Introduction

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

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Boom times and benefits

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

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

This selection of articles was included among a wide range of papers originally presented at a symposium held in Broome, Western Australia, where Australia’s largest mining boom is under way.\(^3\) The articles cover developments in Australia, Papua New Guinea, East Timor and South Africa. Each of these locations has its own particular modes of managing the relationship between indigenous and local peoples on the one hand, and governments and the resources sector on the other. Law plays a role in formalising and implementing these relationships to varying degrees in particular contexts. While these sites have many differences in their historical and contemporary arrangements for managing these relationships, they all involve previously colonised peoples who have been historically and contemporarily disadvantaged, both socially and economically.

The articles, both individually and read as whole, present a range of evidence at both a macro and a micro level of engagement, negotiation, impact, agreement and benefit-sharing from which some key themes emerge as to how indigenous

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and local community interests are accommodated within the resources sector. These include benefits and incentives as well as impediments to long-term social and economic development for indigenous peoples and local communities.

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

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

Thus, as the articles suggest, the multidimensional nature of these issues finds varied expressions in different locations and circumstances. These issues include the legal obligations imposed on the parties, the role of market power, the social responsibility obligations of corporations, risk management, adaptation of processes and forms to local conditions, the impact generally of resource wealth on local communities and the need to identify, measure and evaluate benefits such as employment and education. All of these are crucial elements in what Australia’s Treasury Secretary Ken Henry describes as human capital development.4

The legal framework in which these relationships develop and operate,  

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and the power relationships that flow from this framework, can serve as both a barrier and a stimulus for productive relationships and the flow of benefits to communities. Not only are the context, process and substance of obligations arising under legislation or agreements vital to the flow of benefits and the development of sustainable indigenous and local communities and economies, but also crucial are effective legal models for implementation.\(^5\) Agreements might be structured into legal forms that inhibit or enhance the enjoyment of benefits and wealth creation. Administrative and financial arrangements for the management and disbursement of funds from agreements with mining or other specific project partners are crucial elements in providing opportunities for sustainable economic and social development and wealth creation for communities.\(^6\) Law and its operation are central to the analysis of the complex set of institutional relationships at play in the engagement of indigenous and local peoples and the resource industry. However, as discussed below, law does not operate in a vacuum; it should be viewed as both a reflection of existing modes of accommodation, but also holding the potential for more effective engagement.

This introduction contextualises the analysis and debate across the multidisciplinary research captured in the succeeding articles. The first section of the introduction provides a brief country overview of the history of colonisation and the status of the legal ‘recognition’ of indigenous peoples and local communities’ ‘rights’ to land and resources. The discussion draws on common themes about the social, economic and institutional factors that go to the heart of capacity building for indigenous and local peoples. However, the overarching theme of the introduction, and indeed the articles themselves, is an examination of the enduring social and economic disadvantage of indigenous peoples and local communities that are surrounded by resource-generated wealth, and the development of strategies, policies, and legal and institutional frameworks to address this imbalance. The specific areas examined in some detail include: corporate social responsibility agendas, including employment and training programmes, agreement-making and the revenue distribution processes.


\(^6\) Lisa Strelein and Tran Tran, \textit{Taxation, Trusts and the Distribution of Benefits under Native Title Agreements} Native Title Workshop Report No 1/2007 (Australian Institute of Aboriginal and Torres Strait Islander Series (AIATSIS) 19 September 2007).
Enduring disadvantage: legal frameworks of access to land and resources

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

Australia

In the Australian federal system, direct legal regulation of onshore resource extraction is largely governed by State and Territory legislation. The Commonwealth has power in relation to offshore resources and has constitutional powers in a range of fields which directly affect the operation

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9 Seas and Submerged Lands Act 1983 (Cth).
of State-based legal regimes. In addition, the Commonwealth has plenary powers in relation to Territories and this is particularly relevant for the Northern Territory given its mineral wealth and large indigenous population. A further significant constitutional element is the provision that requires the Commonwealth to pay ‘just terms’ compensation for the acquisition of property. Finally, the race power has played a significant role in transforming the power relationship between the Commonwealth and the States, particularly since the common law recognition of native title in 1992.

