Negotiation of legally binding agreements between mining companies and Aboriginal groups represents a critical aspect of CSR in resource-rich industrialised countries such as Australia and Canada and, increasingly, in developing countries (Banks and Ballard 1997: Appendix 1; Brew 1998; ICME 1999; IED and WBCSD 2002; Langton et al. 2004; O’Faircheallaigh 2006a; O’Reilly and Eacott 1999; Sosa and Keenan 2001). The negotiation of agreements is generally regarded as a positive sign of a new willingness by mining companies to engage with Aboriginal groups in a serious and sustained manner, to share with them the wealth generated by mining on Aboriginal lands, and to allow them a say in the manner in which mines are developed and operated (Environmental Law Institute 2004: 11, 13-14; ICME 1999: vii; Keon-Cohen 2001; Meyers 1996; Miranda et al. 2005: 69-70; Senior 1998). Typical of this view is the statement by the CEO of Falconbridge Ltd on the signing of an agreement between his company and the Nunavik Inuit for the development of the Raglan nickel mine in Northern Quebec: ‘With its commitment to the people of Nunavik, the Raglan Agreement stands as a landmark in Canadian mining history and in the development of the Canadian North. Raglan marks the beginning of a new era in mining’ (cited in ICME 1999: 30).

But what do we actually know about the consequences for Aboriginal peoples of entering into agreements with mining companies? A growing literature on such agreements
provides information on the content of agreements (Kennett 1999; O’Faircheallaigh and Corbett 2005; O’Faircheallaigh 2006b; Sosa and Keenan 2001) and discusses the processes and strategies involved in negotiating agreements and in particular the requirements for ‘successful’ negotiations by Aboriginal groups (Barsh and Bastien 1997; O’Faircheallaigh 1996, 2000; Weitzner 2006). There is a more limited literature focusing on criteria for evaluating agreements (O’Faircheallaigh 2004b), and dealing with some more general issues that arise across agreements, such as their enforceability and the question of whether Aboriginal–company agreements should provide consent for mining (Keeping 1998; Kennett 1999; O’Reilly and Eacott 1999).

Not all of this literature is uncritical of agreements and some of it highlights, for instance, a lack of Aboriginal community involvement in negotiation processes and the limited benefits gained from agreements by some Aboriginal groups (O’Faircheallaigh 2008; Weitzner 2006). However, even the more critical analysis tends to focus heavily on the agreements themselves, on the processes that give rise to them, their content, the immediate impact of their provisions, and how more positive outcomes could be achieved from the agreement making process (O’Faircheallaigh 2006a, 2008; O’Reilly and Eacott 1999; Weitzner 2006). There is very little in the literature that attempts to provide an overall conceptual understanding of the wider legal, political and institutional ramifications of agreement-making between Aboriginal groups and mining companies. In particular, there is little analysis of the way in which agreement-making influences other options and strategies available to Aboriginal groups faced with mineral development on their ancestral land; or of the implications of Aboriginal agreements with private corporations for relations between Aboriginal peoples, the state, other political interests and civil society more generally.

This chapter makes a preliminary and exploratory contribution to such a conceptual understanding. It does so by seeking to locate Aboriginal–mining company agreements within a broader set of relationships between Aboriginal peoples and other elements of a liberal democratic political system within which mining projects are approved and regulated. The specific context for the analysis is therefore settler states that have significant Aboriginal populations, in particular Australia, Canada, New Zealand and the USA.

The chapter first considers the ‘counterfactual’; that is, a situation in which no contractual arrangements exist between affected Aboriginal groups and mining companies wishing to develop resources on Aboriginal land. It then examines how the creation of a contractual relationship through negotiation of project-based agreements between Aboriginal groups and mining companies (and in certain cases government also) affects the legal and political status of Aboriginal groups and the nature of their relationship with other elements of the political system. The comparison between the ‘counterfactual’ and the ‘agreement’ scenarios highlights some major conceptual and practical issues raised by Aboriginal participation in contractual arrangements. It also facilitates analysis of a fundamental issue that rarely features in the literature on Aboriginal–mining company agreements: whether, and under what conditions, entering agreements is or is not likely to create net benefits for Aboriginal groups.
The counterfactual: absence of an agreement

Figure 4.1 illustrates the counterfactual, where no contractual arrangement exists between Aboriginal peoples, mining companies and governments in relation to a mining project. The situation this creates for Aboriginal groups can be summarised as follows.

