make it much harder to do so. That is, proving native title requires arguments that overcome these difficulties.

In the negotiation, design and implementation of agreements however, such factors must explicitly be taken into account, not circumvented. For example, there will be a need to develop sophisticated, nuanced, but practical analyses and proposals around such matters as contemporary Aboriginal authority structures and leadership domains. It will be critical to the long-term sustainability of agreements that cultural enclave governance principles such as the supposedly unchanging nature of tradition are not unwittingly built in. Equally, it will be essential to not build in obsolescence such as traditionalist notions of authority of elders in domains where they may demonstrably not have such authority (see discussion below). It will also be vital to be alert to different governance principles which may operate in different arenas—for example, decision-making principles in relation to country, in comparison with those necessary for viable commercial enterprises.

Sustainable agreement governance design will also require detailed attention to be paid to the implications of the complex interplay in Aboriginal societies between the local and individual on the one hand, and the collective or community on the other. There is typically a pervasive public dialogue amongst Aboriginal people around collective social forms, which nonetheless takes place against the background of the reality of an intense localism (discussed later in this chapter) with a stress on local group autonomy, and with ethical and political frameworks centred on highly localised imperatives. One implication of this is that it is likely to be problematic to assume that a small number of representatives from, say, a native title group, will in practical terms prove a sufficient conduit for communication between an agreement entity and the relevant group (see also the discussion below on the politics of representation). As another instance, it may be important in negotiations to not just focus solely on community-based benefits, such as resources and assistance for business development, but also to have the mechanisms for local groupings or families, or even individuals, to access them (see also Holcombe, Chapter 7; Scambary, Chapter 8).

Agreements as intercultural institutions

Thus far, I have discussed the need to incorporate the recognition of agreements as systems, as well as their explicitly transformative character, into agreement governance in the negotiation, design and implementation stages. The final and key element in agreement governance to be considered here is the necessity of reflecting the intercultural nature of the values and practices that the Aboriginal parties to agreements will bring to both their involvement in negotiations and

participation in subsequent agreement implementation. However, this is not to propose the apparently straightforward principle that agreements need to take account of Aboriginal culture, for example through creating supposedly culturally appropriate institutions and ways of working within agreements.

This is because while it is possible to meaningfully delineate distinctive characteristics of the contemporary values and practices of the Aboriginal peoples of Australian mine hinterlands, these values and practices have been produced, reproduced and transformed through complex historical processes of engagement with those of the dominant society which has resulted in what Merlan (1998) terms an intercultural social field. This process has involved not just Aboriginal people's domination by and exclusion from non-Aboriginal society, but also their appropriation and incorporation of many of the wider society's values and practices into their own, distinctive, ways of being and acting (Martin 2003, 2005a, 2005b). Even who and what Aboriginal people consider themselves to be has been affected by the representations of Aboriginality by others (Merlan 1998).

Aboriginal societies and cultures cannot be seen as bounded and separate entities or domains (Hinkson and Smith 2005; Merlan 2005); nowhere in Australia do (or indeed can) Aboriginal people live in self-defining and self-reproducing domains of meaning and practices. Rather, they draw from and contribute to complex and contested intercultural social fields (Martin 2003). It should be noted that while the notion of the intercultural implies both Aboriginal and non-Aboriginal people are operating within a (more or less) shared social field, they may well be doing so from quite distinct positions, as Merlan observes (1998: 233). A key insight of significant practical import is the challenge posed by the notion of the intercultural to the existence of separate, disconnected Aboriginal and non-Aboriginal domains of beliefs, understandings, and practices. It recognises that the characteristics of any particular governance arena in, for example, a mining agreement do not draw solely from a supposedly separate Aboriginal domain with its origins in the 'classical' (Sutton 2003) past, nor derive simply from a self-contained and dominant non-Aboriginal society and culture. Rather, each arena or phenomenon will involve values and practices which draw from ideational and practical repertoires whose origins may ultimately lie within either or both Aboriginal society or the wider one, and which are simultaneously implicated in an ongoing cycle of adaptation, incorporation, and transformation (see also Smith and Hunt 2008).