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

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10 For example s 51(i) (trade and commerce power), s 51(xx) (corporations power), s 51(xxiv) (external affairs power) of the Commonwealth Constitution 1901 (Constitution of Australia).
11 Section 122 of the Commonwealth Constitution 1901.
13 Section 51(xxxix) of the Commonwealth Constitution 1901.
14 Section 51(xxvi) of the Commonwealth Constitution 1901.
15 Mabo v Queensland (No 2) (1992) 75 CLR 1 and the Native Title Act 1993 (Cth).
17 The power of the Commonwealth to make laws in relation to indigenous peoples was confirmed by referendum that changed s 51(xxiv) of the Australian Constitution in 1967 under which the Commonwealth was empowered to make special laws it ‘deemed necessary’ for people of particular races including ‘Aborigines’. The Commonwealth’s power has been confirmed, especially when exercised pursuant to enabling international instruments and obligations (Australian Constitution, s 51(xxiv)). See Koowarta v Bjelke-Petersen (1982) 153 CLR 168. This power has emerged as the crucial element for protection of indigenous interests through the application of the Racial Discrimination Act 1975 (Cth), the municipal implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (see Mabo v Queensland (No 1) (1988) 166 CLR 186).
As a consequence of these constitutional arrangements, the States and Territories manage mineral extraction, resulting in eight different legal regimes directly governing the industry, with the Commonwealth influencing directly or indirectly through its powers referred to above. The norm in these regulatory regimes is that minerals are publicly, rather than privately, owned. A significant consequence of this arrangement has been a regulatory system revolving around management of resources in a way that brings the various legal and constitutional elements together. This has been achieved through a range of mining rights and mining titles which may involve property rights but not ownership of the resource for grantees. The management mosaic involves parties with interests including the Crown as owner of the resource, the developer as holder of a right to access a resource (or explore for it) and the owner or title holder of land in which the resource is located. In 1987, Fisher described this mosaic of interests and regulatory environment in the following way: ‘management of natural resources within the legal system has become the principal means of settling disputes arising in consequence of the fragmentation of rights of property into a series of potentially conflicting interests. Each of the institutions of the law has a part to play within this system.’

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

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

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


21 Fisher, *ibid*, at 44.

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

23 Fisher, n 20 above, at 45.
common law recognition of native title and its related statutory regulation.24

Colonial governments started creating reserves for the ‘benefit of Aboriginal people’ from around the 1830s but there was no involvement of indigenous inhabitants of reserves in the resource extraction process and no financial benefits from the reserves were used for or flowed to the indigenous inhabitants of the reserves. This contrasts with Canada, for example,25 where there has been a scheme for distribution of funds under the Indian Act.26 This policy began to change in the 1960s with the establishment of Aboriginal Land Trusts in South Australia.27 Thereafter activities on reserves by non-indigenous interests, including by resource developers, usually required some element of special consent by the body charged with responsibility for management of the reserve, but not from the indigenous inhabitants of reserves. Most jurisdictions established at least administrative regimes to process applications28 and to make arrangements for special payments from the activity, including royalties. But these payments most often became part of consolidated revenue and were rarely, if ever, used on the reserve that produced the revenue.

Statutory land rights schemes,29 established from the 1970s onwards, included provisions for the regulation of resource development and other uses on granted land. Some of these schemes integrated indigenous processes with the resource regulatory regime for the first time.30 In the case of the Northern Territory legislation, these schemes provide for consultation and for a veto of such proposals by indigenous landowners. Negotiations under these regimes, especially in the Northern Territory, provided the first examples of the potential for agreement-making.31 They continue to operate alongside the native title scheme.

Legislative regimes for the protection of land-based cultural heritage were

24 See Native Title Act 1993 (Cth).
27 Aboriginal Lands Trust Act 1966 (SA).
31 John Altman, Aborigines and Mining Royalties in the Northern Territory AIATSIS (1983).
passed generally in the 1960s and early 1970s. These schemes stipulate that it is an offence to interfere with aboriginal heritage but create a regime to permit such interferences. These provisions bind resource developers and have been the source of major disputes over time. There was little or no integration of heritage into the regulatory regime until 2003 when Queensland attempted to integrate heritage, native title and development planning decision-making.

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

While there was considerable resistance initially to providing a ‘seat at the table for indigenous peoples’, subsequent events reworked relationships across many facets of the Australian community including the resources sector. The Native Title Act 1993 (Cth) was passed following *Mabo*. In addition to providing a process for the establishment of native title and attempting to manage issues of invalidity of past grants of title (including resource titles), the Act attempted to provide a code for dealing with future activities (including resource activities) on land in which native title might exist. Briefly, the key relevant elements of the legislative framework provided for

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33 Archaeological and Aboriginal Relics Preservation Act 1972 (Vic). Other States and Territories passed similar legislation at various stages: for example Native and Historical Objects and Areas Preservation Ordinance 1976 (Northern Territory). See also Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).
34 For example, s 6 of the Aboriginal Heritage Act 1980 (WA).
36 Aboriginal Cultural Heritage Act 2003 (Qld); see also the Aboriginal Heritage Act 2006 (Vic).
37 See Strelein and Tran, n 6 above.
39 Fisher, n 21 above.
a right to negotiate over certain resource developments on land the subject of native title, with time limits for negotiations and an arbitral provision in the event that the parties fail to reach agreement.41 In addition, as Langton and Mazel point out, a complex set of provisions governing other future acts on land had an impact on resource developers.42

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

As the resources boom developed during the 1990s, indigenous peoples’ rights to participate in decisions about their land, and to negotiate economic benefits, were based on underlying cultural heritage rights, and statutory schemes where applicable, and the rights arising out of the Native Title Act.43 As Langton and Mazel note, this complex scheme has resulted in resource developers embarking on negotiations and relationship building that goes beyond the strict requirements of the legal regime. Increasingly, it is in this space which lies beyond technical legal compliance where the most innovative management of complex relationships takes place.

