Realising the Principle of Free Prior Informed Consent: Building Indigenous Institutional Capacity

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Abstract

Indigenous people in Australia and Papua New Guinea are keenly aware of the potential role of the principle of Free Prior Informed Consent in achieving their goals in relation to large-scale resource projects. To realise this potential, they must build appropriate governance institutions to engage with corporations and the state and perform the ‘internal governance’ tasks arising from large-scale resource development. Powerful and resilient governance institutions exist in contemporary Indigenous societies in both countries, but they face problems in dealing with large extractive projects, for instance because the cultural values they represent are often not recognised or regarded as legitimate by developers and state authorities. This paper examines two attempts to create ‘hybrid’ institutions that draw on both Indigenous and western modes of governance, the first involving a proposed Liquefied Natural Gas Precinct in Western Australia, the second plans to reopen the Panguna copper mine in Bougainville, Papua New Guinea.

Introduction

Large-scale resource development, in common with other aspects of modern industrial society, is dominated by institutions, by the huge corporations that extract, market and process minerals, and by the state agencies which regulate their extraction and which control, or seek to control, the interaction between themselves, resource developers and Indigenous peoples. In this context Indigenous peoples can only hope to realise the principle of Indigenous Free Prior and Informed Consent (IFPIC), in other words to control whether development happens on their ancestral lands and the form of any development they allow to occur, if they can develop robust Indigenous institutions to engage with corporations and the state and perform the ‘internal governance’ tasks arising from large-scale resource development. The reality of this situation is evident from recent comparative studies of large-scale extractive industries on Indigenous lands. These show that it is those Indigenous groups who have the organisational capacity to mobilise politically, and engage with
corporations and the state though these institutional platforms, that achieve substantial control over development and, where they consent to large scale mining, minimise its negative consequences and win an equitable share of its benefits (O’Faircheallaigh 2012, 2015a; Sawyer and Gomez 2012).

However building appropriate institutional capacity is no simple matter. As well as the capacity to engage effectively with the state and corporations in the context of large-scale, technically complex extractive industries, institutions must also reflect Indigenous values, priorities and modes of operation. Otherwise, there can be no guarantee that the outcomes they pursue will be in the interests of their Indigenous constituents, and will protect and reinforce Indigenous control of land and resources and Indigenous cultural and social norms. As discussed in the next section, some analysts question whether it is even possible to develop institutions which can both engage effectively with large-scale extractive industry and embody Indigenous values and practices. In addition, while the literature on the political economy of resource extraction recognises the crucial importance of institutions in shaping economic and social outcomes, it has very little to say about how to go about building appropriate institutions where these do not currently exist. Yet unless Indigenous people affected by resource development can build institutions that reflect their values and priorities, their prospects of realising the principle of IFPIC in practice are bleak.

Against this background, this paper considers two attempts to build institutions to govern resource development on Indigenous land, the first in response to Liquefied Natural Gas development in the Kimberley region of Western Australia, the second in response to proposals to reopen what was one of the world’s largest copper mines before it was closed by armed rebellion, the Panguna mine in Bougainville, Papua New Guinea. Both case studies represent ‘works in progress’, and the paper does not claim to demonstrate the success of the institution-building efforts that are described. Rather the goal is to draw attention to the hugely important issue of institutional development, and to illustrate the efforts in this regard being made by the Indigenous peoples and organisations involved.

Institutions, extractive industries and Indigenous peoples

There is growing evidence from the international literature regarding the importance of institutions and governance in shaping outcomes from extractive industries. While some analysts continue to argue for the existence of a ‘resource curse’ that undermines even the most robust of institutions and results in corruption, waste and distortion of existing economies, the weight of evidence favours the view that while extractive industries are often associated with such impacts, an appropriate institutional framework can ensure considerably more favourable outcomes (Brunnschweiler and Bulte, 2008; Collier and Venables 2011; Freudenburg and Wilson; Pegg, 2006; Sovacool, 2010). There still remains the issue of whether it is possible to devise institutions in the Indigenous context that both incorporate Indigenous cultural and social values, and so are capable of achieving outcomes that reflect and reinforce these values, and are also effective in governing large natural resource projects.

