

Negotiating Cultural Heritage? Aboriginal–Mining Company Agreements in Australia

Ciaran O'Faircheallaigh

Author Information

Professor of Politics and Public Policy, Griffith Business School, Griffith University, Nathan, Queensland 4111, Australia.

Citation

O'Faircheallaigh, C. (2008), Negotiating Cultural Heritage? Aboriginal–Mining Company Agreements in Australia. *Development and Change*, 39: 25–51. doi: 10.1111/j.1467-7660.2008.00467.x

Development and Protection of Indigenous Cultural Heritage: Aboriginal – Mining Company Agreements in Australia

Abstract

Mining and other forms of industrial development can result in profound and often irreversible damage to the cultural heritage of indigenous peoples. Fear of such damage regularly results in indigenous opposition to development and, in many cases, to delays in construction of development projects or even to their abandonment. Government legislation has generally proved ineffective in protecting indigenous heritage. An alternative means of achieving protection arises from the growing recognition of indigenous land rights and the opportunity this creates for negotiations with mining companies regarding the terms on which indigenous landowners may support development. To evaluate the potential efficacy of negotiated approaches, this article analyses 41 agreements between mining companies and Aboriginal peoples in Australia. It argues that negotiated agreements do have the potential to protect indigenous cultural heritage, but only where underlying weaknesses in the bargaining position of indigenous peoples are addressed. This finding has wider implications given that negotiation and agreement-making are increasingly being promoted as a means of addressing the structural disadvantages faced by indigenous peoples and of resolving conflicts between them and dominant societies.

Key words: Indigenous, Aboriginal, cultural heritage protection, mineral development, corporate social responsibility, Australia

Introduction

In Australia and other mineral-rich countries, mineral development has resulted in widespread and profound damage to indigenous cultural heritage (Aipin, 1989; Dixon and Dillon, 1990; Moody, 1988; O’Faircheallaigh, 1991). Legislative initiatives designed to protect indigenous heritage have generally proved ineffective (Bell, 2001; Ritchie, 1994; Yellowhorn, 1999). Indigenous peoples have continued to seek ways of protecting their heritage (Hornborg, 1994), and in recent decades another opportunity for doing so has

arisen through the negotiation of agreements with mining companies regarding the terms on which development will occur on indigenous land. Agreements between indigenous peoples and mining companies ('mining agreements')¹ are now commonplace in Australia, Canada and the United States (ICME, 1999; O'Faircheallaigh, 2004; Sosa and Keenan, 2001) and are also being negotiated in developing countries (Banks and Ballard 1997).

Indigenous attempts to negotiate protection of their cultural heritage have not been subject to any systematic evaluation. This article makes a substantial contribution in this regard by analysing 41 agreements between Aboriginal peoples² and mining companies in Australia, based on explicit criteria developed for this study. Its findings and the methodology it develops have important implications for indigenous peoples in other jurisdictions whose cultural heritage is at risk as a result of industrial growth and who have an opportunity to negotiate 'terms of development' with corporations and/or governments. They also have wider policy implications given that negotiation and agreement making are increasingly being utilised in structuring relations between indigenous peoples, developers and governments, and promoted as effective mechanisms for addressing the structural disadvantage faced by many indigenous peoples and for resolving conflict between indigenous peoples and dominant societies (see for example Commonwealth of Australia 2006; Downing 2002: 21; Langton *et al.* 2004; National Native Title Tribunal 2006; Ontario 2006).

The article discusses the 'Aboriginal cultural heritage' that relevant provisions of mining agreements seek to protect, and Aboriginal understandings of the knowledge embedded in and surrounding it. This provides essential context for the later discussion of cultural heritage legislation and mining agreements. The dangers to cultural heritage posed by exploration and mining are identified, and attempts to address these dangers through legislation and through direct political action are discussed. The general failure of such attempts provides important background for the recent emphasis on negotiating with mining companies. The cultural heritage provisions of the 41 agreements are then analysed. These vary greatly in terms of their extent, content and potential efficacy in providing protection. To allow a more systematic analysis, standard criteria are established for

evaluating agreements according to (i) the level of protection they offer to Aboriginal cultural heritage, and (ii) the means they provide for achieving that protection.

The article concludes that mining agreements do have the potential to help protect Aboriginal cultural heritage. However that potential is currently not being realised in many cases in Australia. A majority of agreements do not require a high level of protection or/and fail to provide the resources and processes required to achieve particular levels of protection. A wider analysis of the content of the mining agreements suggests that this outcome does not reflect decisions by Aboriginal groups to ‘trade off’ cultural heritage protection against economic or other benefits. Rather it results from the generally weak bargaining position of many Aboriginal peoples in Australia in dealing with mining companies. More positive outcomes in relation to cultural heritage protection are unlikely to eventuate either in Australia or other jurisdictions with indigenous populations unless indigenous bargaining positions can be enhanced.

What is ‘Aboriginal cultural heritage’?

In the current context Aboriginal cultural heritage can be seen as having two dimensions. The first involves material manifestations of Aboriginal occupation during earlier periods of time, including burial sites, middens created by discarded shells and other food debris, rock and cave paintings and scatters of stone tools. These manifestations can be up to 50,000 years old, or only a generation or two removed from the present. The second may be lacking in material manifestations and involves places, sites, areas or landscapes that are of spiritual significance to living Aboriginal people. They may be important for a variety of reasons. Sites or areas that are of special significance are often associated with the actions of mythological beings during the creative period of the Dreaming, the time long ago when these beings moved across the landscape and created not only the forms the land now takes, but also the law that governs peoples interactions with the land and each other and the languages and ceremonies that constitute key elements of their culture (see Rose, 1996: 22-33 for a fuller discussion of Aboriginal concepts of the Dreaming). Certain sites are the resting place of powerful creation spirits. Sites or areas may also be important because they are breeding grounds for key food species, are associated with initiation, mortuary or other ceremonies or because they were the location of important historical events (Dodson, 2003;

Palmer and Williams, 1990; Merlan, 1998; for a discussion of similar sites in other indigenous cultures, see Carmichael et al., 1994).

For the Aboriginal traditional owners of land or sea in Australia the distinction between these two categories of 'cultural heritage' is artificial. They see the land and the sea, all of the sites they contain and the knowledge and laws associated with those sites as a single entity that must be protected as a whole, and also see themselves as intimately linked with earlier generations who have used the land and later generations who will use it in the future. In addition, areas of contemporary spiritual significance may contain physical evidence of historical sites and individual physical features such as a set of cave paintings may be associated with a particular spiritual entity (Ilyatjari, 1998; Morphy, 1998). The unity of land, sea, sites, knowledge, law, culture and people is expressed by Aboriginal people through the use of a single English word, 'country', to refer to all of them.

Country is a word that abbreviates all the values, places, resources, stories and cultural obligations associated with that area and its places. The entirety of our ancestral domains ... It is place that also underpins and gives meaning to our creation beliefs – the stories of creation form the basis of our laws and explain the origin of the natural world to us (Dodson, 2003).

There is an intimate relationship between land, sites and people.

People talk about country in the same way they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country. People say that country knows, hears, smells, takes notice, takes care, is sorry or happy ... country is a living entity with a yesterday, today and tomorrow, with a consciousness, and a will towards life. Because of this richness, country is home, and peace; nourishment for body, mind and spirit; heart's ease (Rose, 1996: 7).

The 'health' of the group and of relationships among its members depends on the state of the group's country and the sites it contains, and the condition of country and sites reflects

the well being of the owners (Bell, 1998; Ilyatjari, 1998; Rose, 2001: 102). It follows that damage to sites inevitably involves harm to people and to social relations.

However the distinction between the 'physical, historical' and the 'contemporary, spiritual' aspects of cultural heritage often forms the basis for legislation and for negotiations between Aboriginal peoples and mining companies. Thus for example Western Australia's *Aboriginal Heritage Act* (Section 5) distinguishes between places where 'persons of Aboriginal descent have ... left any object ... used for ... traditional cultural life' and 'any place, including any sacred, ritual or ceremonial site, which is ... of special significance to persons of Aboriginal descent'. Similarly, agreements between Aboriginal groups and mining companies often distinguish between 'Significant Objects' and 'Significant Sites'.