**South Africa**

In South Africa, issues of land dispossession during the colonial and apartheid regimes, and subsequent measures to address this dispossession under the restitution regime underlies current relations between local communities, mining companies and the wider South African society. Both the history of dispossession and subsequent measures highlight the role of mining in employment and wealth generation. Colonisation of South Africa commenced with the initial Dutch assertion of sovereignty over the Cape of Good Hope in the mid-17th century. European

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42 Marcia Langton and Odette Mazel, ‘Poverty in the Midst of Plenty: Aboriginal People, the ‘Resource Curse’ and Australia’s Mining Boom’, at p 31 of this issue.
43 Godden and Tehan, n 41 above.
sovereignty was asserted over areas already exhibiting a diverse ethnic mix owing to successive migrations, displacing the Indigenous Khoisan and San peoples. As de Villiers notes, ‘the struggle for land predates the colonial presence in Africa’. African customary tenures were complex and integrated with traditional authority structures but most groups recognised common land, but with varying capacity for allotment to individuals.

Following intensification of European settlement, especially after cession of the Cape Colony to the British in 1814, many indigenous and local tribal peoples were further dispossessed, forming a cheap labour force for the expansion of European agriculture. Many parallels exist with colonial contexts in Australia: ‘[a]s British Imperialism proceeded and whites conquered previously independent communities, British ownership of land increased and racist ideology and segregation intensified.’ During the late 19th century, legislative measures introduced quit-rents (an insecure tenure form) and individual titles, rupturing African tribal societies and forcing many to leave the land. One consequence was the development of a pool of migratory labour for the emerging labour-intensive diamond and gold mining industries.

In a similar move to developments in Australia, the late 19th and early 20th centuries saw the government set up reserves for tribal groups, such as the Zulus, while simultaneously opening up much of the remaining areas of South Africa to white settlement. In 1910, the former southern African colonies were granted independence and formed the Union of South Africa.

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

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48 Fryer-Smith, n 44 above, at 5.
49 de Villiers, n 45 above, at 46.
wealth generated by natural resources, including mining.

The 1936 Native Trust and Land Act\(^50\) marginally increased the land available to black South Africans to some 13 per cent of the total, but increased the controls over the administration and use of black lands.\(^51\) These specific land laws and policies were accompanied by a more systematic cultural separation and racial segregation under the evolving apartheid system. Legal measures, such as the Population Registration Act 1950 and the Group Areas Act 1950 further cemented the economic and political disadvantage of the black and coloured populations, concurrently with the concentration of black communities into overpopulated marginal lands.\(^52\) ‘[i]n short the social transformation after 1913 was swift, sweeping and severe.’\(^53\) Mining, like many other forms of wealth generation was largely closed off to black communities, apart from participation in poorly paid labour positions. The disparities of wealth that this generated are particularly entrenched in rural areas, especially in the former black ‘homelands’. In several areas, such as the North West province, mining represents a major economic activity, often located in close proximity to the ‘traditional’ homeland areas. Yet to date, comparatively little of this wealth has flowed to local communities. Some notable exceptions include the Bafokeng community.\(^54\)

Land rights, land tenure and natural resources reform were key parts of the transformation to the ‘new’ South Africa that emerged after apartheid.\(^55\) The apartheid legacies of dispossession and poverty were addressed through a three-pronged land reform package of upgrading of land tenure rights (particularly customary tenures), land redistribution (on a relatively modest scale) and land restitution.\(^56\) The South African Constitution provides a mechanism for restitution. Under section 6 of the Restitution of Land Rights Act 1994, a claim can be lodged for restitution. If agreement cannot be reached between the dispossessed claimant and the current owner, the claim is adjudicated by the Land Claims Court. Claims for restitution are made against the state.\(^57\) Restitution can be in the form of the original land, cash payments, alternative state land or priority access to state housing and land.

\(^{50}\) Later ironically named the Development Trust and Land Act.

\(^{51}\) Fryer-Smith, n 44 above, at 7.

\(^{52}\) Ibid, at 8.

\(^{53}\) de Villiers, n 5 above.

\(^{54}\) See Kloppers and du Plessis, n 2 above. See also ATNS project website entries for Bafokeg – www.atns.net.au/agreement.asp?EntityID=4124.


\(^{56}\) Bordeaux-Smith, n 47 above, at 2846.

As Mostert suggests, the land reform legislation had to address two objectives. First, it needed to acknowledge and to make good injustices arising from the racially inspired territorial segregation.\(^{58}\) Secondly, it needed ‘to address the phenomenon of massive underdevelopment that was the result of racially segregatory laws’.\(^{59}\) Interestingly, in relation to historic dispossession, the bases of claim in South Africa and Australia are quite different. In South Africa under restitution legislation, it is necessary to show forced dispossession due to a racially discriminatory act,\(^{60}\) while in Australia to claim native title it is necessary to provide evidence of continuing connection to land and waters.\(^{61}\) Both processes were instrumental in producing a racially-based transfer of indigenous and local peoples to the more ‘marginal lands’ accentuating the role that the resources sector plays in any future capacity to redress historic patterns of economic and social inequality.

