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Resources Policy

journal homepage: www.elsevier.com/locate/resourpol

Indigenous engagement in Australian mine water management: The alignment of corporate strategies with national water reform objectives

Marcus Barber*, Sue Jackson

CSIRO, Ecosystem Sciences, 564 Vanderlin Drive, Berrimah, Darwin, NT 0820, Australia

ARTICLE INFO

Article history:

Received 22 June 2011

Received in revised form

12 December 2011

Accepted 13 December 2011

Available online 11 February 2012

Jel classification:

Q25

Keywords:

Water resources

Indigenous people

CSR

Water management

Corporate strategy

ABSTRACT

In the mineral rich but arid Pilbara region of Western Australia, managing water constraints represents a significant challenge to the mining sector where local depletion is a growing problem. Conversely, the expansion of pit dewatering is creating surface water excess in localised areas of potentially high social and ecological significance. Indigenous people are by far the longest term residents of the Pilbara region and express a range of strong concerns about past, current and future water-related developments in the area. They also have proprietary interests in water recognised by the common law and protected by federal native title legislation. Rio Tinto Iron Ore (RTIO), commissioned the authors to undertake research to improve corporate understanding of Indigenous interests in water and to provide advice on its consultation processes. We argue here that a more sophisticated account of Indigenous water values is a necessary but, on its own, insufficient measure to achieve RTIO's desired long-term goals. We suggest an equivalent process of understanding and documenting corporate water values and interests, actions to improve trust and credibility in the relationship between the parties, and leadership in wider catchment management as necessary complementary actions. These actions follow logically from internal corporate commitments regarding water and Indigenous people and from recognition of their property rights, but also align directly with major trends in the National Water Initiative, the key water policy framework for Australia. Therefore significant synergies exist between internal corporate aspirations, the evolving legal regime, and wider governance agendas for a key limiting resource. Our analysis is relevant to a range of CSR and water resource contexts across the wider mining sector.

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Introduction

Business strategies for achieving Corporate Social Responsibility (CSR) and 'triple bottom line' (Elkington, 1998; Richards, 2009) outcomes which enhance the 'social license to operate' (Richards, 2009) are now an established aspect of the corporate landscape (Luning, *In press*). Although the terms used can vary and both they and their consequences are subject to critique (Vanclay, 2002; Hutchins, Walck et al., 2005; Langton and Mazel, 2008; Crowson, 2009; Idemudia, 2009; Campbell, *In press*; Mutti, Yakovleva et al., *In press*; Slack, *In press*; Warnars, *In press*), such strategies are designed to provide both guidance and impetus to company activities that enhance corporate outcomes and entitle companies to a social license to operate. In their external engagements, resource companies (like many other companies) have historically tended to identify the community in a simplistic and undifferentiated way (Jenkins 2004 cited in Hutchins, Walck et al., 2005), but effective triple bottom line and/or CSR strategies increasingly require corporations to understand the differences between

stakeholders and the kinds of engagement strategies which are considered appropriate (Luning, *In press*). For mining companies, successful dialogue requires going beyond the conventional limits of mining practice and discourse to include issues such as environmental sustainability, cultural diversity, economic equity and social justice (Solomon, Katz et al., 2008). The Australian mining sector has adopted CSR policies and aspirations and it operates in areas containing high numbers of Indigenous Australians. Many initiatives emerging from those aspirations have focused on Indigenous people, including employment targets and programs as well as the recognition of the interests of Indigenous landowners (Godden, Langton et al., 2008). Mining companies such as RTIO, which are seeking best practice operations, are continuing the process of Indigenous engagement¹ and the aspiration to better understand Indigenous water values forms part of that recent engagement effort.

¹ Recently, corporate Indigenous engagement strategies within RTIO have resulted in binding commercial agreements between resource companies and native title holders, significantly strengthening obligations on both sides beyond the more common voluntary 'good neighbour' community programs or internal corporate CSR policies. The agreements represent a further step away from the conventional distinction between legal obligations and voluntary CSR (Velsquez, *In press*).

* Corresponding author. Tel.: 088 944 8420

E-mail address: marcus.barber@csiro.au (M. Barber).

In jurisdictions such as Western Australia which has not formally recognised Indigenous land rights, the recognition of native title by the Australian High Court in 1992² provided a legal framework within which the resource sector could address Indigenous resource rights and interests (O'Fairchellaigh, 2004), including rights to water. The High Court's *Mabo* decision and the *Native Title Act (NTA) 1993* made possible some recognition of Indigenous rights to inland waters under Australian law (Jackson and Altman, 2009). In general terms, native title is capable of legal recognition in limited circumstances in Australia: namely, where there has been no extinguishment of native title (by, for example, a grant of freehold title), it can be proven by an Indigenous claimant group or agreed by government that native title exists, and the particular native title or native title rights sought to be established are regarded by the courts as consistent with the common law principles³ (O'Donnell, 2011).

