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The right to negotiate and the miner's right: a case study of native title future act processes in Queensland

J.D. Finlayson

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Summary

The paper examines the circumstances in which a small gold mining company (Union Mining NL) was issued with an s29 notification for a future act by the Queensland State Government during 1997. What is remarkable about this case is first, that apart from s29 notifications for Century Zinc Limited's (CZL) Century mine, Union Mining NL is the only other mining company in Queensland to have been issued with such a notification to date; second, Union Mining NL was not operating an enterprise of the size of Century mine and therefore represents another, and different dimension of the resource extractive industry; finally, Union Mining NL's gold mine at Georgetown eventually closed, despite positive negotiations with the claimant group within the right to negotiate process. In the company's assessment, the Georgetown closure was not a consequence of native title as a development risk, but flowed from inefficient and untimely administrative and decision-making processes of the State Government.

The research concludes that in relation to the native title process in Queensland:

- these processes have been under utilised, apart from two exceptional cases (CZL and Union Mining NL);
- that the Queensland Cabinet granted Union Mining NL an s29 notification as a 'test case' only;
- that post-Wik, the Queensland Government's present administrative freeze on issues of new leases is tacit acknowledgment of the development risk now faced by the mining and pastoral industries from the issue of 800 potentially invalid leases;
- that Queensland State Government bureaucrats and politicians actively discouraged industry from applying the future act processes and cited the experience of Western Australia as illustrative of the damage to industry from the future act process;
- that the Queensland Government's political strategy of ignoring the native title future act processes has, ultimately, not been pragmatic. Nor did it follow the example of States like Western Australia where the majority of s29 notices proceed without objections;
- that the delays of the Queensland Government to issue Union Mining NL with an s29 notice, combined with the administrative embargo on grants of new leases or conversions from exploration to mining tenements, eventually made it economically necessary to close the mine with a loss of 40 jobs.
- that native title claimants must appreciate that the mining industry is not a homogenous body, but supports a range of industry types from small, individual 'tin scratchers', to multinational companies operating in a global economy. This means that packages negotiated between mining companies

and native title claimants will need to realistically assess what is possible and reasonable for the industry body.

The research recommends:

- that in order to facilitate industry development especially in mining, State Governments need to engage with native title processes in a timely and administratively efficient manner across all sectors of the mining industry;
- that the mining industry is increasingly apprehensive about the capacity of governments to support industry development, not least because of the kind of political strategies currently used to deal with native title issues;
- that more attention be paid to comparative situations (such as that between Queensland and Western Australia) for assessments of how State Governments might pragmatically respond to native title and mitigate development risks for industry;
- that regional framework and project agreements may have the potential to facilitate the interests of both native title claimants and industry bodies over future act matters. A current example of such arrangements is the Far West Coast Working Group in South Australia. The agreement involves 14 mining companies and several native title groups with the objective of establishing work and site clearance protocols for minerals exploration as well as decision-making processes about what level of activity can occur in specific areas covered by the agreement;
- that for all parties (government, industry and indigenous groups) there are strategic advantages to be gained from being familiar with native title legislation.

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Introduction

Until the High Court's decision of December 1996 in the *Wik Peoples v Queensland* many State Governments operated on the principle that pastoral leases extinguished native title. There seemed to be little anticipation of the potential for coexistence of native title on pastoral leases; although in Western Australia, the State Government has, since March 1995, consistently issued s29 future act notices (notices of future government actions) to accommodate the activity of the mining industry and to ensure issue of valid leases.

Overnight, the Wik judgement revised previously held assumptions amongst some stakeholders about what constituted a 'permissible future act', where it applied and when it attracted the right to negotiate (RTN) process. The impact of the Wik case was to reopen questions about future act procedures and the right to negotiate in relation to pastoral activities; not simply in relation to the mining industry.

Only two s29 notifications have been issued in Queensland to date; one set of notices to Century Zinc Limited (CZL) for Century Mine and the other, to Union Mining NL for their Georgetown mine. Despite the reluctance of successive Queensland State Governments over issuing s29 notices the Century Mine has now gone ahead. By contrast, Union Mining's operation at Georgetown has closed.

This paper concentrates on the situation of Union Mining as a small mining company with an application for the grant of a number of mining leases over a pastoral property in northern Queensland in the post-Wik climate. The case first came to my attention when Union Mining NL's Managing Director, Rob Murdoch, addressed a conference in Brisbane, Working with the Native Title Act, in June 1997. I was intrigued by the company's experience; first, because they had managed to get an s29 notification issued from the Queensland Government and second, despite the notification, they had closed down their operation. Why were the situations of Union Mining NL and CZL so different in outcome?

Several lessons are to drawn from the case study. Much of the literature describing the negotiations between mining companies and Aboriginal communities on Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* has dealt with relationships with large, often multinational companies. By comparison, the situation for various categories of mining under the *Native Title Act 1993* (NTA) is less well known, especially when agreements reached so far are subject to confidentiality. What is apparent is that a notion of economies of scale will need consideration when negotiating the financial aspects of agreements; and second, that the RTN process (as it currently stands) will have differential impacts on and transaction costs for different kinds of resource developers, not least because of the variation in resource extraction methods and hence the nature of the enterprise (Altman 1995).

