

Customary Law and Mining: Comparing the Interaction between the Two in Ghana and Western Australia, with a Focus on Heritage

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Research aims:

The aim of this research was to identify linkages between development outcomes for Indigenous communities and mining activities in Ghana, with a focus on heritage protection, as informed by Australian developments over the last two decades taking into account extant regulatory approaches.

The overall objective is to support Ghana to transform its extractive resource endowment to inclusive and sustainable economic growth and social development through improved governance and regulation, strengthened social outcomes and improved operational effectiveness.

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IM4DC Action Research Report



Summary of Action Research Activity

Customary law and mining: comparing the interaction between the two in Ghana and Western Australia, with a focus on heritage

Engagement between mineral resource companies and customary landowners takes place everywhere the two cross paths; companies in pursuit of access and mineral rights, and customary landowners seeking to protect and uphold their customary interests in the land. The framework of laws and policies in a country shapes the nature and outcomes of this engagement. The skills, objectives, knowledge and will of both the company and the customary landowner group in each case are also important. All of these factors are increasing in importance as the social impacts of mining come to occupy a place alongside environmental and fiscal considerations as part of the broader global push towards increased sustainability in resource developments. The effect in general has been to increase the public scrutiny of deals between resource companies and customary landowners and consequently the effort put into them, with corresponding adjustments to the balance of regulatory and policy considerations applied by governments in each country.

This research examines two key aspects of company-customary landowner interaction in the mineral sector in Ghana and Western Australia: regulatory approaches – that is, what laws and policies the government has put in place – and the outcomes of the company-customary landowner interaction in practice. It firstly compares the regulatory and policy frameworks circumscribing the interaction between resource companies and customary landowner groups in the two countries. Secondly, it empirically examines the way in which the interactions carried out within this framework play out ‘on the ground’ in the two countries, with interviews carried out with members of mining impacted communities as well as industry and government stakeholders in both jurisdictions.

The research concludes by setting out the key learnings and some possible reform options based on the legal and empirical research.



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1 Introduction

Engagement between mineral resource companies and customary landowners takes place everywhere the two cross paths – companies in pursuit of access and mineral rights, and customary landowners seeking to protect and uphold their customary interests in the land. The framework of laws and policies in each country shapes the nature and outcomes of this engagement. The skills, objectives, knowledge and will of both the company and the customary landowner group in each case are also important. All of these factors are increasing in importance as the social impacts of mining come to occupy a place alongside environmental and fiscal considerations as part of the broader global push towards increased sustainability in resource developments. The effect in general has been to increase the public scrutiny of deals between resource companies and customary landowners and consequently the effort put into them, with corresponding adjustments to the balance of regulatory and policy considerations applied by governments in each country.

This research examines two key aspects of company-customary landowner interaction in the mineral sector in Ghana and Western Australia: regulatory approaches – that is, what laws and policies the government has put in place – and the outcomes of the company-customary landowner interaction in practice.

As such, this research first comparatively examines the regulatory and policy frameworks circumscribing the interaction between resource companies and customary landowner groups in the two countries.¹ Second, it empirically examines the way in which the interactions carried out within this framework play out ‘on the ground’ in the two countries. The research was thus carried out in two substantive phases. The first phase comprised a desktop analysis and comparison of the relevant legal frameworks in Ghana and Western Australia. In the second phase, fieldwork in the form of interviews was carried out with members of mining impacted communities as well as industry and government stakeholders in both jurisdictions. The research concludes by setting out the key learnings and some possible reform options based on the legal and empirical research.

The key research outputs – reflecting the two research phases – are two papers, entitled ‘Mining Impacts on Customary Law and Heritage in Ghana and Western Australia: Exploring Indigenous Heritage Protection’ (publication pending), and ‘From Mabo to Obuasi: Mining, Heritage and Customary Law in Ghana and Western Australia’ (publication pending).

This report gives an overview of the findings made and recommendations arising from the legal analysis and fieldwork. Attached at Appendix 1 to this report is the full report arising from the legal analysis.

¹ The scope of this research does not include international instruments of potential applicability in each country.

2 Analysis and comparison of the regulatory frameworks applying to mining and customary land-ownership in Ghana and Western Australia: key findings

This section sets out the key findings of the desktop analysis of the regulatory frameworks governing mining and customary land ownership in Ghana and Western Australia, and highlights the distinctions between them. As mentioned above, this research is also reflected in a journal article entitled ‘From Mabo to Obuasi: Mining, Heritage and Customary Law in Ghana and Western Australia’ and the full report arising from the legal analysis is in Appendix 1.

2.1 The research areas

There is a useful combination of parallels and dissimilarities between Ghana and Western Australia that informs their selection for comparison. Mining plays a critical role in the economies of each. In 2011 Ghana featured in the top 10 producers of gold globally, and ranked 13th for production of diamonds by volume.² Mining accounted for 7.3% of Ghana’s gross domestic product for 2011.³ Australia’s mineral sector contributed around 10% to the country’s GDP overall in 2012⁴ and is considered one of the leading mining nations globally.⁵ Within that national setting Western Australia is one of the key mineral producing areas and is considered ‘one of the great mineral provinces in the world’ in its own right.⁶ A range of commodities is mined in the state, including iron ore, gold, diamonds, nickel, lead and alumina.⁷

Likewise, customary land ownership – albeit in very different forms – features prominently in both countries. As at 2013, approximately 85% of Western Australia was subject to Aboriginal customary interests in land, known as ‘native title’.⁸ In Ghana, approximately 80% of land is held under customary tenure.⁹

² United States Geological Survey, 2011 Minerals Yearbook, Ghana, 20.1.

³ Getting the Deal Through, Mining, Ghana, 2012, at <http://www.kimathilegal.com/publications/Mining%20in%20Ghana%202012.pdf>, last accessed 15 October 2014, p 89.

⁴ United States Geological Survey, 2012 Minerals Yearbook, Australia, at 3.1.

⁵ Getting the Deal Through, Mining, Australia, 2013, at <http://www.gadens.com/News/Documents/GTDT%20Mining%202013%20-%20Australia.pdf>, last accessed 15 October 2014, p 26.

⁶ Government of Western Australia, Department of Mines and Petroleum, ‘Doing Business in the Western Australian Resources Sector’, at http://www.dmp.wa.gov.au/documents/Doing_Business_in_the_WA_Resources_Sector.pdf, last accessed 15 October 2014, p 1.

⁷ United States Geological Survey, 2012 Minerals Yearbook, Australia, at 3.1-3.9.

⁸ This includes both land where native title has been determined to exist by the Federal Court, and land where an application has been made for a determination of native title but not yet finalised; Government of Western Australia, Department of Premier and Cabinet, ‘Guide to Government Business under the Commonwealth Native Title Act 1993’, at <http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/Guide-to-Government-Business->

There are also, however, significant differences. Western Australia is a country subdivision within a wealthy nation, which has only relatively recently come to recognise Aboriginal customary rights to land. Ghana on the other hand is a developing country featuring strong, constitutionally founded recognition of customary laws and land ownership.¹⁰ Yet Ghana's regulatory framework does not feature any form of heritage protection for areas of heritage value to customary landowners, unlike Western Australia. Each of these differences, among others, was explored in this research.

2.2 Heritage protection

The key piece of Western Australian legislation directly engaging with Aboriginal customary interests is the Aboriginal Heritage Act 1972 (Western Australia). This Act operates to protect sites of significance under customary law but does not confer any form of property interest. Outside of this, effective recognition and accommodation of Aboriginal customary rights remains an ongoing issue at both the legislative and policy level in Western Australia.

A key point of difference between the Western Australian and Ghanaian frameworks is that the Ghanaian framework makes no provision for the protection of sites or objects of heritage value under customary law.

2.3 Constitutional protections

There is no constitutional protection of customary interests in land for Aboriginal groups in Western Australia.

The constitutional and legislative framework in Ghana features strong legal and institutional pluralism. The customary law in Ghana is constitutionally recognised and the institution of chieftaincy constitutionally guaranteed. Likewise, the Constitution of the Republic of Ghana 1992 makes provision for the vesting of stool¹¹ lands in accordance with customary laws, and the distribution of revenues deriving from stool lands (including mining royalties) for the benefit of customary landowners. Constitutionally recognised customary interests therefore extend to all interests contemplated by customary laws as promulgated on an ongoing basis, and thus extend to economic interests where relevant. Unlike Western Australia, there is no requirement to prove ongoing connection to a particular

[under-the-Commonwealth-Native-Title-Act-1993-Version-1-12-July-2013.pdf](#), foreword, last accessed 15 October 2014.