Historically, the ownership of mineral rights in South Africa was largely tied to land ownership, and common law title, until the reforming legislation, the Minerals and Petroleum Resources Act 28 of 2003 vested minerals in the nation state, in trust for the people of South Africa.\(^{62}\) In addition, the seminal Richtersveld decisions recognised indigenous land claims.\(^{63}\) Indeed, these decisions have been regarded as landmarks which reworked preconceived ideas about property, discrimination, dispossession, communities and cultural identities in South Africa.\(^ {64}\) Given the broad reforming sweep of these decisions, it is striking that this claim was against Alexor (Pty) Ltd, the State-owned diamond mine which commenced operations in the lands occupied by the ‘Nama’ peoples in the 1920s. The Constitutional Court accepted the claim for restitution, acknowledging that the Richtersveld community had ‘rights’ that survived annexation and that the Precious Stones Act which initiated diamond mining constituted a discriminatory measure for restitution purposes.\(^{65}\) Ultimately, a community claim for compensation was awarded. How the Richtersveld community will use the compensation


\(^{59}\) Mostert, ibid, at 5.

\(^{60}\) Dorsett, n 57 above, at 3.

\(^{61}\) Section 223 of the Native Title Act 1993 (Cth).


\(^{63}\) Richtersveld Community and Others v Alexor (Pty) Ltd and Another, 2001 (3) SA 1293 (LCC), Richtersveld Community and Others v Alexor (Pty) Ltd and Another, 2003 (2) All SA 27 (SCA), Alexor (Pty) Ltd and Another v Richtersveld Community and Others, 2004 (5) SA 460 (CC).

\(^{64}\) Mostert, n 58 above, at 10.

\(^{65}\) Alexor (Pty) Ltd and Another v Richtersveld Community and Others, 2004 (5) SA 460 (CC).
moneys to build future social capital and reduce the current levels of poverty experienced by the community goes to the heart of the questions being explored in this volume.

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

**Papua New Guinea**

Papua New Guinea (PNG), comprising the eastern half of the island of New Guinea and various other islands and island groups, is located in the Pacific, about 160km from the north-eastern tip of Australia. PNG’s history of colonisation began when various European powers began taking an interest in the region in the 19th century. The Dutch annexed the western half of New Guinea in 1828, while the Germans and British established protectorates in the eastern half in 1884. British New Guinea was renamed the Territory of Papua and came under Australian control with the passing of the Papua Act 1905, while control of German New Guinea also passed to

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Australia pursuant to a 1920 League of Nations mandate. This was to remain the status quo, with the exception of a period of Japanese occupation during World War II, until the two territories merged and gained independence from Australia in 1975.

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

This issue of mineral ownership remains unresolved despite being the subject of numerous cases both in PNG and internationally.

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

68 Ibid.
70 For example, s 5 of the Mining Act 1992 states that ‘All minerals existing on, in or below the service of any land in Papua New Guinea, including any minerals contained in any water lying on any land in Papua New Guinea, are property of the State’.
74 The search for gold was the major contributing factor to the opening of the Highlands of Papua New Guinea in the early part of the last century, see Dalton, ibid.
New Guinea Fields Limited, continues to operate in Morobe gold fields.

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

The Ok Tedi gold and copper mine was originally explored by Kennecott Explorations (Australia) Limited, but Kennecott was unable to reach agreement with the State. The government proceeded with further exploration on its own initiative and then began negotiations with Broken Hill Proprietary Limited (BHP). A concession agreement, ratified by the Parliament in the Mining (Ok Tedi Agreement) Act 1976, was made between the State and Dampier Mining Limited, a wholly owned subsidiary of BHP. Production commenced in 1984. Ok Tedi was not the same financial success as the Panguna mine. There were significant cost overruns during the construction stage, and, because of the long period of time that elapsed

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

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


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

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

80 Kennecott Copper Corporation is a multinational American mining company. See R F Mikesell, Foreign Investment in Mining Projects, Case studies of recent experiences (1983), p 265. Also see R Jackson, Ok Tedi: The Pot of Gold (1982), p 40.

81 Mikesell, ibid, at 267.

82 Broken Hill Proprietary Limited, (now BHP Billiton) is one of the largest multinational mining companies. At the time the company was based in Melbourne, Australia.
between discovery and production, it missed out on high metal prices. Ok Tedi achieved notoriety for the high levels of pollution from tailings that polluted the Fly River and surrounding lands. The PNG government passed legislation to block compensation claims by the affected landowners.

In comparison with mining, there have been no commercial discoveries of petroleum resources despite explorations carried out sporadically throughout the 20th century. For example, in 1911 reports suggested that numerous oil and gas seeps were located in the Papuan Gulf but none has proved commercially viable.