A number of general points should be made about sites and areas of contemporary significance in the context of Aboriginal Australia, and about knowledge associated with these. First, sacred or significant sites may have substantial and even dramatic effects on people and these effects can be positive or negative depending on the nature of the site, the people concerned and their behaviour. For instance sites may be gendered, and safe for one sex but dangerous to the other. Some may be safely visited by any male, others only by initiated men of a particular group. Second, knowledge regarding the existence, location and significance of sites is often not public. Knowledge may be secret and sacred and if transferred inappropriately may be dangerous both to the giver and receiver. More generally, there is no assumption in Aboriginal society, as there often is in Western society (Rose, 2001: 94), that knowledge is a 'public good' that, as a matter of principle, should be widely transmitted:

In Aboriginal societies ... personal authority, personal achievement, the authority of seniors, and the integrity and autonomy of local groups depend on control of knowledge through restrictions on its dissemination. Such a system is subverted through any form of 'freedom of information'. If there is one thing that is absolutely not free in Aboriginal culture and society, it is knowledge (Rose, 2001: 98).

Knowledge is shared and transmitted in the context of relationships among people and between people and land, for example between older and younger people or between individuals who share specific kin connections and interests in country. Knowledge

transmission usually occurs both on the basis that potential recipients stand in a particular relationship to informants, and that recipients display certain behaviours and capacities that demonstrate their readiness to receive that information, including a willingness to reciprocate by providing emotional and material support to the informant (Myers, 1980). It is not unusual, for example, to hear older Aboriginal people say that they have yet to 'hand on' important cultural information because younger people, while in principle being the 'correct' people to receive it, have yet to demonstrate their *readiness* to do so.

While relevant knowledge regarding sites may be carefully controlled and often withheld from non-Aboriginal people, the dangers associated with damage to sites or inappropriate release of knowledge concerning them is not confined to Aboriginal people. Indeed the consequences of damage to or destruction of particular sites can be catastrophic for non-Aboriginal people as well as for their custodians (Gelder and Jacobs, 1998: 67).

A final point is that it may be possible for Aboriginal people to take remediative measures that help deal with damage to sites. Sites may be 'healed' through appropriate ceremonies, generally designed not to reverse physical damage but rather to 'restore' the site in a spiritual sense (see for example Rose, 2001). This may not be an option where a site has been completely destroyed, but even though the damage cannot be remedied it may still be possible to minimise the negative consequences that follow from it, for instance through the ongoing conduct of ceremonies designed to protect those potentially affected.

The Impacts of Exploration and Mining

In considering the efficacy of mining agreements in protecting Aboriginal cultural heritage, it is important to understand how development can affect that heritage. Most obviously and fundamentally, exploration or mining can physically destroy or damage either physical or spiritual sites. For example, the Argyle diamond mine in Western Australia completely destroyed a Barramundi dreaming site that was of regional importance and of special significance to Aboriginal women, an event that had lasting and serious implications for its custodians (Dixon and Dillon, 1990). There have been numerous examples of exploration activity, for instance bulldozing of seismic lines for oil exploration, destroying or damaging

sites (Stead and Niblett, 1985). Physical damage may also occur as a result of the recreational and other off-site activities of mine workers and their families.

In considering the impact of exploration and mining on cultural heritage, it is important to stress that individual sites are not only important of themselves, but as parts of site complexes, sometimes referred to as dreaming tracks, that stretch over hundreds and even thousands of kilometres, connect individual sites and mark the routes taken by creation spirits in the Dreaming. While no individual Aboriginal group will have intimate knowledge of all connected sites, they are well aware of the links between them and so will feel the effect of connected sites that may be long distances from their ancestral lands. Thus damage to sites can adversely affect not only those people on whose land the sites are located, but also many other people whose country is connected to those sites.

Sites can be damaged even where they are not physically affected by exploration or mining, for instance as a result of inappropriate visitation by exploration crews or by miners, their families, visitors to mine sites, or tourists making use of exploration tracks or mine roads. The fact that the individuals involved may be ignorant of the existence of sites does not affect the gravity of the damage.

Inappropriate release of information about sites can also cause serious damage to Aboriginal people. Information may be released by mining companies or by government regulatory authorities that have become aware of it through their interaction with Aboriginal custodians. Alternatively, Aboriginal people may release information themselves because they are required to do so in order to seek protection under relevant legislation or agreement provisions, or more generally because they believe that only by highlighting the importance of a site have they any chance of protecting it. In this regard Aboriginal custodians face serious dilemmas. The public release of information that is supposed to be secret causes great anguish, and thus people are reluctant to release it unless a site is in imminent danger. However if they do not initially reveal the existence or importance of a site and later do so in an attempt to prevent damage, they are in danger of being accused of 'inventing' the site or exaggerating its importance (Gelder and Jacobs, 1998: 69). A public inquiry into a proposed dam that would destroy sacred sites near Alice Springs highlighted the dilemma:

Aborigines, working under long inherited laws of protection through secrecy, prefer not to mention the existence of a sacred site, let alone its significance, until it is almost on the point of being destroyed. Europeans find this approach to be very frustrating and, because they do not understand it, will claim that Aboriginal people find sites only after development proposals have been announced. From the Aboriginal point of view this appears to be a surprising attitude since Aborigines know they must maintain secrecy unless ... the release of knowledge is ... the only way to protect an area (cited in Rose, 2001: 111).

Thus the way in which information regarding significant sites is treated is critical in avoiding damage to their Aboriginal custodians and to Aboriginal society more widely.

The discussion in the last two sections raises the issue of whether there is a fundamental incompatibility between Aboriginal cosmology and Aboriginal attitudes to information on cultural heritage, on the one hand, and Aboriginal involvement in modern capitalist socio-economic systems (and exploration and mining in particular) on the other. Aboriginal people in Australia certainly seek to find ways of participating in the benefits of commercial development on their traditional lands while at the same time protecting their cultural heritage and information that is private and/or sacred. Their attempt to do so does generate tensions, as outlined by one analyst with extensive experience at the interface between Aboriginal groups and mining companies:

Thus for Aboriginal people mineral development requires a balancing act ... between people's desire for development, which offers benefits they badly need, and their desire to look after country ... in our experience Aboriginal people in Australia are not romantic figures standing in the way of development but neither are they intent on peddling their heritage in return for material benefits provided by developers. They are driven by needs and ambitions that are part material, part cultural and spiritual ... (O'Faircheallaigh, 2006: 4).

A critical focus for this article is whether agreements negotiated between Aboriginal groups and mining companies can provide a basis for reconciling these potentially conflicting needs and aspirations. To provide context for that analysis, we first examine at a general level a number of different approaches to protection of Aboriginal cultural heritage.

Protecting Cultural Heritage: Legislation, Political Action, Agreements

During the 1960s and 1970s Australia's state and federal governments introduced legislation whose stated intention was the protection of at least some aspects of Aboriginal cultural heritage. Legislative provisions varied from state to state, but with the possible exception of the Northern Territory they displayed a number of features that substantially undermined their value from an Aboriginal perspective (Ritchie, 1994; Dillon, 1990; Ritter, 2003).³ Much of this legislation is still in place, or has been in place until very recently.

First, key decisions regarding the significance of Aboriginal cultural heritage, whether it should be protected and how protection would be attempted were placed in the hands of non-indigenous bureaucrats or politicians. Such a situation was abhorrent to Aboriginal custodians who under Aboriginal law and custom could not delegate their responsibility for sites, even if they wished to. In addition the non-indigenous people involved lacked specific knowledge regarding sites and often had a worldview different to that of Aboriginal people (Hubert, 1994). They thus lacked the capacity to effectively protect cultural heritage, even had they been willing to do so, which in fact many were not (see below).