⁹ United States Government, United States Agency for International Development, 'USAID Country Profile: Property Rights and Resource Governance, Ghana, 2012, at http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Ghana_Profile_0.pdf, last accessed 15 October 2014, p 1.

¹⁰ Economic data taken from International Monetary Fund, World Economic Outlook Database, 2013, at <http://www.imf.org/external/pubs/ft/weo/2013/02/weodata/index.aspx>, last accessed 22 October 2014.

¹¹ The term 'stool' can be understood as an emblem of power and authority analogous to a throne, symbolising the institution of chieftaincy.

piece of land from pre-colonial times for customary laws to be recognised. Mineral ownership however, is reserved to the state.

2.4 Legislative protection of customary interests in land

There is no Western Australian legislation protecting customary interests in land. Aboriginal customary rights to land were recognised for the first time by the Australian courts in 1992, and subsequently legislated for at the national level in the form of the Native Title Act 1993. The Native Title Act does not recognise any customary rights to minerals within the meaning of the Mining Act 1978 (Western Australia). Recognised rights and interests are limited to ‘traditional’ rights and interests practised since pre-colonial times. It follows that liability for compensation arises only in relation to these interests, and does not extend to mineral rights (unless those rights can be characterised as traditional – such as the right to take ochre).

Thus, while the Western Australian legal system is a plural legal system in the sense that it accords recognition to Aboriginal customary laws, this recognition is largely limited to the protections flowing from the Native title Act and imposed at the national level. The focus on and responsibility for mining at the sub-national level and the relatively recent national-level recognition of native title rights has resulted in complexity and a degree of uncertainty about the proper interaction between the national and sub-national frameworks. This has resulted in numerous amendments being made to the Native Title Act with the most significant being the 1998 amendments, which substantially decreased procedural rights initially accorded to customary landowners.

In Ghana, various pieces of legislation have been enacted to give effect to the country’s constitutional directives and to establish a framework for and procedures relating to and protecting customary land ownership. Chiefs (through a Regional House of Chiefs) have the power to declare a customary rule in force in a given area. Customary landowners’ interests – generally through the institution of chieftaincy – are formally represented at all levels of government.

The Ghanaian legislative framework relating to land is characterised by ongoing cycles of legislative reform, including the introduction of a new constitution in 1992 (which engages heavily with land-related issues) followed by significant legislative activity in the mid-1990s. This was followed by subsequent legislative reforms in the late 2000s as part of an ongoing project to harmonise land laws.

2.5 Mining legislation

Both the Western Australian and Ghanaian regulatory frameworks reserve ownership of minerals to the state.¹² Both frameworks also declare almost all land open for mining (subject to various exceptions and consents).

The WA Mining Act is almost four decades old, and has not been extensively amended – with the notable exception of changes made to allow it to properly function alongside the native title rights recognised 15 years into its operation (after the introduction of the Native Title Act).

The Ghanaian Minerals and Mining Act 2006 is much newer, having been introduced at the conclusion of a modernisation process commenced in the early 2000s. This modernisation process featured extensive consultation with customary land owners, and this is reflected in the notification, consultation and compensation provisions incorporated directly into the Act.

2.6 Role of Government

There are a number of government agencies administering Western Australia's regulatory framework, spearheaded by the Department of Mines and Petroleum (DMP) – which has been designated the 'lead agency' in promoting and regulating the Western Australia mineral sector. The objective of the lead agency framework is to streamline approvals processes for mineral resource companies. Western Australia's mineral sector features a comprehensive regulatory framework, effective institutions to administer the framework and high levels of transparency in decision-making. Its safeguards and quality controls ranking, however, is relatively low.¹³

No government agencies in Western Australia are directly involved in the representation of Aboriginal customary interests in land (noting however that government funded 'native title representative bodies' (NTRBs) have been set up to represent Aboriginal customary interests, as discussed below). The nearest a government agency comes to this is the Department of Aboriginal Affairs, which is responsible for the preservation of places of heritage value to Aboriginal people.

In Ghana the Ministry of Lands and Natural Resources has overall responsibility for Ghana's mineral sector. Within the Ministry, the Minerals Commission administers the Ghana Mining Act. Ghana's mineral sector has scored a medium or 'partial' rating for its institutional and legal framework and

¹² Noting that different wording is used to achieve the same objective: as already mentioned *supra*, minerals in Western Australia are appropriated to the 'Crown' while in Ghana minerals are vested in 'the President in trust for the people of Ghana'.

¹³ National Resource Governance Institute, at <http://www.resourcegovernance.org/countries/asia-pacific/australia/overview>

transparency in decision-making, while ranking higher than Western Australian for safeguards and quality controls.¹⁴

Ghana's institutional arrangements relating to the administration of land are complex, in spite of a recent, internationally supported reform effort. A number of land-related agencies within the Ministry of Lands and Natural Resources assist with the administration land. These include the Lands Commission, Regional Lands Commissions, and the Office of the Administrator of Stool Lands. The Lands Commission engages with policy matters affecting customary landowners through liaison with Ghana's House of Chiefs. Regional Lands Commissions have the power to block development proposals where inconsistent with regional development plans developed by District Assemblies.

Outside of the Ministry of Lands and Natural Resources, the District Assemblies, National House of Chiefs and the Regional Houses of Chiefs are also important components of the network of organisations involved in land administration.

2.7 Representation and access to information

Aboriginal customary interests in Western Australia are primarily represented by NTRBs (whose key function in the context is to facilitate and assist with the making of native title claims and associated processes, such as negotiations with resource companies), and 'prescribed body corporates' (PBCs). These entities form part of the framework set up by the Native Title Act. The Australian Government funds NTRBs; PBCs receive either limited or no direct Australian Government funding. Outside of the NTRB/PBC framework, Aboriginal groups have the option to engage private lawyers to assist with negotiations with resource companies, where they can afford to do so.

Ghana hosts a variety of representative structures representing customary interests. The National House of Chiefs and Regional Houses of Chiefs directly represent customary interests in land through the constitutionally guaranteed institution of chieftaincy.

The National House of Chiefs or Regional Houses of Chiefs – as the case may be – are in turn represented in entities including the Council of State, the Lands Commission and Regional Lands Commissions and Small Scale Mining Committees. District Assemblies must consult with the relevant House of Chiefs in the exercise of certain functions.

There is no legislative provision expressly dealing with representative structures for customary landowners for engaging with or negotiating about land access issues. This is implicitly left to the Houses of Chiefs and other representative structures such as the land secretariats that customary landowners have established in some instances to represent their interests.

¹⁴ National Resource Governance Institute, at <http://www.resourcegovernance.org/countries/africa/ghana/overview>.

2.8 Approvals and agreement making – Notification

In Western Australia the DMP notifies customary landowners of all applications for new mineral tenements specifying a notification date. The future acts regime within the Native Title Act sets out detailed procedures to be followed by the Government of Western Australia, tenement applicants and customary landowner groups following this notification. The notification date has the effect of ‘starting the clock’ in respect of the time limitations contained in the future acts regime.

Where the DMP is of the view that the tenement applicant is not required to comply with the negotiation procedures specified in the future acts regime, and may instead rely on an ‘expedited’ procedure, it includes an assertion to this effect in its notice.

In Ghana the Minister Responsible for Mines is required to notify chiefs in writing of pending mineral tenement applications, but does not go in to further detail about how this is to be done. A Minerals Commission guidance document indicates that the notification period is 21 days, but does not specify what procedural rights accrue to customary landowners during the notification period or what happens at the end of the period.

2.9 Approvals and agreement making – Negotiation and consent

The only Western Australian legislation directly affecting the interaction between resource companies and customary landowners is the Aboriginal Heritage Act. The WA Mining Act does not engage substantively with customary landownership issues; it was enacted 15 years before customary rights to land were recognised by the Australian courts.