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

Following pressure from industry and locals, the government enacted the Mining Act 1992 to provide a simple standard agreement framework that could be applied across different projects. The new Act also allowed landowners to participate in the negotiation process, and made mandatory the holding of a developmental forum before either special mining leases (SMLs) or petroleum development licences (PDLs) could be granted. The Oil and Gas Act 1998 replaced the Petroleum Act Chapter 98 after the discovery of crude oil in the Iangifu in the Southern Highlands prompted similar calls for legislative change.

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83 In the middle of the 1960s the world outlook for copper prices was good, and copper prices were significantly high in the early 1970s, particularly between 1973 and 1974.
84 Dalton, n 7 above, at 101.
Filer provides a detailed analysis and evaluation of this changing process, recording its mixed outcomes: ‘as matters stand, the nearest approximation to “community sustainable development plans” are the plans made by developers to meet their own social responsibilities. Even the district and local government planning process enjoined by the new Organic Law is normally revealed as a hollow form of wishful thinking when it takes place in the vicinity of a major resource project.’ The patterns of limited engagement with local communities who live in the shadow of resource extraction activities have again proven difficult to dislodge. While some advances have occurred in the direction of corporate social responsibility, without more substantial legal and administrative frameworks operating in tandem little substantive gains will be achieved. Clearly there remain significant challenges to ensure that PNG, yet another country whose economy is dominated by resource extraction, achieves long-term, sustainable social and economic development, for its communities, particularly in a country beset with mounting poverty and facing major health problems, such as Aids.

**Timor-Leste**

Turning to Timor-Leste, the major focus of comparison vis-à-vis other cases studied in this volume, relates to the distribution of the resource-generated wealth in the context of a newly emerged nation struggling with issues of capacity building, and the initiation of functional structures of government and administration. These emerging national institutions are now charged with wide responsibility for the management and distribution of resource wealth from the offshore oil and gas of the Timor Gap area. These emergent structures also need to take cognisance of customary interests, the overlay of past colonial forms of administration and the legacy of past violence and extreme poverty. In the context of the analysis in this volume, the complexities arise in relation to questions about how to best use the wealth for the long-term social and economic benefit of the nation. Moreover, the complexities of resolving long-term sustainability need to be understood in the light of the need to manage disparate interests, including customary forms of ‘entitlement’, political conflict and the overwhelming effects of poverty, which in large measure result from Timor-Leste’s colonial past.

The Democratic Republic of Timor-Leste\(^9\) comprises the eastern half of the island of Timor, situated north-west of Darwin, Australia. Timor has been colonised since the 16th century, with the Portuguese and the

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88 Filer, n 86 above.
89 Timor-Leste is the official name given to the new nation. Formerly, the country was known as East Timor.
Dutch dividing the island between them until the Second World War. The Portuguese heavily exploited the country, while introducing coffee, sugar and cotton plantations\(^90\) that disrupted traditional subsistence farming. Portuguese control was reasserted after the War, but with the administration operating under the auspices of the United Nations, as a result of the post-war decolonisation movement. Attempts were made to ‘develop’ the country, although the lax Portuguese administration preserved many former colonial structures.\(^91\) Ultimately, administration broke down, and fighting broke out in Timor-Leste between political parties seeking East Timorese independence; this eventuated on 28 November 1975. The experience of sovereignty was short-lived.\(^92\) Ten days later Indonesia invaded, occupying the country until 1999. The adjacent major offshore petroleum and gas reserves may have motivated the invasion.

The resulting occupation was marked by violence.\(^93\) The East Timorese continued to struggle against the Indonesian regime, and ultimately it was determined that the country would undergo a United Nations sponsored referendum. The withdrawal of Indonesia was marred by violence, forced migration and the destruction of the bulk of the country’s infrastructure.\(^94\)

After independence in 2002,\(^95\) Timor-Leste remained plagued by social and legal unrest following over 400 years of Portuguese colonisation and, thereafter, 24 years of contested Indonesian occupation. Homelessness or displacement affected a quarter of the entire community.\(^96\) Further, the legal system was non-existent, since law-makers and enforcers from the previous regime had absconded.\(^97\) To restore stability, the Security Council set up the United Nations Transitional Administration in East Timor (UNTAET), which was authorised to legislate, administer and deliver justice.\(^98\) A new legal system had to be established ‘from scratch’ rather than simply

\(^91\) Ibid.
\(^93\) It is estimated that 200,000 Timorese were killed by the Indonesians in this period. A Brief History, n 90 above.
\(^94\) About 1400 people were massacred following the ballot box results, which showed an overwhelming majority favouring independence.
\(^96\) Ibid.
\(^98\) Ibid, at 172.
reconstructed’. It had to be led by a new and impartial judiciary, supported by the legal profession. The infant legal regime was beset with many complexities. The overarching issue remains: how to reconcile the laws of the previous regime (applicable during the interim), traditional laws which persisted since Portuguese colonisation and international human rights norms. The newly-created Timor-Leste Constitution, largely informed by international norms, provides a space for accommodating these distinct legal orders by explicitly sanctioning consistent traditional laws. However, this relationship is still in its embryonic stage.