Aboriginal people are unconstrained in pursuing political strategies designed to halt project development or change the nature or timing of development that does occur. Reflecting this fact, the circle representing Aboriginal people lies entirely in the 'Political' zone of Figure 4.1. Aboriginal groups can, for instance, seek public support through the media, build political alliances with NGOs such as environmental and church groups, lobby government and mobilise pressure on corporations and their shareholders (activities represented by the black lines emerging from the 'Aboriginal' circle in Fig. 4.1). For example, Innu and Inuit landowners in Labrador used a number of these strategies to delay the development of the proposed Voisey's Bay nickel project in the late 1990s. The Mirrar, Aboriginal traditional owners of the land on which the proposed Jablukura uranium project in Australia's Northern Territory is located, used a combination of all of them to oppose development of the deposit. They were ultimately successful, with Rio Tinto agreeing to refill a portal that had been constructed to start mine development and committing not to recommence development without the consent of the Mirrar (Gibson 2006; Katona 2002).

Aboriginal access to components of the judicial and regulatory system that are relevant to project approval and management (represented by the line at the top of Fig. 4.1 and marked 'Litigate, Object, etc.') is unconstrained by any contractual obligations. Aboriginal people can exercise rights available to citizens generally or rights arising from any specific property or other Aboriginal interests they hold. Those rights may allow them, for instance, to challenge the level of environmental assessment proposed for a project; to take legal action to prevent damage to Aboriginal cultural heritage or the environment; or to sue for compensation if such damage occurs. Using legal and procedural rights and political strategies, Aboriginal groups may be able to influence the terms of contractual and regulatory instruments negotiated between the state and the developer: for instance, by helping to shape the conditions attached to environmental approvals and mining leases.

While Aboriginal groups are in principle free to access all available legal and political strategies to influence decisions regarding development on their ancestral lands, in practice a number of factors may constrain their capacity to do so. The first involves their often limited access to financial resources and relevant expertise. It is costly to bring people together to discuss and agree on proposed strategies, to engage in legal action, or to make representations to governments or corporations in distant capital cities. The cost of acquiring access to the technical and political expertise required to effectively pursue legal and political strategies is also high.

The second constraint involves the fact that in many contexts legal recognition of Aboriginal rights and interests may be limited, and so in practice few judicial or regulatory avenues may be open to them. This is particularly so where Aboriginal peoples have been heavily impacted by European settlement. Thus a number of Aboriginal groups in regions of eastern and southern Australia settled in the early 19th century; for instance,
Figure 4.1: Mineral development process without aboriginal-mining company agreement.
the Yorta Yorta traditional owners of the Murray River basin in Victoria have been unable to secure recognition of their native title (Streiten 2006), and so may face problems in gaining standing in relevant legal processes.

Political strategies and use of legal rights are generally more effective at minimising the potentially negative environmental and cultural effects of a project than at maximising their potential economic and social benefits for Aboriginal groups, for a number of reasons. First, legal processes are generally reactive and respond to actions by individuals or corporations that wish to prevent damage to property or other interests or seek compensation for damage that has occurred. They are not oriented towards creating economic opportunities for specific groups in society. Second, project approval processes such as environmental impact assessments (EIAs) tend to be biased towards minimising the biophysical effects of a project rather than towards addressing either its negative or potentially positive economic and social aspects. Thus the Final Report of the Mining, Minerals and Sustainable Development (MMSD) initiative, for instance, noted that social factors have only recently started to 'creep' into environmental impact assessment (IIED and WBCSD 2002: xxi). Third, political strategies such as the creation of alliances with environmental NGOs or the use of media campaigns are generally easier to pursue when they focus on prevention of damage to ecosystems or to 'traditional' Aboriginal culture than when they focus on ensuring that Aboriginal people share in the economic benefits of mining. For example, Aboriginal groups in Western Australia are finding it more problematic to recruit the support of environmentalists for their demands to obtain an equitable share of benefits from current resource development projects than they did to gain support for opposing resource projects that threatened Aboriginal sacred sites in the early 1980s (Hawke and Gallagher 1989; Kimberley Land Council 2008).

