

Indigenous Agency and Mineral Development: A Cautionary Note.

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**Paper presented to the
Annual Canadian Political Science Association Conference,
May 2009, Ottawa, Ontario.**

Word count 7027 (excluding references)

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Abstract

There is a tendency in recent literature to emphasise the transformative power of Indigenous agency, particularly in relation to resource development projects on Indigenous lands. This paper, utilising a case study of mineral development in the Gulf of Carpentaria, Australia, argues that while Indigenous agency proved a critical factor in determining the outcomes for Indigenous people, given the findings from this case study, it is perilous to overstate the transformative capacity of Indigenous agency in the face of the fundamental structural realities of mineral development in a capitalist economy, particularly the structural power of the state. The analysis of the structural power of the state in this paper also focuses upon the discursive forces that can undermine Indigenous agency, and therefore reinforce the structural power of the state. The paper calls for caution in overstating the transformative power of Indigenous agency in light of these findings.

Introduction

It is necessary to understand that the present conjuncture, far from being the only natural or possible societal order, is the expression of a certain configuration of power relations. It is the result of hegemonic moves on the part of specific social forces that have been able to implement a profound transformation in the relations between capitalist corporations and the state (Laclau and Mouffe 2001:xvi).

Across the world, Indigenous peoples, encapsulated within a variety of political systems and embracing a diversity of cultures, share a common material reality. People who are Indigenous are much more likely to be economically disadvantaged than their non-Indigenous counterparts (McNeish and Eversole 2005:2). Social and economic indicators from around the world confirm the high rates of poverty, unemployment, poor educational outcomes, ill health, family violence and high rates of suicide and incarceration that are prominent in Indigenous communities (Fournier 2005:vii). Indigenous peoples represent the most socially and economically marginalised populations around the globe (Render 2005). In Australia Indigenous people are recognised as the most disadvantaged group within Australian society.

Resource development, with its potential for opportunities such as employment and training, is often presented as a panacea for some of the problems facing Indigenous communities (see Trigger 2005:42). In Australia, mineral development is seen as a mechanism whereby Indigenous people

living in remote regions may enter into the capitalist economy. It is argued that the benefits created by large-scale mining projects could help overcome the disadvantage that currently characterises Aboriginal Australia (O'Faircheallaigh 2005:2). The negotiating period, where Indigenous people are legislatively ensured a right to negotiate with the state and mineral development companies, is a critical point in the mineral development process where Indigenous people can exercise their agency to maximise the benefits and minimise the impacts they obtain.

Prior to the High Court's *Mabo* decision in 1992, Indigenous Australians held a weak and tenuous bargaining position in many mineral negotiation processes, with legislative protection of their interests usually based upon relevant State government heritage protection legislation.¹ The *Mabo* decision wrought significant structural changes to the landscape of Indigenous rights and presented a challenge to the existing Australian system of property rights. The legislative response to the *Mabo* decision, the *Native Title Act 1993*, (NTA) created a potential space to facilitate Indigenous agency and a strengthening of their bargaining position via the Right to Negotiate (RTN) procedure of the Act. Since the *Mabo* decision, Aboriginal peoples in Australia have been increasingly involved in negotiating terms for large-scale resource development on their traditional lands (O'Faircheallaigh 2000, Howitt 2001, Pearson 2004).

States play a key role in the definition and control of resources (Howitt 2001:143). They establish property rights, enforce commercial contracts and regulate the behaviour of the private sector in such areas as company and environmental law (Bell 2002:2). States define the terms on which resources will be accessed, produced, transported and marketed (Howitt 2001:139). In short, states shape the institutional framework within which resource development occurs and, as such, are a major determinant of the constraints and opportunities faced by the various actors involved in resource development (Hay and Lister 2006:11). In Australia, due to the federal nature of the Australian polity, several arms of the state are involved in determining the terms and conditions under which mineral development occurs, including Federal, State and Territory governments, the judiciary, and various other statutory bodies and agencies. Under the principle of crown ownership, Australia's State governments can claim an interest in almost all sub-surface minerals, which entails the rights to allocate exploration and mining titles,

¹ An exception was the Northern Territory, where Indigenous Australians held the right to veto mining projects on their traditional lands via rights afforded them under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA (NT)), which gave them a very strong bargaining position in mineral negotiations.

and to require various fees and royalty payments (Howitt, Connell and Hirsh 1996:14). The Australian state is thus a key player in mineral development, and its behaviour has enormous significance for determining the negotiating environment in which mineral development takes place.