Second, legislation was often limited in scope, focusing heavily on protection of burial sites and artefacts, and ignoring or paying much less attention to sites of contemporary spiritual importance (Ritchie, 1994). Even where legislation formally placed equal emphasis on both aspects of Aboriginal culture, in practice implementation measures focused on material culture (see for example Dillon, 1990: 40-1). Thus critical components of Aboriginal culture heritage were excluded from protection. Third, legal ownership of cultural heritage was often vested in the state rather than in Aboriginal custodians, with the result that Aboriginal people lacked standing in judicial proceedings affecting their cultural heritage. Fourth, legislative regimes were based around identification of sites and their listing in a register that was, at least in relation to basic information regarding sites, open to the public.

As indicated above Aboriginal people have grave reservations about information regarding sites entering the public domain.

Fifth, bureaucrats and politicians often proved reluctant to invoke the protective provisions of legislation. For instance Ritchie (1994: 224) notes, in relation to legislation introduced in the Northern Territory in the 1960s, that 'despite a number of incidences of damage protected under the Act, no offenders had been detected and no charges had ever been laid'. Even where officials were willing to act, resources were rarely provided to implement legislation 'on the ground'. This was a major issue given the need to monitor exploration and mining activity across huge areas of land and over the life of mining projects that could last for decades. Dillon (1990: 50-1), for example, documents how government officers in Western Australia lacked the resources required to even document the existence of sites, let alone to provide effective protection over time. He records the admission of the Registrar of Sites that in the wake of exploration and mining activity Aboriginal sites in remote areas 'suffered very badly' (Dillon, 1990: 41).

A final and fundamental problem was that in the major mineral producing states a central goal of cultural heritage legislation was in fact not to protect sites but to allow their destruction in order to facilitate mineral development. For example Section 18 of Western Australia's *Aboriginal Heritage Act 1972* provided that the responsible government minister could issue an order allowing a registered sacred site to be employed for 'another purpose'. In the case of exploration or mining, such a declaration would inevitably involve damage to or destruction of a site. This provision was used, for example, to allow oil drilling on a sacred site on the Aboriginal-owned Noonkanbah pastoral property in 1979, and to allow the complete destruction of a key site to allow diamond mining at Argyle (Dillon, 1990; Hawke and Gallagher, 1989; Ritter, 2003). The approach of governments reflected their determination to facilitate development, and the lack of priority they attached to the protection of Aboriginal cultural heritage (O'Faircheallaigh, 2006). This approach has changed little in recent decades. In September 2006, for instance, the Western Australian and federal governments announced their intention to jointly approve the destruction of some 100 rock carvings, among the world's oldest rock art, to make way for oil and gas development in Western Australia (Lewis and Laurie, 2006).

In summary, legislation generally removed their cultural heritage from the control of Aboriginal people, while failing to protect that heritage when it was threatened by mineral development.⁴

An alternative way for Aboriginal people to try and protect sites was through direct political action focused on forcing governments and companies to halt activities or projects that threatened important places. During the 1970s and 1980s Aboriginal people grew increasingly effective in mobilising politically and in creating alliances with environmental, church and trade union groups. A number of national campaigns were waged to protect significant sites or areas from mining and oil exploration. Some were successful, for example that to stop gold mining at Coronation Hill on Jawoyn country in the Northern Territory. Others failed, including the campaign to stop uranium mining in the Alligator Rivers Region of the Northern Territory, to prevent oil exploration at Noonkanbah and to stop construction of Alcoa's aluminium smelter at Portland in Victoria (Hawke and Gallagher, 1989; Moody, 1988: 159-86). Apart from the uncertain outcomes associated with individual political campaigns, direct political action has two inherent weaknesses as a basis for protecting cultural heritage. First, it has an 'all or nothing' character, and where Aboriginal people lose political battles they may be denied any chance to mitigate or minimise damage to heritage. Second, it may be feasible to mobilise political support around a small number of high profile projects, but it is not feasible to do so around the scores of mining projects that are initiated in Australia every year.

One further avenue existed to secure protection, through negotiation of legally binding agreements between Aboriginal people and companies undertaking mineral development. The passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* allowed Aborigines in the Northern Territory, for the first time, to seek recognition as the legal owners of their ancestral lands. If they achieved such recognition, they could then negotiate agreements with mining companies, including measures to protect cultural heritage, in advance of the companies being granted exploration or mining leases by government. The *Act* effectively conferred on Aboriginal landowners a veto over exploration and mining, and placed them in a strong position to negotiate effective protection.

The Australian High Court's 1992 *Mabo* decision greatly extended the potential scope of negotiated agreements. The High Court ruled that indigenous common law rights in land ('native title') had survived Britain's colonisation of Australia in 1788. Native title could still survive as long as it had not been extinguished by valid acts of government and the Aboriginal people concerned had maintained their connection with their ancestral lands. In response to *Mabo* the Australian government enacted the *Native Title Act 1993*. This created a process through which Aboriginal landowners throughout Australia who met relevant legislative requirements could achieve recognition of their native title, and conferred on them a 'Right to Negotiate' in relation to future grants of exploration or mining interests.

The Right to Negotiate does not allow Aboriginal people to stop a development they believe may damage cultural heritage, as occurs under the *Aboriginal Land Rights (Northern Territory) Act 1976*. If agreement cannot be reached with developers the matter is referred to a federal government tribunal, the National Native Title Tribunal (NNTT). The NNTT determines that a mining lease may not be granted to the developer; that it may be granted subject to conditions; or that it may be granted without conditions. The Tribunal's decision can be overridden by the relevant state or federal government minister, who can in effect allow a project to proceed. However the Right to Negotiate does, for the first time, provide many Aboriginal landowners in Australia with an opportunity to negotiate with mining companies about the terms on which landowners will *provide their consent* for development.

Additional momentum for agreement making has resulted from the increasing concern of mining companies to demonstrate their 'corporate social responsibility' (CSR) to investors and other stakeholders both in their home countries and in countries where they operate (Ali, 2003; Cragg and Greenbaum, 2002; Crawley and Sinclair, 2003; Day and Affum, 1995; Hood, 1995; Humphreys, 2000; Kapelus, 2002; Mirvis, 2000; O'Faircheallaigh, 2007; Warhurst and Mitchell, 2000). Achieving the support of local indigenous communities before undertaking projects on their ancestral lands is important in allowing companies to establish their 'CSR credentials', and agreement making is an important

mechanism for obtaining and for publicly demonstrating that support. The growing concern of mining companies to achieve indigenous consent and support reflects not only a desire for favourable publicity, but also an increased recognition of the substantial operational and financial risks associated with a failure to do so. In a number of high-profile cases such failure has resulted in the temporary or permanent closure of mines by local populations. For example Rio Tinto was forced to abandon its US\$1.5 billion investment in the Bougainville copper project in Papua New Guinea after its forced closure by local landowners incensed at the environmental damage it had created and dissatisfied with the small share of economic benefits flowing to them. Numerous projects in Australia, Canada, South America, South East Asia, the South Pacific and the United States have experienced costly delays as a result of a failure to gain indigenous support (Ali, 2003; Humphreys, 2000).

Thus mining companies are more willing to enter agreements with indigenous groups, a fact reflected for instance in the decisions of some firms in Australia in recent years to negotiate agreements in the absence of any legislative requirement to do so (O’Faircheallaigh, 2006). At the same time, to the extent that agreement making is driven primarily or largely by CSR policies rather than by legal rights and obligations, the content of agreement is ultimately at the discretion of the corporations involved. It cannot be assumed that all companies will match their CSR rhetoric with a willingness to accept significant restrictions on their freedom to develop and operate projects in order to ensure protection of indigenous cultural heritage. Indeed the limited work that examines the *behaviour* of mining companies engaged in CSR initiatives, rather than simply their public pronouncements and self-generated CSR reports, indicates that mining companies vary greatly in their willingness to support their CSR rhetoric with substantive commitments and the resources necessary to deliver on such commitments (Kapelus, 2002; Kelly and O’Faircheallaigh, 2001). It is therefore important to recognise the potential of varying company policies and practices to affect the cultural heritage provisions of agreements, a point to which we return in analysing such provisions later in the article.

