

Submission to the Australian Government's Energy White Paper

PARTICIPATION OF INDIGENOUS PEOPLES IN NATURAL RESOURCE DEVELOPMENT IN AUSTRALIA

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Australia was very slow to recognise the rights of Indigenous peoples over their natural resources. However, after more than 200 years of European settlement, the power of Indigenous peoples in Australia may have reached the tipping point, the point where the balance on the scale finally shifts. Australian natural resource developers must now embrace a new era of development in which sustainable development is the overriding theme and in which Indigenous peoples play a special role.

The History of Recognition of Indigenous Rights in Australia

In 1778, aboriginal lands in Australia were acquired by Britain on the basis of the doctrine of *terra nullius* (land belonging to no-one). This was effected by the relatively simple step of settlers taking possession of the territories in the name of the British Crown. Since the indigenous inhabitants had no recognised sovereign, they were considered to be without laws, and the English common law was imposed. The English common law did not recognise their proprietary interest in land.

In 1976, the Commonwealth enacted the Aboriginal Land Rights (Northern Territory) Act which applied to the Northern Territory of Australia. This was a significant landmark in recognising Indigenous rights. It provided for the granting of a fee simple interest in certain lands to Aboriginal Land Trusts and for the claiming of unalienated crown land by those groups of Aboriginal people who could prove (through a claims process before an Aboriginal Land Commissioner) that they were the traditional owners. The Act provided for the creation of Aboriginal Land Councils to administer certain areas of land and for the creation of Aboriginal Land Trusts to hold freehold title.

In 1992, the decision of the High Court of Australia in the Mabo case¹ completely overturned the *terra nullius* doctrine. In their judgment, Chief Justice Mason and Justice McHugh held that "*the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands*". In his judgment, Justice Brennan described the denial of native title as a "*discriminatory denigration of indigenous inhabitants*". Brennan expressed the view that "*[t]he fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country ...*".

The High Court's decision was quickly followed by the Government's enactment of the Native Title Act of 1993. This created a mechanism by which questions relating to whether native title still existed over particular areas of land and waters could be determined and claims of compensation could be addressed. The Native Title Act established the National Native Title Tribunal, a negotiating, mediating and research body, and gave jurisdiction to the Federal Court of Australia to decide contested claims.

¹ *Mabo v. Queensland* (1992) 107 ALR 1.

The following ten years were difficult, and sometimes turbulent, times as developers grappled with the impact of native title on their projects. Companies such as Normandy and CRA engaged with Aboriginal groups and started to change their practices but it took some time for anything like true collaboration to emerge.

In 2004, the Minerals Council of Australia initiated a proposal for collaboration with Indigenous communities and adopted a formal strategic framework for pursuing this.² In 2005, the Minerals Council signed a memorandum of understanding with the Australian Government recording the intention of mining companies and government to work together with Indigenous people to build sustainable, prosperous communities in which individuals could create and take up social, employment and business opportunities in mining regions. Implementation began by using regional partnership agreements to find solutions to local issues in partnership amongst mining companies, governments and Indigenous communities.³

Almost as important as the Mabo case was Australia's "Sorry Day". On 13 February 2008, the Australian Parliament delivered a long-awaited formal apology to the Indigenous peoples of Australia for *"the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians."*

In April 2009, a memorandum of understanding was signed for the establishment of the site for an LNG export hub on the coast of the Kimberley region of Western Australia. The parties to the MOU were the Kimberley Land Council, the State of Western Australia and Woodside Energy. The traditional owners met in Broome to endorse the project.

International Standards of Treatment

In 2007, after more than 20 years of debate, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples.

Australia was one of only four countries⁴ that voted against the adoption of the UN Declaration, mainly because of its apparent incompatibility with Australia's constitution and legal system. It can be argued that drafters of the Declaration went too far in asserting the right of Indigenous peoples to self-determination and the right to freely determine their political status. However, the UN Declaration is not a treaty and is not legally binding, either on members that voted for it or those that did not. In any case, in April 2009, Australia changed its position and announced its support for the Declaration.