There is a perception that the state often plays a negative or deleterious role in mineral negotiations involving Indigenous peoples. Indeed, the literature on Indigenous peoples and mineral development in Australia is replete with case studies of mineral developments in which Indigenous Australians were marginalised, both in the decision making process, and from the potential benefits accruing from resource developments on their traditional lands (see, for example, Roberts 1981, Chase 1990, Lane 1993, Lane and Chase 1996, Dixon and Dillon 1990, Hawke and Gallagher 1989, Howitt 1979, 1989, 2001, Howitt, Connell and Hirsh 1996, Harman and Head 1981, O'Faircheallaigh 1991, 1996a, 1996b, 1996c, 2000, 2002, 2005, 2006, and Cowell 1996). This resonates with the view of many Indigenous people who see unwillingness by many governments and state agencies to uphold their rights (even when they are recognised in national and international law) and a reluctance to distribute the financial benefits that accrue from mining to their communities (Render 2005). Given that mining can often represent the only opportunity that Indigenous peoples living in remote regions have to generate independent wealth and participate equitably in the broader capitalist economy (Connell and Howitt 1991:4-7), mineral development negotiations offer a unique opportunity to analyse the efficacy of Indigenous agency in the face of state developmental agendas.

There has been a notable tendency of late, both in the national and international literature, to celebrate the many victories achieved by Indigenous peoples worldwide in the face of development projects on their traditional lands (see for example, Lane and Cowell 2001, Harwood 2002, Blaser, Feit and McRae 2004, Trebeck 2006, Salee 2008). This trend in the current literature attributes these victories, in part, to the transformative capacity of Indigenous agency. However, it is a central contention of this paper, and argued in the following pages, that this tendency to focus on the transformative capacity of Indigenous agency carries with it the inherent danger of 'taking our eye off the ball' and ignoring the omniscient reality of the structural relationship between the state and capital that informs state developmental agendas and sees Indigenous aspirants continually marginalised in resource development processes on their traditional lands.

This paper presents this argument, drawn from doctoral research carried out between 2001-2004, within a broader discussion on the relationship between structure and agency, a discussion that has troubled political and social

scientists for some time, and has been claimed 'to be the most important theoretical issue within the social sciences' (McAnnulla 2002b:271). Ruminating on this theoretical issue is critical for the purposes of this paper, as any claims for advocating caution in relation to overstating the transformative capacity of Indigenous agency must be situated within current developments in the theoretical literature. This paper does not attempt to adjudicate on the debate, nor make a case for the primacy of either structure or agency. Rather, it seeks to distil the major insights from that debate and use these as a framework for the ensuing analysis of the Century Mineral negotiations from the Gulf of Carpentaria, Northern Australia, negotiations which occurred during a transformative period in relationships between Indigenous Australians and the Australian state.

The argument is presented in three main sections. The first section will outline the contours of the debate regarding structure and agency within political science. The second section will present both an overview of the case study of mineral negotiations in the Gulf of Carpentaria, Northern Australia, 'the Century Zinc Mineral negotiations', and an analysis of the findings from the case study in light of the central tenets of the debate on structure and agency. This analysis highlights that while Indigenous agency proved a critical factor that influenced the outcomes of these negotiations, this same agency was inhibited and constrained by the structural reality of the historical and institutional relationship between the state, capital, and Indigenous people in relation to mineral development. Extrapolating from this analysis, the conclusion argues for caution when advocating the transformative power of Indigenous agency.

The Structure and Agency Debate

All political theories make reference to either the causal powers of groups (agency) or contextual factors such as the environment, or patriarchy or capitalism (structures) (McAnnulla 2002b:273). Hay (2002:93-93) contends that the question of structure and agency goes to the heart of what it means to provide an adequate explanation of social phenomena. Lewis concurs, arguing that in order to understand and explain social phenomena it is essential to examine the interaction between structure and agency, for all social life issues from the interplay of structure and agency (Lewis 2002:17-18). While the examination of structure and agency has historically been the focus of sociologists, there has recently been a refocussing on these issues within political science (see for example Sibeon, 1999, Archer 2000, Lewis 2002, Hay 2002, McAnnulla 2002a and 2002b).

At this point it is requisite to provide definitions of the central terms in the debate - structure and agency. Structure, according to Hay (2002:94), refers to context, to the material conditions or setting in which social political and economic activity occurs and which defines the range of actions available to actors within a given policy domain. Structure refers to the enduring, though not immutable, circumstances within actors operate, or similarly 'the conditions of action' (Sibeon 1999:142). While political institutions and practices, routines and conventions, appear to exhibit regularity or structure over time, and are in fact structured contexts, they are not structured in a determined or predictable sense – and this is because of agency (Hay 2002:94).

Agency refers to an individual's or group's ability to affect their environment (McAnulla 2002b:271); their political conduct, or similarly, their ability or capacity to act consciously to realise their intentions (Hay 2002:94). This notion of agency implies a sense of free will, choice or autonomy for political actors, with an implicit inference of conscious deliberation. Agency centred or agential explanations thus emphasise the conduct of the actors directly involved, implying that it is their behaviour, *their agency* that is responsible for the effects and outcomes we observe (Hay 2002: 95 -97).