Against this background agreements between mining companies and Aboriginal landowners have proliferated in Australia since the early 1990s. In principle, such

agreements could offer important advantages over legislation or direct political action as a means of protecting cultural heritage. They create, for the first time, an opportunity *for Aboriginal people themselves* to devise measures to protect their cultural heritage, and to negotiate acceptance of those measures by mining companies. Agreements could protect Aboriginal cultural knowledge, and could facilitate a proactive approach, allowing traditional owners to put systems in place designed to avoid damage. In addition, agreements could provide the resources required to support ongoing management and protection of sites over extended periods of time.

Agreements between Aboriginal people and mining companies in Australia are not restricted to protection of cultural heritage. They also deal with a range of other issues including Aboriginal participation in environmental management of mining projects, recognition of Aboriginal interests in land, monetary payments to Aboriginal landowners, and initiatives to maximise Aboriginal employment. Measures to enhance Aboriginal participation in the economic benefits of mining are of considerable importance given that most Aboriginal communities in Australia experience incomes and access to employment opportunities and to basic services and infrastructure such as health education and housing that are far below the Australian norm.

Thus negotiation of provisions relating to cultural heritage protection occur in a context where Aboriginal participants are pursuing multiple goals, economic and non-economic, material as well as cultural and spiritual. At the same time as Aboriginal leaders seek to protect their cultural heritage, they seek to improve the material well being of their families, clans and communities. Further, in seeking to negotiate effective cultural heritage protection, only on Aboriginal land in the Northern Territory do landowners have a right to refuse to allow development if appropriate measures cannot be agreed with mining companies. In other jurisdictions governments can allow mining to proceed in the absence of agreement, leaving Aboriginal people to rely on legislation whose efficacy is highly questionable for protection of their cultural heritage. This situation clearly presents Aboriginal negotiators with formidable challenges.

Against this background, we now examine the cultural heritage protection provisions of mining agreements in Australia.

The Mining Agreements

Most Australian mining agreements contain legally binding confidentiality clauses. This creates a major problem in learning about, presenting and analysing agreement provisions. The strategy used to deal with this issue was to seek access to a sufficient number of agreements so that their content could be discussed in aggregate without revealing the identity or the content of individual agreements. Access was gained to agreements through working as a negotiator for Aboriginal communities;⁵ and, in particular, through research protocols with a number of leading Aboriginal land councils, allowing access to agreements while at the same time protecting the confidentiality and intellectual property rights of the parties. In this way 41 agreements were obtained that govern the development and operation of mining projects.

The agreements were negotiated under a variety of legislative and policy regimes over the period 1978-2005. Reflecting the increase in agreement making since the introduction of the *Native Title Act*, over half have been signed since 1998. No comprehensive record of mining agreements exists in Australia, so it is not possible to say exactly what proportion of all agreements this selection represents. However it is substantial. Searches of relevant databases and of media sources indicates that there is close to full coverage of agreements in New South Wales and Victoria and substantial coverage in many of Australia's major resource producing regions, including the Pilbara and Kimberley regions of Western Australia, the Alligator Rivers Region of the Northern Territory, and the Cape York and Central Queensland regions of Queensland. An extensive data base compiled by a major research project on Agreements, Treaties and Negotiated Settlements at the University of Melbourne indicates that our sample amounts to 45 per cent of all agreements for mining projects negotiated in Australia between 1977 and 2005.⁶

Most of the agreements are complex documents and some run to hundreds of pages. Each agreement was analysed in full, because provisions relating to cultural heritage are not necessarily restricted to sections with headings such as 'Cultural Heritage Protection'. All but two of the 41 agreements contain provisions in relation to Aboriginal cultural heritage. These vary enormously in terms of their extent, content and likely efficacy in avoiding or

minimising damage to cultural heritage. Indeed at one extreme a small number of the agreements appear likely to reduce the efficacy of existing legislative protections. For example, certain legislative provisions only come into play if Aboriginal traditional owners *apply* for site protection. Two agreements involve a commitment by the Aboriginal parties not to exercise their right to seek protection, but to rely solely on agreement provisions that, in the cases concerned, are very limited. Other agreements adopt a minimalist approach, providing only that the mining company will comply with cultural heritage legislation in the relevant jurisdiction. At the other extreme a small number of agreements involve undertakings by mining companies to completely avoid damage to any aspect of Aboriginal cultural heritage. Some mining companies agree to undertake substantial investments in ensuring that cultural heritage protection is delivered on the ground. Others commit very few resources to this end.

Explicit evaluative criteria are required in order to allow a more systematic analysis of this wide variety of agreement provisions and outcomes. Such criteria are essential in order to discern patterns that can provide a basis for explaining the highly variable outcomes emerging from negotiations between Aboriginal groups and mining companies and, in particular, for the willingness of some Aboriginal groups to enter agreements that appear to offer little protection to their cultural heritage. The international literature on indigenous cultural heritage protection is of little assistance in this regard. The possibility that indigenous people might negotiate protection of their cultural heritage is mentioned only in passing and in the context of negotiations with government (Miller, 1998: 94; Mohs, 1994: 205). We have not been able to find any substantial discussion of negotiations between indigenous peoples and developers in relation to heritage protection, let alone of criteria to evaluate outcomes from those negotiations.⁷

The following sections develop two numerical scales for assessing the cultural heritage provisions of the 41 agreements, drawing on the earlier discussion of Aboriginal approaches to cultural heritage and of the reasons for legislative failures; on the general literature on indigenous cultural heritage protection; and on over a decade's experience in assisting Aboriginal communities to negotiate agreements that include cultural heritage provisions. In developing these scales, the intangible and 'incommensurable' nature of

aspects of Aboriginal cultural heritage is recognised (Hornburg, 1994: 263), as are the consequent challenges involved in applying numerical criteria to the treatment of cultural heritage in mining agreements. However, a more systematic analysis is impossible in the absence of clear and explicit evaluative criteria. Such criteria are also essential if indigenous peoples and their organisations are to develop robust proposals for cultural heritage protection to serve as a basis for negotiations with mining companies, or to evaluate and respond to proposals put forward by companies.⁸

Cultural heritage provisions: levels of protection

Protection of indigenous cultural heritage can be conceptualized as having two key components. The most important is the *level or degree of protection* that is sought. Also critical are the *means available (activities, processes, resources) to ensure that this level of protection can actually be secured in practice*. The two are inextricably linked. For example, a mining agreement may specify avoidance of any damage to cultural sites as the required level of protection. However if the processes used to pursue this goal make it impossible to involve the Aboriginal people who hold relevant cultural knowledge, sites may be left unprotected or managed inappropriately and the required level of protection will not actually be achieved. The level of protection is of primary importance because no matter what activities, processes and resources are applied, damage to cultural heritage is likely to occur if the required level of protection is low. However activities, processes and resources are also vital, because in their absence high levels of ‘nominal’ protection may not deliver ‘protection on the ground’.

Levels of protection can be envisaged as falling along a spectrum. At one extreme is a complete lack of any protection; mining or related activity can proceed uninhibited by any attention to Aboriginal cultural heritage. At the other end of the spectrum, complete protection is provided where project operators give an unqualified commitment to avoid any damage to cultural heritage. In the latter case, damage must be avoided even if this requires mining to be avoided or abandoned on specific areas of a lease or an entire lease. Three additional points can be envisaged along the spectrum, each offering a growing level of protection. The first permits damage or destruction of sites to occur, but allows Aboriginal custodians to take remedial action, for example by removing artefacts or holding

ceremonies. The second requires that developers minimise damage to cultural heritage to the extent that this is consistent with commercial requirements. This implies, for instance, that a developer would not be required to adopt a particular approach to protection if this added substantially to project costs. The third requires the developer to avoid damage except where this would make it impossible to proceed with a project. Following this approach, damage would be allowed if a site were co-located with the ore body that was to be developed, because to protect it would render development impossible. However unlike the previous approach it would for instance require a developer to re-route infrastructure if this avoided damage to sites, even if significant additional cost was involved.