Another drawback for Aboriginal people is that they have little opportunity to be directly involved in managing the environmental and other impacts of projects on an ongoing basis. They may be able to utilise EIA processes to influence the nature of the environmental protection regimes that are initially established. However, the decisions that emerge from EIA processes tend to be 'once and for all' and not to be revisited during the life of a project (Howitt 2001: 337-38; Joyce and MacFarlane 2001: 3, 12; O’Faircheallaigh 2007: 322-33), excluding any opportunity for an ongoing role in environmental decision-making and management for Aboriginal people. The environmental management regimes established pursuant to legislation and EIA decisions are applied to projects by companies and governments. This can be a major problem for Aboriginal people who believe they have responsibilities for looking after their ancestral land that cannot be delegated to others.

Turning to responsibility for enforcing, or the availability of legal mechanisms or institutional capacity to enforce, conditions imposed on resource extraction, in principle there is no ambiguity. Government bears the sole responsibility and has available to it a range of bureaucratic and legal resources to ensure corporate compliance. This is the case whether these conditions derive from contractual arrangements between government and developers or from general legislation and regulation (see Fig. 4.1). This does not of course mean that government will in practice act to ensure such compliance (see, for instance, Anguelovski, Chapter 11 this volume; Crate and Yakovleva, Chapter 12 this volume; M. Smith 2007).
The impact of Aboriginal–mining company agreements

When Aboriginal groups enter contractually binding agreements with mining companies, some of the processes and relationships represented in Figure 4.1 and discussed above change significantly. An analysis of the changes that occur is critical in achieving a broad, conceptual understanding of the impact and implications of agreement-making. To date, analysis of this sort has been very limited. Figure 4.2 represents a starting point for the discussion. This portrays the new situation, with the sphere representing Aboriginal people now overlapping the 'Political' and 'Contractual' zones of the diagram, and areas, processes or relationships that may change as a result of negotiated agreements highlighted as thick (and in most cases broken) lines.

One of the most significant changes involves the access of Aboriginal groups to the judicial and regulatory systems (represented by the broken line at the top of Fig. 4.2). At least three features of negotiated agreements are relevant here. First, recent agreements in the case study countries almost always involve Aboriginal support for the project concerned, and/or for the grant of specific titles or approvals required for the project to proceed. For example, Kennett (1999) notes that many agreements in Canada contain specific provisions that commit the Aboriginal party either to support the project involved or to refrain from opposing its implementation or regulatory proceedings. One agreement states that in consideration for the mining company entering into the agreement, the Aboriginal signatories 'will not object to the issuance of any licences, permits, authorizations or approvals to construct or operate the Project' (Kennett 1999: 45-46). Another agreement involves broader commitments, requiring the Aboriginal parties not to institute any legal proceedings or engage in or undertake any other actions or activities to prevent or delay authorization of the [mining project]. A number of agreements commit the Aboriginal parties to not opposing projects in the event that they become subject to an environmental assessment as a result of actions taken by non-signatories to the agreements (Kennett 1999: 45-46).

It follows that Aboriginal groups may be contractually constrained in their ability, for instance, to object to government approval of a project either in principle or in its current form. Thus, for example, the operator of one project in Canada utilised the existence of such clauses to argue that an Aboriginal signatory to the agreement was prohibited from objecting to the grant of a water licence required to allow further development of the project.

Second, some agreements contain provisions preventing Aboriginal groups from utilising specific legal or regulatory avenues that would otherwise be available to them. For example, under one recent Australian agreement the Aboriginal parties undertake not to 'lodge any objections, claims or appeals to any Government authority ... under any [state] or Commonwealth legislation, including any Environmental Legislation' (O'Farrell and Corbett 2005: 637). Third, agreements may contain dispute resolution processes that preclude the parties from initiating legal proceedings to resolve disputes, or require all other potential avenues for resolving disputes to be exhausted before they do so. In combination, such provisions can create a fundamental shift in the ability of Aboriginal groups to exercise legal rights they would otherwise have available and more generally to access legal and regulatory regimes relevant to resource extraction.