An exemplar of an intercultural phenomenon is that of Aboriginal elders. The contemporary category of elder is not simply a phenomenon of Aboriginal societies themselves with its roots in traditional authority structures; it has been created in part precisely through the interactions between Aboriginal and non-Aboriginal societies (Mantziaris and Martin 2000: 302–3). Elders have become

the individuals with whom governments, agencies and resource developers consult to ascertain the views of Aboriginal groups about issues ranging from the protection of heritage and culturally significant sites to the protection of children. In certain contexts, the category has even been introduced into legislation (for example, the *Aboriginal Land Act* 1991 (Qld)). Not only, then, has who constitutes an Aboriginal elder and the nature of their status and authority been transformed by institutions of the wider society, but Aboriginal eldership has in turn impacted on how those institutions interact with and understand Aboriginal groups and communities.

Mining agreements themselves constitute intercultural institutions. They quintessentially arise from and in turn structure and transform the nature of the engagement of Aboriginal people and their institutions with those of the wider society—and vice versa (see, for example, Doohan 2003; Scambary 2007, this volume Chapter 8; Trebeck 2005, 2007a). Indeed, many Australian mining agreements are negotiated on the basis of claimants holding or asserting native title rights in project development areas, and native title itself is an archetypical intercultural phenomenon. As discussed above, its logic derives from the recognition space of native title, rights and interests whose origins lie in traditional laws and customs, but are recognised and given force by the general Australian legal system (Mantziaris and Martin 2000). The intercultural character of native title arises through the processes by which the content of a particular Aboriginal group's or society's relations to country under its own laws and customs is translated into rights and interests which can be accommodated by Australian property law—but which in turn impact on how members of that group or society understand, practice and reproduce those laws and customs (e.g. Glaskin 2007; Redmond 2007).

While a mining agreement as a whole needs to be understood as intercultural, so too do its constituent entities and relationships and, more broadly, the economic values and motivations which Aboriginal people bring to bear on their engagement with a given mine and its associated agreement. It is not just specifically Aboriginal institutions such as the GADC previously discussed in relation to the GCA which are intercultural. Equally, key functional areas of the mining company or its subcontractors such as a Community Relations division charged with the responsibility for engaging with Aboriginal stakeholders and oversight of agreement implementation are also potentially intercultural institutions. Their organisational cultures (such as work practices, accountability constituencies, styles of interpersonal relationships and more generally an ethos which are all influenced by the values and practices of Aboriginal staff and clients) have the potential to be quite different from those of, for example, production units, as is the case with the mine site GCA Support Department within CZL (Scambary 2007: 224–5; Trebeck 2005). On the other hand, Rio Tinto Iron Ore has taken a different course with its Communities and External Relations

division, on the basis that to be relevant it must share common corporate goals and culture, with community relations being an integral part of the company's overall operating strategy (B. Hart, pers. comm. 2008).

In these core project operational areas (such as the mine itself, crushing and beneficiation plants, and assay laboratories) factors such as production targets, quality control, other technical requirements, and occupational health and safety standards, limit most potentially transformative impacts of Aboriginal involvement on what is overwhelmingly modern industrial production culture. On the other hand, mine administrative and service operations may be more open to other cultural influences. In the Century project, factors such as the significant presence of Aboriginal employees (in the range of 15–20 per cent according to Barker and Brereton 2004), political actions such as the 2002 sit-in previously discussed, and proactive leadership by both Aboriginal and non-Aboriginal individuals have served to create a distinctive culture around the mess and recreation and living areas which marks this project out from other field sites discussed in this volume. In the case of the Argyle diamond mine, however, Doohan (2003) provides examples of how the Argyle Participation Agreement between the miner and traditional owners has allowed the latter to 'insert their cultural forms and presence onto the mine site in a number of ways' (see also Aboriginal and Torres Strait Islander Social Justice Commissioner 2007, Chapter 5). These have included Aboriginal people framing their relationships with the miner in terms of *wirnan* exchange relationships, instituting regular *manthe* ceremonies involving the (Aboriginal) hosts welcoming and inducting (company staff) guests and giving them a ritual safe passage across the mine site—which in Doohan's view constitutes a form of a specifically Aboriginal health and safety instruction, and social incorporation of senior mine personnel through giving them 'skin' classificatory names.