A detailed process circumscribing negotiations between resource companies and customary landowners is set out in the Commonwealth Native Title Act. This process, known as the future acts regime, has been the subject of significant contestation between tenement applicants and customary landowner groups (and at times involving the Government of Western Australia, which is also a party). A large body of case law has consequently been developed to clarify its application.

The future acts regime gives no veto to customary landowner groups. Customary landowners instead have the right to negotiate with resource companies about the grant of mining leases. In respect of the proposed grant of exploration licences, customary landowner groups generally have only the right to be notified. The future acts regime sets out clear timeframes and provides for parties to have recourse to arbitration if agreement cannot be reached within the specified timeframes, provided the parties have negotiated in good faith. The good faith requirement has in practice been found by the courts to have a low threshold.

Outside of the future acts regime, there is no legislative provision for Western Australian customary landowner groups to share directly in mining benefits.

The Ghanaian regulatory framework contains few provisions dealing specifically with the rights of customary landowners in relation to mineral sector developments. The provisions that do exist are contained within the country's Minerals and Mining Act. On the other hand, the framework is made up of various enactments containing numerous provisions recognising and protecting customary land ownership.

Prior to the grant of a tenement, the Ghana Minerals and Mining Act gives customary landowners (through chiefs) the right to be notified of the application a tenement. Post-grant, tenement holders are obliged to pay compensation to customary landowners for damage, but there is scant provision for the procedure to be applied in terms of timeframes and oversight. The Ghana Mining Act also sets up a relatively extensive regime for small-scale mining, which has a significant nexus with customary landownership issues.

While the provisions in the mineral legislation are few, the process for engagement between resource companies and customary landowners is made more complex by Ghana's various land-related enactments. Various government traditional authorities have the power to make laws, policies and recommendations. Customary landowner groups have established Land Secretariats to assist in the management of customary land. Regional Lands Commissions have the ability to block mineral development proposals where they are deemed inconsistent with local development plans. The degree to which these plans reflect the interests of customary landowners depends on the extent to which customary landowners are represented in each district, and is potentially significant.

2.10 Benefits distribution

In Western Australia the distribution of benefits is largely a private matter between companies and native title groups. The Western Australian government is required by the Native Title Act to participate in negotiations between resource companies and native title groups but it does not in practice involve itself with and is not privy to the substantive aspects of this process. Likewise, the government has legislated to make resource companies responsible for any compensation liability that may accrue in favour of native title holders – a liability that would otherwise have been borne by the government. The government therefore plays only a nominal role in the negotiation and distribution of payments. Similarly, it has not stipulated any form of schedule or other guidance, legislatively or otherwise, about the types or amounts of fees that may be payable by resource companies to customary landowners.

The Ghanaian Constitution and legislative and policy framework establish a range of processes for the provision of land rent, compensation and a substantial share of mining royalties to customary landowners. The Office of the Administrator of Stool Lands has been set up with the express objective of managing and allocating revenues deriving from customary lands. It should be noted that these funds are diverted via central government.

3 Fieldwork

This section sets out the key findings of the fieldwork. As referred to above, these findings have also been incorporated into a journal article entitled ‘Mining Impacts on Customary Law and Heritage in Ghana and Western Australia: Exploring Indigenous Heritage Protection’.

Fieldwork in support of the research was carried out in both Ghana and Western Australia. The researchers conducted interviews at the Northern Star mining impacted community in Wiluna, Western Australia, and in the AngloGold Ashanti and Newmont-Ghana mining impacted communities in the Ashanti Region of Ghana and the Akyem Kotoku Traditional Area in the Birim North District of the Eastern Region of Ghana respectively. The researchers also consulted industry and government stakeholders in Ghana and Western Australia to document their perspectives.

The key problems explored during this fieldwork and consultative process were:

- a) How do mining companies interact with Indigenous/customary landholders and communities in Australia and Ghana and how do central and sub-national governments participate in or regulate these interactions?
- b) What are the attitudes of customary landholders in Ghana about the impact of mining development on their cultural heritage and how can the situation be improved?

The recommendations arising from this fieldwork and desktop analysis are set out in Section 4 below.

3.1 Fieldwork planning

The fieldwork approach was initially developed during a meeting with Dr. Wazi Apoh, Wendy Treasure and Kirsty Wissing at the University of Ghana, Legon, Accra, on the 27th of July 2014. At this time, the two proposed comparative research areas – Ghana and Western Australia – had already been determined. It was decided to separate the comparison of legislation and the comparison of the impacts of mining on cultural heritage in practice into two papers: a legal and an anthropological paper respectively. In this initial meeting, the authors drew out similarities and differences between the research areas and discussed initial logistics for fieldwork, including a general time frame.

A follow up meeting was held with Dr. Wazi Apoh and Kirsty Wissing on the 12th of August 2014. Two field sites were proposed by Dr. Wazi Apoh during this meeting. They were the Newmont Akyem gold mine, Eastern Region and the AngloGold Ashanti (AGA) mine in Obuasi, Ashanti Region. Newmont Brong-Ahafo gold mine was also discussed as a possible alternate field site for comparison with the Newmont Akyem mine. However, it was decided that the Newmont Akyem and AGA Obuasi field sites provided the greatest comparison in terms of duration. The Newmont Akyem mine has only been operating a few years, and the memories of local residents regarding consultation, compensation and impacts are still very vivid. In comparison, the AGA has been operating for over 100 years. Although the memory of consultation, compensation and other matters has been dimmed over time and across

generations, the impacts of long term mining are more visible in this field site than the other possible sites. It was decided to conduct anthropological interviews with local residents, leaders and local government representatives at Newmont-Akyem and AGA-Obuasi respectively. This was to be followed by interviews with national government officials and regulatory bodies in Accra.

Prior to all fieldwork, a list of questions were drafted by Joe Fardin to incorporate into the fieldwork interviews. These were disseminated to all authors for feedback before a final version was decided upon. They research questions were subsequently beefed up by Kirsty Wissing and Wazi Apoh. They cover the general areas of community attitudes towards mining, community/customary landowner representation, interaction with government, interaction with industry, and community/customary landowner access to information and representation. These questions were incorporated into the interview in a semi-structured way.

It was decided to try and target decision makers from the local level (including chiefs and other community leaders) to the national level and to include mining representatives and civil society organisations in our interviews. A list of those interviewed features in the fieldwork schedule section below.

3.2 Fieldwork interview schedule

Table 1 lists the interviews conducted in Ghana (arranged in chronological order of interviews).

*Table 1: Interviews conducted in Ghana (arranged in chronological order, * indicated interview conducted in English, rather than Twi)*

Date	Person(s)	Position(s)	Location	Present at Interview
27/08/2014*	Felix Apoh	Environment and Social Responsibility Manager – Newmont	Golden Hotel, Akyem, Eastern Region (ER)	Wazi Apoh, Kirsty Wissing
28/08/2014	Oberempon Amoh Kyeretwie I	Abirim Chief.	Chief's Palace, New Abirim, ER	Wazi Apoh, Kirsty Wissing
28/08/2014	Nana Kofi Owusu Nana Nkansah Afrah II Okyeame Atta Kwakye	Regent Chief. Queen Mother. Linguist.	Chief's Palace Afosu, ER	Wazi Apoh, Kirsty Wissing

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	Nan Kofi Kyei	Youth Chief.		
28/08/2014	Nana Dansua Abeam Nana Teila	Queen Mother Adontehene.	Yayaaso, ER	Wazi Apoh, Kirsty Wissing
28/08/2014*	Felix Apoh	ESR Manager Newmont.	Felix's house, New Abirim, ER	Wazi Apoh, Kirsty Wissing
29/08/2014	Nana Asiedu Akora II Nana Abakwan Nana Asomaning Nana Adjei Twum Nana Okyeame Nimo Nana Obeng Ababio Openyem Unwa	Chief of Ntronang. Benkomhene. Benkumhene. Akwamuhene. Senior Linguist. Junior Linguist.	Chief's Palace Ntronang, ER	Wazi Apoh, Kirsty Wissing
29/08/2014	Nana Boateng Ababio Opanyin Oduro Owusu Nana Teye Laweh Nana Kweku Boateng Nana Kwejo Nyarko Nana Adjoa Tanowaa Maame Ata Lydia Opanyin S.R Anaman Nana Okyeame Asirifi Joe Tetteh	Mamanso Odikro. Elder. Krobohene. Akobeahene. Gyaasehene. Akwamuhene. Elder. Mmranthene. Linguist. Krobo Kyeame.	Chief's Palace Mamanso, ER	Wazi Apoh, Kirsty Wissing