A second important area involves the ability of Aboriginal groups to build relationships with and to mobilise other political actors. The common requirement for Aborig-
FIGURE 4.2 Mineral development process with aboriginal–mining company agreement

- Courts, EIA process, legislation, regulation
- Input to government decisions
- Ongoing regulation
- Litigate, object, etc.
- Contract enforcement
- Lobby/political pressure
- Government
- Company
- Aboriginal group
- Specific conditions for development
- Mineral extraction
- Wider relationship with the state, e.g., service provision, land claims

4. UNDERSTANDING CORPORATE-ABORIGINAL AGREEMENTS
inal groups to support a project immediately limits their capacity to manœuvre politically, particularly in relation to environmental and other groups that might otherwise be valuable political allies. In addition, agreements very commonly (indeed almost universally) include confidentiality clauses that prevent Aboriginal groups from making public information about negotiations and agreements. For instance, one Canadian agreement states that its terms ‘shall be kept confidential and its terms shall not be disclosed to any party, without the prior written consent of both parties. Confidentiality clauses may be included not only in final agreements but also in negotiation protocols under which companies provide funds to support negotiation processes; and they may continue to be legally binding even where the parties agree to terminate a negotiation protocol or an agreement as a whole. Thus, for example, an Australian negotiation protocol governing the conduct of negotiations between a mining company and Aboriginal groups states that ‘the negotiations will be confidential and the Parties must not say anything to the public about the negotiations unless the Parties agree otherwise . . . the Parties will keep this document confidential to themselves . . . and not make any public statements about [it] unless [the Parties] agree.’

Confidentiality provisions can severely constrain the capacity of Aboriginal groups to communicate with the media and with other political groups. The requirement to support a project combined with confidentiality provisions can also significantly constrain an Aboriginal group’s ability to lobby or otherwise place political pressure on a government in relation to a project. In dealing with government, most Aboriginal groups have two powerful weapons, often used in tandem. The first involves any capacity they have to delay or halt a project, either by accessing the legal and regulatory systems and, for example, obtaining injunctions on project construction or delays in project approvals; or through direct action aimed at halting or delaying development activity on the ground. The second involves the ability to embarrass government politically by using the media to appeal to its constituents (Gibson 2006; Trebeck, Chapter 1 this volume). If contractual agreements preclude or inhibit the use of both weapons, this may substantially reduce Aboriginal capacity to influence government decision-makers.

This raises the broader issue of the relationship between Aboriginal groups and the state, represented by the broken line at the upper right-hand corner of Figure 4.2. The legal and constitutional basis for this relationship varies considerably between Australia, Canada, New Zealand and the USA, and in some cases also varies within individual countries depending on the legal status of particular Aboriginal groups. However, it is clear that, in general, negotiations of agreements between Aboriginal groups and mining companies have the potential to influence Aboriginal relations with the state in a number of ways. First, states may seek to reduce their budgetary allocations to Aboriginal communities on the basis that the latter now obtain revenues from commercial sources as a result of their agreements with mining companies. This has certainly occurred in Australia (O’Farrechallagh 2004a), and the prevalence of confidentiality provisions in agreements may reflect, in part, a desire by Aboriginal groups to withhold information on their revenues from government and so reduce the likelihood of a cut in government funding.

Another area in which significant impacts can occur involves attempts by Aboriginal peoples to win legal recognition from the state of their inherent rights to their ancestral states. Both Australia and Canada, for instance, have been and continue to be extensively involved in negotiations and/or litigation with Aboriginal groups regarding either
recognition of their 'native title' for the first time through negotiation of comprehensive land claim settlements (Canada) or determinations of native title (Australia), or regarding implementation of treaty obligations that the state has historically ignored. The discovery of a major mineral deposit on an Aboriginal group's land often focuses state attention on land tenure issues, in many cases in response to corporate pressure on state agencies and on political leaders to have these issues resolved as a precondition for undertaking major capital investments.

The implications of a stronger state focus on resolving land tenure issues as a result of major mineral discoveries are unclear and require further research. On the one hand, Aboriginal groups, frustrated over many years by their inability to gain the attention of government decision-makers and by the unwillingness of government to properly resource land claim processes, may suddenly find that the purse strings are loosened and that their access to decision-makers is enhanced. They may be able to use the leverage provided by the government's desire to secure project approval in order to achieve their goals in relation to much wider areas of land than that involved in the project concerned. For example, Innu and Inuit groups in Labrador had made limited progress on settling their claims with Canada prior to the discovery of the Voisey's Bay nickel deposit. The prospect of the project's development resulted in a much more active stance by Canada in relation to the negotiations, and led to the conclusion of Interim Land Claim Agreements with both groups in 2002.