Returning to the implications for agreement negotiation, design and implementation, while a range of entities and relationships within a mining agreement need to be understood as intercultural, the intrinsic character and the entailments of interculturality of each will be potentially different. That is, while the governance of entities such as an Aboriginal representative and advocacy body, or the company's community relations and employment divisions, and relationships between each of these entities and the Aboriginal stakeholders must all incorporate a recognition of intercultural factors, different issues will arise for each in their design and implementation. The following factors are relevant to defining the intercultural character of each arena. These are crucial matters to be established for both design and implementation purposes:

• Is the governance that of a relationship between an entity and a collectivity, between two entities, of relationships within a collectivity, or of an entity itself?

- Does the particular governance arena entail multiplex linkages or is it relatively mono-dimensional?
- Does the institution involved have a formal, legal or administrative presence, or is it a collectivity or a 'natural social grouping' of some kind?
- What is the source of authority for the relevant principles of governance (for example, to adjudicate on conflicting viewpoints, resolve disputes, and to establish the rules of practice)?

A schematic illustration of entities and the relationships between them to be found in Australian mining agreements with Aboriginal people is provided in Fig. 5.2. It is not intended to represent the formal structures of any given agreement as Fig. 5.1 does in the case of the GCA. Rather, it illustrates governance *arenas* relating to classes of entity and categories of relationships in such agreements.[9] Its aim is to disaggregate different kinds of governance arenas in order to illustrate how the preceding proposed governance principles—the need for agreements to be understood as systems, agreements' transformative character, and their intercultural nature—can be usefully brought to bear in specific instances. That is, it aims to break down agreement governance into components which potentially need to have their own distinctive and specific governance characteristics to support agreement sustainability.

Fig. 5.2 Key agreement governance arenas

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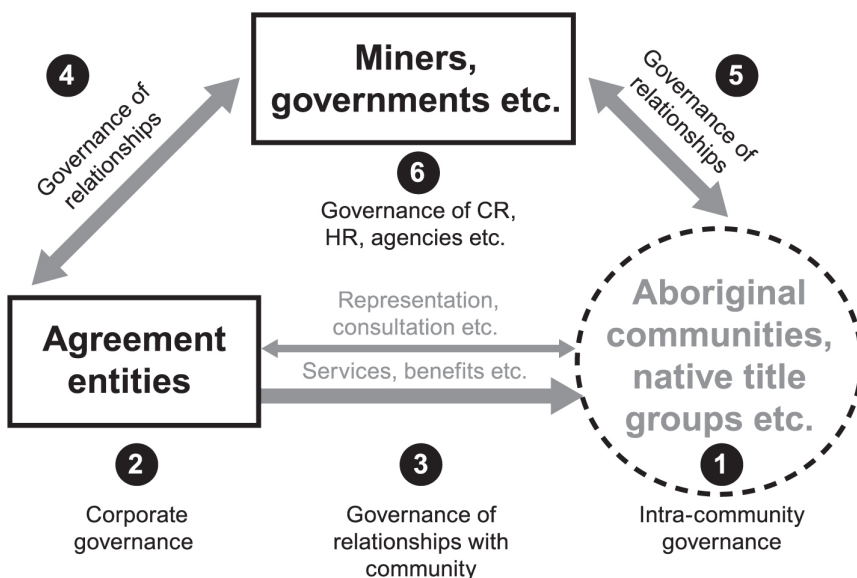
[9] In Fig. 5.2, the line representing Aboriginal groups and communities is dotted to indicate their relative lack of clearly defined bounds in comparison with, for example, the formal membership of a corporation.