The structure/agency debate² addresses the critical relationship between political actors and the environment in which they find themselves – the extent to which political conduct shapes, and is shaped by, political context. There has tended to be an ontological divide operating between structural and agential explanations of political phenomena, with either side arguing for the primacy of their side in explaining political outcomes. Giddens' structuration theory(1979, 1984, 1999) was an attempt to transcend the debate on structure and agency via development of a hybrid theory that recognised their mutual dependence. For Giddens, structure and agency are ontologically fused, they are in fact 'two sides of the same coin' that may only be separated analytically (cited in Hay 2002:118, McAnulla 2002b:33). Giddens thus conceives of structure and agency as mutually constitutive – they are a duality as opposed to a dualism (Sibeon 1999:139) and in this perspective, it is only possible to view only one at a time because they are distinct entities that only exist in relation to each other.

² The debate gained prominence in Europe with the adoption of the 'Third Way' as a policy framework in post Thatcherist Britain. The Third Way was seen as an attempt to transcend the battle between left and right in politics via a distinctive normative agenda which required the development of social values in response to the dominant social transformations of our time, including economic and cultural globalisation and the knowledge revolution (Legget 2004). With its emphasis of transformation of values, The Third Way advocated a significant role for political agency as a enabling, transformative resource.

Similarly, Hay (1995, 2000, 2002) also conceptualises of structure and agency as ontologically inseparable, - 'neither has an existence in isolation from the other – their existence is relational' (Hay 2002:127). For Hay, the only distinction between structure and agency is an analytical one – neither structures nor agents are real, as neither has an existence in isolation from each other. Therefore their relationship is dialectical as their interaction is not reducible to the sum of structural and agential factors treated separately. Hay insists that political analysis needs to focus on this dialectical interplay of structure and agency, rather than on any reification or privileging of either one (Hay 2002:127-34).

Archer (1995, 2000) argues that these perspectives conflate structure and agency. She contends that in reality structure and agency are ontologically distinct entities with different properties and powers (see McAnulla 2002a). Archer, a critical realist, argues that we should be more concerned with how structure shapes interaction, and interaction, in turn, re-shapes structure, that we must differentiate the two and not conflate them so that we can analyse their interplay (Archer 2000:463-465). For Archer, and other critical realists, structurally emergent properties, though dependent on the actions of agents, are real and causally efficacious (McAnulla 2002b), and can therefore impinge upon agents, by generically shaping the situations which they confront (Archer 2000:467). While this structural power is not always observable, and not able to be accounted for empirically, it does exist and it does affect agency.

Critical realists thus do not reject the dialectical relationship between structure and agency. Lewis (2002:19) contends that they are 'recursively related' – each is both a condition for, and a consequence of the other, and neither can be reduced to the other. However critical realists insist on a temporal relationship between the two, as all social activity (agency) takes place within contexts that are provided by a pre existing set of social structures. It is worth quoting from Lewis at length on this point:

Social structures exert causal influence over the behaviour of actors because at any given point in time antecedent social structures embody a particular distribution of vested interests and resources (Lewis 2002:19).

This approach therefore contends that history matters and the historical distribution of resources and interests laid down structurally over time may exert an important enabling or constraining influence on agency.

As stated earlier, the aim of this paper is not to adjudicate on the structure agency debate, nor to make a definitive claim for the primacy of either. The

aim is however to advocate caution against overstating the transformative capacity of agency. Thus it is prudent to distil the central insights from the preceding discussion so that a comprehensive picture of the importance of both structure and agency, and the critical relationship between them, can be obtained. These insights can be summarised as follows: structure and agency are dialectically linked – structure effects agency, and agency in turn influences structure; all agency occurs within pre-structured contexts; structurally emergent properties, though dependent on the actions of agents, are real and causally efficacious; and finally, history matters and the historical distribution of resources and interests laid down structurally over time may exert an important enabling or constraining influence on agency. What follows is an overview of the negotiation process for the development of Century Zinc mine, with these insights in mind.

The Century Mine Negotiations.

The Century Mine is a zinc/lead mine located in Far North West Queensland, 250kms north west of the regional centre of Mt Isa, and 150kms from the Gulf of Carpentaria. The mine itself is located on Lawn Hill pastoral lease, close to the Aboriginal community of Doomadgee. It was intended that the mineral concentrate from the mine would be conveyed in slurry form 300kms to the port of Karumba in the Gulf of Carpentaria, via an underground pipeline, from where it would be barged to ships further out in deeper Gulf waters (O'Faircheallaigh 2005). The project potentially affected a wide range of Aboriginal people in the region, including coastal and island communities that might be affected by any adverse environmental impacts associated with the loading and transshipment of concentrates. The Gulf of Carpentaria is a remote monsoonal region, subject to seasonal cyclones, with poor road access, limited infrastructure and high unemployment. The region was, in the words of the Queensland Premier,³

an economic basket case - it was like going to some long lost frontier, some outpost in the wilderness (Borbidge *Pers. Comm* 2004).