On the other hand, the state is usually driven by a desire to resolve land tenure issues both speedily and in a way that facilitates project development, and as a result Aboriginal groups may find themselves under enormous pressure to accept land claim settlements that do not satisfy their wider, long-term aspirations. Significant issues also arise in relation to implementation of settlements. If government is driven primarily by a desire to have projects approved, then once this has occurred its commitment and willingness to provide resources may quickly evaporate. The 2001 Western Cape Communities Co-existence Agreement (WCCCA) between the State of Queensland, Comalco Ltd and Aboriginal traditional owners highlights this issue. To facilitate the agreement Queensland undertook to transfer substantial areas of land not required by Comalco for mining to its traditional Aboriginal owners, but seven years later not a single hectare has actually been transferred.

Agreement provisions regarding Aboriginal support and confidentiality can also result in fundamental changes in the way in which Aboriginal groups relate to mining companies. As Trebeck explains in Chapter 1, the willingness of corporations to undertake CSR initiatives in relation to any social group depends, in large measure, on the capacity of that group to inflict damage on the corporation by threatening its social licence to operate. In her words, groups must apply 'an ever-present threat of the loss of social licence to operate in order to ensure that companies recognise and address [their] demands . . . civil society organisations need to maintain surveillance and pressure to ensure it is always in the corporate interest to respond to community demands' (Trebeck, Chapter 1 this volume, page 20). She notes in particular that the capacity of groups to threaten the reputation of corporations is a 'crucial lever'. Where agreements bind Aboriginal groups to support corporate activities and silence them through confidentiality provisions, they have substantially surrendered their ability to threaten a company's licence to operate. It may of course be the case that this threat is no longer needed, because agreements contain legally enforceable provisions that ensure the ongoing per-
formance by a company of certain CSR obligations. Two points remain. First, the nature of the relationship between Aboriginal groups and companies has profoundly changed. Second, the question of whether obligations taken on by corporations through agreements with Aboriginal groups are both substantial and enforceable and so represent a 'fair trade' for the forbearance promised by those groups cannot be resolved a priori, but only through an examination of the provisions of individual agreements. Another important issue here involves the length of time over which agreements apply, which is typically for the whole of project life and for major projects is often measured in decades rather than years. If Aboriginal groups discover after the event that the trade-off they have made is not to their advantage, it may be a very long time before they have an opportunity to change the situation.

This brings us to the new line in Figure 4.2 linking the interface between the 'company' and 'Aboriginal group' circles directly to the setting of specific conditions for mineral extraction. This represents a further and very significant change from the 'counterfactual', and indeed provides the key rationale for Aboriginal groups to enter binding agreements. It provides a mechanism through which they can simultaneously pursue two key sets of objectives.

First, binding agreements offer opportunities to share in the economic benefits generated by resource extraction. For instance, they can offer Aboriginal groups access to an income stream in the form of royalty or other payments. This can assist in meeting a community's short-term and often urgent need to fund services such as housing, health and education and to augment Aboriginal incomes that are usually a fraction of the national average. As noted above there is a danger that government expenditures will fall, negating some of this impact, but on the other hand if used judiciously mining revenues can be used to leverage additional public expenditure. For example, the Gagudju traditional owners of the Ranger uranium mine used their royalties to start new education and health initiatives that government had refused to fund, but, once these were operational, they negotiated for government to take over their funding. The traditional owners of the Argyle diamond mine have used part of their income stream to create a 'partnership fund', from which money can only be committed if government is willing to provide matching funds. On this basis they have established projects in areas including kidney health, health education, sports, law, culture and youth suicide prevention (Gelganyem Trust and Kilkayi Trust 2006, 2007). At a broader level, access to mining income can provide Aboriginal groups a degree of autonomy from the state, allowing them to establish their own priorities rather than having to accept the state's priorities as a condition for access to public funding; and adding to their negotiating power in dealing with the state in relation to, for instance, service delivery, land title and management, and governance.

In the longer term, income streams from mining create the potential for Aboriginal groups to establish capital funds that will generate income into the future and indeed long after mining has ceased. For instance, the Aboriginal signatories to the WCCCMA decided to invest in excess of 50% of their revenues in a long-term investment fund. Income is reinvested for 20 years, after which the capital base is preserved and interest is available to fund current spending. The capital fund already sits at more than A$30 million, and by 2021 it will have the capacity to generate ongoing and substantial income.
Agreements can also offer preferential access to employment and training and business development opportunities for members of Aboriginal groups or for Aboriginal corporations. Income levels tend to be considerably lower, and unemployment levels considerably higher, in Aboriginal communities than in mainstream ones, and access to such opportunities can be critical in helping to overcome Aboriginal economic disadvantage. To take one example, Aboriginal people accounted for less than 5% of the workforce of Argyle Diamonds Ltd when negotiations for an agreement with traditional owners commenced in 2001. Today they account for over 20% of the workforce, generating employment for some 100 additional Aboriginal employees. At average 2007 mining industry earnings of A$90,000, this represents additional income of some A$9,000,000 annually for Aboriginal workers, families and communities.