Because the focus of this chapter is neither on the governance of mining company community relations divisions and the like, nor on the governance of governments in terms of how its various agencies may operate in their dealings with Aboriginal people through mining agreements (see O'Faircheallaigh 2006 for some discussion of these matters; also Trebeck 2007a, this volume Chapter 6), these have been aggregated in Fig. 5.2. Effective governance in each of the six arenas identified in Fig. 5.2, I propose, is one of the key requirements for the long-term effectiveness and sustainability of agreements as a whole. Each arena will have differing intercultural characteristics, and different transformative implications—and thus potentially involve different governance principles. For illustrative purposes however this chapter will sketch these out in only two of these arenas of particular significance to mining agreements: first, the governance of agreement organisations themselves *qua* organisations—that is, corporate governance and the like; and second, the governance of relationships between agreement entities and the particular Aboriginal stakeholders.

The governance of agreement structures

This section focuses on Arena 2 in Fig. 5.2, concerning the governance of more or less formal entities such as committees and working groups as well as incorporated bodies, although discussion here will centre on the latter. There are now several thousand Aboriginal-controlled organisations around Australia (Hunt and Smith 2006a: 10), ranging from virtual 'post box' landholding entities to commercial and service delivery corporations with turnovers of millions of dollars. As is the case for non-Aboriginal organisations, there is also considerable diversity in terms of their viability or otherwise. There is a developing, if contested, literature on theorising Australian Aboriginal organisations and governance (for example, Mantziaris and Martin 2000; Martin 2003, 2005a, 2005b; Martin and Finlayson 1996; Sullivan 2006, 2007), and the factors that are held to contribute to good governance and successful Aboriginal organisations (for example, Finlayson 2007a, 2007b; Hunt and Smith 2006a, 2007; Hunt et al. 2008).

However, this section will not canvass this terrain in any detail, but will refer to a set of key issues that bear on the design of organisations such as those established through mining agreements. In particular, it will follow arguments that it is necessary to separate—both conceptually and practically—the governance of organisations themselves (Arena 2), from that of the communities which they serve (Arena 1), and that of the relationships between them (Arena 3) (see, for example, Mantziaris and Martin 2000: 126–8; also Martin 2003; Sullivan 2007).

Of course, Aboriginal people bring distinct values and ways of acting in the world to their participation in organisations, which have become fundamental constitutive elements in Aboriginal polities. Some of these pose challenges to

the governance of Aboriginal-controlled organisations, especially those with diverse and broad constituencies. An 'intense localism' (Martin and Finlayson 1996) is a particularly significant feature to be found across Australian Aboriginal societies generally, with ancient roots in their original hunter-gatherer predecessors. Here, priority is given to values and interests asserted at the small-scale, locally based or even individual levels, and to individual and local-group autonomy (Martin and Finlayson 1996: 5; Sullivan 2006: 17). While this localism exists along with wider networks of connection and interdependence (Myers 1986; Hunt and Smith 2006a: 24–5), strong emphasis is typically placed on the identities and autonomy of individuals and local groupings, such as those referred to by Aboriginal people as 'families' which frequently form the 'backbone' of organisational governance (Hunt and Smith 2006a: 10).[10]

Localism has important ethical as well as political implications. A person's strongest bonds and obligations are usually to their immediate kin and family, and those from other groups may well be viewed with a degree of suspicion or even hostility. A notion of the wider common good—including amongst those who are parties to the one mining agreement—may not meaningfully exist, or be very attenuated (Peterson 2005; Trigger 2005; Tonkinson 2007). These overriding political and ethical commitments to immediate kin and family have significant implications for Aboriginal members of governing committees and boards. To take just one instance, the legal requirement for a board member to act in accordance with their fiduciary duty to the organisation itself can directly conflict with the ethical and political requirement that the individual concerned act in the interests of and support immediate kin, including directing organisational resources to them (for example, Hunt and Smith 2006a: 17; Mantziaris and Martin 2000: 189–92).