The region contains two predominantly Aboriginal towns, Doomadgee and Mornington Island.⁴ Burketown and Normanton are small remote townships

³ During the negotiation process there were changes of government at both the Federal and State levels (Blowes and Trigger 1999, 85). The Premier at the time of this comment was Mr Robert Borbidge, the leader of the Queensland National Party.

⁴ Under the *Community Services Act (Aborigines) Act 1984*, both Doomadgee and Mornington Island, which had been former Aboriginal reserves, were granted local government status. The Act required that Aboriginal councils who were given responsibility for local governance. The councils became trustees of the land, which were allocated as Deeds of Grant in Trust (DOGITs) (Crough and Cronin 1995:21).

in the region that serve as service centres for local council governance. Both towns have large Aboriginal populations (Smith and Altman 1998:7). Mt Isa is the major regional service centre. Century Mine was seen a major economic boon to the area, with officials estimating \$429 million in annual output, and a total of 1,340 jobs for the region, making the mine the largest single economic activity in the southern Gulf (Crough and Cronin 1995:3).

The Gulf is one of the most sparsely populated regions in all of Queensland (Crough and Cronin 1995:10). Of major significance for the negotiating environment were the economic and cultural characteristics of the Gulf Aboriginal population (Smith and Altman 1998:1). In the early 1990s the Mt Isa region had an Aboriginal population of approximately 6000 people, whose life expectancy ranked amongst the lowest of all Queensland regions. Sanitation and water supply were inadequate or non-existent and there was an acute shortage of housing. Aboriginal people in the region had the lowest educational qualification rates of any Queensland region. Murandoo Yanner, the leader of the Carpentaria Land Council (CLC), the Aboriginal representative body in the region, claims that the high rates of illiteracy in the Gulf meant many Indigenous people were disadvantaged in the negotiations:

Ask the signatories today what is in the agreement today and they can't tell you - so that must speak volumes. I am not making fun of them for not reading and writing but if they made a fully informed decision they should at least know in detail some of the agreement (Yanner, *Pers. Comm.* 2005).

Employment skills and experience were low, and most employment was through the Community Development Employment Scheme (CDEP)⁵ (Smith and Altman 1998:7, Martin 1998:4).

The region also has a particularly violent history of dispossession (see Trigger 1982 and Roberts 2005) with many documented accounts of settler violence towards Indigenous peoples throughout the early period of colonisation. Several authors have documented the harsh authoritarian missionary practices at Doomadgee (see Trigger 1992, Cowell 1996, Harwood 2002), which together with extreme levels of isolation and deprivation, and a high degree of institutionalisation,⁶ saw the Aboriginal population of Doomadgee

⁵ The CDEP is a public works program often described as "work for the dole", which is run by the federal government and entails works to be undertaken in return for benefits paid. It is a significant employer of Aboriginal people in remote regions, which keeps official unemployment figures at an artificially low level (Cowell 1996:64).

⁶ Children and young adults at the Doomadgee mission were institutionalised in dormitories and punished severely if they transgressed the rules of the mission, which included practicing any traditional cultural activities (Trigger 1992:76).

described in a government report of 1950, as the 'most severely restrained in North Queensland' (cited in Trigger 1992:71). While Harwood (2002) and Trigger (1992) have argued that the Aboriginal people of Doomadgee resisted complete subjugation to white authority, the fact remains that they were among the most institutionalised of all Aboriginal groups in Australia. This was the physical, cultural, social and economic context within which the Century Zinc negotiations occurred.

The proposal to develop the mine caused tension and disagreement within the Aboriginal communities. For some Aboriginal people in the region the mine represented the only opportunity to redress the marginalisation and poverty that characterised the regions' history:

The reality is this mine is going to go ahead whether we like it or not, and if we are not careful we will lose what they have offered us now (Anon 1996a).

For others, it represented another wave of colonialism:

The mining company and the state were acting the same way they did when they came on the first boat (Yanner, *Pers. Comm.* 2005).

Yanner offered the following assessment of the attitude of the majority of Indigenous people toward the development of the mine:

We were determined to stop them. We didn't want them. We wanted to send them back to England. WE DID NOT WANT THEM. We would be happier without them. That was our first aim and our total aim, to stop them, but we also had a back up plan. Even if we lose we have to lose well because it was a big agreement. But we primarily truly 100% wanted to wipe them out and not have them here (Yanner *Pers. Comm.* 2005).