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29/08/2014	Nana Yaw Dwamena Nana Yaw Kusi Nana O. Acheampong Nana Ofori Atta Nana Pinamang Debrah Nana Opoku Frimpong Kyeame Opoku Hon. Bernard Owusu Boateng Nana Frimpong Avornu Nana Afua Asantewaa Nkyemaa Anthony Asimeng	Akwamuhene . Benkumhene. Sanaahene. Mrantehene. Krontehene. Nifahene. Linguist. District Assembly Member. Ewe Chief Queen Mother. Unit Committee Chairman.	Chief's Palace Hweakwae ER	Wazi Apoh, Kirsty Wissing
30/08/2014*	Nana Bonin-Abankro V /Dr Tano Thompson	Chief of Adausena	House of Dr. Thompson, Adausena, ER	Wazi Apoh, Kirsty Wissing
31/08/2014*	Hon. Paul Dadzie	District Chief Executive (DCE) – District Assembly.	House of DCE, Abirim North, ER	Wazi Apoh, Kirsty Wissing
9/10/2014*	Edmond Agyei	Senior Community Development Officer – AngloGold Ashanti (AGA)	Anyinam Lodge, Obuasi, Ashanti Region (AR)	Wazi Apoh, Kirsty Wissing
9/10/2014*	Prince Aboagye	Member of the Centre for Social Impact Studies (CeSIS)	Anyinam Lodge, Obuasi, AR	Wazi Apoh, Kirsty Wissing

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9/10/2014*	Richard Ellimah Malik Bin Ishmael	Executive Director - CeSIS Presenter on SHAFT FM radio (member of CeSIS)	SHAFT FM Radio Station, Obuasi, AR	Wazi Apoh, Kirsty Wissing, Prince Aboagye (research assistant; RA)
9/10/2014	Nana Ofori Bonah	Chief of New Bidiem	Chief's Palace, New Bidiem	Wazi Apoh, Kirsty Wissing, Prince Aboagye (RA)
	Charles Manu	Linguist		
9/10/2014	Nana Kwamoa Bosompem	Benkumhene of Odumase	Benkumhene's house, Obuasi, AR	Wazi Apoh, Kirsty Wissing, Prince Aboagye (RA)
9/10/2014	Nana Kyei Akasabebuo	Acting Chief of Anyinam	Chief's house, Anyinam, AR	Wazi Apoh, Kirsty Wissing, Prince Aboagye (RA)
10/10/2014	Nana Kwadwo Kyere	Asakyerehene	Akrokerri Traditional Council Office, AR	Wazi Apoh, Kirsty Wissing, Prince Aboagye (RA)
	Nana Owusu Asiam	Chief Linguist		
	Nana Abu Kwadwo	Gyasewa		
	Nana K. Amponsem	Linguist		
	Mr Kusi Appiah	Secretary		
	Kweku offin	Ahenkwaa		
10/10/2014	Nana Opoku Adantehene	Adontehene of Bekwai Traditional Council	Bekwai Traditional Council Office, AR	Wazi Apoh, Kirsty Wissing, Prince Aboagye (RA)
	Mr. Oppon Ababra	Elder		
10/10/2014	Nana Kutin Asaadu	Chief of Adanse-Ayease	Chief's House	Wazi Apoh, Kirsty Wissing, Prince Aboagye (RA)
11/10/2014*	Aboagye Ohene Adu	Executive Manager of Sustainability	AGA Office, Obuasi, AR	Wazi Apoh, Kirsty Wissing

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	Edmond Agyei	Department – AGA Senior Community Development Officer – AngloGold Ashanti (AGA)		
12/10/2014*	Nana Bansrah Afriyie II (aka Kwaku Bonsrah)	Residence of Nana Bansrah Afriyie II, Kumasi		Wazi Apoh, Kirsty Wissing
6/11/2014*	Kwaku Afari	Programs Officer – WACAM	Africa Centre for Energy Policy (ACEP) office, North Legon, Accra	Wazi Apoh, Kirsty Wissing
27/11/2014*	Evelyn Sarpong Chris Nyarko	HR Manager Research Officer	Chamber of Mines, Accra	Wazi Apoh, Kirsty Wissing, Wendy Treasure
27/11/2014*	Ahmed D. Nangtogmah Chris Nyarko	Director of Public Affairs and Environment Research Officer	Chamber of Mines, Accra	Wazi Apoh, Kirsty Wissing, Wendy Treasure
27/11/2014*	Kwabena Badu-Yeboah Haron Harrison-Afful	Director of Environmental Assessment and Audit Program Officer in Mining	Environmental Protection Agency (EPA)	Wazi Apoh, Kirsty Wissing, Wendy Treasure
27/11/2014*	Peter Awuah	Deputy Manager for Minerals Title / Head of GIS	Minerals Commission	Wazi Apoh, Kirsty Wissing, Wendy Treasure

Interviews in the Newmont-Akyem field research area were facilitated by Mr. Teye Mensah, Community Liaison Officer, Newmont-Akyem. In each case Teye would introduce the authors, explain the purpose for our research visit, and then depart the interview so as not to influence the information given. The interviewers would then proceed to elaborate on reason and details of our research.

Interviews in Obuasi were facilitated initially through a contact at AGA, Mr. Edmond Agyei, Senior Community Development Officer. He recommended engaging Mr. Prince Aboagye as a research assistant. Prince had worked for AGA for a temporary period before becoming retrenched as part of the closure period for “care and maintenance”. At the time the interviews were conducted, he was working for the civil society organisation the Centre for Social Impact Studies (CeSIS). Prince helped to make contacts with local chiefs and others and acted as an interpreter for interviews. Unlike the situation in Newmont-Akyem, Prince remained in all interviews (as indicated) and assisted with interpretation of interview information to Kirsty Wissing.

Table 2 lists the interviews conducted in Western Australia (arranged in chronological order of interviews).

Table 2: Interviews conducted in Western Australia (arranged in chronological order).

Date	Person(s)	Position(s)	Location	Present at Interview
TBC	Guy Singleton Andrew lindsay	Principal External relations and Social Responsibility General Manager	Northern Star Resources Ltd Jundee Gold Mine Office, WA	Wazi Apoh Wendy Treasure
3/12/15	TBC	Manager of Environment , NJO	Northern Star Resources Ltd Jundee Gold Mine Office, WA	Wazi Apoh Wendy Treasure Guy Singleton
3/12/15	Delston Ashwinf Zavereth Long Richard Narrier	Martu Rangers, NJO	Northern Star Resources Ltd Jundee Gold Mine field	Wazi Apoh

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	Mike Wilde	Manager, Tenure and Native Title/ Dept. of Mines and Petroleum, Western Australia	Australia Office, WA	
5/12/15	Michael Hayden Gordon Cole	Chairman, Indigenous Construction Resource Group Maarli JV Pty Ltd (ICRG Maarli) Director, ICRG Maarli	ICRG Maarli office, WA	Wazi Apoh Wendy Treasure
6/12/15	Dr Debbie Fletcher	National Native Title Tribunal	National Native Title Tribunal, WA	Wazi Apoh Wendy Treasure

In Western Australia, a number of interviews were conducted by Wazi Apoh and Wendy treasure between Dember 3-8 2014. The interviews were started with senior managers of Northern Star Resources Ltd, and were followed by interviews with some Martu Rangers working with the NJO, officials of the Central Desert Native Title Services, and the members of the Wiluna Determination Prescribed Body Corporate (WDPBC). These meetings were held at Wiluna. Other interviews were conducted with WA officials in the Department of Mines as well as with a lawyer working at the Native Tribunal in Perth. In order to assess the views of Aborigines in business, we interviewed the leadership of the Indigenous Construction Resource Group Maarli JV Pty Ltd.

3.3 Interview structure

Information initially presented during the interview included:

- The names and occupations of each interviewer
- The research project
- The comparative aspect of the research project
- The project funding origin

- The independence of the study from the mining company with a concession of the research area (Newmont and AngloGold Ashanti respectively)
- The output of the project (a published legal and anthropological paper)
- What the project hoped to achieve (including recommendations)
- An opportunity for research participants to ask questions about the research and to decide whether to participate or not in the interview.