Equally, principles underlying democratic representative institutions and other organisational structures whereby individuals or groups cede their right to speak for, manage, and protect their interests to others who represent them, do not typically operate within Aboriginal groups and communities. The localism mentioned previously is manifested in resistance by individuals and local groups to others taking on this role—and indeed to being bound by the decisions of others, including those who nominally act for or represent them in contemporary institutions. This originates in part in the high value placed on individual and local-group autonomy, and on a resistance to hierarchy outside the religious and ritual arena. Equivalently, a person's occupation of a formal institutional position such as chairman or board member does not necessarily give that person the authority or legitimacy within the relevant Aboriginal polity to speak for others.

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[10] Sutton (2003, Chapter 8) provides an extended treatment of post-classical Aboriginal 'families of polity' as fundamental political, social and economic forms in contemporary, 'post-classical' Aboriginal societies.

All Aboriginal participants understand and acknowledge this cultural logic and imperative by which the primary ethical and political obligations of those on a board are to *their* kin and mob—and that therefore those from outside that network can have no necessary assurance that their interests will be fairly and equitably represented.

This is one of the key reasons why, across Australia, many Aboriginal organisations are characterised by intense competition between different groups and by corporate histories in which competing factions alternate in their control of the board, or fission off to form new organisations. Political conflict in these organisations will often be conducted through manipulation of membership and meeting processes to establish control of boards (and therefore of organisational resources). This destabilising 'politics of representation' (Mantziaris and Martin 2000: 303–5) can also be seen sometimes in the attempts by individuals and sub-groups within the wider organisational constituency to assert control over the means by which membership of the organisation, and thus the means by which composition of its board, are determined.

Nonetheless, while distinctive, Aboriginal organisations are not cultural isolates but focal sites where Aboriginal practices and values are both incorporated and simultaneously transformed through processes of engagement—appraisal, contestation, and appropriation—with those whose ultimate origins lie in the broader non-Aboriginal society (Martin 2003: 5). Aboriginal organisations have become sources of legitimacy and authority not only within the Aboriginal domain but also the non-Aboriginal one where, in some respects, they can be seen as the functional equivalent of the King Plates the early colonists were wont to hang around the necks of putative leaders of local Aboriginal groups (Mantziaris and Martin 2000: 101, 274). They have a form of dual incorporation, whereby they are simultaneously legally incorporated under, or established by, statutes of the general Australian law, and incorporated into Aboriginal polities (Mantziaris and Martin 2000). Aboriginal organisations are thus necessarily and intrinsically intercultural institutions (Martin 2003)—not culturally autonomous Aboriginal arenas, but rather the locations of transforming and transformed practices and values.

From this perspective, then, I suggest it is totally inadequate to leave the construction and evaluation of organisational management principles solely to the Aboriginal people concerned and to a domain of supposedly uniquely Aboriginal values (Martin 2003: 9). If good organisational governance is a core component of an increased capacity by Aboriginal people for strategic engagement with the dominant society (Martin 2003), then it must draw not only from the values and practices of Aboriginal people, but also from those of the general Australian society. While the possibility of distinctive values and practices must be accepted as a basic premise in institutional design, the essence

of developing appropriate Aboriginal organisational governance does not lie in supposedly resolving potentially conflicting cultural values and practices; rather, it is to be undertaken through establishing institutional structures and principles which are robust enough to encompass and engage diversity, competition and conflict, and which are appropriate to the task at hand.

It is therefore not defensible to resort to an unexamined notion of cultural appropriateness, or to one of a notionally autonomous domain of Aboriginal culture, in determining the core principles by which effective Aboriginal organisations should be established and operated (Mantziaris and Martin 2000: 293–4; Martin 2003: 9–10; Sullivan 2006, 2007).[11] The concept of cultural appropriateness in relation to Aboriginal organisations assumes a domain in which Aboriginal values and practices are autonomous from those of the general Australian society, and a domain of operations of these corporations which is separate from the legal, political, and economic fields in which they are necessarily situated. Neither assumption is true. As I have argued elsewhere:

> The more attempts are made to reflect the complexities and subtleties of the values and practices of Indigenous people in formal corporate structures and processes—for example, regarding such matters as authority and decision-making, or the various forms of the typically labile Indigenous groupings and sub-groupings—the more there is the risk that the formal corporate structures and processes over time will supplant the informal Indigenous ones—a process of the juridification of social relations. While as we have seen, the engagement of Aboriginal and non-Aboriginal people can best be understood in intercultural terms, juridification takes this a step further, raising the problem of the underlying social relations being distorted or dominated by the legally enforceable expression of the same relations (Martin 2003: 10).