At the beginning of negotiations, Aboriginal people in the region had no recognised rights to land under Australian law, as the land on which the mineral resource was located, and over which the pipeline would traverse, was pastoral lease. According to the mining company, any consultation undertaken by them was done on the basis of good neighbour relationships rather than any statutory rights held by the local Aboriginal people. The mining company initiated contact with some Aboriginal groups and communities in 1991, to provide them with information about the proposed project and to seek their cooperation in undertaking the cultural heritage clearances required under Queensland legislation (Cowell 1996).

At this stage mining company was not prepared to consider any proposal for a written agreement with affected Aboriginal people, though it hoped that by providing information and undertaking consultations it could obtain their support for the project (Blowes and Trigger 1999:89). Although the *Mabo*

decision had not yet been handed down, the company proceeded to begin purchasing pastoral leases over the proposed mine site to buffer itself against any future native title claims (Wear, 1996). It also commenced a process whereby it chose to consult with some groups over others (notably those groups that were not stridently anti mine), privileging these groups throughout the negotiation process. These alleged actions led to a certain level of distrust on the part of the Indigenous people in the region towards the mining company (Cowell 1996:81).

According to Yanner (*Pers. Comm.* 2005), the company's original monetary offer was somewhere in the vicinity of \$100,000.00 per year for the life of the mine. Thus prior to the *Mabo* decision, with no statutory obligation to consult with, or gain Aboriginal consent, the mining company treated Indigenous interests with a certain degree of contempt. The *Mabo* decision saw a marked change in the mining company's behaviour, which concurred with changes in the global corporate culture of many major mining companies, with mining company executives declaring a commitment to improved community relations with Indigenous peoples (Brennan 1998, 22; Howitt 2001, 261).

The Behaviour of the Australian State throughout the negotiations

Under the Australian federal system, State governments are responsible for management of land use issues, and they also issue mineral leases. As Century mine is located in far north west Queensland, the Queensland government therefore major jurisdictional power in these negotiations. The literature on the historical treatment of Aborigines in Queensland illustrates the denial by successive Queensland governments of any inherent Aboriginal right to land (see for example Kidd 1997; Roberts 1981; Lane 1993; Lane and Chase 1996; Howitt 2001). The Century negotiations occurred during a period that saw a Labor government elected in Queensland for the first time since 1957. There was great expectation that treatment of Aboriginal interests would change, as the Goss Labor government had been elected on a platform of land rights. However Holden and Pearson (1993) argue that there remained a fundamental ideological opposition within the new Goss labour government to the idea that Aboriginal people have any inherent right to land. They argue that the Goss government was 'essentially racist, suspicious and extremely uncomfortable in its dealings with Aboriginal people' (1993, 194). There thus existed a pre-structured context in Queensland which had seen Indigenous people historically and institutionally marginalised.

Despite a change of government in Queensland during the negotiations its approach to the Century project remained constant. Both the Goss Labor government and the Borbidge National/Liberal Coalition government were

committed to making the project happen. Wayne Goss, the Labor premier, constantly reiterated his government's commitment to the project in media articles:

There is one thing I would like to do before I leave this job. It is to see a major project like this go...Queensland is about to see its third wave of mining activity ... this is the big picture, the stuff dreams are made of (Morely 1995).

Similarly, when asked if his conservative government supported the development of the mine, Premier Borbidge claimed:

It will be the biggest thing to happen to the northwest of the State and will provide the catalyst for more development throughout the region, which remains one of the last great prospective areas on earth (Emerson and Fagan, 1997).

A majority of the Indigenous people interviewed agreed that there was no discernible change in the Queensland government's attitude after the election of the Borbidge National/Liberal Coalition government.

Responsibility for the Century project lay with the Office of the Co-ordinator General (OCG), a powerful economic development agency located within the Department of the Premier, Economic Development and Trade (DPETD). As lead Queensland government agency, the OCG had constant dealings with the mining company. The manager of the mining company Century Zinc Lead, (CZL) Mr Ian Williams, offered the following appraisal of the actions of the OCG:

the person in charge of OCG thought we were being too wimpy and we should just tell them [the Aborigines] to buggar off and get on with the job (Williams, *Pers. Comm.* 2004).

Interviewees with senior OCG staff revealed a dominant pro-development institutional agenda:

there was a down turn in economic development in the early 1990s and the Goss government were concerned with getting on and doing a lot of economic development of the State. The OCG was quite autonomous and we were just told to get on with doing business (Potter *Pers. Comm* 9 July 2004).

When asked if there was a strong development agenda within the Goss government the officer replied, 'absolutely' (Potter *Pers. Comm.* 2004). Another senior OCG employee confirmed the government's commitment to development:

Development is jobs and every State government agenda is to keep people happy by providing jobs (Clague *Pers. Comm.* 2004).

The personal philosophy the leader of OCG, Mr John Down was to provide jobs at any cost, 'I would be prepared to slash and burn to

make sure that at the end of the day the population had jobs' (Gillespie 1993).