Some analysts deny the possibility of such an outcome. For example Colin Filer (1990) argues that there is a fundamental incompatibility between large-scale mining revenues and the social structures available to Indigenous (in his case specifically to Melanesian) societies to manage them, an argument Filer labelled ‘social disintegration theory’. The arrival of mining revenues leads to problems of social stratification, inheritance and succession within landholder communities, an outcome that does not simply reflect the greed of individuals, but ‘the simple absence of a custom which prescribes the proper way to distribute rent’ (1990, 12). In Filer’s view increasing the flow of payments to landowners
would simply exacerbate the problem and bring forward the point at which the (inevitable) social conflict would occur. Similarly, in the context of gold mining on Lihir island in Papua New Guinea, Bainton (2010, 193-94) claims that certain forms of wealth created by mineral revenues, for example trucks or permanent housing materials, ‘simply fail to fit existing cultural logics governing the categories of wealth and value’, leading to a rise in jealousy, envy or discontent, reflected in part in an increase in sorcery accusations and associated violence.

On the other hand Steven Cornell and his colleagues in their work on the Harvard Project on Indian Economic Development argue that not only is compatibility between modern economic and governing institutions and Indigenous cultures a possibility, it is a necessity for positive economic outcomes. Based on a comparative review of the economic development record of a number of tribal governments, Cornell and his colleagues concluded that critical elements in successful economic development were not their natural resource endowment, education levels or access to capital, but rather how nations are organised, make decisions and govern themselves. Of particular importance in this latter regard is ‘sovereignty’, or control over their own affairs; effective governing institutions; and, of particular importance, the ‘match’, or lack of match, between specific Indian cultural values and practices and the organisational forms used by tribes to pursue economic development. Governing institutions have to match Indigenous ideas about how authority should be organised and exercised, and institutions must match contemporary Indigenous cultures if they are to be effective. For example, Connell and Kalt cite the contrast between Apache and Sioux communities in the US. The Apache used organisational structures and decision making methods that aligned with their cultural values and in particular their emphasis on strong, centralised decision making and leadership. The Sioux on the other hand achieved no such congruence between cultural values and organisational form, a fact to which Cornell attributes their failure to achieve economic success (Cornell and Kalt 1995; and more generally Cornell and Kalt 1998, 2010).

The Harvard Project’s conclusions have, in turn, been criticised by a number of scholars. For example Sullivan argues that the Project’s conclusions are not supported by its empirical research and that the Project fails to provide any guide for action if there is an absence of ‘cultural match’, or if culture is positively inimical to economic development (Sullivan 2007, 5-11). Mantziaris and Martin (2000, 293-94) argue that ‘the complexity and diversity of contemporary Indigenous cultures do not allow for reference to a homogenous and historically prior notion of “culture” that would assist in the formulation of institutional rules and practices’. They also make the point (2000, 324) that contemporary Indigenous institutions have to operate in an intercultural sphere, and that given this reality aligning institutional arrangements with what is ‘culturally appropriate’ will not achieve organisational effectiveness or legitimacy (see also Altman and Pollock 1998b, 33-34). This point is certainly relevant in the context of organisations that deal with large-scale resource projects, which must for example engage effectively with non-Indigenous organisations and individuals such as mining companies, financial institutions, investment advisers and potential business partners as well as with their own Indigenous constituency.

On the other hand the literature is replete with examples of the problems caused when non-Indigenous institutional forms are foisted on Aboriginal peoples (see for example Kesteven 1984, 144-48; Altman and Smith 1999; Mantziaris 1997; O’Faircheallaigh 2002). Against this background Altman and Pollock argue (1998, 33-34) that those organisations that draw on both the Indigenous and non-Aboriginal domain in creating structures and processes to manage mineral revenues are likely to be most effective. A critical issue, of course is how this integration of the two domains can be effected. The broader literature on institutions and the ‘resource curse’ is of limited assistance in this regard because, mirroring
Sullivan’s comment on the Harvard project, it provides little guidance in on how you build appropriate institutions if they don’t already exist.

Against this background, this paper offers a preliminary assessment of two attempts to develop institutions that allow effective management of natural resources and also reflect Indigenous cultural and social values and priorities. In this context ‘institutions’ are defined, following Dovers, as ‘Laws, processes or customs serving to structure political, social, cultural or economic transactions and relationships in society. They may be informal or formal, and allow organized, collective efforts around common concern’. The paper draws on two case studies, the first of a Liquefied Natural Gas (LNG) development on Aboriginal land in the Kimberley region of Western Australia, and second of efforts to develop new institutions to manage the possible reopening of the Panguna copper mine in Bougainville, Papua New Guinea. When Panguna was first developed (between 1966 and 1989), it resulted in serious conflict between customary landowners, the developer (Rio Tinto) and state authorities, ultimately leading to a civil war which closed the mine and led to the loss of several thousand lives. Indeed Bougainville is regarded as a classic case of the ‘resource curse’, and it was in response to this conflict that Colin Filer originally developed his ‘social disintegration theory’. Efforts to develop institutions capable of managing a re-opened Panguna mine thus constitute a particularly useful and challenging case.