This approach leads to a 5-point scale that represents increasing levels of protection as we move up from **1** to **5** through the scale (see Table 1). In considering the first two alternatives, which allow damage to sites, agreements cannot be in breach of the legislation in the relevant jurisdiction, and thus an agreement could not condone damage that is prohibited by law. However as noted earlier the protection offered by cultural heritage legislation is often limited, and in addition agreements may require that Aboriginal custodians refrain from triggering relevant legislative provisions.

The cultural heritage provisions of each of the 41 agreements was analysed and classified on the basis of the ‘Levels of Protection’ set out in Table 1. It proved possible to classify a substantial majority (30) of the agreements unambiguously as requiring a particular level of protection. With the remaining 11 agreements, some provisions indicated a commitment to, for instance, Level **2** protection, while others implied a commitment to Level **3** protection. (No agreement included individual provisions separated by more than one Level, e.g. Level **2** and Level **4**). To address this situation, these agreements have been allocated a score midway between the two levels concerned, for example **2.5** for an agreement containing both Level **2** and Level **3** provisions. Agreements with no cultural heritage provisions attract a score of zero.

Table 2 provides ‘Level of Protection’ scores for the 41 agreements. They indicate that agreements do have the potential to provide significant protection to Aboriginal cultural heritage. Four agreements contain an unqualified requirement to avoid damage, requiring

the developer to entirely avoid mining in particular areas, or ultimately to abandon a

Table 1: Levels of protection in relation to Aboriginal cultural heritage

- 1** Sites or areas of significance may be damaged or destroyed by project development without any reference to Aboriginal people.
 - 2** Sites or areas of significance may be damaged or destroyed, and Aboriginal parties only have an opportunity to mitigate the impact of the damage.
 - 3** The developer must ‘minimise’ damage, to the extent that this is consistent with commercial requirements.
 - 4** The developer must avoid damage, except where to do so would make it impossible to proceed with the project.
 - 5** There is an unqualified requirement to avoid damage.
-

Table 2: Levels of Cultural Heritage Protection, Australian Agreements between Aboriginal Peoples and Mining Companies

Level of Protection (Table 1)	Number of Agreements n=41
0	2
1	2
1.5	1
2	8
2.5	6
3	12
3.5	2
4	2
4.5	2
5	4

project, if this is necessary to protect sites. A total of 8 agreements or nearly 20 per cent of the total including an unqualified commitment to avoid damage, a commitment to avoid damage except where this would make it impossible to proceed with the project, or a combination of the two. In these cases Aboriginal people have been able to negotiate complete control, or a very high degree of control, over whether development will occur and/or the form it will take. This provides a basis on which they can reconcile their desire to share in the benefits of development with their desire to protect their cultural heritage and information surrounding it.

On the other hand a larger number of agreements, 13 or 32 per cent of the total, contain no or very limited protections, allowing at best for impact mitigation, for instance through the removal of artefacts. Twenty agreements or nearly half of the total achieve a score of **2.5 – 3.5**, that is they contain at least some provisions requiring that projects must be modified to minimise damage, consistent with commercial requirements. An obvious and important question is why Aboriginal people enter into agreements that offer limited protection of their cultural heritage. We consider this question below in providing an overall analysis of the findings.

Cultural heritage protection: activities, processes and resources

Turning to the activities, processes and resources applied to securing a desired level of protection in practice, the earlier discussion of Aboriginal cultural heritage, of the impacts of exploration and mining and of cultural heritage legislation indicates that six areas are of central importance. The first involves maximising Aboriginal control of the processes through which cultural heritage sites are identified, evaluated and managed. Such control is central to effective protection, because Aboriginal people are much more likely than developers or governments to be strongly committed to protecting sites and possess the knowledge required to do so (UNESCO, 1994: 2, 5; Matunga, 1994; Ritchie, 1994: 231, 240). Relevant agreement provisions could, for example, make Aboriginal people the judges of what represents ‘significance’ in assessing cultural heritage, and so of what sites are protected. This may in turn mean that the ‘cultural heritage’ that is protected is defined more widely than in legislation. Other aspects of control might include the ability to choose

technical staff to assist in cultural heritage surveys, to organise field trips, receive reports from technical staff and control the flow of information to the developer.

A second requirement involves explicit protection of knowledge provided by Aboriginal people as part of a cultural heritage protection regime. As mentioned above unauthorised release of information regarding significant sites can cause serious damage to Aboriginal people. As a result cultural information required for effective identification and management of sites is unlikely to be forthcoming unless agreements contain provisions to secure its protection (Stead and Niblett, 1985: 4). More broadly, explicit protection of cultural heritage knowledge, combined with Aboriginal control of the cultural heritage process, can assist in reconciling the desire of Aboriginal people to benefit from commercial development while at the same time ensuring that private and/or sacred information is treated appropriately.

A third area involves provision of financial and other resources to support cultural heritage surveys and facilitate the effective participation of the appropriate Aboriginal people. Relevant expenditures include wages or per diem payments for knowledgeable Aboriginal people, and access to transport, accommodation and meals. As noted earlier implementation of cultural heritage protection in Australia and other jurisdictions has often failed in part because of the absence of such resources (Dillon, 1990; Harries, 2005; Yellowhorn, 1999), indicating the critical role they play. However it is not sufficient for an agreement to provide the resources required to undertake specific activities related to identification and management of individual sites. An indigenous community's ability to contribute to effective protection depends on its general capacity to sustain, transmit and apply cultural knowledge (UNESCO, 1994: 3, 5). Thus a fourth area involves agreement provisions designed to support and enhance that capacity. These might involve company funding for community activities that promote cultural vitality, or for Aboriginal cultural heritage workers whose responsibilities range well beyond protection measures for the project concerned.

Aboriginal custodians may not be aware, in advance, of all significant heritage sites in an area that will be disturbed by mineral development. This may reflect the antiquity of the sites and the fact that they have been buried over long periods of time, or the removal or exclusion of Aboriginal people from the area in the colonial period. Thus a fifth requirement is for processes that allow traditional owners to at least temporarily stop project activities where previously undiscovered sites are threatened or damaged, allowing protective or remediative measures to be put in place. Finally, general educative and preventative measures are required to help prevent threats to sites from arising in the first place. Such measures might include cultural awareness training for company employees and contractors, to give them an appreciation of the importance of indigenous culture, allow them to quickly recognise undiscovered sites, and make them aware of specific protection measures provided under an agreement. Measures might also include the rehabilitation of exploration drill lines to reduce the possibility that non-indigenous people (for example tourists) might gain access to protected areas or sites.

Table 3 summarises these six areas. The potential contribution of agreements to effective cultural heritage protection depends on how many of the elements listed in Table 3 they contain. In other words, this list is *cumulative*. The more elements are contained in an agreement, the greater the likelihood that a desired level of protection will actually be achieved. This is in contrast to Table 1, which present *alternative* levels of cultural heritage protection organised in a hierarchy.

The 41 agreements were analysed, and each awarded a point for each element from Table 3 that it includes. Possible scores thus range from **0**, where none of the elements are included, to **6**, where all are included. In this case eight of the agreements proved difficult to classify, as certain key components of their cultural heritage provisions contained for instance two elements, whereas others contained three. As with levels of protection, this situation has been addressed by awarding the agreements intermediate scores such as **2.5**.

Table 4 presents the results of the analysis. Twenty of the agreements or nearly half of the total contained fewer than three elements, indicating that significant issues are likely to

arise in achieving the cultural heritage protection the agreements require. No agreements contains all six elements and only three, or 7 per cent of the total, contain five of the elements, though a further 11 agreements contain four. These figures again suggest that mining agreements do have the potential to provide effective cultural heritage protection, in particular by allocating to Aboriginal custodians a central role in cultural heritage protection and by establishing ongoing processes and resource allocations to support them. However in many cases that potential is not being realised, or being fully realised.