The Queensland government were extremely cautious not to set any legal precedents in these negotiations that might have facilitated the interests of Aboriginal people in future mining negotiations. The Queensland Premier verified the government's desire to avoid setting precedents:

I guess we were cautious because the native title situation was not clear then ... this was a High Court inspired political time bomb, the fuses were still going and we had to weigh that up against getting this project up and running – there was certainly a degree of caution – no one had been down this road before and we were being careful in terms of precedents (Borbidge *Pers. Comm.* 2004).

They also proposed enabling legislation to circumvent the NTA and weaken the native title rights of the Gulf Indigenous communities in order to facilitate speedy development of the mine. It regarded the rights of the Indigenous people in the region as an impediment to the development of the mine, rights which could simply be legislated away.

While major jurisdictional power in the Century negotiations lay with the Queensland government, the Federal government had a large impact on the context within which the negotiations occurred (O'Faircheallaigh 2006:10). The *Mabo* decision was handed down by the High Court in 1992, affirming that customary rights to land had pre-existed and in certain places, survived British sovereignty (Langton *et al.* 2004:17). The decision overturned the popular belief that Australia was terra nullius at the time of settlement and confirmed that the common law of England included the doctrine of recognition of native title (Pearson 2004:84). The nature of the title and its implications for the property system of Australia were unclear until the Keating Labor government enacted the *Native Title Act* (1993). The Act was designed to establish processes by which native title could be recognised and protected, to validate existing non-Indigenous interests in land and to create a system to accommodate the ongoing grant of title to non-Indigenous interests. It established a compensation regime for those Indigenous people whose native title had been extinguished after 1975, and also established the National Native Title Tribunal (NNTT) to mediate and process native title claims. The Act encountered substantial opposition, particularly from the mining industry, which first sought to prevent the introduction of the Act, and then lobbied the Commonwealth government to amend the Act, arguing it was unworkable and an impediment to development (Healy 2002:15).

The Minister responsible for Aboriginal Affairs within the Keating government, Mr Robert Tickner, was very much concerned with protecting

and safeguarding Aboriginal interests (Wootten *Pers. Comm.* 2005), however this position often alienated him within the Federal Labor cabinet, which also had a very pro development agenda. The Keating cabinet had previously supported Northern Territory government legislation to bypass native title legislation to ensure security of title for a major mineral development project there. The Federal government's decision to support the NT legislation shattered the confidence and trust that Aboriginal people were developing in the Keating Labor government (Tickner 2001:106).

The Federal government under Keating did however at times facilitate Indigenous agency through various funding regimes, including its funding of the Aboriginal and Torres Strait Islander Council (ATSIC) and Native Title Representative Bodies (NTRBs). After the enactment of the NTA, ATSIC was responsible for administering and funding of Native Title Representative Bodies (NTRBs), which were, in turn, responsible for funding native title claims within their jurisdictions (Smith and Altman 1998:9). Thus the federal arm of the Australian state, via the Federal Department of Aboriginal and Torres Strait Islander Affairs and ATSIC, provided the funding for representative bodies involved in native title negotiations. They were thus facilitating Indigenous agency on the one hand to oppose the mine, while simultaneously pushing a pro development agenda and circumventing Indigenous rights.

There was, however, a definitive change in the role of the Federal arm of the Australian state in the negotiations after the election of the Howard Liberal coalition government in 1996. The Howard government was elected on a platform that included proposals to amend the NTA, so as to reduce the impact of native title on miners and pastoralists (Bartlett 1997:50). It continually pointed to the controversy over Century as justification for these amendments, with the Federal Minister for Resources and Energy, Senator Parer, stating that:

the government would examine the lessons of Century Zinc and take steps to ensure they did not recur (cited in Burton 1996).

As the negotiations stalled and it seemed that an agreement could not be reached Senator Parer proclaimed:

The failure of these negotiations destroys the arguments of those who maintain the existing negotiations provisions in the Native Title Act work and send a dangerous message to investors (Anon 1997).

Prime Minister Howard continued to threaten amendments to the NTA which would remove any unnecessary impediments to economic development.

In June 1996, three months after it was elected, and at the height of the Century negotiations, the Federal government introduced amendments to the

NTA into parliament. Brennan (1998:37) argues that this showed the government had set a course to wind back any statutory rights granted to native title holders and to withdraw the Commonwealth as far as possible from land management issues, which it wanted returned to the States. Thus, key Federal legislation, the NTA, that had facilitated Indigenous agency and enhanced their bargaining position in mineral negotiations, was to be amended. The *Native Title Amendment Act 1998* (NTAA),⁷ enacted in 1998, after the Century negotiations, substantially weakened the position of native title claimants and holders (O'Faircheallaigh 2005:10).