For regional interviews in Akyem and Obuasi regions, the interview usually then proceeded with background information about the relationship that local residents had to land within the mining concession, as well as broader settlement history (both Ghanaian and non-Ghanaian) for the area. This portion was more detailed for Akyem communities than for Obuasi communities because Dr. Wazi had previously conducted settlement research in this area.

Interviews were semi-structured and the legal questions were incorporated to bring out research participants' views on the various themes. The interviews offered an option for research participants to suggest recommendations regarding cultural heritage protection or other related issues around mining.

At the end of the interview, contact details were left by some or all of the authors should research participants have follow up queries.

3.4 Language and the use of interpreters in Ghana

The prominent language spoken in both Akyem and Obuasi is Twi. Dr. Wazi Apoh speaks this language but none of the other authors speak Twi. It is customary that Twi, rather than any other language (including English) must be spoken in the palaces of chiefs. Furthermore, Twi was a more comfortable language for some research participants to communicate in than English, resulting in a more productive interview. For this reason, Dr. Wazi Apoh often led interviews in the Akyem and Obuasi areas. In the Akyem area, Dr. Wazi interpreted the interview material to Kirsty Wissing during interviews. In the Obuasi interviews, research assistant Prince Aboagye interpreted the interview material to Kirsty Wissing and translated her research questions to participants. All interviews conducted in Accra were in English. Interviews conducted in English have an asterisk next to them as shown in Table 1 above.

3.5 Assessment of interview findings

Dr. Wazi Apoh and Kirsty Wissing discussed the interviews during the evenings of fieldwork and used each interview to sharpen the focus topic for future interviews. As much as possible, recommendations by research participants of other people within the region to interview were followed up. After each Ghanaian fieldwork trip, Dr. Wazi Apoh and Kirsty Wissing conducted a debrief meeting at the University of Ghana to discuss the research project and information gleaned. Dr. Wazi Apoh, Wendy Treasure, Joe Fardin and Murray Wesson also conducted a debrief meeting in Perth after the Western Australia

fieldwork before Dr. Apoh advised Kirsty Wissing of the research findings when he returned to Ghana. A challenge from the research interviews was that the information gleaned was quite varied and would not all fit within the topic framework or word count of the final anthropological and legal papers.

3.6 Summary of findings arising

The fieldwork gave rise to various findings about the two research areas, centred on cultural heritage issues. The research documented immense impacts on cultural heritage resources in both research areas, caused by mining. Research participants in Ghana reported that although cultural heritage – as defined – was a part of Ghana’s identity, understanding of heritage was being lost. Ghanaian customary landowners and community members reported altering of behavioural and customary norms as a result of mining, including the flouting of cultural taboo days and interruption to access to areas of cultural and spiritual significance. Pollution of rivers – and in some cases their entire redirection – is a particular problem, as rivers are in many cases believed to be associated with deities. Another notable impact – shared with the reported experience in Western Australia – is the relocation of or damage to sites and artefacts of archaeological significance. Research participants in Western Australia spoke about their ceremonial obligations in relation to sacred sites, and obligations known as ‘caring for country’. Western Australian participants reported that impacts on cultural heritage caused by mining include damage to the physical environment and the destruction of sacred sites – referring to places where such damage had occurred as ‘finished’.

4 Recommendations

The researchers make a number of recommendations based on the results obtained from the legal analysis and fieldwork. The recommendations focus on reform options for Ghana, drawing on the experience in Western Australia. The recommendations are as follows:

- 1) Incorporate information on cultural heritage into both school curricula and Ghanaian policy to address the current lack of any consistent understanding of the value of cultural heritage in Ghana;
- 2) Enact heritage protection legislation in line with the following:
 - a. The legislation must contain binding and enforceable rules applicable to all phases of the mining cycle;
 - b. The legislation must empower heritage professionals, archaeologists, anthropologists and museum experts to conduct heritage impact assessments;
 - c. Funding for such mandatory heritage impact assessments must be based on a ‘polluter pays policy’ and borne by the applicant;
 - d. The legislation must define who is a customary title holder and who holds authority to make decisions about land and cultural heritage protection;

- e. The legislation must specify the process by which mandatory consultation and negotiation are to be conducted between customary title holders, mining applicants and other parties (including the central and/or regional governments);
 - f. The legislation must specify a complaints procedure to guide the parties where agreement about cultural heritage protection cannot be reached between the parties;
 - g. The legislation must impose penalties for breaches for non-compliance;
 - h. The legislation must specify which institution or individuals will judge when a breach has occurred, and the appropriate penalty;
- 3) In relation to both 1 and 2 above, adopt a definition of cultural heritage that is developed independently or in correlation with the definition of environment as per the Environmental Protection Agency Act 1994 (Act 409) (Ghana);
- 4) Heritage professionals should provide periodic seminars on heritage impact assessment for all government and industry stakeholders in the mining sector.

These recommendations are set out in more detail in the paper arising from this research entitled 'Mining Impacts on Customary Law and Heritage in Ghana and Western Australia: Exploring Indigenous Heritage Protection', referred to above.

In addition, it is recommended that a set of model rules be developed to complement the proposed heritage legislation, to be implemented at the local or regional level using the power vested in Ghanaian Chiefs to declare customary rules in force. This reflects the mandatory custody over the known and unknown heritage resources exercised by Chiefs, queens and other community representatives in Ghana on their customary lands. This recommendation is set out in more detail in the second paper arising from this research entitled 'From Mabo to Obuasi: Mining, Heritage and Customary Law in Ghana and Western Australia', also referred to above.

5 Conclusion

Ghana features strong legal pluralism and substantial protections for customary interests – both within the Constitution and elsewhere. It also features a complex web of laws relating to land, reflecting the tensions inherent in such a legally pluralistic framework. There is a critical gap in this legal framework in that there is no heritage protection law.

Western Australia is also host to a plural legal environment, but it can be characterised as 'less' pluralistic in that protections of customary laws are featured in fewer legislative instruments and not at all at the constitutional level. At the same time there is a comprehensive legislative framework for mining with well-established administering agencies focussed on streamlining procedures for industry.

First of all, strong legal pluralism and constitutional recognition of customary law, as featured in the Ghanaian framework, do not necessarily result in empowered and satisfied customary landowners in mine-affected communities. Likewise in Western Australia the existence of specific heritage protection legislation, while fulfilling a crucial function in the context, has not been unproblematic.

Both of these observations reflect the inevitable compromise required in regulating to mitigate the effect of mining on customary interests. The success of the interaction between mining companies and customary landowning groups is determined by a wide range of factors, of which the legal framework plays a substantial part, but not the sole part. The extent to which the legal framework can guide the parties to successful outcomes will depend not only on political will and policy support, but also the will, skills and leadership shown by the mineral resource company and the customary landowner group in each case. Even a bespoke legislative framework can be ineffective.

The power vested in Ghanaian chiefs to declare customary laws presents an opportunity: model rules relating to the protection of cultural heritage should be developed and implemented at the stool level. This has the potential to provide clear guidance on heritage protection. There is also a clear need in Ghana for heritage protection legislation to be implemented, along with associated capacity building processes.

Analysis of the regulatory frameworks in Ghana and Western Australia shows that the enactment of laws or regulations can create opportunities. What is done with those opportunities, where they exist, is up to decision-makers in the first instance and also to stakeholders more broadly in terms of their ability to have input into the decision-making process. With this in mind, improving access to information at the local level and taking every opportunity to compare experiences, improve mutual understandings and collaborate at the regional and international levels is critical to the ongoing evolution of this complex interaction.

The researchers therefore wish to express their gratitude to IM4DC for making this research possible. The researchers express hope that this research contributes to advancements in the continually evolving interaction between resource companies, governments and customary land-owning groups, particularly in relation to heritage protection.