The UN Declaration specifies minimum standards for the treatment of Indigenous peoples. These non-binding standards can be expected to have a major influence on how the rights of Indigenous peoples are to be pursued in Australia.

The Right to Determine Development Priorities

Several provisions of the UN Declaration have profound relevance to Australian Indigenous communities, none more so than Article 32. It specifies that *"Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"*.

Article 32 goes on to require States to do three things:

- (i) it requires them to obtain the free and informed consent of the Indigenous peoples

² Minerals Council of Australia, "Indigenous Relations Strategic Framework", Canberra, December 2004.

³ Janina Gawler, "Sustainable Regional Development – A New Way to Build Prosperity for Indigenous People in Australia", 3rd International Conference on Sustainable Development Indicators in the Minerals Industry, Greece, June 2007.

⁴ The other countries were Canada, New Zealand and the United States.

concerned;⁵

- (ii) it requires them to provide "effective mechanisms for just and fair redress for any such [development, utilization or exploitation] activities"; and
- (iii) it requires them to take measures to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 39 of the UN Declaration also specifies that Indigenous peoples are entitled to financial and technical assistance from States for the enjoyment of their rights.

What Sustainable Development Means for Indigenous Peoples

Concurrent with advances at the legal level, the concept of sustainable development has been winning universal acceptance as the overriding principle that should guide decisions about natural resource development. It has been internationally noted to be of particular importance in the context of Indigenous people.⁶ In pursuing sustainable development, Indigenous people expect cultural issues to be considered alongside economic, social and environmental issues. How these four elements may be addressed in a coherent way is illustrated in the table below:

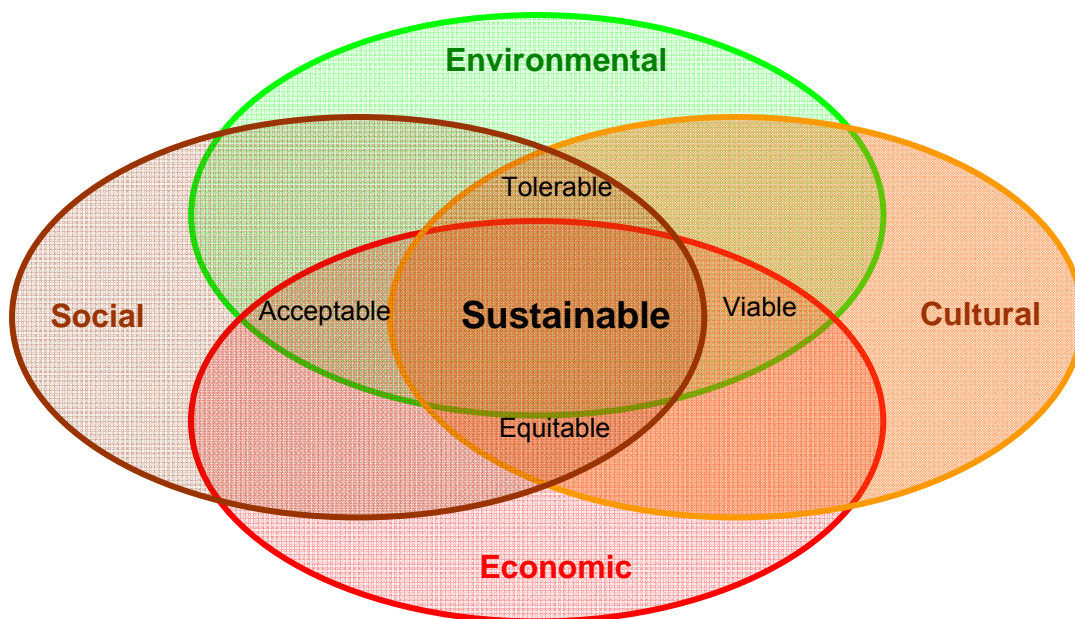


Table 1: The Interlinked Elements of Sustainable Development

⁵ Article 32 requires States to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

⁶ Chapter 26 of Agenda 21 (a non-binding document which carries strong normative force and which arose from the 1992 United Nations Conference on Environmental Development) states that: "in view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of Indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of Indigenous people and their communities".