A corollary is that attempts to import particular aspects of Aboriginal political culture into the management structures and procedures of an organisation run the risk of creating organisational instability, as in the phenomenon of the politics of representation mentioned previously. This can have highly adverse consequences for Aboriginal people themselves, as in cases where the organisation is delivering an essential service, or managing a multi-million dollar trust. The objective fact is that representative structures can never truly reflect the nature of and relationship between the fluid and diverse groupings and alliances that characterise Aboriginal political systems. It is a common mistake, repeated across Aboriginal Australia including by those providing advice on the establishment of Aboriginal corporations, to focus attention largely on attempting to capture

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[11] Sullivan (2006, 2007) challenges the related notion of 'cultural match' developed by the Harvard Project on Native American Economic Development and adopted in the work of CAEPR's Indigenous Community Governance Project.

the diversity of the particular constituency in the board structure itself. It can certainly be important to an organisation's legitimacy with its constituency that its board is representative, in the particular sense of being drawn from a broad cross-section of the constituency and reflecting as far as feasible the cultural geography of the governance environment (Hunt and Smith 2006a: 24). However, problems will inevitably arise when the work of incorporating and responding to the diverse interests and expectations across an organisation's Aboriginal constituency is left essentially to the political and administrative representative structure of a board.

From this perspective, there are compelling arguments for establishing Aboriginal organisations which leave as much distinctively Aboriginal social and political process as possible within the informal Aboriginal realm where it belongs, and do not attempt to codify it within corporate structures or organisational governance mechanisms (Martin 2003: 10). The focus in these corporations' design and management should be on instituting organisational governance of a form which will maintain a viable and legitimate structure through which services would be delivered. Mantziaris and Martin (2000: 322–7) outline a set of principles for organisational design, which while developed for Prescribed Bodies Corporate are of more general applicability. These are: legal certainty; legitimacy (in the sense of having the capacity to attract the allegiance of the group); sensitivity to Aboriginal values; sensitivity to motivational complexity; revisability; robustness; simplicity; and transactional cost efficiency.

As Mantziaris and Martin note, there are interrelationships between these principles, and tradeoffs between them; for example, between sensitivity to Aboriginal values, and transactional cost efficiency.

Separate attention needs to be paid to such matters as developing procedures to ensure effective and accountable relationships and linkages between the corporation and the relevant Aboriginal group or community (Arena 3, Fig. 5.2; see discussion in the following section). These are the areas where full cognisance must be taken of the informal and pervasive governance principles operating within the relevant Aboriginal community itself. In Sullivan's (2007: 15–6) terms:

> A developmental or service delivery organisation should not be conflated with an institution of self-government. It needs neither a representative structure nor should it attempt to mimic local cultural forms. The representative structure is not required because the function of representation continues to happen where it belongs, in the cultural milieu of the community, and in the forms appropriate to the culture. Attention should turn away from representative structure (in service-delivery organisations) and towards means of communication, information transfer (in both directions), monitoring of consent, and effective policy input from the client/membership/constituency. This

means seeking authority wherever it lies, whether in institutions, families or particular individuals and encouraging sound leadership.[12]