Liquefied Natural Gas Development in the Kimberley

In a paper delivered to an earlier ECPR conference, I provided a detailed case study of Indigenous political mobilisation around a proposal to establish a single location or ‘LNG Precinct’ to develop the large reserves of natural gas discovered off the coast of the Kimberley region, in north west Western Australia (O’Faircheallaigh 2015b). In this paper I wish to focus specifically on the existing institutional context for the proposed development, and on the manner in which Indigenous landowners and their regional organisation sought to create a different institutional configuration that would allow them to assert more control over development and share in its benefits.

Historically, Aboriginal peoples in the Kimberley had been entirely marginalised by large-scale resource development in Western Australia, with the State Government ignoring their interests and approving projects that destroyed important cultural and spiritual sites and failed to generate any significant benefits for affected landowners (see for example Dixon and Dillon 1990). The Australian High Court’s 1992 Mabo decision, which recognised the existence of inherent Indigenous rights in land in 1788 at the time of European colonisation (referred to as ‘native title’), meant that Indigenous interests could no longer be entirely ignored. However the institutional environment created by the Commonwealth Native Title Act 1993 (NTA), which gave legislative expression to the Mabo decision, was still strongly unfavourable to Indigenous interests. As explained below its fundamental purpose is to facilitate the grant of mining and other commercial interests on Indigenous land, not to protect native title, and it creates a profoundly unequal bargaining arena which continues to privilege corporate and state interests.

The NTA validated existing non-Indigenous titles in land that had been alienated to European settlers since 1788, but also created a process through which Indigenous people could claim land that had not been so alienated and to which they could claim an unbroken cultural connection. The NTA created what is called the ‘Right to Negotiate’ (RTN), which provides Indigenous groups that have registered native title claims, or whose native title has been recognised, with an opportunity to negotiate about the terms of any proposed mineral
development with the company involved and with the state government that proposes to issue the relevant mining interests. There is an initial six month negotiation period after which, if negotiations do not lead to an agreement, either party can refer the matter to arbitration by an administrative body established under the NTA, the National Native Title Tribunal (NNTT). Decisions of the Tribunal are not final, but may be set aside by the responsible Government minister. Thus the NTA does not confer on Aboriginal landowners a veto over exploration or mining, rather it gives them a limited opportunity to sit down and negotiate with developers, limited both in the sense that it is subject to a time constraint and that a developer can, if negotiations do not produce agreement, seek the grant of the mining interest from a government administrative tribunal whose decisions can, in turn, be reversed by a government minister. This arrangement obviously departs very substantially from the principle of IFPIC, for example because the ‘consent’ of Indigenous landowners is not required for development to proceed; because the time limit and the ability of the NNTT to impose decisions means that any Indigenous consent which is provided is not ‘free’; and because the short time frame for negotiations makes it difficult to ensure that affected Indigenous people are ‘informed’.

Other provisions of the NTA further weaken the bargaining position of Aboriginal groups. Under Section 33 of the Act, agreements reached within the negotiation period can include payments to native title parties worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party as a result of the proposed ‘act’. However under Section 38 (2), if an agreement is not reached within the negotiation period and the matter is referred to the NNTT, the Tribunal must not determine a condition that entitles native title parties to payments worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party. This places native title parties under considerable pressure to conclude an agreement within the negotiation period.

In theory this pressure on the native title holders to reach agreement is balanced by the pressure created on developers to do the same by the additional time which would elapse if a matter is referred to the NNTT for arbitration, and by the uncertainty that arbitration creates given that the Tribunal might not approve the grant of a mining lease or might attach stringent conditions to a lease. Thus both sides would be under pressure to do a deal, helping to ensure that the agreements reached would be equitable to both parties. However this assumes there is a real possibility that the NNTT will not allow at least some mining leases to be granted; or that in a significant proportion of cases where approval is given grant of leases, stringent conditions will be attached. Only if these assumptions hold will mining companies feel that going to arbitration involves a significant risk that their proposed activities will be halted or delayed or subjected to conditions more onerous than those likely to apply under a negotiated agreement. In fact it has become increasingly obvious that the NNTT is most unlikely to reject an application for a mining lease or to impose substantial conditions on its grant. To date, in only 3 of 44 cases in which Indigenous landowners have refused to consent to mining lease has the Tribunal rejected a mining company’s request to issue a mining lease. Thus the Aboriginal parties are under considerable pressure to settle during the right to negotiate period, while mining companies are under no such pressure, knowing that if they do not achieve an agreement that suits them, they can go to the Tribunal and obtain the interests they need to proceed with their project.