The economic element of sustainable development

From the point of view of social justice, Indigenous peoples are entitled to some type of economic stake in any new natural resources project on their traditional lands. This stake should, this author suggests, be commensurate with what they may have to forego and what they may themselves contribute to the success of the project.

It can be confidently asserted that an economic stake in natural resources projects is fundamental if Indigenous peoples in Australia are to escape from their current circumstances of poverty, are to develop economic self-reliance and are to participate meaningfully in the benefits of development.

The benefits that an economic stake can provide to traditional landowners might include:

- a share of project benefits commensurate with what they contribute;
- the potential to share in the additional wealth that is generated as a project expands or becomes more profitable;
- mechanisms for building Indigenous employment, leadership and technical skills; and
- access to processes to provide information about the affairs, future prospects and eventual decommissioning of projects, providing landowners with an early warning mechanism about future changes.

The concept of an economic stake for Indigenous peoples in Australian resource development projects is novel and challenging and not all project proponents will be enthusiastic to embrace it. They will however already find precedents in other countries, such as Papua New Guinea and Canada, discussed further below, and there are innovative ways of financing minority economic interests over the life of a project.

The social element of sustainable development

It would be disingenuous for anyone to deny that poverty and unemployment are chronic in Indigenous Australia. Indigenous Australia also lacks the institutional capacity and support systems to cope with the impact of development projects. The social, family, health, educational and community services are often just not there to meet the demands that economic development imposes on them.

It has been demonstrated that, at the earliest development-approval stage, governmental approval processes in Australia are deficient in not providing an institutional framework or procedure for adequate assessment of the socio-economic impact of development on Indigenous communities. This was highlighted by the Ord Project negotiations.⁷

It is clear that project proponents should establish community consultation programs at the earliest point, as recommended by the World Bank, discussed further below.

At the same time, Indigenous communities must build their own capacity to make their own commercial decisions and to pursue appropriate commercial activities. With increased capacity and capabilities, community empowerment will be progressively enhanced.

Education and training provide the essential foundation for capacity-building.

⁷ R Bogan and S Hicks, "Lessons Learned: An Evaluation of the Framework of the Negotiations with the Ord Final Agreement 2006", Office of Native Title, Perth, December 2006.

The environmental element of sustainable development – in particular climate change

The concept of sustainable development had its origins in concerns over the sustainability of the natural environment. This needs no elaboration here save for the risks associated with global climate change.

Climate change refers to changes in the variability or average state of the atmosphere over time scales ranging from decades to millions of years. These changes can be caused by processes internal to the earth, by external forces (such as variations in sunlight intensity) and, more recently, by human activities that have increased greenhouse gas emissions. Though contributing the least to global greenhouse gas emissions, Indigenous people will be substantially impacted by any adverse effects of climate change, due to the unique deep engagement they have with the land.

Australia is about to impose a nation-wide "cap-and-trade" scheme to regulate domestic greenhouse gas emissions. The problem is however a global problem and a domestic scheme is unlikely to have a discernible effect on Indigenous people.

The cultural element of sustainable development

Cultural issues comprise the fourth element of sustainable development.

The starting point for Indigenous peoples, as emphasised by the World Bank, must be early and full knowledge of all project proposals. This requires them to have access to all relevant information and for there to be complete transparency in what is initially proposed and what is ultimately done.

As already mentioned, mere consultation is unlikely in future to be sufficient: it will be increasingly necessary to allow Indigenous peoples a direct say in all project development decisions that will affect their future interests. This can be effected by enabling their participation in site selection, in definition of project concepts and in ongoing operations.