Appendix 1

Law and policy: The nature and evolution of the Ghanaian and Western Australian regulatory frameworks applying to mining and customary land-ownership

A.1 Western Australia

The main sub-national¹⁵ legislative instruments affecting the intersection between the mining industry and Aboriginal groups in Western Australia are the *Aboriginal Heritage Act 1972 (WA)* and the *Mining Act 1978 (WA)*. The customary rights and interests – known as ‘native title’ – of Aboriginal groups in Western Australia are governed by a national level enactment: the *Native Title Act 1993 (Cth) (NTA)*.

i. The Aboriginal Heritage Act 1972

The *Aboriginal Heritage Act 1972 (WA)* (‘the AHA’) provides for the “preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto.”¹⁶

The AHA establishes an Aboriginal Cultural Material Committee (ACMC) to advise the Minister for Aboriginal Affairs on Aboriginal heritage matters. The appointed members of the ACMC “shall be selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which ... will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters before the [ACMC].”¹⁷

The ACMC plays an important role in development approvals processes because whenever a land development is proposed, the ACMC is tasked with determining whether an Aboriginal site exists in that area.¹⁸ ‘Aboriginal site’ is defined in Section 5 of the AHA to mean:

- (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object natural or artificial used for, or made or adapted for use for any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- (c) any place which, in the opinion of the [ACMC], is or was associated with the Aboriginal people and which was of historical, anthropological, archaeological or ethnographical interest and

¹⁵ That is, Western Australian.

¹⁶ *Aboriginal Heritage Act 1972 (WA)*, long title.

¹⁷ *Ibid*, s 29(4).

¹⁸ *Ibid*, ss 4 and 5.

should be preserved because of its importance and significance to the cultural heritage of the State [of Western Australia];

- (d) any place where objects to which the [AHA] applies (generally objects of sacred ritual and ceremonial significance) are traditionally stored, or to which under the provisions of the [AHA] such objects have been taken or removed.

Where the ACMC finds that a site does exist, it evaluates the significance of the site,¹⁹ and ultimately makes a recommendation to the relevant Minister whether or not to grant consent to the application to use the land in question.²⁰

The AHA imposes penalties for breach of its provisions,²¹ while providing a defence for disturbance of a site where a person “did not know and could not reasonably be expected to have known” that a place was a site within the meaning of the AHA.²²

The AHA is administered by the Department of Aboriginal Affairs (DAA). The government department responsible for mining – the Department of Mines and Petroleum (DMP) – coordinates with DAA in relation to heritage policy as it relates to the mineral sector.²³ As part of a government push to streamline approvals processes the DMP has been designated the ‘single entry point’ for project proponents. As such the DMP refers tenement applicants to the DAA as necessary for particular heritage-related approvals.

At the time of writing, the Government of Western Australia has a proposal afoot to effect substantial changes to the AHA. To this end, it has released a draft bill for public comment: the Aboriginal Heritage Amendment Bill 2014 (‘Draft Bill’). Among other things, the Draft Bill proposes to reduce the role of the ACMC and correspondingly expand the powers of the Chief Executive Officer of the DAA, while at the same time expanding the scope and scale of penalties for non-compliance. One of the factors underlying the proposed amendments is a finding by the Western Australian Auditor General in 2011 that the DAA²⁴ “has not effectively monitored or enforced compliance” with the AHA.²⁵ These proposed amendments also reflect the Government of Western Australia’s current policy objective of streamlining

¹⁹ Pursuant to Aboriginal Heritage Act 1972 (WA), s 39(2).

²⁰ Including conditions, where relevant.

²¹ Aboriginal Heritage Act 1972 s 57 (as emended in 2003).

²² *Ibid*, s 62.

²³ Government of Western Australia, Department of Aboriginal Affairs and Department of Mines and Petroleum, ‘Memorandum of Understanding Regarding Lead Agency Working Arrangements’, 2014, at http://www.dmp.wa.gov.au/documents/Lead_Agency_Agreement.pdf, last accessed 24 October 2014, p 4.

²⁴ Known in 2011 as the Department of Indigenous Affairs or DIA.

²⁵ Government of Western Australia, Auditor General Western Australia, ‘Ensuring Compliance with Conditions on Mining’, 2011, at https://audit.wa.gov.au/wp-content/uploads/2013/05/report2011_08.pdf, last accessed 28 October 2014, p 22.

approvals processes for resource companies (as referred to above and as discussed in more detail at A.1.4 below), particularly with a view to stimulating exploration in new or ‘greenfields’ areas.²⁶

ii. The Mining Act 1978 (WA)

The other key piece of legislation in Western Australia is the *Mining Act 1978 (WA)* (the ‘WA Mining Act’). This act came into operation on 1 January 1982 alongside the associated Mining Regulations 1981.²⁷ It replaced the ‘old’ *Mining Act 1904 (WA)*, which was the first substantive legislative instrument regulating mining activities in the state. The old Act focused on gold mining, which at the time accounted for the vast bulk of mining activity in Western Australia.²⁸ The new WA Mining Act was developed following the release of a Committee of Inquiry report in 1971 recommending that

“the [old] Act might well be described as a pick and shovel period Act trying to fulfil the needs of a mechanised and sophisticated industry... We are convinced that the [old] Act is so unsatisfactory that it should be repealed and entirely new Act substituted.”²⁹

Thus, the ‘new’ WA Mining Act is “[a]n Act to consolidate and amend the law relating to mining and for incidental and other purposes”.³⁰ In doing so, it appropriates all minerals to the Crown³¹ in right of the State of Western Australia, with the effect that the Government of Western Australia is responsible for setting the regulatory framework (rather than the national government). The WA Mining Act is a sub-national rather than national-level law because the Australian Constitution does not list minerals as a matter within the national government’s power to regulate.

The WA Mining Act declares Crown land³² and private land³³ open for mining, and public reserves are open for mining subject to a special consent process.³⁴ It creates six classes of mineral tenements: prospecting licences, exploration licences, retention licences, mining leases, general purpose leases and miscellaneous licences. Of these, prospecting licences may be granted for an initial period of four years³⁵ and cover up to 200 hectares.³⁶ Exploration licences may be granted for an initial period of five years³⁷

²⁶ Government of Western Australia, Department of Mines and Petroleum, ‘Our Plan for Success to 2017 – A three year rolling strategic plan for the Department of Mines and Petroleum’, at http://www.dmp.wa.gov.au/documents/our_plan_for_success_to_2017.pdf, last accessed 5 October 2014.

²⁷ *Government Gazette*, 11 December 1981, p 5085.

²⁸ Hunt, MW, *Mining Law in Western Australia*, The Federation Press, Sydney, 2001 (3rd edition), p 3.

²⁹ *Report of the Committee of Inquiry Appointed to Inquire into and report on the Operation of the Mining Act 1904-1970*, Government Printer, Perth, 1971, p 18.

³⁰ *Mining Act 1978 (WA)*, long title

³¹ *Ibid*, s 9 – with the exception of minerals within freehold land alienated before 1899.

³² Crown land is land which has not been reserved, leased or sold (among other things) or which can be considered vacant; for a more detailed definition see *Mining Act 1978*, s 8.

³³ That is, land held in freehold (owned ‘outright’) – analogous to allodial title in civil law jurisdictions.

³⁴ *Mining Act 1978*, Part III.

³⁵ *Ibid*, s 45(1).

³⁶ *Mining Act 1978*, s 40(2).

and cover up to 70 ‘blocks’ (an area roughly 19,600 to 23,100 hectares, depending on location within the State).³⁸ Mining leases may be granted for an initial period of 21 years³⁹ and cover up to 1,000 hectares.⁴⁰

Roughly a decade after the WA Mining Act came into operation the Australian High Court in 1992, in what has come to be known as the Mabo decision, handed down its first judgment recognising Indigenous customary rights to land.⁴¹ The ensuing codification of that case law – the *Native Title Act* 1993 (Cth)⁴² (the ‘Native Title Act’) – had significant implications for the regulation of Western Australia’s mineral sector and therefore for the operation of the WA Mining Act:

“[T]he biggest change in the practical application of mining law in Western Australia has been caused by native title. The impact of the *Native Title Act* 1993 and the 1998 amendments to it has been enormous, involving a radical rethink in both the administration and operation of the [WA Mining Act], particularly so far as applications for mining tenements are concerned.”⁴³

More specifically, the process of granting mineral titles – historically a process solely involving the Government of Western Australia and mineral tenement applicants – was at first considerably slowed by the introduction of this supervening national legislation. A commentator noted in 1998:

“Western Australia is the State hardest hit by the unworkable processes of the current [Native Title Act], with the minerals industry continuing to suffer immense difficulty in having mineral titles approved... Since March 1995, only 208 mineral titles have been granted as a result of the [Native Title Act ‘right to negotiate’ procedures] – less than one per week – but a further 14 title applications enter the process each week.”⁴⁴

Subsequent amendments to the Native Title Act – principally the Native Title Amendment Act 1998 – specifically addressed factors contributing to this tenement application backlog. The Native Title Act and related matters will be discussed further below at A.1. iii.