This is not to argue that representative Aboriginal organisations are not necessary to mining agreements—they are. But, it is to propose a reconceptualisation of their character, purpose, and therefore design. The challenge is to develop and manage distinctively Aboriginal organisations which nonetheless facilitate effective engagement with the wider society rather than limiting it (Martin 2003: 10), and which pay particular attention to the governance of their relationships with their constituencies. From this perspective, appropriate and effective Aboriginal organisations would not draw their structures and operating principles from a supposedly autonomous Aboriginal domain, but from universal standards of good management (Sullivan 2007: 15–16). Indeed, the scale of many Australian mining agreements is such that there is an overriding necessity for highly competent management. While Aboriginal organisations must certainly take account of specific values and practices of the Aboriginal people who participate in them and whom they serve through the development of flexible organisational cultures which are sensitive to the milieu in which they operate, to be truly culturally appropriate Aboriginal organisations will also have to directly engage—and even on occasion challenge and circumvent—these values and practices. Where it is absolutely essential that Aboriginal values and practices be taken into account is in how they do their business; that is, in the governance of their relationships with their Aboriginal constituents and service community. Aboriginal governance needs to move beyond concentrating on the structure of organisations and towards the development of effective consultation, information sharing, and permission mechanisms (Sullivan 2006: 18, 2007: 30).

Governance of relationships with Aboriginal stakeholders

My focus in this section is on Arena 3 in Fig. 5.2, the governance of relationships between (Aboriginal controlled) agreement entities and their stakeholders. Before proceeding to discuss this, it must be noted that major mining agreements also include another and very important class of relationships involving the Aboriginal stakeholders, that between them on the one hand and the resource developer and relevant government agencies on the other (Arena 5, Fig. 5.2). A key focus of this arena is typically on such matters as education, training, and employment programs, which are beyond the scope of this chapter (see, for example, discussions in Barker and Brereton 2004; Scambary 2007: 86–9, 224–6; Tiplady and Barclay 2007; Vidler 2007). It is clear that to be effective, service delivery in this area must proactively engage potential Aboriginal participants through culturally aware, flexible measures adapted for their specific needs and

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[12] In my reading, Sullivan is here using 'representative' in the sense of political representation, not the sense discussed previously of a 'representative sample' of constituents.

circumstances, as instanced by the recruitment case studies for the Argyle diamond mine in Tiplady and Barclay (2007: 24–39). Similarly, Kemp, Boele and Brereton (2006) argue for a more proactive, externally focused, stakeholder-driven and values-based approach by resource companies to community relations, another aspect of governance of relationships (Arena 5).

On the other hand, the need for proactive, flexible and adaptive mechanisms for engaging with Aboriginal people does not, in general, appear to have been a widely instituted principle in the relationships between Aboriginal stakeholders and the Aboriginal-controlled agreement structures such as trust companies and special-purpose representative and advocacy bodies (that is, community relationships in Arena 3, Fig. 5.2). As has been argued above, typical agreement governance arrangements have left the work of reflecting community diversity largely to formal structures like boards and committees, like those in the GCA outlined previously. Furthermore, the common expectation of miners and governments is that community members on these structures will act as effective conduits of information, concerns and issues between Aboriginal people and other parties to agreements. Implicitly, the assumption is that representative boards and committees can act as proxies for the relevant community. Direct engagement with Aboriginal stakeholders, it is assumed, is to be conducted largely through community meetings of one sort or the other. Neither assumption can be safely made.

The first assumption—that community representatives on boards and committees will necessarily act as effective conduits for information—fails to take account of the import of localism in establishing people's social, political and ethical frameworks. Even though a nominated or elected member of a board or committee may notionally represent a particular sub-group of the agreement beneficiaries (for example, a language group), communication may not necessarily flow across boundaries set by immediate kin and family connections—much depends on the individual concerned.

The second assumption—that meetings provide a key mechanism for communication with Aboriginal people—also needs careful examination (see also Sullivan 2006: 29-30). Meetings provide a problematic mechanism for informing and seeking input from members of what are often dispersed and deeply factionalised groups. This is for a number of interrelated reasons, to be found across Aboriginal Australia and which in part reflect the highly localised nature of Aboriginal polities discussed previously. Particularly in the case of large, community meetings involving people from disparate groups, they are prone to being dominated and disrupted by individuals who use them for political aggrandisement, which can mean that it is difficult if not impossible to ensure effective participation of those who may have equivalent rights but less political standing. Such meetings can also provide forums that become dominated by the

airing of grievances about the operation of the agreement as it is the only occasion available to do so.