Second, agreements can provide opportunities to be involved proactively, and on an ongoing basis, in managing the cultural, social and environmental impacts of resource extraction. These might include a key and possibly leading role in defining, identifying and protecting Aboriginal cultural heritage; participation in joint company–Aboriginal environmental management regimes; and involvement in decisions regarding project expansions and project closure. For instance, under the WCCA, traditional owners are funded to operate a cultural heritage protection system intended to avoid damage to sites of significance; receive annual payments to help support a ranger programme designed to control impacts associated with the activities of mining town residents and tourists; have an opportunity to comment on all applications for environmental permits; and must be consulted by the mine operator regarding implementation of its environmental management system and any major project changes that may have a significant impact on the environment. As discussed earlier, a mineral development system missing an Aboriginal–corporate contractual arrangement, as represented in Figure 4.1, offers limited opportunities for pursuing this kind of ongoing involvement in managing environmental and cultural impacts.

Turning to the issue of enforcing conditions attached to mining projects, as indicated above in the 'no agreement' model in Figure 4.1 responsibility lies with government, which has at its disposal appropriate enforcement mechanisms and the resources to apply them. With the introduction of a company–Aboriginal agreement, part of the responsibility for enforcement falls on Aboriginal peoples, as indicated by the insertion of 'Contract enforcement' alongside the line linking the Aboriginal group to the Courts (Fig. 4.2). To date, major problems have arisen in relation to enforcement of conditions negotiated between mining companies and Aboriginal groups because many agreements do not include the sorts of provision that are required to maximise the chances that they will be fully and effectively enforced and implemented (O’Farcheallaigh 2002, 2003). Critical requirements include:

1. Allocation of the financial and human resources required for enforcement and implementation. This does not simply involve funding for the direct costs of specific initiatives (for instance, for apprentices’ wages, or for the cost of delivering cultural awareness training). It also includes resources to support the general implementation of agreements, to ensure that all of the initiatives contemplated by an agreement actually happen when and how they are intended to happen.
2. Identification of goals that are clear and precise and linked to specific timeframes. For instance, while there is debate within some mining companies regarding the merits of targets for Aboriginal employment, international experience shows that absence of specific, numerical goals makes it extremely difficult to generate the organisational momentum required to significantly change the composition of the workforce.

3. Clear specification of who is responsible for delivering on agreement commitments, and allocation of responsibility to individuals who have the authority and capacity to deliver.

4. Inclusion of incentives and penalties designed to ensure that commitments are adhered to, especially over the long term. Turnover in mining companies and among non-Aboriginal staff in Aboriginal organisations is high, and as a result those responsible for implementation may not have been involved in negotiating agreements and may have little personal stake in their successful implementation. In this situation especially, substantial, and if possible automatic, penalties and incentives are required.

5. Systematic, ongoing information-gathering and monitoring is essential to establish progress towards goals, attract attention to implementation failures, and provide a basis for developing alternative or additional initiatives, if necessary. Information must be reported to the affected parties on a regular basis and in a form that allows its significance to be easily understood. While the need for regular monitoring of activities and of goals against objectives is very firmly established in relation to the environmental regimes applied to mining companies, it is still the case that few mining company-Aboriginal agreements provide for any systematic monitoring of progress or achievements against agreement goals.

6. Creation of structures such as joint Aboriginal community-mining company coordination committees whose primary purpose is to ensure that implementation occurs. These structures need to be appropriately resourced and to include the key individuals from mining companies and Aboriginal organisations with authority in relation to the issues involved. The regular involvement of senior personnel with decision-making authority is an essential prerequisite.

In some cases implementation problems will be of a sort or on a scale that cannot be addressed within the existing terms of an agreement. Indeed, given that many mining agreements have long terms, frequently in excess of 20 years, there is a strong likelihood that during their lives the broader social and economic environment will change substantially, raising issues regarding the appropriateness of agreement goals and of the mechanisms provided for their implementation. Thus there is also a need for effective mechanisms that, while protecting the underlying interests of the parties, facilitate regular review of agreements and ensure that they can be amended in a timely manner and without undue cost.