Proposed amendments to the NTA currently include limitations and exemptions to native title claimants' RTN a range of future acts over land under

claim (Smith 1996). For indigenous groups this proposal remains a contested issue (see ATSIC 1996; 1997); although it is an option championed by many industry groups (Industry Commission 1996: 218–26). Since mining tenements and exploration licenses are frequently issued over pastoral leases, charges of 'uncertainty' and 'unworkability' with respect to the native title process have been frequently made from both resource development industries and pastoralists. In particular, pastoralists appear consumed by questions about what activities can be undertaken on their leases without invoking the future act procedures and the RTN process (see National Farmers Federation 1997).

The RTN process in Queensland

Since the introduction of the NTA, the Queensland Government has issued only eight s29 notices of intention to do a future act over land where native title exists or it is claimed to exist, and where the RTN applies. Seven of these notifications related to mining leases and compulsory acquisitions to do with the establishment of the mine proposed by CZL in north-west Queensland. The other notice related to the grant of mining leases to Union Mining NL, a small gold mining venture employing 40 people on their Georgetown mining site.

How and why did a relatively unknown company succeed in gaining this notification, given that s29 notices in Queensland are only issued with the approval of Cabinet? The story of what occurred and its aftermath forms the context of this discussion paper about the Queensland Government's strategic behaviour with respect to the RTN processes.

The background

In the period immediately following the High Court's Wik decision, the Queensland Government put an administrative freeze on the processing of all current and future exploration licences and mining leases. In part, this was a response to its earlier presumption that pastoral leases did extinguish native title and the Queensland Government's subsequent decision to issue licences and leases without engaging in the future act procedures laid down under the NTA. As a result of this position between January 1994 and the Wik judgement of December 1996, the Queensland Government issued 800 potentially invalid leases. The administrative freeze represented a strategic political response to reassess the State's position in relation to the now potentially invalid leases and the ensuing uncertainty felt from major sectors of the Queensland economy, namely pastoralists and miners.

Union Mining NL was caught up in the political decision to enforce an administrative freeze on the further issue or renewal of applications for mining grants. Their operation at Georgetown, west of Cairns, consisted of processing plants and earthmoving equipment to deal with the site-specific bodies of ore the

company were sequentially mining as each deposit was worked out. The majority of the ore deposits were held within exploration licences and these were being progressively upgraded to a grant of a mining tenement prior to extraction. This meant that a new mining tenement lease was required for each ore deposit. Usually the upgrade was applied for 18 months in advance of the need on the assumption of a six-month progression through the State bureaucracy. Most of the Georgetown exploration licences had been issued over pastoral land.

At the time of the Queensland administrative freeze, Union Mining NL had several applications for changeovers from exploration licenses to grants of mining tenements, with 16 mining lease applications moving through different stages in the Queensland Department of Mines and Energy's (DME) administrative system. Post-Wik, any decisions to grant a mining lease would now be encumbered by the additional considerations of the coexistence issue and attract the RTN process.

To appreciate the finer details of the Union Mining NL story, it is worth recapping the future act process for mining and exploration activities; mindful that these processes are currently subject to the proposed bill of amendments to the NTA introduced in the Federal Parliament in the first week of September 1997.

The NTA encompasses a range of future acts (ss226, 227 and 233) including a specific category of 'permissible future acts' (s235) akin to acts which can be carried out on freehold land. However, native title claimants and holders have a statutory right to negotiate over certain permissible future acts before they can legally take place. Permissible future acts which attract the RTN include the following (s26(2)):

- the creation or variation of a right to mine, including exploration, prospecting and quarrying (s253);
- the variation and extension of the period of a mining right, except where the variation or extension is a legally enforceable right; and
- the compulsory acquisition by government of native title land where the purpose is to transfer rights or interests to a party other than government (Smith 1996: 1–2).

As the legislation currently stands, when government believes land over which there may be a native title interest is affected by a proposal to issue a 'right to explore for minerals, or to grant, vary or extend a right to mine, then the government must advertise the proposed future act and give two months notice to:

- Any native title holders ('native title parties');
- Any registered native title claimants ('native title parties');
- Any representative Aboriginal or Torres Strait Islander body in relation to the area of the land or waters affected by the proposed grant;
- State or National Native Title Tribunal, acting as an arbitral body; and

- The miner or mineral explorer ('grantee party') seeking to benefit from the future act (National Native Title Tribunal [NNTT] 1995: 50).

No right to negotiate currently operates in an unopposed non-claimant future act notice; in off-shore areas; or where renewal of a licence or lease is a legally enforceable right (Smith 1996: 2).

Provided there is no response from the native title holders or any native title claimants within the two month notification period, then mining or exploration can proceed. It is worth remembering that the two month period of the s29 notice is the *only* window of opportunity for native title parties to secure the RTN since no retroactive right can be sought (Smith 1996: 3). Native title claimants or holders can only attract the RTN process when they have a claim registered with the NNTT. This also means that unless an overlapping claim is lodged during the two month period after the issue of the s29 notice then no extra burden of additional native title parties in negotiations is entailed for the mining company.

In some cases, the proposed activities can be fast-tracked through an 'expedited procedure' and other mechanisms provided for under the NTA (see Altman 1995: 6). If the expedited procedure does not apply then negotiations begin between the Government, native title parties and the grantee party. However, Government can signal that it is seeking to attract the 'expedited procedure' when notice of an s29 future act is publicly advertised. The grounds on which an 'expedited procedure' would be invoked are situations where the permissible future act does not 'involve major disturbance to any land or waters, and does not directly interfere with any community life or sites of particular significance to the native title holders or claimants (s237). ... The majority of future acts for which governments are currently seeking to attract the expedited procedure are exploration and prospecting licences' (Smith 1996: 3). The expedited procedure does not entail a 'full-blown right to negotiate' (Smith 1996: 3).