Against this background Indigenous groups in the Kimberley region faced little chance of using the NTA to establish a significant degree of control over, or derive substantial benefits from, LNG development. However an opportunity to pursue a different course occurred in 2006 when the Western Australia (WA) Labor Government, in a major departure from previous policy, stated that LNG development would occur only with the ‘informed
consent and substantial economic participation’ of Aboriginal traditional owners (TOs). In mid-2007 the WA Government established a Northern Development Taskforce (NDT) to find a single location or ‘Precinct’ for gas processing on Kimberley coast, and Aboriginal cultural leaders and their regional land organisation, and Traditional Owners and their regional land organisations, the Kimberley Land Council (KLC), were determined to ensure that they would shape the site selection process by establishing decision making structures that reflected Aboriginal political, social and cultural values and practices.

In December 2007 senior Aboriginal leaders met to start designing appropriate processes and structures they hoped would allow them to determine if LNG development should happen along the Kimberley coast and, if so, where. The State agreed to a KLC request for funding to support a Traditional Owner consultation and decision making process that would give practical effect to the State’s requirement for Indigenous informed consent. In mid-December 2007, the KLC convened a meeting of senior Aboriginal men and women from coastal regions, as well as senior ‘cultural bosses’ from elsewhere in the Kimberley to direct the KLC on how to proceed. The meeting discussed LNG development and its likely impacts in the Kimberley over two days. A State representative outlined the State’s preliminary ideas about LNG development, including the membership and role of the State’s NDT. In response to this information the senior Aboriginal men and women present at the meeting outlined a consultation process and culturally appropriate representative structures, and drafted a timetable to consider the Government’s proposal for an LNG Precinct. They decided that there should be a Traditional Owner Taskforce (TOTF) representing all native title claims groups along the Kimberley coast, as an equivalent representative and administrative body to the State’s NDT. Following this meeting the KLC established a Senior Leadership Group to advise and assist Traditional Owners of the Kimberley coastal regions and the KLC in their deliberations about the complex matters that had to be considered in making decisions about LNG development. Over the wet season (December – February), Traditional Owners began to consider the potential impacts of LNG development and how they could effectively engage with industry and government to achieve positive outcomes for Aboriginal people in the Kimberley.

In mid-February 2008 another meeting of senior Aboriginal men and women, including cultural bosses from across the Kimberley, was held in Broome. The KLC’s Senior Leadership Group was confirmed in its role on the basis of appropriate cultural practices, including separate men’s and women’s meetings and consensus decision making, while some more senior men and women were added. The Senior Leadership Group would provide advice and leadership to the KLC’s consultation process, and attend meetings with coastal native title claim groups. The KLC was instructed to undertake a consultative process with all Traditional Owners with native title claims along the Kimberley coast; facilitate selection of representatives for a TOTF equivalent to the State’s NDT; and gain as much information from as many sources as possible concerning proposed LNG development in the Kimberley.

The area of the Kimberley Coast within which the State was seeking a single suitable location for an LNG Precinct encompasses parts of the traditional country of fifteen different native title claim groups. Senior Aboriginal men and women took the position that all those groups had to be consulted, for two reasons. First, they recognised that the proposed LNG development is a massive long life project, and that its impacts, positive and negative would be felt widely and have intergenerational effects. The second arose from the bonds and commitments inherent in the cultural and social form that pervades the Kimberley, the wunan. The wunan has binding, moral, ritual, economic and supportive elements, and can be viewed as an overarching foundational practice of local and regional Aboriginal governance. It is a complex and integral element of Aboriginal peoples’ secular and ritual lives, includes aspects of community and individual health and wellbeing, and embodies a range of social
relations that joins together large numbers of people over extensive areas of land (Doohan 2008). The *wunan* was often called on during the process of forming the TOTF and during TOTF meetings, as a mediating and re-affirming practice considered to be greater than local groups, or even larger native title groups, and to encompass ‘the Kimberley’. To be consistent with the principles of the *wunan*, decision-making in relation to LNG development would have to be inclusive and involve mutual support between all the native title groups involved.