In response to the advent of native title, the WA Mining Act was amended to deal with the issue of compensation for native title holders. An amendment was made to the WA Mining Act in 1998 to make the holder of a tenement liable for any compensation to be paid.⁴⁵ The effect of this amendment was to

³⁷ Ibid, s 61(1).

³⁸ Ibid, s 57(2).

³⁹ Ibid., s 78(1)(a).

⁴⁰ Ibid, s 73.

⁴¹ *Mabo v Queensland (No 2)* [1992] HCA 23

⁴² Discussed further *infra* at 1.3.

⁴³ Hunt, MW, *Mining Law in Western Australia*, The Federation Press, Sydney, 2001 (3rd edition), p ix.

⁴⁴ *Australian Journal of Mining* 23 (1998), quoted in Hunt, MW, *Mining Law in Western Australia*, The Federation Press, Sydney, 2001 (3rd edition), p 31.

⁴⁵ Mining Act 1978, s 125A.

shift liability away from the Government of Western Australia, which would otherwise be responsible for any compensatory liability arising under the Native Title Act 1993.⁴⁶

As mentioned above, the DMP is responsible for the administration of the WA Mining Act. The DMP is therefore responsible for regulating the extractive industries in Western Australia, collecting royalties, and ensuring that health, safety and environmental standards are met.

Overall, the administration of Western Australia's mineral sector is acknowledged as featuring a comprehensive regulatory framework, effective institutions to administer the framework and high levels of transparency in decision-making, although its safeguards and quality controls ranking is relatively low.⁴⁷

iii. The Native Title Act 1993

The Native Title Act is Australia's principal piece of legislation on the rights of its Aboriginal people. As distinct from the Mining Act and the AHA, it is a Commonwealth (national level) enactment. It aims to recognise and protect native title while also providing a level of certainty to others – such as resource companies – about the nature and extent of this recognition. It arose as a legislative compromise negotiated following the High Court's watershed decision in *Mabo v Queensland (No 2)*, referred to above. In this decision, the Australian legal system recognised for the first time the common law native title rights and interests held by Aboriginal and Torres Strait Islander people, rejecting the historical position that pre-colonial Australia was 'terra nullius' – 'land belonging to no one'.⁴⁸ The rights and interests recognised by the Native Title Act are 'the communal, group or individual rights and interests of Aboriginal Peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia'.⁴⁹

⁴⁶ Native Title Act s 51. See also *infra* at 2.1.3.

⁴⁷ Natural Resource Governance Institute, at <http://www.resourcegovernance.org/countries/asia-pacific/australia/overview>. See also Fraser Institute, Fraser Institute Annual Survey of Mining Companies 2012/2013, at <https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=ht tp%3A%2F%2Fwww.fraserinstitute.org%2FuploadedFiles%2Ffraser-ca%2FContent%2Fresearch-news%2Fresearch%2Fpublications%2Fmining-survey-2012-2013.pdf&ei=oJIIVLrMKqXFmwXMgoCABA&usg=AFQjCNEFhtSk4e2Q5EllglaD0c9K8haZTQ&sig2=xSyOVvO1vs4vInhh34VMKQ&bvm=bv.77880786,d.dGY&cad=rja>, p 10.

⁴⁸ Native Title Act 1993, preamble.

⁴⁹ Native Title Act 1993, s 223(1).

This requirement for traditionality of practices and an unbroken connection to land since pre-colonial times⁵⁰ means that the Native Title Act is not capable of recognising and protecting non-‘traditional’ practices (such as commercial activities).

The main objects of the Native Title Act (taking into account the foregoing) are:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.⁵¹

Of these objects, (b) and (d) are the most important for the purposes of this research. The Native Title Act operates to validate certain acts that would otherwise be invalid to the extent they affect native title – importantly including the future grant of rights to explore for or extract minerals. The validation provisions relating to mineral titles yet to be granted is known as the ‘future acts’ regime, and applicants must comply with this regime to properly secure mineral tenure.⁵²

The future acts regime therefore sits at the heart of interactions between resource companies and Aboriginal groups in Western Australia. In practice, regime works as follows. When a mineral resource company applies for a new mineral tenement, the DMP issues a notice⁵³ of its intention to grant the new tenement in a state and a national newspaper. The DMP also notifies any affected Aboriginal group.⁵⁴ The notice specifies a ‘notification day’ and contains a statement specifying that persons have three months from the notification day to become native title parties in relation to the notice.⁵⁵ Once four months have elapsed after the notification day, any native title party⁵⁶ has a right to negotiate with

⁵⁰ The State of Western Australia is deemed to have been established on 1 June 1829: Interpretation Act 1984 (WA) s 73.

⁵¹ Native Title Act 1993, s 3.

⁵² *Ibid*, s 24OA. Mining tenements already granted and which can be categorised as ‘past acts’ or ‘intermediate period acts’ are validated by Division 2 and Division 2A of the Native Title Act respectively. The Native Title Act also empowers sub-national governments to ‘confirm’ existing ownership of natural resources by the Crown.⁵² It does not allow for the conferral of any rights to Aboriginal people in respect of minerals as defined in the Mining Act.

⁵³ Pursuant to Native Title Act 1993, s 29.

⁵⁴ Native Title Act 1993, s 29.

⁵⁵ *Ibid*, s 29(4).

⁵⁶ A native title party can be either a ‘native title body corporate’ (Native Title Act 1993, s 30(1)(b),(c)) or a registered native title claimant. A native title claim must be ‘registered’ pursuant to Part 7 of the Native Title Act 1993 for the procedural rights contained in the future acts regime to accrue. To achieve registration a native title claim must meet a number of conditions to do with both the merits of the claim and certain procedural matters, in the assessment of the Native Title Registrar – Native Title Act 1993 s 190A(6)(b)(i) and (ii).

a tenement applicant about the grant of mineral tenure.⁵⁷ From that point the native title party, the tenement applicant (referred to as the ‘grantee party’) and the ‘government party’ (in this case the Government of Western Australia) negotiate with a view to obtaining the agreement of the native title party. The native title party does not have any procedural right akin to a veto (that is, a right to say ‘no’) within this process and so, if no agreement has been reached between the parties after six months have elapsed after the notification day, the matter can be referred to an arbitrator to make a binding decision.⁵⁸

An exemption from the obligation to negotiate – known as the expedited procedure – exists for ‘low impact’ acts, being acts that are not likely to interfere directly with Aboriginal community or social activities, areas of significance, and related matters.⁵⁹ Thus in practice native title parties generally are generally afforded a seat at the negotiating table in the case of mining lease applications but not in the case of exploration and prospecting licence applications because these come within the ‘low impact’ exemption.

There is a great deal of case law dealing with the practical implications of the interaction between the Native Title Act and Australia’s various sub-national mining regimes. It is beyond the scope of this research to engage with common law developments in this aspect. It is worth noting, however, that shortly after the introduction of the Native Title Act the Government of Western Australia challenged the entire Native Title Act framework by attempting to set up its own, sub-national legislative regime. This endeavour was ultimately unsuccessful,⁶⁰ but it is illustrative the tension between the objective of facilitating the growth of the mineral sector at the sub-national level and the objective of recognising and protecting native title rights under national legislation. Another historical factor relates to the so-called ‘1998 amendments’ referred to above. The obligations to negotiate contained in the Native Title Act were historically much broader in scope, in terms of both who could benefit from the specified procedure and the circumstances in which it applied. However the Native Title Amendment Act 1998 – introduced after the longest Senate debate in the history of Australia’s national Parliament⁶¹ – made substantial changes to the Native Title Act including diminishing the scope and operation of the obligation to negotiate, bringing it to its present form.⁶²

Native title holders are entitled to compensation under the Native Title Act for the extinguishment or impairment of their native title rights and interests.⁶³ The grant of mineral tenure by the Government of Western Australia may therefore give rise to a liability to pay compensation to native title holders. Importantly (and also as referred to above) the Government of Western Australia has “passed this

⁵⁷ Native Title Act 1993, s 31(1)(b)(i).