The expedited process is not discussed in this paper because in the case of Union Mining NL they were specifically seeking a grant of the right to mine, not exploration or prospecting licences. They were seeking an upgrade of 16 of their ore deposits from exploration licence to mining leases. Union Mining requires a separate mining lease for each body of ore and at least 10 leases a year are needed for project viability. The company maintain that it was not financially feasible for them to secure a whole-of-area grant of lease to mine because the area involved would be larger than permissible under a single mining lease.

The public advertisement of a Government's intention to engage in a future act requires that Government enable parties to make submissions to it (either orally or in writing) about the proposed mining activity, and importantly, to negotiate in good faith to reach an agreement with the other parties. The negotiation period extends, from the date the notice was first advertised, for four months (for proposed mineral exploration) and six months (for proposed mining). It is not mandatory for the NNTT to be involved in negotiations. However, at any

point in the negotiation phase any one of the parties can invite the NNTT to act as a mediator to assist in reaching an agreement. If no agreement is reached after six months of negotiation for a mining future act, then the matter is subject to an arbitrated determination by the NNTT.

Union Mining NL at Georgetown

The story of Union Mining NL's experience at Georgetown raises important questions about how grantee parties access legitimate and effective processes under the native title legislation. For Union Mining NL's operation at Georgetown this was not simply a question of procedural knowledge, but was increasingly a matter determined by the political strategy of the State Government.

Nevertheless, it would be misleading to infer that the Union Mining NL experience is wholly a misadventure due to the workings of either the Wik judgement or the particulars of the native title legislation. For resource exploration and resource developers like Union Mining NL, decisions about the company's future necessarily involve a constant assessment of risk factors to do with the legislative conditions impinging on their operation (such as native title legislation, and mining and environment rehabilitation requirements) and current market trends (such as the fall in gold prices and the diminished profitability of forward selling during 1997). It is the combination of all these factors which determines their economic viability and their future direction.

When Union Mining NL began in Georgetown in 1994 it was simply a processing plant to extract gold from ore deposits from 'a number of satellite mining operations within a 50 kilometre radius of the plant' (Union Mining NL 1996: 6). Over three years, 30 separate deposits were mined as open cuts and the landscape rehabilitated. By 1996, the success of the Georgetown operation had expanded to 'undertake the mining operation itself in order to maximise the grade and minimise the dilution' (Union Mining NL 1996: 6). Initially, the life expectancy of the Georgetown mining operation was six years, although the acquisition of additional crushing plants and earth moving machinery suggested the potential for an extended life as an ancillary operation. 'Acquisition of other gold resources in the area, and possible mining and carting of the Croydon gold resources enhanced mine life to a possible 10 years' (Union Mining NL 1996: 19). A feasibility study was conducted in 1996 to assess the viability of carting ore from Croydon to the Georgetown plant. However, carting ore from Croydon to Georgetown was not undertaken in 1997 as the company felt that DME's requirements with respect to approving the Environmental Management Overview Strategy for this project were too onerous for this to be an economical and viable alternative at that time.

As a small gold mining operation, Georgetown's continued operation was dependent on the periodic granting of leases for the mining of identified deposits in the vicinity of the processing plant. Given the dispersal of the ore deposits from the plant, the most economically feasible strategy for the company was to

maintain exploration interests over the deposits and upgrade these when needed. As Altman (1995: 3) has noted, in general, the differentiation between exploration and production phases of resource development for mining companies and the petroleum industry mean the native title process is likely to impact differentially across extractive industries like petroleum and mining.

In such a staged process, time is a prime commodity in maintaining economic viability. But in the post-Wik political climate of Queensland politics, the question of how to effectively engage the state's administrative system with the procedural requirements of the native title legislation in order to engage in a permissible future act, and therefore maintain production, became a dominant concern of the company. Inevitably a management decision was made of the assessment of the risk factors. The company's Quarterly Report for March 1997 carries this statement. 'The lack of a continuous flow of mining leases as a result of the High Court Wik Decision following Queensland Department of Mines and Energy delays in 1996, compounded by lower gold prices, has resulted in difficulties in the long term running the Georgetown Operation. The Georgetown type of operation is not suited to either current Department policies or to the implementation of the Native Title Act as it currently exists' (Union Mining NL 1997: 1).

The s29 notification process in Queensland

The State's position

Post-Wik, the Queensland State Government decided that any issue of a s29 future act notification would first require Cabinet approval. This is not necessarily the path adopted by other States. Western Australia has a high level of industry interest in exploration and mining, but since March 1995 and its failed challenge to the validity of the NTA legislation in the High Court, they decided to 'issue future mining titles only after an assessment of the possibility that native title continued to exist' (NNTT 1995: 52). [1] But 'in any case where native title remained a possibility, the future act regime would be used' (NNTT 1995: 52).

In South Australia, the State Government has been as proactive in its establishment of its own future act regime with State legislation as is possible under the NTA. The experience of the Western Australian and South Australian Governments confirms that it is possible for a State Government regime to deal with all s29 notices post-Wik.

The Western Australian Government was equally careful to use tenure histories where 'a proposed mining title reveals grants that may not be inconsistent with the continued existence of native title, such as pastoral leases issued with a reservation in favour of Aboriginal people' (NNTT 1995: 52). This decision meant that the Western Australian mining industry was in a very different position from that in Queensland following the Wik decision.