Under the NTA, rights to hunt, gather and fish for the purposes of satisfying the personal, domestic or non-commercial needs of native title holders can be exercised free from water licensing or permit restrictions that otherwise apply to such activities. Typically, as recent commentators have observed (Godden and Gunther, 2010), native title rights in relation to water where recognised are not interpreted on the evidence as conferring an interest akin to a fee simple, that is beneficial (private) property right, but rather a '*right to water as ancillary to the exercise of native title rights*'. This narrow interpretation has been used to preclude Indigenous people from accessing commercially viable volumes of water and it limits the extent to which native title holders can control access to water and make decisions about how the waters are used (see O'Donnell, 2011 for a full discussion of these matters).

Godden and Gunther (2010) argue that in light of the acknowledged limitations of judicial interpretations of native title over the post-*Mabo* era,⁴ negotiated outcomes and agreement making have been the preferred strategy of increasing numbers of Indigenous people over pursuing claims through the litigation process. This trend is evident in the Australian resource sector, where there is now widespread support for agreement making as the preferred method by which to address issues surrounding the recognition of native title (O'Fairchellaigh, 2004). Following a period of internal 'cultural change' in the company (Harvey, 2004), RTIO has been at the forefront of native title agreement-making in Australia and RTIO has recently negotiated a number of regional agreements as part of the settlement of native title claims to land and waters in the Pilbara (Cleary, 2011). Mutually satisfying native title outcomes are crucial to relationships between mining corporations and Indigenous land owners, but despite the importance of water on both sides, there is little published evidence that Indigenous proprietary rights in water and mine water management has been a major topic of discussion. The absence of evidence may be attributed to the fact that there is yet to be a thorough analysis of outcomes from Australian agreements with mining corporations. Although the implications of some of our data for such an analysis are clear, we do not further analyse the legal and/or native title framework in this paper (but for a fuller description of the general status of Indigenous rights and interests in water, see (Tan, 1997; Bartlett, 2004; Behrendt and Thompson, 2004; Jackson and Altman, 2009; Godden and Gunther, 2010). Instead we explore

some implications of internally generated corporate aspirations for both Indigenous engagement and water management, and demonstrate how these implications align with key aspects of national water reform policy. In this sense, we identify processes and actions which are complementary to the basic recognition of Indigenous proprietary rights required of corporate actors by native title legislation, noting how those processes and actions position corporate actors well for emerging wider water governance regimes.

In considering Indigenous water values and their relevance to the Australian mining sector, we fill a gap in the literature on resources policy. The literature acknowledges that the impacts on water quality and quantity are among the most socially contentious aspects of mining projects (Bebbington and Williams, 2008; Velásquez, *In press*). But consistent with the above observation about the undifferentiated way in which community engagement is undertaken, the existing literature does not give sufficient attention to the distinct rights, values and interests of Indigenous people with respect to water and its management. Reconceptualising an undifferentiated 'community' as a series of 'stakeholders' is an improvement, but the stakeholder model still tends to reduce the unique rights, deep cultural connections, and extended residence times characteristic of Indigenous people to those of other 'stakeholders' with usually very different relationships to the locations and resources being discussed. In the Pilbara, considerable frustrations exist within the Indigenous community about past water resource developments (Rijavec, 1993; Rumley and Barber, 2004; Olive, 2007; Barber and Jackson, 2011a) and mining issues (Holcombe, 2005, 2006; Olive, 2007). These influence current Indigenous attitudes to water and mining developments associated with the recent economic boom. Historical experiences also influence Indigenous attitudes to mining consultation processes such as the one described here.⁵ RTIO staff were aware of these frustrations at the commencement of the study reported here and wished to both better understand Indigenous perspectives and improve corporate performance in the area, hence the decision to commission the work on which this paper is based.

In detailing the research outcomes, our paper provides an overview of the major water issues raised by Indigenous people participating in the study, particularly those relating to mine impacts. However our analysis of these issues suggests that successfully presenting a comprehensive descriptive account of Indigenous values in line with RTIO's request would only partly address overall corporate aspirations. Indeed, despite RTIO's leadership in the sector, we argue that such an account cannot be properly provided without some important preliminary steps to establish better communication flow, equivalence, and trust in the relationship between the corporation and local Indigenous people, and that these steps are applicable well beyond the specific circumstances of this study. We conclude by noting the alignment between these steps in Indigenous engagement, corporate leadership in catchment management, and major national water policy trends.

Case study region and methods

Case study region

The Pilbara bioregion in north-western Australia covers an area of 178,500 km² and the larger government demarcated Pilbara planning region covers 507,896 km². There are three distinct geographic zones- the eastern desert area, the inland uplands of Hamersley and

² Referred to as the *Mabo* decision.

³ O'Donnell (2011 p 55) observes that the last condition has had particular application to native title and water. In the case of a sea rights claim in the Northern Territory (*Commonwealth v Yarmirr*), the High Court concluded that 'an asserted native title right of exclusive possession was fundamentally inconsistent with common law public rights of fishing and navigation and the international right of ships to innocent passage through the territorial seas of a nation state'.

⁴ In 1998, native title holders lost the short-lived right to negotiate over water resource developments.

⁵ A leader of a major Indigenous group in the area refused to take part in the research outlined here, citing the lack of impact of previous reports on mining company attitudes and behaviour. Understanding this response in the light of company aspirations and previous CSR actions was a major motivation for the current analysis.

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