There is not a clear correlation between scores achieved by agreements for 'Level of protection' and for 'Activities, process and resources'. None of the eight agreements that achieved a 'Level of protection' of 4 or 5 achieved a score of 5 in the rating for activities, processes and resources. This highlights the fact that including a requirement for a high level of protection in an agreement is no guarantee that this level of protection will actually be achieved. However, only one of these eight agreements achieved a score of less than 3 for 'Activities, processes and resources', indicating that the factors allowing achievement of a high level of protection (discussed below) also had some bearing on provisions dealing with activities, processes and resources. A number of agreements that scored 4 or 5 on 'Activities, processes or resources' scored substantially lower on 'Level of protection'. This may indicate that the companies involved were prepared to engage in activities related to cultural heritage management and commit resources to these activities, possibly driven by a desire *to be seen to* accommodate Aboriginal interests, but were unwilling to negotiate any substantial constraints on their freedom to develop their projects in order to protect Aboriginal cultural heritage.

Conclusion and Analysis

Negotiation and agreement making are increasingly being utilised to structure relationships between indigenous peoples nation state and commercial interests. This analysis of Australian experience indicates that in relation to cultural heritage, negotiated agreements do have the potential to protect indigenous interests, as indicated by the fact that some agreements require high levels of protection and indeed may result in projects being substantially reconfigured or even abandoned in order to ensure heritage protection. Certain

Table 3: Activities, processes and resources applied to securing protection of Aboriginal cultural heritage

- (a) Provisions that maximise Aboriginal control of site clearance and heritage management processes.
 - (b) Provision of financial and other resources to support cultural heritage identification and management.
 - (c) Measures to enhance an Aboriginal community’s general capacity for cultural heritage protection.
 - (d) Explicit protection of any cultural knowledge provided by Aboriginal people as part of the cultural heritage protection regime.
 - (e) Provisions that allow traditional owners to temporarily stop project activities to protect previously unknown sites.
 - (f) More general measures designed to support a *system* of cultural heritage protection.
-

Table 4: Ratings for activities, processes and resources applied to securing cultural heritage protection, Australian Agreements between Aboriginal Peoples and Mining Companies

Elements Included (Table 3)	Number of Agreements n=41
0	4
0.5	1
1	2
2	9
2.5	4
3	4
3.5	3
4	11
5	3
6	0

agreements also mandate processes and provide resources required to ensure that protection is achieved in practice.

However the application of systematic evaluative criteria suggests that in only a small number of the Australian agreements is this potential fully realised. Only about a fifth of agreements require the two highest of the five levels of protection, while less than a tenth fall in the two highest of the six categories used to classify the adequacy of activities, processes and resources. In addition, a substantial minority of agreements offer little by way of effective protection. Some agreements may actually detract from the limited protection available to Aboriginal custodians under cultural heritage legislation. Thus while in principle agreements can allow Aboriginal people to benefit from capitalist development while protecting their cultural heritage and private or sacred information associated with it, many agreements are not currently reconciling these two objectives. In these cases development is proceeding at significant cost to Aboriginal cultural heritage and the integrity of information surrounding it.

What explains these outcomes? One possible explanation is that Aboriginal groups are involved in deliberate trade-offs in the negotiation process, and that some groups have chosen not to pursue stronger cultural heritage provisions in return for concession from mining companies in other areas, such as financial benefits or employment and training programs. Carmichael, Hubert and Reeves (1994: 6), for instance, suggest the possibility of such an outcome in the broader context of commercial development on indigenous land.

It may indeed be the case that within individual negotiations in Australia trade offs have been made between Aboriginal groups and mining companies. However there is substantial evidence that any such trade offs are occurring 'at the margins' and do not explain the pattern of outcomes regarding cultural heritage outlined above. If they did, one would expect to find that agreements with strong cultural heritage provisions had significantly weaker provisions in other areas, or conversely that agreements with no or weak cultural heritage provisions had strong provisions in other areas, reflecting the result of trade-offs between different categories of benefits. This is not the case. As part of our broader research we have developed criteria to evaluate six other categories of provisions that tend

to be central to agreements between Aboriginal people and mining companies (participation in environmental management, Aboriginal interests in land, financial provisions, employment and training, business development, and implementation provisions). Without exception, agreements that achieve a high level of cultural heritage protection (i.e. 4 or 5) also score highly on the criteria for these other areas, indicating that other benefits have not been traded off in a substantial way to achieve stronger cultural heritage provisions. The same conclusion emerges from the fact that agreements achieving a low score for cultural heritage protection also score poorly on the other provisions [**references suppressed**]

Another possible explanation is that outcomes reflect the policies of companies entering agreements, with some companies willing to negotiate strong protection provisions and others unwilling to do so. As noted earlier in the article, while many mining companies may feel a need to espouse principles of corporate social responsibility, there is evidence that companies vary widely in their willingness to negotiate agreement provisions that would give concrete expression to these principles. Thus the varying outcomes highlighted above could reflect variations in company policies. However while not discounting the influence of corporate policies entirely, they are not apparently determinate of agreement outcomes. This is clear because there are in our sample two companies that have been involved in multiple agreements. Outcomes have differed substantially (for instance between 2 and 5 on the 'level of protection' scale) between agreements negotiated by the same company, indicating that company policy is not of itself a determinative factor. This finding also emphasises the point, raised earlier, regarding the limitations of CSR policies in providing a basis for protection of indigenous cultural heritage.

A third explanation, given that the *NTA* has only been in place for just over a decade, is that the diversity of outcomes reflects a learning process by Aboriginal groups, with poorer outcomes reflecting their inexperience in conducting negotiations in the years immediately after introduction of the *Act* in 1994. However this interpretation is not supported by the evidence, because weak *and* strong cultural heritage provisions occur both during these years and in the more recent period 2001-2005. In addition, Aboriginal people have shown themselves able to negotiate strongly favourable agreements immediately after other

legislative initiatives, including the *Aboriginal Land Rights (Northern Territory) Act 1976* (Altman, 1983) and Queensland's *Mineral Resources Act 1989* (O'Faircheallaigh, 1999).

An alternative explanation is that the outcomes summarised above are the result of differences in bargaining power between individual Aboriginal groups. There is substantial evidence to support this interpretation. Of the eight agreements achieving a score of **4** or **5** on the 'level of protection' scale, three were negotiated under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976*. As noted earlier the *Act* places Aboriginal landowners in a strong bargaining position because it provides them with a veto over exploration and mining if they are not able to reach an agreement on cultural heritage protection and other matters that is satisfactory to them. A further four were negotiated under other legislative regimes but with the assistance of major, high-profile Aboriginal land councils in north Australia. These bodies have, in the context of Aboriginal Australia, access to significant technical and financial resources and as a result are in a position to advise and support the Aboriginal people they represent in negotiating cultural heritage provisions with mining companies. Their senior office holders (chairman, chief executive officer) have usually achieved recognition as part of Australia's national Aboriginal leadership and have been active in national politics. In addition, many of these organizations have in the recent past been involved in direct action aimed at stopping mining projects that threatened Aboriginal cultural heritage. While some of these actions failed, the organizations involved can make credible threats to disrupt, delay or even halt projects if companies do not negotiate satisfactory agreements. The combined effects of these factors is that these organizations and the Aboriginal groups they represent can bring substantial political weight to bear at the negotiation table, increasing the prospects of achieving strong agreement provisions on cultural heritage protection.

This discussion highlights an important issue in relation to the role of direct action in protecting Aboriginal cultural heritage. As noted in an earlier section, direct action on its own may not be a basis for achieving protection. However the ability to credibly threaten such action may be important in allowing Aboriginal groups to negotiate agreements that offer effective protection.