Post-Wik, the Queensland Government faced a situation where they had issued 800 potentially invalid leases to mining companies and interests on pastoral leases after 1 January 1994 and until December 1996. No permissible future act s29 notifications had accompanied any of these licences or grants of leases. However, the situation was worse than simply 800 potentially invalid leases on pastoral land. In a press statement of 31 January 1997 the Queensland Minister for Mines and Energy, Mr Tom Gilmore MLA, estimated that a total of 4,601 mining tenures had been granted in Queensland after 1 January 1994. The subsequent freeze over all new applications and grants of renewals for mining and exploration tenures on non-freehold land was estimated to affect 2,500 tenures in a full year (Pinnock 1997: 1).

To add to the industry's frustrations, the Queensland Government had also made it clear that on the basis of their legal advice the State could not be compelled to issue an s29 notice and all applications would be considered on a case-by-case basis.

Initially, the Queensland Government was not prepared to issue s29 notices to Union Mining NL. Admittedly, CZL had managed to acquire the necessary notifications; although in this case too, the Queensland Government had initially attempted to enable the mine to proceed outside the NTA framework. Indeed, it was pressure brought by the native title claimants, and later CZL that forced the State Government to agree to work within the native title legislation and the RTN process. However, the Century mine, unlike Union Mining NL in Georgetown, represented a significant resource development prospect in the Gulf Mineral Province with substantial financial gains to the State in revenue and employment opportunities. If economic imperatives were the required incentive in the CZL case for the State Government to engage with the NTA, by contrast, Union Mining NL had less economic leverage to exert in their negotiations with the Queensland Government. Yet in actual terms the company's operations provided 40 jobs in a remote town of 300 people with few alternative employment opportunities.[2]

There is some dispute about the exact date of Queensland's issue of the s29 notice to Union Mining NL and consequently of the two-month notification period. The State Government claims they issued an s29 advertisement before the administrative freeze was partially lifted on 31 March 1997 (*The Courier Mail* 18 June 1997).[3] Queensland further claims that Union Mining NL sought issue of an s29 notice on 21 March and that Cabinet approved it on 24 March and the notices were advertised shortly thereafter.

The importance of the notification date lies in the question of the role of the two-month notification period as a contributing factor in the closure of the mine. Union Mining NL simply could not continue because access to ore had been denied to the company. What leases it had left were of marginal interest given the low gold prices. The failure of a grant of new leases meant the company would be forced to operate at a loss if it intended to wait longer on the grant. Some of the lease applications in question covered ore deposits of better grade. This would have sustained the operation for some time and possibly through the period of

downturn in gold prices. However, the losses incurred whilst waiting for action and the write-down needed upon shutdown, along with limited cash availability for this project eventually made it impossible for Union Mining NL to reopen the Georgetown mine. Certainly lower prices impacted on the project's sustainability. At times of lower prices the company needed access to high grade ore deposits and without such access the operation could not continue (pers. com. Rob Murdoch).

What is certain is that early in 1997 Union Mining NL was actively seeking a way to engage with the future act processes under the NTA in order to secure a valid grant of leases. Indeed, Union Mining NL's correspondence records their request to Queensland for issue of an s29 notice as early as late February/early March 1997.[4] In the event, the Queensland Government did not issue the notice until 19 April and this put the end of the two-month notification period at 19 June 1997.

It is equally clear that during the earlier stages of Union Mining NL's application to government for an s29 notice, that they were actively dissuaded from involvement with this process. Union Mining NL's management received clear advice from State bureaucrats that 'as it stands the RTN process is complex, time consuming and costly'.[5] According to a DME spokesperson, the State faces the logistical problem of applying the RTN process to 500 outstanding applications, 1,500 new applications and the 1,000 renewals received each year in Queensland (pers. com.)

To invoke the RTN processes for this number of applications was likely to cause major administrative problems for the DME and to personnel in the regional offices. And yet Western Australia was engaging in just such a process for hundreds of exploration licences and mining leases. The DME has subsequently estimated the costs of implementing the RTN process based on the expectation of 1,500 application for s29 notices per annum. In their estimate, to issue these notices would cost Queensland $30 million; companies $60 million, and an overall administrative procedural cost of $1 million (pers. com. DME; see Table 1, estimated costing of RTN processes for Western Australia).[6]

The Queensland State Government had many reasons for actively discouraging Union Mining NL. The Government was of the view that the future act process had uncertain outcomes, entailed prohibitive costs and was likely to be time consuming in the extreme. Indeed, they cited Century mine as a case in point. The State Government further advised Union Mining NL's management that what could be learnt from the Western Australian experience was that 'only a minority of applicants had avoided negotiations, and a backlog has developed with the remainder for which there have been no successful negotiated outcomes to date' (files, Union Mining NL March 1997). They estimated that the RTN processes were delaying projects by at least 14 months. Cabinet's decision to issue an s29 notice to Union Mining NL was part of an experiment according to a DME spokesperson, to 'see if Aboriginal people would lodge claims against small miners' and not simply against large mining companies.

Table 1. Estimated RTN processes, Western Australia

Unit	Total costs $	Attributable to RTN %	Costs attributable to RTN $	Pro-rata RTN per year $
Western Australia Government, 1995–96				
Native Title Unit, Premier & Cabinet	1,562,000	30.0	468,600	
Land Claims Mapping Unit, WALIS	269,000	20.0	53,800	
Dept. of Minerals and Energy	1,750,000	95.0	1,653,000	
Dept. of Land Administration	596,000	80.0	472,000	
Land Claims Unit, Crown Solicitors Office	1,000,000	90.0	900,000	
Total			$3,544,400	$3,544,400
NNTT May 1995 – June 1997				
Future Act Unit	2,010,000	100.0	2,010,000	
Members assigned to arbitral matters	310,000	100.0	310,000	
Total			$2,320,000	$1,160,000
Total annual costs to Western Australia Government and NNTT				$4,700,000

During research for this paper an official from DME confirmed the State Government's view of the unworkability of the RTN process. The official referred to the situation in Western Australia as the benchmark of workability. According to their understanding only two applications of the RTN process had 'come to fruition out of a total of 4,000 applications in Western Australia'.