The KLC commenced coastal native title claim group meetings during which the idea of LNG development on the Kimberley coast was introduced, the NDT process was explained, the KLC consultation process was outlined and the limited information about LNG development then at hand was delivered. The KLC sought advice, suggestions, questions and direction from Traditional Owners and information on what was important to them. Each native title claim group was invited to consider the selection of four representatives to form the TOTF, how the TOTF should function, and how it should report back to group members. The TOTF was established in May 2008, following a further series of meetings which brought together clusters of related native title groups. The KLC provided Traditional Owners with details of the possible locations being considered for development. Further information was also provided regarding natural gas processing and its likely cultural, social, economic and environmental impacts, and regarding some of the potential benefits of development, including employment and training, education and business opportunities and equity participation.

The roles and rules of the TOTF were discussed, clarified and endorsed. Of critical importance and consistent with traditional decision-making practices, the TOTF members could not make decisions on behalf of their native title groups about whether to agree to locating an LNG hub in the Kimberley or on their traditional land and sea country. Such decisions would have to go back to the whole native title claim groups. TOTF members would make decisions about consultation processes; ensure the integrity of the information delivered by the TOTF and the KLC; and act as a conduit for the flow of information to and from the larger native title claim groups. The TOTF would also provide a mechanism through which the native title groups would support each other, whatever decision individual groups made about LNG development on their traditional country. At the meetings each native title claim group selected four representatives to participate in the TOTF.

The establishment and management of the TOTF process re-affirmed Kimberley Aboriginal people’s cultural practices, and their right to make decisions about their country, in the context of contemporary large-scale resource development.

The TOTF met monthly until September 2008. During the meetings the TOTF engaged in exchanges with government, non-government organization (NGO) and industry visitors, who presented information concerning the proposed LNG development and sought to answer questions raised during the meetings. At each meeting an agenda was set, minutes were recorded, key issues and tasks to be undertaken were highlighted, and questions unanswered or requiring further elaboration were noted. These records were used to prepare TOTF newsletters that provided a basis for discussion within families and the wider native title claim groups.

In July and August 2008 the KLC met with native title claim groups to facilitate discussions regarding which of the 11 potential locations identified by the NDT could remain in the site selection process. Traditional Owners for these proposed locations also participated in scientific and engineering studies in collaboration with the NDT. As the process unfolded a number of Traditional Owner groups withdrew their land and sea country from consideration as potential sites, though these decisions were not made public until the four remaining locations were made known on 10 September 2008 (see below). Traditional Owners withdrew sites in some cases because multiple potential sites existed on their country and
they only wished a single site to be considered. In other cases they withdrew sites because of their serious concerns about the potential impact of a Precinct on the environment and on their cultural and economic lives. The NDT also removed some of these same sites from consideration due to environmental and/or technical factors.

In July 2008 a State election was called and held six weeks later. This was a period of uncertainty for the TOTF and the members of the native title groups, as it was unclear whether the NDT process and the TOTF would continue and, if it did not, what would replace it. Nonetheless the TOTF continued, despite the uncertainty, to engage with the four native title claim groups that had decided to leave the locations within their traditional country for further consideration. By early September 2008 and before the results of the State Government elections were finalised the TOTF formally announced the remaining four locations still being considered by Traditional Owners: Anjo Peninsula, North Head, James Price Point and Gourdon Bay. On 13 September 2008 a Liberal/National Party was formed, and on 15 October 2008 the new Premier Colin Barnett announced that it was unacceptable for government to, in his words, give ‘a right of veto to local Aboriginal people, expressed in the following terms that projects would not go ahead unless there was informed consent by Aboriginal people’. The Government would discontinue the existing site selection process and funding for the TOTF, and would choose its preferred site (James Price Point, as it transpired) unilaterally. Failure to secure further funding jeopardised any future TOTF or native title claim group meetings after Karajarri Traditional Owners met on 16 December 2008 and decided to remove the Gourdon Bay location from consideration, following their interpretation of newly released NDT environmental survey results and their own body of ecological knowledge.

The KLC and Traditional Owners enjoyed considerable success over a very brief period in establishing a site selection process that reflected Aboriginal values and allowed pursuit of the principle of IFPIC. They were also able to support Traditional Owners in saying ‘no’ to eight potential sites for the LNG hub, as these sites were not brought back into consideration after the change of government. However that change meant that the remainder of the site selection process did not involve Traditional Owners for the sites involved, and departed in fundamental ways from the principle of IFPIC.