The agreements that score poorly on the two scales were nearly all negotiated under the terms of the *Native Title Act (NTA)*. As mentioned above the *NTA* places Aboriginal groups in a weak negotiating position because they cannot prevent development if they are unable to negotiate effective measures for protecting their cultural heritage. If they do not reach agreement the matter is referred to the National Native Title Tribunal, which can refuse to grant a mining lease; grant it subject to conditions; or grant it without conditions. In the 12 years since the introduction of the *NTA*, the Tribunal has in every single such case referred to it determined that mining leases can be granted, and has refused to attach conditions relating to cultural heritage protection (or to other matters of interest or concern to the indigenous parties to the grant of leases).⁹ In addition, the *NTA* prohibits the NNTT from determining compensation for Aboriginal groups based on the value of the minerals concerned or the profits won from their exploitation, whereas Aboriginal groups are free to pursue compensation based on the value of minerals or on profits during the negotiation period. In this situation indigenous groups are under enormous pressure to reach agreement, even if they are dissatisfied with the level of cultural heritage protection being offered by the company concerned. The alternative is that they are denied an opportunity to negotiate substantial compensation, and they still fail to achieve of their cultural heritage. This is a key part of the explanation as to why many Aboriginal groups have entered into agreements that offer limited or little protection to their cultural heritage.

Where Aboriginal groups are supported by organizations that are well resourced and politically powerful, they can in effect overcome at least some degree the weak legal position created for them by the *NTA*. However many groups do not enjoy such support. This is particularly so in ‘settled Australia’ (New South Wales, Victoria, southern Western Australia and Queensland). Here Aboriginal people have had much greater difficulty than in northern Australia in winning legal and political recognition, and their organisations tend to have limited access to resources and limited political influence.⁹

A major implication of these findings is that mining agreements will be limited in their ability to assist in protecting Aboriginal cultural heritage unless Aboriginal peoples can identify ways of enhancing their bargaining power vis a vis mining companies. How can this be achieved? One approach would involve use of legal and regulatory avenues other

than cultural heritage or native title legislation. For example most jurisdictions provide for environmental impact assessments of major projects, and for public rights of objection and review, for instance in relation to the level of assessment required, the scope of assessment, and the conditions to be imposed on the operator once a project is approved. Aboriginal groups may have the capacity to either facilitate or to delay the smooth progression of a project through the environmental assessment process. This ability can represent a useful negotiating tool in dealings with developers. Similar opportunities may be provided by administrative and mining law.

A second option involves using the commitment of companies to CSR policies to gain leverage in negotiations. While the motivation of companies in adopting such policies is varied (O’Faircheallaigh 2007), all hope that their adoption will help them to portray a positive corporate image to their key stakeholders and the wider public. If they are not living up to that image in their dealings with Aboriginal groups, judicious use of the media and of public forums such as shareholders’ meetings to draw this to public attention, or even the threat of such action, can enhance Aboriginal negotiating positions.

Third, there is a need for concerted Aboriginal political action at a national level to bring about changes to the *NTA* and the way it is currently being administered by the NNTT so as to enhance the bargaining position of Aboriginal peoples. Given the Australian government’s current opposition to any such changes (Corbett and O’Faircheallaigh 2006, p.), political action must adopt a long term perspective and focus at least initially on incremental changes that can build over time towards more fundamental change.

This study has wider implications for three reasons. First, while considerable diversity exists among indigenous peoples, the cultural heritage and related knowledge they seek to protect has much in common (Barsh 1999; Carmichael et al., 1994; Miller 1998). So too do the large-scale industrial projects that can threaten indigenous heritage. Thus the evaluative criteria developed here, or similar criteria, can be useful for other indigenous peoples in developing and assessing proposals for protecting cultural heritage from the effects of industrial and commercial development. Second, this study highlights the fact that even if negotiated agreements specify outcomes that are highly advantageous to indigenous interests, they will have little positive effects unless agreements also deliver the processes

and resources required to render their provisions effective in practice. Finally and of broader relevance is the finding that many mining agreements in Australia fail to offer substantial protection and that this is related to weaknesses in the underlying bargaining positions of Aboriginal peoples involved. This indicates that indigenous peoples must first address the power imbalances they often confront in dealing with developers and governments (Evans, Goodman and Lansbury 2002) if negotiated agreements are to help them restructure their relationships with dominant societies to their advantage.

Notes

1. Referred to in Canada as 'Impact and Benefit Agreements'.
2. Australia has two indigenous populations, Aborigines and Torres Strait Islanders. This paper is concerned only with the former, referred to here as 'Aboriginal peoples'. The term 'indigenous' is used to refer to indigenous groups in Australia and elsewhere.
3. Equivalent legislation in North America and New Zealand often displayed similar characteristics: Bell, 2001; Matunga, 1994; Miller, 1998; Paterson, 1999; Watkins, 2003; Yellowhorn, 1999.
4. This is a situation that still confronts indigenous people in other jurisdictions and in relation to other forms of development. For example Ron Williamson, Professor of Anthropology at the University of Toronto, recently told an inquiry into Aboriginal burial and sacred sites that the Ontario's provincial heritage legislation had been an 'unqualified disaster' in protecting cultural heritage (Harries, 2005).
5. For details of the Agreements, Treaties and Negotiated Settlements database see www.atns.net.au The figure of 45 per cent is derived by eliminating from the ATNS database all agreements that are not for mining projects and/or that are not legally binding; by adding to the remaining agreements any agreements we hold that are not in the ATNS database; and by calculating the 41 agreements in our sample as a percentage of this total.
6. **[Relevant biographical details suppressed]**
7. This statement is based on a thorough review of relevant academic journals, and of general literature on protection of indigenous cultural heritage, including Carmichael *et al.*, 1994; Hornborg, 1994; Miller, 1998; UNESCO, 1994; Yellowhorn, 1999; Watkins, 2003.
8. A number of major Aboriginal land councils are already using the criteria in this way.
9. For a detailed discussion of this point, of outcomes from NNTT decisions and of the problems they create for Aboriginal groups, see Corbett and O'Faircheallaigh 2006.

References

- Aipin, Y. (1989) 'Not by oil alone', *IWGIA Newsletter* 57 (May): 137-43.
- Ali, S. (2004) *Mining, The Environment and Indigenous Development Conflicts*. Tucson: University of Arizona Press.
- Altman, J. (1983) *Aborigines and Mining Royalties in the Northern Territory*. Canberra: Australian Institute of Aboriginal Studies.
- Banks, G. and C. Ballard (eds) (1997) *The Ok Tedi Settlement: issues, outcomes and implications*. Canberra: Australian National University.
- Barsh, R.L. (1999) 'How Do You Patent a landscape? The Perils of Dichotomizing Cultural and Intellectual Property', *International Journal of Cultural Property* 8 (1): 14-47.
- Bell, C. (2001) 'Protecting Indigenous Heritage Resources in Canada', *International Journal of Cultural Property* 10 (2): 246-63.
- Bell, D. (1998) 'Aboriginal Women's Religion: A Shifting Law of the Land', in W.H. Edwards (ed), *Traditional Aboriginal Society*, pp. 252-87. Melbourne: Macmillan.
- Carmichael, D., J. Hubert and B. Reeves (1994) 'Introduction', in Carmichael et al. 1994, pp. 1-8.
- Carmichael, D., J. Hubert, B. Reeves and A. Schanche (eds) (1994) *Sacred Sites, Sacred Places*. London and New York: Routledge.
- Commonwealth of Australia (2006) *Shared Responsibility Agreements*. Canberra: Office of Indigenous Policy Coordination. <http://www.indigenous.gov.au/sra.html>, accessed 20 November 2006.
- Corbett, A. and O'Faircheallaigh, C. (2006) 'Unmasking Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions', *University of Western Australia Law Review* 33 (1): 153-177.
- Cragg, W. and Greenbaum, A. (2002) 'Reasoning about Responsibilities: Mining Company Managers on What Stakeholders are Owed', *Journal of Business Ethics* 39: 319-335
- Crawley, A and Sinclair, A. (2003) 'Indigenous Human Resource Practices in Australian Mining Companies: Toward an Ethical Model', *Journal of Business Ethics* 45: 361-373.
- Day, J.C. and Affum, J. (1995) 'Windy Craggy: Institutions and Stakeholders', *Resources Policy* 21 (1): 21-26.