Such claims should be scrutinised against data compiled by the NNTT's Future Act Unit which operates specifically to deal with s29 processes in Western Australia. As of 24 July 1997 the NNTT had received 9,948 exploration licences and mining tenement applications from Western Australia. Only 672 of these applications were involved in further negotiations (see Table 1). In short, the objections raised by Queensland for not using the s29 process on the basis of Western Australia's experience are not fully informed. Certainly, there are transaction costs associated with the NTA, but there are little data to confirm that independent of strategic behaviour they would be unreasonable or exorbitant (see Altman 1995; Industry Commission 1996).

The Queensland Government, in response to the clamour for action from resource developers over their refusal to process renewals, extensions or new

issues of mining leases and exploration licences, proposed a two-tiered system of indemnity insurance to recover the administrative costs of processing the expected avalanche of s29 notices. As reported in *The Australian* (11 March 1997) the Queensland Government proposed a two-tier system not only to recover the administrative costs of processing s29 notices, but also to deal with possible compensation payments where companies engaged in future acts outside the native title processes. In the first tier, Government proposed that large mining companies would make a financial contribution from their profits to cost recovery and in the second tier, the State Government would provide the necessary funds to cover pastoralists' costs associated with future acts.

The Government further proposed a 'risk assessment' scheme (high, medium or low risk) based on the likelihood of a native title claim being lodged over land where companies had interests (Queensland Mining Council Circular, 14 March 1997). Five risk categories were identified with low risk areas comprising freehold/reserves and well developed agricultural land; medium risks in cleared land (developed and unused) and vacant Crown land; and finally, high risk categories of vacant Crown land and areas under claim.[7] Needless to say, industry groups were not impressed by such a scheme. Nor did it provide resolution for the small mining companies and individual miners.

Other options to facilitate a 'permissible future act'

A non-claimant application

Queensland suggested Union Mining NL lodge a non-claimant application instead of seeking Government issue of an s29 notice. A non-claimant application seeking a determination of native title for a particular area of land can be lodged by 'Commonwealth, State, Territory Governments, local government authorities or persons who hold an interest in land or waters' (NNTT 1995: 46). However, in practice, this was not a realistic or workable solution as the State, not Union Mining NL, was the lease holder and so the State had to lodge the application for a determination. A further possibility for Union Mining NL was an agreement with the native title claimants under s21 of the NTA. No mention was made to them of Government being able to seek, on their behalf, an 'expedited procedure'.

s21 agreements

It is apparent that as early as March 1997, Queensland was prepared to issue new mining tenements where companies had secured agreements with Aboriginal native title parties by going outside the framework of the RTN processes. These leases, however, would be considered 'high risk' arrangements and were likely to attract the penalties of the indemnity scheme and potentially also attract later claims for compensation by native title claimants. Presumably, these agreements could be made under s21 of the NTA to authorise future acts or

they could be made entirely outside the NTA (with the potential of being legally invalid and in the future, subject to compensation claims from claimants).

However, as early as January 1997 Union Mining NL was aware of the impending high risk situation with respect to future production rates if new leases were not forthcoming. Unless it was possible to gain a grant of mining leases over the deposits in the vicinity of the mine the company would have to either concentrate on exploration outside Australia or shutdown the Georgetown plant. Time was of the essence for the viability of the Georgetown mine. Consequently, from January 1997 onwards the company began lobbying the State Government for an s29 notice.

Early in the State's administrative freeze, Union Mining NL began to independently seek negotiations with Aboriginal interests. After the s29 notice was issued, the Ewamian peoples lodged an application with the NNTT for a determination of native title over land in the Georgetown area. Union Mining NL then turned its attention to the possibility of making an agreement with the Ewamian peoples through their Native Title Representative Body, the North Queensland Land Council. A draft agreement was developed and redeveloped during June and July. Ewamian peoples were not opposed to Union Mining NL's continued activity and were happy to expedite a grant of the leases through a s21 agreement. In return, they wanted a financial package, guarantees of site protection issues, employment and training opportunities and the Queensland Government as well as Union Mining NL to be signatories; as is required for ratification under s21 agreements.

It is possible that the option of pursuing an s21 agreement was flawed from the beginning. Industry has recognised the value of s21 agreements as alternatives to the RTN process and as 'framework' agreements to establish agreements on a local or regional basis. The Cape York Heads of Agreement is often held up as a model of what is possible. However, a draft report from the Industry Commission (1995) spelt out the pitfalls from industries' point of view in the present legislation on regional agreements.

- First, they do not appear to be any different from normal contracts.
- Second, their effectiveness depends on ensuring that all interested parties are engaged in negotiations at an early stage. Otherwise, an agreement among some of the parties may need to be renegotiated to accommodate others. It appears that to be authorised under the NTA, the agreements may only be struck between native title holders and governments. However, the NNTT has argued that the parties can include claimants and beneficiaries of a future act such as mining companies (French 1995: 16–17).
- Third, it is difficult to see how agreements struck between peak bodies (such as the Cape York agreement) can be used to ensure compliance by individual members.
- Fourthly, like any agreement, they cannot be enforced against third parties (Industry Commission 1995: 227).