World Bank Policies and Practices About Equitable Sharing

The operational policies of the World Bank recognize the inextricable link of Indigenous peoples with their lands and their natural resources and make provision for Indigenous peoples.⁸ With specific regard to natural resources development, the World Bank insists on its borrowers making provision for Indigenous peoples to share equitably in the benefits of commercial development to an extent that is at least equivalent to anyone else that has full legal title.⁹

⁸ *"The [World] Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture and customary livelihoods, as well as exposure to disease. Gender and inter-generational issues among Indigenous Peoples also are more complex. As social groups with identities that are often distinct from dominant groups in their national societies, Indigenous Peoples are frequently among the most marginalized and vulnerable segments of the population. As a result, their economic, social and legal status often limits their capacity to defend their interests in and rights to lands, territories and other productive resources, and/or restricts their ability to participate in and benefit from development. At the same time, the Bank recognizes that Indigenous Peoples play a vital role in sustainable development and that their rights are increasingly being addressed under both domestic and international law", World Bank Operational Manual (OP4.10 July 2005) paragraph 2.*

⁹ *"If the project involves the commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water or hunting/fishing grounds) on lands or territories that Indigenous Peoples traditionally owned, or customarily used or occupied, the borrower ... [must include] arrangements ... to enable the Indigenous Peoples to share equitably in the benefits to be derived from such commercial development; at a minimum, the ... arrangements must ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land", World Bank Operational Manual (OP4.10 July 2005) paragraph 18.*

At the project concept stage, the International Finance Corporation (IFC) (the private sector lending unit of the World Bank Group) emphasises the value (as well as the risks) of early engagement of stakeholders in considering the strategic options and defining the project concept, especially with larger-scale projects.¹⁰ One of the IFC's recommendations for complex projects is a stakeholder planning forum.

Recent Developments in Papua New Guinea

Since 1998, the PNG Oil and Gas Act has stipulated that the State on behalf of itself and project area landowners is entitled to participate on commercial terms in all petroleum and natural gas developments up to 22.5% of project ownership. The State must provide all necessary funding. Under the Act, the State is authorized to share its equity entitlement with the landowners and local governments in the project area.

The equity participation rights in PNG have worked reasonably well, resulting in the State and landowners acquiring an economic stake in many successful commercial enterprises, including Lihir Gold and Oil Search Ltd. PNG will be a participant in the US\$11 billion ExxonMobil-led LNG project, expected to commence development in 2010.

Recent Developments in Canada

In general, it could be said that Canada is much more advanced than Australia in facilitating Indigenous participation in resources development.¹¹

The long-awaited Mackenzie Gas Project in the Northwest Territories of Canada is a project to develop natural gas from three separate fields in the far north for delivery by pipeline to markets in

¹⁰ According to the International Finance Corporation, "Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets", Washington DC, USA 2007 pp 111 – 112:

"Stakeholder engagement at the early, project concept stage is about gauging potential local support for, or opposition to, different options and alternatives and identifying key issues and concerns that might affect the viability of a project. These concerns (and opportunities) should then get fed back into the decision-making process.

The key at this early stage is to engage with potential stakeholders in a way that protects competitive business interests, and yet also helps to identify risks and inform strategic choices. Consultation with stakeholders at the project concept stage should therefore be highly selective and targeted. For larger-scale projects, and those likely to be contentious with certain influential stakeholders, strategic choices made in the very early stages of project development can have far-reaching consequences for future stakeholder relations. Engaging stakeholder groups early in relation to these strategic decisions and alternatives can help to avoid project opposition and other reputational risks, expensive re-design, and compensation payments. It can also increase the chances that local stakeholders will align with you around the value proposition of the project. Moreover, early engagement may provide valuable opportunities to align the employment, training, infrastructure, and service demands of the project with the related plans and priorities of government agencies and local communities.

There are of course risks to engaging at such an early stage. First, the reality is that the range of truly strategic options is often not great; although project information may still be disclosed, the room for responsive consultation may be limited. For example, project location may be dictated by the site of natural resources or the importance of accessing transport links or markets. The choice of production technologies may also be limited to those already proven and cost-effective. Second, where there is opportunity to engage stakeholders in defining the project concept, one should be aware that the very act of engaging directly with stakeholders when an investment is still uncertain can itself lead to unintended consequences."