Meetings usually provide a poor basis for informed decision-making, particularly around complex and technical issues. Meetings do not facilitate typical Aboriginal decision-making processes of extended consideration and discussion, involvement of appropriate individuals on the basis of such principles as seniority and legitimate knowledge, and consensus building within the local groups where such processes have force. Indeed, because large meetings aggregate local and autonomous groups, they can disempower many people from effective participation. Meetings are a useful and necessary mechanism by which formal ratification of a proposal can be given by the relevant jural public (Sutton 2003)—that is, by those who can legitimately express a position on it and those others who act as witnesses to the ratification. These meetings need to be preceded by a considered and dispersed process of information dissemination, consultation and consensus building, so that the meeting essentially ratifies informed decisions that have already been reached, within the appropriate-level subgroups such as families.

The common reliance upon representative structures together with consultations and information dissemination through meetings as primary means of agreement beneficiary involvement, can also lead to the development of an inherently passive and reactive relationship between beneficiaries and the agreement entities which provide benefits to them. In general, in Australian agreements there appears to be little or no provision for planning or decision-making in which the beneficiaries themselves are or can be actively involved. As a consequence, the dominant relationship between beneficiaries and agreements has become in a number of instances one of opportunistic rent seeking by the former. This is because there are few formalised means by which the beneficiaries can access benefits or be involved in agreement operations or its decision-making processes, and so they are reduced to instrumentally seeking individual or family advantage. Assiduous demanding of sitting fees for mere attendance at meetings is but one example of such understandable, but arguably problematic, rent seeking.

Furthermore, the socioeconomic profiles of Aboriginal people in Australian mine hinterlands, evidence very poor health, education level, employment histories, and so forth (for example, Taylor 2004a, 2008b; Taylor and Scambary 2005). This is a poor substrate on which to graft the important work of agreements in such areas as economic development, human capital development, and other objectives to be found in Australian agreements. Capacity development amongst the beneficiaries therefore is an absolutely essential precursor maximising the returns of the resources provided to leverage sustainable change in accordance with agreement objectives. To be effective such capacity development must

operate at the level where beneficiaries themselves also operate—primarily at the individual and local group levels.

These factors thus suggest that the governance of Arena 3, the relationship between agreement entities and the beneficiaries, should have as its guiding principles:

- providing mechanisms for active participation amongst the beneficiaries at individual and local group levels;
- replacing current reactive and passive relationships between most beneficiaries and agreement entities with relationships based on active participation and a sense of ownership;
- minimising opportunistic rent seeking by agreeing on structured processes in which beneficiaries have a meaningful say in the operations of agreements, while still maintaining appropriate mechanisms for prudential control;
- providing mechanisms (such as participatory cyclical planning processes) by which beneficiaries can plan for their futures and the role which resources from agreements might play in those futures at the levels which are meaningful to them (such as family or residential group) to develop a long-term development perspective in the agreement; and
- a pre-eminent focus on working with the beneficiaries to build their capacity to undertake this planning.

Conclusion

This chapter has argued that the governance of agreements between resource developers and Aboriginal people is a crucial aspect of negotiations, and a critical implementation issue. This suggests that governance capacity (for both Aboriginal and non-Aboriginal parties to an agreement) should be developed as much as possible well ahead of agreement implementation. Governance needs to be developed and implemented with agreements considered as systems rather than just as aggregates of disconnected entities, relationships and processes. Agreement governance should be understood as intercultural, not as involving interaction between discrete and disconnected Aboriginal and non-Aboriginal cultures: it should not be designed and implemented in cultural enclave terms.

Furthermore, there is a range of governance arenas in agreements, each of which will exhibit different characteristics and require different governance principles for sustainable agreement implementation. In particular, it has been argued, the focus historically has tended to be largely on incorporating Aboriginal diversity and distinctive values into the structures of Aboriginal organisations, while insufficient attention has been paid to the governance of the relationships between these entities and their constituents, clients, or beneficiaries. Finally, and critically, the negotiation, design and implementation of agreements should explicitly take into account the profound transformative processes involving

Aboriginal engagement with the institutions of the dominant society and not implicitly be predicated on idealised representations of Aboriginal society and culture.

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