Other arms of the Australian state, including ATSIC and the National Native Title Tribunal all played decisive roles in these negotiations. While space precludes a discussion of each of their roles separately (for more detail, see Howlett 2007), their actions ultimately served to facilitate the development of the mine, despite the fact that many Indigenous people in the region had expressed their objection to the mine. The High Court however acted autonomously from the other arms of the state. Several decisions it handed down throughout the negotiations, in particular the *Mabo*(1992), *Waayni*(1995) and *Wik*(1996) decisions improved the bargaining positions of the Indigenous people in the Gulf region, enabling them to eventually reach a substantial \$60 million agreement with the mining company. While the power of the High Court is vulnerable to the will of the Australian Parliament, and its capacity to judicially intervene is circumscribed by the Australian Constitution (Bachelard 1997: 71), its decisions in this case were of major significance and altered, for a time, the structural context of the negotiations. However these decisions could be subject to reversal or diminution by legislative acts of the Parliament, as was the case when the Howard government enacted the *Native Title Amendment Act 1998* (Patapan 2003:112). Russell (2005:5) advocates caution in his assessment of the High Court's capacity to alter the structural context in Australia within which mineral negotiations occur. He argues that however revolutionary the High Court's decisions may have appeared, the changes it effected were always going to depend on how the political system as a whole responded to them.

Indigenous agency

Indigenous people were not passive victims throughout the process. Under

⁷ The act received widespread condemnation, both at home and abroad for compromising Indigenous rights (Altman and Rowse 2005). Australia was brought into international disrepute and was asked to explain its changes to the *Native Title Act* to the United Nations Committee for the Elimination of Racial Discrimination (CERD). Australia is the first western nation asked to explain its human rights position to the committee (Healy 2002).

the leadership of the CLC and Murandoo Yanner, Indigenous people continually exercised their agency, managing to substantially delay the negotiations and see the original offer from the mining company of \$100 thousand grow to a \$60 million agreement with substantive employment and environmental conditions. With several significant High Court decisions, particularly the *Mabo* and *Waayni* decisions challenging the fundamental property laws of Australia which underpinned the mineral industry's access to land, there was greater scope for Indigenous people to exercise their agency and shape the outcomes of this particular mineral negotiation to a greater extent than in previous negotiations. Indigenous agency was thus a critical factor in these negotiations. Indeed, a critical finding from this research was the tenacious manner in which Indigenous people continually acted to subvert the actions of the state and the mining company through their own agency (see Howlett 2007).

However Indigenous people were unable to achieve what they had set out to achieve, to prevent the development of the mine. The state had historically and institutionally marginalised the interests of Indigenous people in mineral development processes and this resulted in a context that structurally favoured the agency of the state and the mining company. Mineral negotiations processes, as pre-structured contexts, favour those actors who have greater access to financial and technical resources and access to expertise and information. Both mining companies and the state have access to substantial financial resources. In the Century negotiations they were able to utilise these extensive resources to coordinate travel over large areas to communicate with Aboriginal people and constantly promote the benefits of the mine to the disparate Aboriginal groups in the region. O'Faircheallaigh (2006:4) argues that Aboriginal people were, and still are, seriously deficient in the financial, organisational and technical resources required to equitably engage in large-scale resource development negotiations. Thus, following Archer (2000), the historical distribution of resources and interests laid down structurally over time exerted an important constraining influence on Indigenous agency in this case study of mineral negotiations.

The agency of political actors is also subject to their knowledge about the policy context, and the manner in which that context is ideologically constructed (see Hay 2002:132). Knowledge of a context can enhance the capacity for agency, and in this case, was used by certain Indigenous players in the region to strategically counteract the actions of the state and the mining company. However this knowledge can be mediated by the prevalence of hegemonic discourses. Hegemonic discourses can contribute to the construction of an ideologically constructed common sense that often favours

the options and actions preferred by the other actors (McAnulla 2002b:285). These discourses have the ability to influence the agency of the various actors by mediating their knowledge of the constraints/structures that act upon them. This can be critically important in situations where there are high levels of illiteracy, such as in the Century case. The majority of Indigenous people were not educated, nor had access to knowledge about mineral development, who it privileges, who it marginalises, and ultimately, who benefits from it. It could thus be argued Indigenous people's capacity to access and interpret the intricacies of a mineral negotiation process was limited.

The agency of many Indigenous people in the region was constrained by the promulgation of two dominant discourses - a pro-development, pro-mining discourse and an anti-Mabo, anti-Aboriginal rights discourse. The hegemonic pro-mining discourse posits development in general, and mining in particular, as a positive thing, good for all citizens and thus deserving of support and approval. It often resonates with claims of morality and civilization (Trigger 1998), and is deeply infused with European notions of progress and development (Escobar 1995). In this discourse, mineral development renders the landscape "*productive, civilised, and familiar*" (Trigger 1997:166). In this discourse, Indigenous rights to land, and to participate equitably in mineral developments on those lands, are construed as a direct challenge to national cohesion (Howitt *et al* 1996:14).