¹¹ See the undermentioned references:

- William Hipwell et al, "Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change", The North-South Institute, January 2002
- the Intergovernmental Working Group on the Mineral Industry Sub-committee on Aboriginal Participation in Mining: "Report on Aboriginal Participation in Mining in Canada – Mechanisms for Aboriginal Community Benefits", 2005.
- Annual Report, Indian Oil and Gas, Ottawa, Canada 2008 www.iogc.gc.ca.

Canada and the United States. In October 2001, Aboriginal interests were able, with financial assistance from the Federal and Provincial Governments, to enter into agreements to enable the Mackenzie Valley Aboriginal Pipeline Group (APG) to negotiate up to a one-third interest in the Mackenzie Valley Pipeline. This was to be achieved by the APG borrowing on the security of the transportation contracts.¹² The project has still not reached the stage of final investment decision.

Conclusion

It has been a seemingly endless and uphill battle for Indigenous peoples in Australia to win recognition of their legitimate rights over their land and natural resources. However, the tipping point may have been reached, which now places an onus on Australian natural resource developers to embrace a new era of development in which sustainable development is the overriding theme and in which Indigenous peoples are to be recognised as landowners and involved in the development process.

What will this mean in practice for the Australian energy and mining Industry? Aspiring natural resource developers will always need to ensure that Australian Indigenous peoples are freely and closely involved in considering strategic options and priorities for the development of projects on their traditional lands. For this purpose, stakeholder planning forums should be established and the traditional owners provided with financial assistance to participate meaningfully in these activities.

As well, project proponents may need to consider mechanisms to allow traditional owners to acquire an appropriate economic stake in projects and ways of enabling them to participate in all project decision-making that affects their interests. There will be ample scope for differences over what is appropriate but there are creative ways of addressing this challenge.

By respecting the principles of sustainable development, by demonstrating goodwill and by treating Indigenous peoples as partners from the beginning, project proponents will find that investment in natural resource projects in Indigenous Australia will be more secure and rewarding over the full project life cycle. A truly collaborative approach from the beginning will best serve the interests of both project proponents and traditional owners.

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Sydney, May 2009

¹² In a presentation to the Senate Standing Committee on Energy in Canada on 8 March 2004, Bob Reid, Chairman of the Aboriginal Pipeline Group (APG), outlined how the Mackenzie Gas Project deal was achieved by the APG borrowing from banks on the security of long-term gas transportation contracts:

"... in June of 2001, the group had negotiated a Memorandum of Understanding with the Mackenzie Delta Producers – Imperial Oil, ConocoPhillips, Shell and ExxonMobil – who were planning a pipeline to connect their natural gas reserves in the Delta to the North American pipeline grid. That agreement established APG's right to own a one-third interest in the Mackenzie Valley Pipeline. To exercise that right however, APG needed money and it took two full years to find it. In June of 2003, APG announced it had obtained funding from TransCanada Pipelines for the pre-development phase of the Project.

...

The deal itself is quite simple. APG borrows money to support our investment in the pipeline from a consortium of banks. The long-term firm shipping contracts signed by the Delta Producers and others to transport their gas from the Delta to Alberta will form the security for these loans. The loans are repaid from our share of the pipeline revenue. Funds remaining after APG's loan repayment and administrative costs are distributed to our shareholders in the form of dividends."

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ResourcesLaw International is an Australian-based consultancy which provides specialist advisory services to governments and corporations on:

- energy and environmental law and policy
- energy projects, project financing and risk management
- energy industry reform and regulation.

ResourcesLaw is affiliated with the national law firm Piper Alderman which has provided legal services to the Australian community for over 160 years.

Robert is the editor of "Economic Development, Foreign Investment and the Law", published by the International Bar Association and Kluwer Law International, London 1996.

In 2000/2001, Robert chaired the World Energy Council (WEC) Study on Electricity Market Creation in Asia Pacific. In 2001/2002, he was a consultant to the APEC Energy Working Group on Cross-Border Power and on Micro-Economic Reform of the Electricity Industry. In 2004, he was a consultant to APEC on Cross-Border Natural Gas Trade and on Energy Security.

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