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

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

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

In this context, Timor-Leste has established a Petroleum Fund to manage the revenue generated by the exploitation of oil and gas resources. As Drysdale describes, the new state needs to be careful to manage this wealth well, including by balancing the needs of current and future generations, making the processes for its disbursement both transparent and accountable, and setting guidelines for its wise investment. With the country so highly dependent on resource revenues, Timor-Leste’s formative legal system and institutional structures clearly face considerable challenges to ensure effective implementation of the resource funds and long-term sustainability for the community.

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

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112 Triggs and Bialek, n 92 above, at 324.
113 Australia and Indonesia agreed to exploit the region cooperatively and share benefits equally. See Victor Prescott et al., The Timor Gap Treaty: Three discussion papers, Australian Institute of International Affairs (1995).
114 Triggs, n 111 above, at 336.
115 Timor Sea Treaty, EIF 2/4/03 and International Unitisation Agreement. For a discussion see Triggs and Bialek, n 92 above, at 329-336.
‘Paradox of plenty’: resource riches and indigenous and local peoples’ social and economic disadvantage

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

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

The work of Stiglitz and Sen both define the nature of the resource curse and situate it within a ‘development paradigm’ in which a positive institutional framework that supports local peoples provides the basis for economic development. Sen’s work has been highly influential in asserting a core minimum standard for quality of life and opportunity that is to be regarded as a human right. Quoting Stiglitz, Langton and Mazel assert that ‘poor distribution of resource-derived wealth is the cause of poor socio-economic activity in mineral rich areas.’ Stiglitz believes, however, that this can be overcome by associating high institutional quality and improved governance, with sustainable wealth management. He emphasises the prioritisation of open, transparent and accountable institutions which reduce the scope for corruption, and increase the conditions for investment’.

118 Langton and Mazel, n 42 above.
121 Stiglitz, n 119 above.
122 Langton and Mazel, n 42 above.
Drysdale\textsuperscript{123} and Filer\textsuperscript{124} draw on a similar concept of a ‘resource curse’ in their respective analyses of the challenges of management of resource riches in poor countries in pursuit of ‘sustainable development outcomes’.\textsuperscript{125} The conjunction of this idea in different locations forms a key element of the contributions to \textit{JERL} as part of the broad issue of management of benefits for indigenous peoples and local communities.

Langton and Mazel’s insight derives from their application of ‘resource curse’ literature to the situation of indigenous Australians in the mining regions of the country as a source of ‘critical lessons for understanding the problems faced by indigenous Australians in these regions’.\textsuperscript{126} Significantly, they argue that ‘there are trends that illustrate similar tendencies at work in national sub-regions where indigenous populations experience disadvantages caused by historical racism and the recalcitrance of governments to invest in their capability to participate in the economy’.\textsuperscript{127} The focus of their inquiry, however, is on the ‘inequitable distribution of impacts and measures for amelioration’\textsuperscript{128} rather than the distribution of income which is more usually the focus of the ‘resource curse’ literature.

Filer and Drysdale address the distribution element and identify common issues in very different models. In PNG, Filer identifies the legislative basis for the redistribution of central government mineral revenues to customary land owners. Indeed, in many ways the Development Forum and its attempt to redistribute mining revenues to customary land owners provides an example of many of the goals identified in Langton and Mazel. In Timor-Leste, Drysdale identifies the key limitation as the weakness of formal institutions and structures, notwithstanding the prescription of a set of principles to guide the management of revenues. In South Africa, the historic inequalities of access to the wealth generation from resource extraction activities were acute, exhibiting many of the facets of the specific manifestation of the ‘resource curse’ operative in Australia.

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

\textsuperscript{123} Drysdale, n 116 above.
\textsuperscript{124} Filer, n 86 above.
\textsuperscript{125} \textit{Ibid.}
\textsuperscript{126} Langton and Mazel, n 42 above.
\textsuperscript{127} \textit{Ibid.}, at 1.
\textsuperscript{128} \textit{Ibid.}, at 3.
Mechanisms for indigenous and local peoples’ empowerment: agreements, regulation, corporate social responsibility and wealth creation

Turning to Australia as an example – more than a decade after native title was recognised and codified – it is apparent that ‘the complex legal process established for the resolution of native title matters’ is not working well.\textsuperscript{129} The response, in many quarters has been to adopt agreements\textsuperscript{130} for the resolution of conflicts about competing claims to land and resources.\textsuperscript{131} While an agreement-based or partnership model can take many forms,\textsuperscript{132} and it is not unproblematic,\textsuperscript{133} it now appears to offer more scope to resolve longstanding issues of indigenous economic and cultural sustainability that once were regarded as premised on the attainment of land rights. In other locations, such as PNG, Filer points to the Development Forum and benefits packages as another model for the expansion of indigenous peoples’ participation in, and benefits from, resource developments. This regulated scheme contrasts with the developments in South Africa through corporate social responsibility plans as described by Kloppers and du Plessis. These corporate social responsibility plans operate in respect of mining regimes but also need to be considered in the context of legislative support for achieving social and economic rights under the Black Economic Empowerment Act. Clearly, as the authors indicate, these trends sit within a growing momentum that seeks to address racialised disadvantage across many facets of South African society.\textsuperscript{134}

Within Australia, issues about Aboriginal landholding now arise in a

\textsuperscript{129} Sean Brennan, ‘Native Title In the High Court of Australia a Decade after Mabo’ (2003) \textit{14 Public Law Review} 209, 211.