Achieving the requirements for effective enforcement and implementation places a substantial burden on Aboriginal groups, but one they must meet successfully if the potential benefits of contractual agreements are to be realised in practice.
Implications for research and for Aboriginal negotiation strategies

This discussion raises a series of significant questions, each of which could become the focus of a substantial research effort. What exactly is the impact of contractual agreements with mining companies on the access of Aboriginal people to the judicial and regulatory system, and how does this affect their ability to minimise negative impacts of mining projects on their ancestral lands? In the absence of agreements, do Aboriginal groups actually have the capacity to utilise the judicial and regulatory system? In other words, in practice what do they lose if they accept constraints on their rights to access that system? What is the effect of the common requirement in agreements for Aboriginal support of projects on the political flexibility of Aboriginal groups? Where does the impetus for confidentiality provisions originate, and to what extent do they restrict the freedom of Aboriginal groups in lobbying government and in building and maintaining political alliances and public support? How do contractual arrangements affect wider relationships between Aboriginal groups and the state, especially in relation to the state’s obligations to provide services to its (Aboriginal) citizens, and to resolution of wider issues regarding land tenure and treaty rights? Can Aboriginal groups secure a share of economic benefits from mining projects and become directly involved in managing their environmental and cultural impacts in the absence of contractual agreements? Can contractual arrangements be negotiated with mining companies that allow a sharing of benefits and direct Aboriginal participation in project management, yet do not close off judicial, regulatory and political options that might strengthen the capacity of Aboriginal groups to control and shape the impact of mineral development on their ancestral lands?

Even in the absence of more systematic research on these issues, the earlier discussion seems to have some clear implications for Aboriginal negotiation strategies. First, it is important for Aboriginal groups to undertake, at an early stage in project development, a mapping exercise of the sort attempted in Figures 4.1 and 4.2 so that they can consider how negotiation of a contractual relationship with a mining company may affect their engagement with the political and judicial/regulatory system as a whole, including their existing interaction with government in areas such as service provision and land claim negotiations. In my experience of negotiations in Australia and Canada, this is in fact rarely done. Such an exercise can reveal both threats (for instance, a group’s inability to maintain valued political alliances, or a decline in government service provision), opportunities (for example, an increased capacity to engage with government decision-makers) and challenges (for instance, the need to develop a capacity to enforce contractual obligations and ensure effective implementation). In the absence of such an exercise and of preparatory work following on from it, Aboriginal groups may be poorly prepared to deal with threats and poorly placed to grasp opportunities and meet challenges.

Second, it is important to question the assumption (prevalent in much writing on CSR) that negotiation of contractual arrangements with mining companies represents the preferred (indeed the only feasible) method of resolving issues raised by mineral development on Aboriginal land. There are in fact legal and political strategies available
to Aboriginal groups, and the potential costs and benefits of these strategies need to be assessed in comparison to the costs and benefits offered by agreement-making.

Pursuit of negotiated agreements with mining companies and use of legal and political strategies are not of course mutually exclusive. Indeed, it can be argued that Aboriginal groups maximise their gains from negotiated agreements where negotiations are accompanied by the strategic use of litigation, of direct action designed to attract media attention and political support, and building of alliances with other political interests such as environmental groups or trade unions. This raises a third point. It is clearly advisable for Aboriginal groups to maintain their freedom of movement for as long as possible and to the greatest degree possible. It may be unadvisable, for instance, to accept confidentiality provisions in a negotiation protocol, as this may prevent mobilisation of the media and of political allies during the negotiation process. More generally, all proposals to enforce confidentiality (beyond matters that are commercially sensitive for the developer) should be carefully scrutinised, as should any proposed agreement provisions restricting Aboriginal access to the judicial and regulatory system or requiring broad Aboriginal support for a project (as opposed to specific Aboriginal approvals that are an essential precondition for a project to proceed).

This does not imply that Aboriginal groups can both gain the benefits associated with contractual agreements and at the same time retain all of the freedom and options available to them in the absence of such agreements. It does imply that entering contracts with corporate interests has wider and important implications for relationships between Aboriginal groups, the state and civil society. These implications need to be carefully considered both in shaping negotiation strategies and, ultimately, in determining whether contractual relationships represent the best way of pursuing Aboriginal interests.

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4. UNDERSTANDING CORPORATE-ABORIGINAL AGREEMENTS  O’Faircheallaigh 81


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