Negotiations did commence between the WA Government the Traditional Owners of the James Price Point and the KLC regarding the terms on which the LNG Precinct would be established, and the Traditional Owners and the KLC used these to negotiate substantial benefits from the project and ensure that Traditional Owners would have a major and ongoing role in managing its cultural and environmental impacts (see O’Faircheallaigh 2013 for details). Of particular interest in the current context is that they also used it to further pursue the long-term goals of Kimberley Aboriginal people to develop their own regional institutional base. For the first time in Australia, in addition to agreements dealing with the project itself and with benefits for the Indigenous owners of the project site, Traditional Owners and the KLC also negotiated a Regional Benefits Agreement which provided for a substantial funding package (initially $186 million from the State Government, plus proponent contributions) to fund initiatives in Aboriginal education, health, housing, and cultural protection and transmission. The Agreement provides for the establishment of a ‘Regional Body’ to administer this funding and also to hold in trust land transferred as part of the package of agreements, and to play a role in co-managing protected areas established pursuant to the agreements. WA provides funding of $2 million per annum for 10 years to help establish the Regional Body, whose membership consists of all Aboriginal people in Kimberley, and whose Board is constituted in any manner Aboriginal people see fit (State of Western Australia et al. 2011).
The negotiation of the Regional Benefits Agreement and the establishment of the Regional Body, which ensured that all Kimberley people would benefit from any development at James Price Point, reflected the continuation of the Aboriginal principles and values that underlay the activities of the Traditional Owner Task Force, including the value of reciprocity that is central to wunan. The creation of the Regional Body also marks a significant step in the development of regional institutions that can support Kimberley Aboriginal people in their engagement with extractive industry.

Re-opening the Bougainville Copper Mine

The historic and political context

Bougainville offers a classic case of the tragic consequences that can eventuate when customary landowners and affected communities entirely lack the capacity to influence decisions regarding large-scale resource developments. The Panguna copper mine was discovered and developed during the final years of Australia’s colonial administration of Papua New Guinea (1966-1972), by CRA Ltd, the Australian arm of Rio Tinto. Initial exploration activity in 1966-67 was resisted by local villagers, and resistance grew as the scale of the project and the amount of land required for it became clear. However the Australian Administration and CRA/Rio Tinto were both determined to develop the project as quickly as possible, the Administration to secure an internal source of revenue to meet the costs of government after Independence, CRA to take advantage of an anticipated increase in metal prices. Resistance was quashed, and efforts by Bougainvilleans to secure a share of project revenues for the affected communities were rejected by the colonial Administration, to ensure that all revenues would be available to the new government in Port Moresby to contribute towards the national budget.

Mining commenced in 1972 and contributed handsomely to Rio Tinto’s profits and, especially after the original project agreement was renegotiated in 1974, to the coffers of the newly-independent Papua New Guinea. But little of the wealth made its way back to people affected by the massive environmental impacts of mining at Panguna, and especially by the riverine disposal of tailings from what was one of the world’s copper mines. The modest compensation made to landowners were not distributed equitably, while some affected groups missed out entirely because their land, though affected by the wider effects of the project, did not fall inside the lease boundaries of Bougainville Copper Ltd (BCL), the operating company. BCL was successful in recruiting and training substantial numbers of Bougainville workers, but as the years passed some of these, particularly those who had undertaken university training, felt increasingly frustrated by what they saw as their lack of access to more senior and better-paid positions in BCL. This combination of factors led to an armed rebellion by a group of young Bougainvilleans, some of them BCL employees, who became known as the Bougainville Revolutionary Army (BRA). The BRA began to disrupt mining operations in 1989, for example by destroying pylons carrying electricity to Panguna. In 1990 escalating violence led Rio Tinto to cease mining operations, a cessation that all parties involved apparently expected to be temporary. However the conflict escalated after Papua New Guinea riot police sent to quell the rebellion used excessive and indiscriminate violence and the BRA retaliated. The result was a civil war only ended a decade later with the signing of the Bougainville Peace Agreement by the National Government and Bougainville in 2001. The Panguna mine has never been reopened.

As part of the Peace Agreement, Bougainville was granted a much more substantial degree of autonomy than that enjoyed by provinces in Papua New Guinea. The Autonomous
Bougainville Government can take over a series of National Government functions, including mining, through an agreed process and as it develops relevant administrative capacity. The Peace Agreement also provides that a referendum must be held in Bougainville between 2015 and 2020 to determine whether Bougainvilleans wish Bougainville to remain as an autonomous region within PNG or become independent.