\textsuperscript{130} Agreement-making was not unknown in the pre-native title era but it was unusual. For example, in relation to the Pitjantjatjara area there was an agreement in 1981 with Shell in relation to oil exploration: see Philip Toyne and D Vachon, \textit{Growing Up the Country: The Pitjantjatjara Struggle for Their Land} (1984), pp 111–19.

\textsuperscript{131} Mathew Riley, ‘“Winning” Native Title: The Experience of the Nharwuwangga, Wajarri and Ngarla People’ (Issues Chapter No 19, vol 2, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2002), p 2.

\textsuperscript{132} Maureen Tehan and David Llewellyn, ‘“Treaties”, “Agreements”, “Contracts” and “Commitments” – What’s In a Name? The Legal Force and Meaning of Different Forms of Agreement Making’ (2005) \textit{7 Baley: Culture, Law and Colonialism} 1.

\textsuperscript{133} Ciaran O’Faircheallaigh, ‘Implementing Agreements between Indigenous Peoples and Resource Developers in Australia and Canada’ (Research Paper No 13, School of Politics and Public Policy, Griffith University, 2003); Ciaran O’Faircheallaigh, ‘Negotiating a Better Deal for Indigenous Land Owners: Combining “Research” and “Community Service”’ (Research Chapter No 11, School of Politics and Public Policy, Griffith University, 2003).

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

Agreements, as both legal instruments and situated modalities for achieving ‘policy’ outcomes, are critical to realising potential long-term results. Law provides an important means of formalising relationships that have been forged at an economic and policy level, but also as an instrument that defines what those relationships are, and how they are to be managed to achieve goals of economic empowerment and development. It also provides the framework within which negotiations occur. The mix of law and policy that Langton and Mazel identify as triggers of negotiation include: the mining provisions of the Aboriginal Land Rights Act (Northern Territory) 1976 (Cth); the Native Title Act 1993 (Cth) and subsequent amendments; the absence of a statutory basis for Aboriginal rights in some jurisdictions requiring voluntary agreements for a period of time; heritage legislation; commercial imperatives; government requirements for service contracts; and the Howard government’s approach to indigenous affairs (including Shared Responsibility Agreements and Regional Partnership Agreements). 135

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

Kloppers and du Plessis have recognised this trend in South Africa. The Constitution imposes an obligation on the government to realise socio-economic rights but the government has used public/private partnerships to advance this goal. Social responsibility plans for corporations are used to achieve these rights but without any direct legislative enforcement of

135 Langton and Mazel, n 42 above.
the substance of the plans, as opposed to the procedural requirements. Thus as Kloppers and du Plessis argue, corporate social responsibility is not a substitute for regulating or legislating for social rights or shifting state responsibilities to the private sector. They identify this as ‘privatising’ the state’s responsibilities. They argue that in order to ensure an effective framework for corporate social responsibility a regulatory foundation that promotes growth, employment and good governance is required. Langton and Mazel, too, see this as an element in Australia, as governments fail to meet their obligations and look to corporations to fill the void left by them (governments) in the provision of infrastructure, services, human capital development and social and economic development in indigenous communities.

It is necessary to refocus attention on the more overarching role that law may play in accommodating interests in resource extraction and achieving long-term economic and social sustainability for indigenous peoples. Law does not operate in isolation; it sits alongside many other factors that are necessary to accommodate interests in resource extraction to achieve sustainable outcomes. For this reason, this volume contains not only what lawyers may recognise as a more orthodox treatment of mining law, land rights and associated ‘indigenous’ regulatory regimes but also an understanding of the context in which law as both an instrument and a driver for normative outcomes is situated. To this end, several articles provide analyses of social and economic issues connected with resource extraction and indigenous and local communities. Without such interdisciplinary analyses, law as a normative agent is poorly equipped to adapt and inform the dynamic of change that is implemented instrumentally and philosophically.