The anti-Mabo, anti-Aboriginal rights discourse similarly posited the Mabo decision as a threat to the nation, and was underpinned by a 'sense of disquiet and disbelief that Aborigines have any rights in land which the rest of us must respect' (Cowlshaw 1995:45). This discourse evoked fears about security of property rights and future economic development, constituting recognition of Aboriginal rights to land as a direct impediment to future prosperity. Hugh Morgan's⁸ contributions are representative of the general tone of this discourse:

The *Mabo* decision has given substance to the ambitions of communists for a separate Aboriginal state and plunged Australian property law into chaos (cited in Sharp 1996: 217).

Mabo is a challenge to the legitimacy of Australia. The free, prosperous and dynamic nation that our forbearers built ... is irremediably tainted (cited in Russell 2005:283).

This anti Mabo discourse was widely promoted in the media and surveys revealed that a majority of the Australian population believed the Mabo

⁸ Hugh Morgan was executive director of Western Mining Company. Russell claims he was by far the fiercest and loudest critic of the *Mabo* decision (2005:282).

decision constituted a real threat to the security of their property ownership (Goot 1994).

The combination of these discursive influences had a significant effect on the final outcomes of the negotiations, for they unambiguously favoured the interests of the state and the mining company. Not only was the structured context reinforced by historical and institutional distribution of resources and interests, it was also reinforced by the combination of a pro-mining, pro-development discourse and an anti Mabo, anti Aboriginal rights discourse. This particular structured context was underpinned by an ideology that posited the development of the mine as the legitimate option and the rights of Aboriginal people as an impediment to the legitimate option. The agency of Indigenous people was constrained and inhibited by the combination of a historically and institutionally influenced context that favoured the agency of the state and the mining company, and by an ideational construction of mining that favoured those same players. The capacity of Indigenous actors to challenge the structural reality of mineral development (their agency) was in this case, constrained by a combination of structural and discursive factors. The capitalist structural, material and ideational reality that informed this mineral development context ultimately favoured the agency of the state and the mining company.

In summary, the period during which the Century negotiations occurred, 1987-97, saw significant judicial and legislative changes in relation to Indigenous land rights in Australia. These changes, including the High Court's *Mabo* 1992 decision and the *Native Title Act* 1993 (NTA), substantively altered the bargaining power of Indigenous people in relation to mineral developments on their traditional lands, as these decisions challenged the fundamental property laws of Australia which underpinned the mineral industry's access to land. In short these changes in the structural landscape enhanced their capacity to exercise their agency. However these major structural changes in Australian political landscape were ultimately political decisions that could be, and were, overturned, watered-down or legislated away when the outcomes of that enhanced agency proved ultimately unpalatable to the Australian state and the minerals industry. Thus Indigenous agency, efficacious as it was in this instance, was circumscribed by the historical distribution of resources and interests laid down structurally over time, and by discursive forces that promoted the agency of the other actors in this mineral negotiation process.

Conclusion

Following Salee (2008,) it has not been the aim of this paper to downplay or underestimate the capacity for Indigenous agency to transform unequal relationships of power. Quite the contrary, it was a distinctive finding from previous research that Indigenous agency matters (Howlett 2007). Examples of the transformative capacity of Indigenous agency abound, and in the Australian case, the agency of Eddie Mabo and those that challenged the judicial settlement of Australia, and succeeded in overturning the doctrine of terra nullius that underpinned the colonisation of Aboriginal Australia, is an exemplary example of the transformative capacity of Indigenous agency.

The aim of this paper has been however, to call for a degree of caution when celebrating the transformative capacity of this agency. Given the structured political reality that Indigenous people must operate within, their objective reality, it seemed prescient to revisit the debate on structure and agency, via a case study of mineral negotiations involving Indigenous people, and to highlight the constraining and inhibiting power that structure can exert over agent's capacity to exercise their agency. In essence, the aim has been to highlight that structure can inhibit or constrain the capacity for actors to actively change or ameliorate their objective reality. And while the relationship between structure and agency may indeed be dialectical, it is also a temporal relationship - agency is always expressed within contexts that are provided by a pre-existing set of social structures. In this instance the historical relationship between the state and the mining company provided a pre-structured context that constrained and inhibited the agency of the Indigenous actors.

There can be no doubt that agency matters, and that agency has transformative capacity. However a danger in overstating the transformative capacity of agency may result in a lack of analytical and theoretical interrogation of the forces and structural realities that can, and do, constrain and inhibit Indigenous agency. Indigenous people will take every opportunity to exercise their agency, and thus, knowledge of the structural constraints which may impinge upon that exercise of that agency is essential, and must be disseminated in academic literature and analysis.

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