- Dillon, M. (1990) “‘A Terrible Hiding’”: Western Australia’s Aboriginal Heritage Policy’, in R. Dixon and M. Dillon (eds) *Aborigines and Diamond Mining: the politics of resource development in the East Kimberley*, pp. 40-54. Nedlands: University of Western Australia (UWA) Press.
- Dixon, R. and M. Dillon (eds) (1990) *Aborigines and Diamond Mining: the politics of resource development in the East Kimberley* Nedlands: UWA Press.
- Dodson, M. (2003) ‘My People and Place: Why does Place Matter?’, paper presented at the Conference Strengthening Communities – Peoples, Places, Partnership, Sydney.
- Downing, T.E. (2002) *Avoiding New Poverty: Mining-Induced Displacement and Resettlement*. London: International Institute for Environment and Development.
- Evans, G., J. Goodman and N. Lansbury (eds) (2002) *Moving Mountains: Communities Confront Mining & Globalisation*. London: Zed Books.
- Gelder, K. and M. Jacobs (1998) *Uncanny Australia: Sacredness and Identity in a Postcolonial Nation*. Melbourne: Melbourne University Press.
- Harries, K. (2005) ‘Ministry allows ruin of sacred sites, Ipperwash forum told’, *Globe and Mail*, 9 December.
- Hawke, S. and M. Gallagher (1989) *Noonkanbah, Whose Land, Whose Law*. Fremantle: Fremantle Arts Centre.
- Hood, G. (1995) ‘Windy Craggy: An analysis of environmental interest group and mining industry approaches’, *Resources Policy*, 21 (1): 13-20.
- Hornburg, A. (1994) ‘Environmentalism, ethnicity and sacred places’, *Canadian Review of Sociology and Anthropology* 31(3): 245-67.
- Hubert, J. (1994) ‘Sacred beliefs and beliefs of sacredness’, in Carmichael *et al.* 1994, pp. 9-19.
- Humphreys, D. (2000) ‘A business perspective on community relations in mining’, *Resources Policy* 26: 127-31.
- ICME (International Council on Metals and the Environment) (1999) *Mining and Indigenous Peoples: Case Studies*. Ottawa: ICME.
- Ilyatjari, N. (1998) ‘Traditional Aboriginal Learning: How I Learned as a Pitjantjatjara Child’, in W.H. Edwards (ed) *Traditional Aboriginal Society*, pp. 1-5. Melbourne: Macmillan.

- Kapelus, P. (2002) 'Mining, Corporate Social Responsibility and the Community: The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi', *Journal of Business Ethics*, 39(3): 275-96.
- Langton, M., M. Tehan, L. Palmer and K. Shain (eds) (2004) *Honour Among Nations? Treaties and Agreements with Indigenous People*. Melbourne: Melbourne University Press.
- Lewis, S. and V. Laurie (2006) 'Oldest rock art loses out to mine projects', *Australian*, 9 September.
- Matunga, H. (1994) 'Waahi tapu: Maori sacred sites', in Carmichael *et al.* 1994, pp. 217-26.
- Merlan, F. (1998) *Caging the Rainbow: Places, Politics and Aborigines in a North Australian Town*. Honolulu: University of Hawaii Press.
- Miller, B.B. (1998) 'Culture as Cultural Defense: An American Indian sacred Site in Court', *American Indian Quarterly* 22(1/2): 83-97.
- Mirvis, P.H. (2000) 'Transformation at Shell: Commerce and Citizenship', *Business and Society Review*, 105 (1): 63-84.
- Mohs, G. (1994) 'Sto:lo sacred ground', in Carmichael *et al.* 1994, pp. 184-208.
- Moody, R. (Ed.) (1988). *The Indigenous Voice: Visions and Realities, Vols 1 and 2*. London: IWGIA and Zed Books Ltd.
- Morphy, H. (1998) 'The Art of North Australia', in W.H. Edwards (ed) *Traditional Aboriginal Society*, pp. 6-29. Melbourne: Macmillan.
- Myers, F. (1980) 'The Cultural Basis of Politics in Pintupi Life', *Mankind* 12 (3): 197-214.
- National Native Title Tribunal (2006) *Indigenous Land Use Agreements*. Perth: National Native Title Tribunal. <http://www.nntt.gov.au/ilua/> accessed 18 November 2006
- O'Faircheallaigh, C. (1991) 'Resource Exploitation and Indigenous People: Towards a General Analytical Framework', in P. Jull and S. Roberts (eds) *The Challenge of Northern Regions*, pp. 228-71. Darwin: North Australia Research Unit.
- O'Faircheallaigh, C. (1999) 'Making Social Impact Assessment Count: A Negotiation-based Approach for Indigenous Peoples', *Society and Natural Resources* 12: 63-80.
- O'Faircheallaigh, C. (2004) 'Native Title and Agreement Making in the Mining Industry', *Land, Rights, Laws: Issues of Native Title* 2 (25): 1-12.

- O’Faircheallaigh, C. (2006) ‘Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or “Business as Usual”?’ , *Australian Journal of Political Science* 41 (1): 1-22.
- O’Faircheallaigh, C. (2007) ‘Corporate Social Responsibility and Globalisation’, in C.Curran and E. Van Acker (eds) *Globalising Government Business Relations*, pp. 309-32. Frenchs Forest: Pearson Longman.
- Ontario, 2006. *Aboriginal Affairs: Negotiations*. Toronto: Ontario Secretariat for Aboriginal Affairs.
<http://www.aboriginalaffairs.osaa.gov.on.ca/english/negotiate/negotiate.htm>
 accessed 1 November 2006
- Palmer, K. and N. Williams (1990) ‘Aboriginal Relationships to Land in the Southern Blatchford Escarpment Area of the East Kimberley’, in R. Dixon and M. Dillon (eds) *Aborigines and Diamond Mining: the politics of resource development in the East Kimberley*, pp. 5-28. Nedlands, UWA Press.
- Paterson, R.K. (1999) ‘Protecting *Taonga*: The Cultural Heritage of the New Zealand Maori’, *International Journal of Cultural Property* 8 (1): 108-132.
- Ritchie, D. (1994) ‘Principles and practice of site protection in Australia’, in Carmichael *et al.* 1994, pp. 227-44.
- Ritter, D. (2003) ‘Trashing Heritage: Dilemmas of rights and power in the operation of Western Australia’s Aboriginal Heritage Legislation’, *Studies in Western Australian History* 23: 195-209.
- Rose, D.B. (1996) *Nourishing Terrains: Australian Aboriginal Views of landscape and Wilderness*. Canberra: Australian Heritage Commission.
- Rose, D.B. (2001) ‘The silence and power of women’, in P. Brock (ed) *Words and Silences: Aboriginal women, politics and land*, pp. . Crows Nest: Allen and Unwin.
- Sosa, I. And K. Keenan (2001) *Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada*. Toronto: Canadian Environmental Law Association.
- Stead, J. and M. Niblett (1985) ‘Aspects of The Socio/Cultural Effects of Oil and Gas Development in Central Australia’, in B. Foran and B. Walker (eds) *Science and*

Technology for Aboriginal Development, pp. 2.13-2.17. Alice Springs: CSIRO and Centre for Appropriate Technology. .

UNESCO (United Nations Economic and Social Council) (1994) *Protection of the heritage of indigenous people: Preliminary report of the Special Rapporteur 8 July 1994*.

UNESCO, E/CN.4/Sub.2/1994/31.

Warhurst, A. and Mitchell, P. (2000) 'Corporate social responsibility and the case of the Summitville mine', *Resources Policy*, 26: 91-102.

Watkins, J.E. (2003) 'Beyond the margin: American Indians, First Nations and Archaeology in North America', *American Antiquity* 68 (2): 273-85.

Yellowhorn, E. (1999) 'Heritage protection on Indian Reserve lands in Canada', *Plains Anthropologist* 44 (170): 107-116.