In particular, Brereton et al report on research on employment programmes instituted at two mining sites as a result of agreements. Employment provisions are now regularly included in agreements. Such provisions form part of the corporate social responsibility obligations of corporations engaged in resource extraction. Recording the practice is valuable in itself. It is a key in building capacity – an aspect identified by Langton, Kloppers and Drysdale as central to capturing the benefits of resource extraction and creating long-term wealth. The evaluation of these practices then plays an important role in identifying the effectiveness of such provisions in meeting the corporate social responsibility goals of empowerment and capacity building. In addition, the paper by Brereton et al provides a snapshot of

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136 Kloppers and du Plessis, n 2 above.
138 Langton and Mazel, n 42 above.
both implementation of agreements and some of the broader concerns in developing employment programmes in a tight labour market. For example, the Century agreement was negotiated within the context of the Native Title Act’s right to negotiate provisions. As such, the negotiating power of the native title parties was limited by the lack of a veto and it was accompanied by a difficult history between the native title, corporate and government parties. At Argyle, another Australian mine, the negotiation of the recent agreement was not the result of statutory requirements but was nonetheless undertaken more broadly as part of the ‘social licence to operate’ referred to by Langton and Mazel.

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

Taylor suggests that the ‘current political economy of minerals development across remote Australia attempts to ensure that indigenous peoples and communities increase their capacity to participate in buoyant regional economies that are stimulated by the “super-cycle” of global demand for mineral products’. Overall, the aim is to establish initiatives that will secure sustainable economies for mining regions and their communities beyond the operational life of mines making full use of local labour. Yet, as Langton and Mazel, and Kloppers and du Plessis, in particular, ask, how can economic development be measured and planned for? If corporations, whether strictly as part of their corporate social responsibility obligations or as part of a more

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140 Langton and Mazel, n 42 above.

141 Ibid.

wide-ranging ‘social licence to operate’ seek to negotiate with indigenous and local communities ways to transform resource wealth into social and economic development, then, it is important to determine what provisions might be incorporated into agreements, as well as to ensure that there are measures for adequate evaluation of agreements and their implementation.  

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

The long-term nature of the transformative project of economic empowerment and wealth creation incorporates this institutional capacity building and includes recognition of the need to build sustainable communities beyond the life of mines. The implications of this trend, more generally, are highlighted in a number of the articles but its significance for corporations is highlighted in Langton and Mazel. They refer to the Minerals Council of Australia’s view that building lasting relationships reduces risks. There is a recognised risk to companies’ reputations if they simply build dependency on the production phase of a mining project and fail to broaden economic and social capacities and opportunities. Thus, building sustainable institutions is crucial to capacity building and integral to the sustainability of agreements.

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

Conclusion

During the last decade in Australia, with the recognition of native title, there has been a proliferation of agreements between Aboriginal people, governments, non-government organisations and private entities, such as

143 Ibid.
mining companies. These agreements occupy ‘a new space between the old
dichotomies of state and market, public and private, local and global’.

Much of the recent impetus for agreement-making has operated in the
context of a resources boom although the subject matter and range of
agreements now transcends a narrow land use and/or mining orientation
(although this aspect remains important). As such, they form examples of
an emerging model of community organisation, which adopts a ‘blended’
model of private law forms, such as contract and corporation, with public
policy goals and functions.

These new forms do more than simply occupy the middle ground between
state policy and private economic incentives. They are integral to the
changing role that law plays alongside government institutional structures,
and economic instruments and strategy. Law operates at a number of levels
in this mode. It is at once the embodiment of ‘public policy’ when enshrined
as statute but further, when understood as discrete legal instruments, it is
also the point of more specific resistance and empowerment for individual
and other actors such as mining companies and other stakeholders in
resource extraction activities. Within this sphere, law to date has been seen
largely as the default; a backdrop framework that sets the broad rules of the
game. However, as agreement-making with indigenous and local peoples,
particularly in the mining sector, has revealed, the blended forms of legal
instruments provide a very dynamic context. In many instances, law is
simultaneously a technical instrument giving effect to outcomes, or in some
instances providing a barrier to more effective engagement and outcomes
while simultaneously reshaping the normative, economic and social context
in which those outcomes can be achieved. This more constitutive role for law
has not been widely canvassed in the literature or in research to date. Rather,
attention has been primarily directed to the empowering role of institutional
governance forms, in concert with economic and social policy.

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

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144 Mark Considine, ‘Partnerships and Collaborative Advantage: Some Reflections on New
Forms of Network Governance’ (December 2005) Centre for Public Policy, The University
of Melbourne.


146 Langton and Mazel, n 42 above.

147 Fisher, n 20 above, at 45.
The researchers involved in the Agreements, Treaties and Negotiated Settlements project (ATNS), and who convened the Broome Mining workshop on the implementation of agreements, therefore seek to bring law into the spectrum of disciplinary concerns about resource extraction regimes and the impacts on local and indigenous people. As an important means of formalising relationships that in many instances have been forged at an economic and policy level in areas such as corporate social responsibility, law may assist in defining those relationships and how they are to be managed to achieve goals of economic empowerment and development. Articles in this issue of *JERL* vividly display both the role of law and the social, economic and institutional responses to the issues of how best to accommodate the interests of indigenous peoples and local communities in a resources boom to ensure that it is not a ‘boom and bust’ cycle, but rather a means to address longstanding inequalities to ensure long-term economic and social sustainability.