As it became established in the years after 2001, the ABG faced growing issues in relation to its current and in particular its future revenue base. It lacked sufficient resources to restore the physical and service infrastructure that had largely been destroyed during the conflict, let alone provide for the expansion of infrastructure needed to meet the needs of a youthful and rapidly-growing population, or fund the exercise of National Government powers which it was in principle entitled to draw down. What revenue it had was derived almost entirely from PNG Government grants and foreign aid, a situation that clearly could not allow for the exercise of ‘real’ autonomy within PNG, let alone for Bougainville to operate as an independent entity if this was the outcome sought by Bougainvilleans in the referendum.

The only obvious source of substantial internal revenue potentially available to the ABG, at least in the medium term, appeared to be the reopening of the Panguna copper mine. The ABG assumed that this could not even be contemplated without the consent of the customary landowners affected by the Panguna project, and it undertook extensive consultations with landowners between 2009 and 2011 to see if they wanted to consider reopening the mine. A large majority indicated they were in favour of entering negotiations on reopening of the mine, but only if certain conditions were met. These included that landowners would have to be central to decision making on the project; that Bougainville, not the National Government, must be in control of mining; that negative environmental and social impacts would have to be minimised; and that benefits from any new project would have to be shared equitably between the developer and Bougainville.

For the ABG, the critical challenge was to devise an institutional framework that would allow these landowner requirements to be met. The framework would also have to allow the participation in decision making of wider interests across Bougainville, including powerful groups of ex-combatants and a number of armed factions who had been involved in the conflict; and women’s, church and other civil society groups. Whatever view the landowners took, all of Bougainville had been deeply affected by the conflict, and in the ABG’s view this would necessitate a broad consensus in support of renewed mining before reopening Panguna could be seriously considered.

Institutional development

When the Panguna mine initially operated, the only formal organisation representing landowners was a single association involving those landowners associated with lease areas granted under colonial and then PNG mining legislation, and who were subsequently entitled to statutory compensation, for instance occupation fees and payment for loss of tree crops. The relevant leases covered the road from the port to the mine, the Special Mining Lease which covered the mine itself; and the tailings lease where waste from the mine was dumped. No compensation was payable to landowners of areas used for the port, the mine township at Arawa near the coast, or for associated infrastructure such as the power station, and they were not included in the landowners association. The same applied to landowners of areas affected indirectly by the disposal of tailings, including those who lost access to fish populations whose breeding grounds were destroyed because river tributaries were no longer able to discharge naturally into the tailings area; and those in coast areas gradually inundated as tailings were washed out of the major river system, creating an artificial delta. The landowner
association functioned mainly as a clearing house, channelling compensation payments to individuals the colonial administration had identified as representing customary landowning groups.

In consultations with the ABG, landowners made it clear they wanted to organise themselves quite differently on this occasion. They believed that groups affected by mining in different ways would require their own individual organisations, and that all groups impacted by Panguna would have to be involved. After extensive discussions nine separate associations were formed: for the port area; the Arara township; the port-mine access road, the Special Mining Lease (SML); one for each of three distinct zones within the tailings lease (which was very large); the coastal corridor affected by the outfall of mine tailings; and ‘fishowners’, referring to those people who were not landowners within lease areas but whose livelihoods has been affected by tailings disposal. The associations would need to be incorporated under PNG legislation to ensure they would constitute legal entities for the purposes of entering any agreements negotiated in relation to Panguna, and this dictated that a standard organisational form had to be employed. But the relevant legislation did provide some freedom for variations on matters such as the election and composition of boards and the issue of whether gender balance should be mandated, allowing some adjustment to the customary requirements of individual landowning groups.

In deciding to establish a substantial number of associations, the landowners were aware of the need to achieve coordination and to ‘speak with a single voice’, and so asked the ABG to also help them establish an ‘Umbrella Association’ which would perform these roles. The Board of the Umbrella Association was to consist of 2 representatives of each of the individual associations, and the Chair of the SML Association would automatically be the Chair of the Umbrella Association, given the fact that many SML members had incurred the most severe impacts, losing their land entirely. However after the leadership of the SML Association changed hands, the new Chair attempted to use his position within the Umbrella Association to exert his control over the other Associations. The other landowner groups found this completely unacceptable, taking the position that in custom only they could make decisions for their own lands and resources. However rather than confronting the Chair directly, they simply withdrew from any involvement in the Umbrella Association, leaving him in charge of an association with only one member. The nine associations have since been coordinating their activities effectively through bi-monthly meetings with the ABG. While reflecting a common Melanesian tendency to deal with issues in a way that avoids direct criticism of individuals and more generally of open conflict, this approach may create difficulties when negotiations commence as the associations will lack a formal coordination mechanism.