Union Mining NL was aware of the lack of legal certainty involved in such agreements especially if the State was unprepared to be a signatory. Of primary concern was the impossibility of guaranteeing that at some time in the future other claimants might not suddenly appear and question the validity of the original agreement. Agreements under s21 may not be as legally secure as the s29 processes. Smith confirms this possibility: '... grantee and government parties are assured that the outcome of the right to negotiate is a legally valid future act, regardless of the eventual native title status of the claimants. Once done, a future act cannot be made invalid by later claims over the same land. To that extent, the right to negotiate as it currently stands provides significant certainty about the legal validity of future acts' (Smith 1996: 11).

This was the kind of certainty Union Mining NL was seeking. Such certainty was not guaranteed under s21 agreements despite its potential to short-circuit the lengthy period for s29 negotiations. But the gains and losses of each process would have to be carefully assessed by industry.

A further flaw of s21 agreements was the lack of an articulated process for registering such an agreement under the NTA. This meant any agreements struck between parties would not be legally binding against other (third) parties. Nor would it circumvent the possibility of future overlapping claims from other groups claiming interests in the land in question. Despite these caveats, Union Mining NL's management continued to pursue an agreement, in the belief that securing an agreement with the local Aboriginal groups in Georgetown (Ewamian peoples) would circumvent the statutory processes with the mandatory s29 time frames for notification, negotiation and/or arbitration.

What Union Mining NL management was working towards between January and June 1997 were the options available to them for a speedy resolution of the impasse over the future act processes under the Queensland administrative freeze. The marginality of the Georgetown operation made progression of the matter urgent since a small company could ill afford loss of production. However, it was also clear to Union Mining NL's management as early as April 1997 that the mine would have to close given the lengthy delays resulting from the Government's freeze, and as the company saw it 'the time involved with the NTA negotiations' and the impact on stand-down time for the plant.[8] The company had to made a strategic decision in the context of their overall exploration and investment plans. These concerns were the primary basis for the decision to close the Georgetown mine; at least this is the view taken by the North Queensland Land Council in their media release on the mine's closure. The release states, 'The North Queensland Land Council stresses that the closure of the mine was not the result of any action taken by the traditional owners but an economic decision by Union Mining' (North Queensland Land Council Aboriginal Corporation 1997).

Union Mining NL management concurred with this view. In an article about the closure in *The Courier Mail* (18 June 1997) the company's managing director 'blamed the State Government's freeze on issuing mining leases in the first three months of this year as the reason for the shutdown. He said the State

Government froze applications after the High Court Wik judgement on December 23, 1996, and refused to issue section 29 notices under the Commonwealth Act which may have enabled mining permits to be approved.... for four months we weren't allowed to deal with the federal Act'.

The Queensland Government's story of their relationships with Union Mining NL argues a different sets of claims; notably that the Government issued an s29 notice before the freeze was partially lifted on 31 March. This assertion does not seem to conform with the subsequent timetable where the end of the notification period for the s29 notice was June 19, thereby making the initial notification two months previously (that is, 19 April).

The State Government also claimed Union Mining NL was in breach of some of its security deposits for environmental rehabilitation and that this had resulted in a hold up of the future act process. Union Mining NL states that to their knowledge there were no problems in this regard at the time of the Wik judgement nor subsequent to it. Yet the wider issues of environmental rehabilitation and management with the Queensland mining industry has been subject to public criticism and calls for greater scrutiny of departmental procedures following a series of revelations in *The Courier Mail*. In April, *The Courier Mail* reported that 'Crown law advi[ses] that two-thirds of the security deposits held by the Mines Department to ensure the rehabilitation of mine sites were worthless and did not conform with the [Queensland] Mineral Resources Act [1989]' (see *The Courier Mail* 12 April 1997).

In a war of administrative hurdles and political tactics over future act notices and the NTA in general in Queensland, all parties—the mining industry, Aboriginal people and the State Government—seemed to have lost out. The fluctuations in the price of gold will certainly impact on the viability of exploration in Queensland. Michael Pinnock, Executive Director of the Queensland Mining Council, observed 'the falling price of gold would have a significant impact on exploration in Queensland' (*Canberra Times* 9 July 1997). Clearly, it would have been in Queensland's best interests to facilitate Union Mining NL's use of the NTA, rather than obstruct their use of it since the company has now closed its mine, cancelled the employment of 40 people at the site and arguably has diminished the opportunity to work successfully with native title claimants to facilitate mining. Moreover, Queensland has lost investment potential with the decision by Union Mining NL management to concentrate on exploration outside Australia and possibly served to dissuade other small mining companies. The magnitude of the State's loss is relative however as 'work is proceeding on the Mount Isa gas pipeline, the $350 million Ernest Henry copper-gold mine and BHP's $450 million Cannington base metals mine' (*The Courier Mail* 19 April 1997). Although Queensland has major resource development projects they also have a large number of smaller scale miners and mining interests whose value the State may gauge in political, rather than economic, terms.

Altman (1995) discusses the options for strategic behaviour in the field of resource development with the associated risk-assessment strategies for industry,

government, and indigenous parties in dealing, or not, with the NTA. In his view 'there is a possibility that delays in negotiation, under the guise of strategic behaviour, will have real long-term costs. Because past acts have been validated and renewals guaranteed, there is no evident downturn in exploration and mining since the Mabo High Court judgement (Australian Mining Industry Council 1994).[9] But even normal processing of exploration licence applications has a long lead time, varying between States from one to three years. If exploration licences are not processed then there is a distinct possibility that there will be a hiatus in resource development in the future: mining and, to a lesser degree the petroleum industry (and ultimately the Australian economy) will suffer, but it is unclear if it is the NTA that will be at fault. The costs of this strategic behaviour will be most acutely felt by small exploration and mining interests unless they move quickly to negotiate with native title parties under the NTA's future acts regime: large companies will be at greater liberty to shift their focus offshore' (Altman 1995: 10).

This critique goes to the heart of the issues facing Union Mining NL's use of the s29 future act processes at Georgetown.

Conclusions

To date, Union Mining NL is one of only two mining companies in Queensland to secure State Cabinet approval for issue of an s29 permissible future act notice. Union Mining NL stands by way of contrast in industry scale with the other company (CZL) which secured s29 notices for the future acts process.

Union Mining NL is a smaller company than CZL with essentially an exploration focus. As a company it lobbied governments independently of an industry representative such as the Queensland Mining Council and single-handedly agitated for access to the future acts process and to encourage changes to the NTA. Few, if any other resource developers in Queensland have followed the trail that they blazed. Most have preferred, like the Queensland Government itself, to wait for Commonwealth amendments to the NTA and/or the introduction of a State alternative future act regime. Importantly, Union Mining NL's initiatives and preparedness to negotiate gained positive responses from Aboriginal claimants.

Union Mining NL's success in gaining access to the RTN process is testament to the energies of the company's management who pursued the issue at State and Federal levels of Government. Why the Queensland Cabinet decided in their favour is not exactly clear. In some quarters it was suggested that approval was given as an experiment to test the waters on how small resource developers might fare under native title claims and the RTN process and whether it was only the larger companies and their capacity for compensation which were attractive to potential native title claimants, bearing in mind the 800 or so potentially invalid leases that were issued.

The Union Mining NL case confirms the incentive, even in small-scale operations, for industry to work within legislative processes which ensure legal certainties. Indeed, one of the frustrations of their experience was the refusal of the State Government to abide by the due processes of the NTA and, as Union Mining NL argues, the State Government's duty of care to implement due legislative processes. Time was a critical factor in the economic viability of Union Mining NL's operation.

However, it is equally clear that mining operations differ and that operations smaller than Union Mining NL may not be as fully informed or as responsive to the issues of negotiation and consultation with claimant parties as are many larger companies now.[10] Increasingly, for all parties, there is a strategic advantage in becoming familiar with the native title legislation and its specific application to the particular resource industry. Large companies are often at an advantage over small companies and individual miners, in respect to access to assistance from peak industry bodies and with representation of their concerns in state and national forums. Union Mining NL liaised with the peak industry body during the time they sought issue of an s29 notification but the Queensland Mining Council did not feel able to directly assist the company other than to provide moral support.

Large companies appreciate the importance of full knowledge of legislative processes like the NTA and their need to engage with it to minimise potential impacts on production strategies (see Altman 1995). While large corporations might have greater flexibility in what can be offered or packaged as agreements and compensation incentives, it is also true that smaller companies of Union Mining NL's size will have to adjust their expectations when dealing with native title claimants and their representatives; and vice versa.

For native title claimants and representative bodies, working with smaller industry bodies may require different strategies to those more familiar with engagement with multi-national companies. Marginal operations may have limited cash resources on which to cover the financial costs involved in negotiations and on which to forge agreements, but may be willing to expand their options in other arenas, for example, access to infrastructure; training and human resources programs; joint ventures; preferential service contracts. It may also be in the interests of all parties to adopt a strategic process for expediting procedures for small mining companies through potential regional agreements in prospective areas; a case in point is the recently concluded regional agreement between 14 mining companies and Aboriginal native title groups in South Australia (the new body is known as the Far West Coast Working Group).[11] What this case study shows is that it has not been in the best interests of either the Ewamian peoples or Union Mining NL to have the mine close at Georgetown.

In an *Australian Journal of Mining* editorial the issue of sovereign risk in Australia for overseas investment was discussed in terms of the impact of the NTA. Mr Jerry Ellis, President of the Minerals Council of Australia made these comments: 'While it is too early to quantify native title considerations as part of

the cost of land access, the uncertainty and delay inherent in the current native title procedures are resulting in deferral of expenditure or the switching of investment to areas where the procedures of the Native Title Act do not apply' (Ellis 1997: 4). This paper suggests that State Governments can play a substantial role themselves in either exacerbating such delays, or ameliorating them.

The experience of Union Mining NL indicates a point endorsed by other resources developers; in part it is up to the industry itself to overcome delays and it requires a willingness to negotiate, to maintain a relationship with Aboriginal people and generally to work with the requirements of the native title legislation (not withstanding the proviso of certain amendments). Also Native Title Representative Bodies and claimants must be aware of the different degrees of flexibility in negotiations between large and small companies.

Two points have potential policy significance. One is that the Federal Government's 'once only' amendment of present RTN procedure over exploration and mining may in fact be counterproductive in terms of workability. Father Frank Brennan SJ made this point in evidence to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund regarding the Native Title Amendment Bill 1996. In his view, by collapsing negotiations for exploration with project development one invited claimants to think in terms of 'mega-negotiations'. Exploration was likely to be challenged since the 'one-stop' RTN process could not only make seeking instructions from native title claimants difficult with all project phases jammed together but 'create a situation where you set up an expectation, particularly among Aboriginal claimants, that any prospective exploration could be a 'Century Zinc' at the end of the process' (Commonwealth of Australia 1996: 24; see also remarks by the Aboriginal and Torres Strait Islander Social Justice Commissioner Dodson (Dodson 1996)). A caveat on the virtue of offering the RTN at exploration in Altman's view is that native title claimants come to expect a 'sweetener' that small companies often cannot afford (Altman 1995).