In recognition that all of Bougainville were affected by conflict, the ABG embarked on widespread consultation during 2012-2014 regarding the possibility of reopening Panguna. Regional forums were held throughout Bougainville; two forums were held with ex-combatants; and in April 2014 a large forum was held with some 200 women representatives in from all districts in Bougainville. In early 2014 the ABG also supported extensive village-level consultations throughout BCL’s former leases and adjacent areas. These consultations indicated widespread support for re-opening Panguna subject to strict conditions, especially repeal of the colonial agreements and laws under which Panguna had been developed, Bougainville control of mining, and an equitable allocation of benefits and costs from the project.

Following on from the consultations, the ABG established a Bougainville Negotiation Forum to provide overall direction to negotiations. The Forum incorporates all major stakeholders, including the President of Bougainville and senior ABG Ministers and departmental heads; chairs of the 9 landowner associations; and representatives of ex-
combatants, women’s groups, churches, youth and business. It held its first meeting in August 2014 and began the work of developing a comprehensive negotiating position.

Perhaps the most radical and far-reaching institution building initiative involved the passage of the *Bougainville Mining (Transitional Arrangements) Act* on 8 August 2014 and the promulgation of a permanent *Bougainville Mining Act* on 1 April 2015. In conjunction these terminated the legal foundation for the original Panguan development, the *Bougainville Copper Agreement 1967*, and the mining interests it created. BCL lost the seven exploration tenements it held; its Special Mining Lease; its ancillary leases; and was granted only an exploration licence over the SML, valid for two years after the passage of the *Transitional Act*. The *Bougainville Mining Act* ended Papua New Guinea’s ownership of minerals in Bougainville, stating (Clause 12) ‘All minerals existing on, in or below the surface of land in the Autonomous Region of Bougainville cease to be the property of the State of Papua New Guinea’. Minerals on customary land would henceforth belong to customary landowners (Clause 13): ‘All minerals existing on, in or below the surface of any customary land in the Autonomous Region of Bougainville are the property of the owners of the customary land’. Land owners are granted a veto over exploration and mining on their land, and landowners of mining and ancillary leases and of other areas affected by mining are guaranteed at least a free 5 per cent carried equity in any project and a share of royalties, and will also benefit from a further royalty payment that must be allocated to community development in areas affected by mining. To protect the wider interests of Bougainville and to avoid any exploitation of landowners by unscrupulous developers, the ABG has exclusive power to grant tenements under the *Act*. Thus while no development can happen without the consent of landowners, only the ABG can provide the final approval for development to proceed.

The *Bougainville Mining Act* constitutes a fundamental realignment in the institutional framework for mining and Bougainville, shifting power away from the National Government and existing mining interests towards customary landowners and the ABG. It also realigns the distribution of costs and benefits from any future large-scale mineral development. As such it creates a number of the preconditions that the landowners and other Bougainvilleans indicated had to be achieved before they would consider reopening Panguna.

**Conclusion**

The institutional development outlined in the two case studies above is still very much in flux and it is too early to tell how effective it will be in promoting the principle of IFPIC, and in allowing the Indigenous peoples involved to deal effectively with large-scale extractive industry on their traditional lands. However the case studies do illustrate the capacity and determination of Indigenous peoples to engage in institution building, and they clearly illustrate the potential of the institutions concerned to combine elements of Indigenous values and organising principles with institutional forms capable of dealing with large-scale extractive industries.

The Kimberley case study illustrate the potential vulnerability of Indigenous efforts at institution-building in a situation where state actors have the capacity to insist on using decision making structures that marginalise Indigenous interests, as occurred when WA Premier Barnett terminated the LNG Precinct site selection process developed by Traditional owners and the KLC. The contrast with Bougainville, where a government responsive to landowners interests possesses the political authority to legislate for landowner ownership of minerals, is clear, and emphasises the huge importance of efforts to win a degree of political autonomy for Indigenous peoples.
The case studies also show that embedding Indigenous values and norms in non-Indigenous organisational structures creates significant challenges, as illustrated by the tension created when one landowner leader in Bougainville attempted to use the Umbrella Association to exert control over other people’s land in a manner inconsistent with traditional norms. Yet the ability of landowners to subvert this attempt and find an alternative coordination mechanism attests to the capacity of Indigenous groups to manage the tensions involved. In reality, they have little choice, because only by developing robust yet dynamic institutional forms can Indigenous peoples hope to give concrete expression to the norm of Free Prior Informed Consent.

References


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