The tendency for both claimant parties and State Governments to think of extractive industries as an homogenous body already exists; in a recent survey of 30 Western Australian mining companies concern existed that 'precedent setting, Aboriginal financial expectations and inexperience on both sides in reaching such agreements have hampered the process' (Industry Commission 1996: 228).

Michael Pinnock, Executive Director of the Queensland Minerals Council argues that 'There is a willingness among our companies—admittedly, mostly the middle-sized and larger operations—to negotiate commercial and social packages which will enable projects to proceed' (*The Courier Mail* 30 May 1997).[12] Equally, all companies have to realise that a reasonable offer will be necessary as restitution for loss of access or enjoyment of land, damage to cultural property and curtailment of customary practice, or impingement on spiritual attachment. The issue of compensation and how this is to be assessed is currently untested. But there is every indication that in the constitutional pursuit of 'just terms,' like

the above, compensation will be integrated into how native title holders are assessed.

The second policy issue is the 'Big Picture' question raised by this case study; how to facilitate the projects of smaller companies and what combination of packaging for social and economic benefits to the native title parties might be proposed in return for fast-track RTN procedures? In States like Queensland and Western Australia, the issue of future act processes will impact significantly on this smaller-scale sector of the mining industry.[13] One solution might be to develop different administrative processes both at the State departmental level, and under the NTA, to deal specifically with different industry sectors.[14] Another might be the regional agreements process (see Howitt 1997). From the mining industry's perspective it is increasingly clear that government in Australia needs to sponsor a more proactive approach to industry development; for miners, this is not confined to issues of native title (see articles by J. Webber *The Australian*, 18 August 1997 p.18; and D. Kirkwood *Business Queensland*, 4 August 1997 p.8).

It remains to be seen whether these and other issues raised by the case study will be addressed by the detail of the Federal Coalition Government's bill of amendments to the *Native Title Act 1993*.

Notes

1. The Western Australian Government's strategy was to flood the NNTT and clog the system.
2. Union Mining NL pointed out that their mining operation was the principal employer in Georgetown and contributed approximately $1.5 million to the local economy with a loss, after the closure of the mine, to the State and Federal Governments of over $1 million in revenue and taxes.
3. Premier Borbidge announced a partial lift of the freeze on 13 March 1997— this is the date quoted by Mr Michael Pinnock, Executive Officer, Queensland Mining Council, to the Working with Native Title Conference, Brisbane, 16–18 June 1997.
4. These dates are confirmed by Union Mining NL management's acknowledgment that by January 1997 they recognised their three options as:
   a) using political pressure to lift the administrative freeze;
   b) convincing the Queensland Cabinet to issue a s29 notice no later than the end of February 1997;
   c) reaching agreement with potential native title holders through the North Queensland Land Council (see paper presented by Mr Rob Murdoch to the Working with Native Title Conference, Brisbane, 16–18 June 1997).
5. Compare this with details from Western Australia provided to the Industry Commission on mining tenement applications subjected to the RTN process or

expedited procedure between 16 March 1995 and 2 August 1996 (Industry Commission 1996: 214).

6. Unfortunately, no details were provided for such an estimate; although presumably some of this costing is linked to the two-tier indemnity system proposed by the Queensland Government. See also an article by Don Kirkwood in *Business Queensland* 4 August 1997 about current Queensland Government policy with respect to the RTN process and the Government's decision not to fund extra staff in the DME to facilitate native title matters.

7. See details discussed in a paper presented by Mr Michael Pinnock, Executive Officer, Queensland Mining Council, to the Working with Native Title Conference, Brisbane, 16–18 June 1997.

8. The company has pointed out that they did not find the NTA per se a problem. The problem was the time involved in the whole process (pers. com. Rob Murdoch).

9. The Industry Commission Report (Industry Commission 1996) and the Human Rights and Equal Opportunity Commission Commissioner Dodson (Dodson 1996) concur with this conclusion.

10. Some estimates by peak mining industry bodies in Queensland suggest that in Far North Queensland alone, there are at least 200 family mining operations working on 4,000 mining leases. Although these mining operations are small in terms of total State production they often have economic significance for the region in which they operate. Moreover, it is standard practice for prospecting to open the gateway to mining, since once a deposit is identified on a prospecting or exploration licence it is then traded through the competitive market place to companies with the financial capacity to mine the deposit.

11. See D. Frith, *The Australian*, August 19, 1997 p. 24.

12. See also results of survey of 30 mining companies in Western Australia on responses to NTA reported in Industry Commission Report 1996: 228.

13. The Queensland Mining Council estimates that in Far North Queensland alone, about 200 small family miners operate on about 4,000 mining leases. These are short-term leases covering small areas. The sector has a high turn over of renewals and transfers essential to the nature of their exploration and extraction activity.

14. One solution may be to develop a standard administrative process for classes of activities as occurs in other areas in law such as conveyancing or building contracts. The point is to develop an administrative process which takes the controversy out of it; perhaps the experience of the land councils in the Northern Territory should be examined for issues of workability in exploration and project development (see Industry Commission 1996: 217–18).

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