⁵⁸ *Ibid*, s 35.

⁵⁹ *Ibid*, ss 32, 237.

⁶⁰ See *Western Australia v Commonwealth* [1995] HCA 47.

⁶¹ Kildea, Jeff, ‘Native Title: A Simple Guide’, Human Rights Council of Australia, 1998.

⁶² Native Title Amendment Act 1998, s 3.

⁶³ Native Title Act 1993, s 51.

obligation to grantee parties.... Relevant provisions of the *Mining Act 1978* (WA) ... reflect that position.”⁶⁴

The other key component of the Native Title Act for present purposes is Part 11, which sets up a system providing for the recognition and operation of so-called native title representative bodies ('NTRBs'). These bodies receive funding from the national government to carry out a number of functions pursuant to the Native Title Act including a 'facilitation and assistance' function. Among other things, this function involves researching and preparing applications for native title and assisting native title holders or applicants in consultations and negotiations about mineral tenement applications.⁶⁵ This sets up a system of representative organisations providing legal, anthropological and other forms of assistance to Aboriginal groups Australia-wide who seek formal recognition of their customary rights. Aboriginal groups retain the option to obtain legal representation from private law firms, but the bulk of native title-related work done on behalf of Aboriginal groups is currently carried out by NTRBs. There are five NTRBs in Western Australia.⁶⁶ If an application for native title is determined in the affirmative by the Federal Court – with the effect that the customary rights claimed are given formal legal recognition – a 'prescribed body corporate' ('PBC') must be set up to hold the native title on behalf of the group.⁶⁷ At this point, the NTRB's functions may be transferred to the PBC, or the NTRB may continue to assist in some capacity, if requested by the PBC and if the NTRB has sufficient funding to do so. PBCs may apply for limited, non-recurrent government funding in 'exceptional circumstances', but otherwise do not receive direct financial support from the Australian Government.⁶⁸

iv. Western Australian Government policy

The DMP has been designated the 'lead agency' in promoting and regulating the Western Australian mineral sector, under a recent state government initiative establishing a 'Lead Agency Framework'.⁶⁹ The effect of the Lead Agency Framework is to establish a single entry point for project proponents

⁶⁴ Government of Western Australia, Department of Premier and Cabinet, 'Guide to Government Business under the Commonwealth Native Title Act 1993', at <http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/Guide-to-Government-Business-under-the-Commonwealth-Native-Title-Act-1993-Version-1-12-July-2013.pdf>, pp 5-6, last accessed 9 October 2014; Mining Act 1978, s 125A.

⁶⁵ Native Title Act 1993, s 203BB(1).

⁶⁶ Respectively covering the Kimberley, Pilbara and Gascoyne, Central Desert, Goldfields and South West regions.

⁶⁷ Native Title Act 1993, s 55.

⁶⁸ Australian Government, Department of Families, Housing, Community Services and Indigenous Affairs, 'Guidelines for Basic Support Funding for Prescribed Bodies Corporate (PBCs)', at http://www.nativetitle.org.au/documents/FaHCSIA_PBCBasicSupportGuidelines2013.PDF, last accessed 23 October 2014, p 6.

⁶⁹ Government of Western Australia, Department of the Premier and Cabinet, 'Lead Agency Framework, A guidance note for implementation, at http://www.dsd.wa.gov.au/documents/Lead_Agency_Guidance_Document_March_2011.pdf, last accessed 2 October 2014.

(such as mineral tenement applicants) from which the lead agency itself coordinates all relevant approvals processes. The objective is to streamline processes to maximise attractiveness to potential investors and facilitate applications for mineral tenure and development processes by, among other things, coordinating approvals processes.

In connection with this the DMP has implemented two key informal policies in relation to Native Title Act processes. The first relates to the ‘expedited procedure’ exception to the duty to negotiate (discussed above at A.1.3), wherein a tenement applicant is not required to negotiate with a native title group where it is proposing a ‘low impact’ activity. The DMP has developed an informal policy of asserting the application of the ‘expedited procedure’ in every exploration or prospecting licence notification, provided the applicant has met certain conditions.⁷⁰ It is then up to native title groups to monitor DMP notifications and lodge an objection if they feel the expedited procedure should not apply and that the duty to negotiate should be imposed.

The second informal DMP policy is in relation to the Native Title Act requirement that the Government of Western Australia is to participate in ‘future act’ negotiations between resource companies and native title groups. The DMP has in practice “stood back and allowed both the grantee party and the native title parties to negotiate without the State government being involved.”⁷¹ This is reflected in the Government of Western Australia’s statement that

“The Federal Court’s recognition of native title rights over an area of land or water does not impact on State and Commonwealth laws of general application. Nothing in a native title determination amends existing laws or limits normal administration by public officers. Consent determinations include statements that the native title rights and interests are exercisable in accordance with the laws of the State...”⁷²

Native title parties have in the past argued that by taking a passive stance – demonstrated by, among other things, refusal to provide financial compensation out of mining royalties – government parties are not fulfilling their obligations within the Native Title Act right to negotiate framework.⁷³ The National Native Title Tribunal (NNTT), however, has determined that there is no obligation on the relevant sub-national government to get involved in substantive negotiations: “[i]f an issue is satisfactorily resolved

⁷⁰ Namely, if it has signed a ‘Regional Standard Heritage Agreement’: Government of Western Australia, Department of Mines and Petroleum, DMP website, at <http://www.dmp.wa.gov.au/4327.aspx#4920>, last accessed 26 October 2014.

⁷¹ *Western Australia v Taylor* (1996) 134 FLR 211 [3.1].

⁷² Government of Western Australia, Department of Premier and Cabinet, ‘Guide to Government Business under the Commonwealth Native Title Act 1993’, at <http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/Guide-to-Government-Business-under-the-Commonwealth-Native-Title-Act-1993-Version-1-12-July-2013.pdf>, p 1, last accessed 9 October 2014.

⁷³ Daniel Guttman, ‘Australian and Canadian Approaches to Native Title Pre-Proof
Australian Indigenous Law Reporter 8.

by agreement between the grantee and native title parties there may be no need for the government party to intervene with further proposals”.⁷⁴ What the parties do to satisfy the good faith obligation

“must be judged by reference to the interests that they seek to advance in the negotiation ... For example, in relation to the government party’s obligation to negotiate, it is entitled to have regard to its interests in the orderly administration of tenements, and due performance of functions under the Mining Act, and other State legislation.”⁷⁵

The NNTT has come to refer to agreements engaging with the substantive aspects of a deal (including benefits flowing to the native title party) as ‘ancillary agreements’ solely between the grantee party and native title party.⁷⁶ The related agreement to which a state government is a party is referred to as a ‘State Deed’, and this document merely “confirms that the grant of the tenement can occur”.⁷⁷ Ancillary agreements are treated as confidential as between the grantee party and the native title party; the government has no involvement in their negotiation. This effectively splits the negotiation process into two streams and allows the state government to remove itself from the substantive aspects of agreement making with Aboriginal groups.

DMP has developed a range of guidelines and policies “to promote the responsible development of [Western Australia’s] mineral ... resources”.⁷⁸ One of these is a document entitled ‘Guidelines for Consultation with Indigenous People by Mineral Explorers’. These guidelines were developed for the benefit of mineral explorers, as the title suggests. They seek to define how and to what extent the nature and extent explorers must consult with Aboriginal groups to satisfy the legislative requirements. Of note is the following statement contained in the introduction to the document:

“Over the last 25 years, Governments in Australia have attempted to recognise the importance of Aboriginal cultural identity and relationships to land through changes in policy and the enactment of legislation. This recognition is still developing in many areas and will continue to do so for some time.”⁷⁹

⁷⁴ *Normandy Pajingo Pty Ltd V Queensland* [2000] NNTTAA 327 (29 September 2000), [33].

⁷⁵ *Western Australia v Dimer* (2000) 163 FLR 426.

⁷⁶ See National Native Title Tribunal, ‘ILUA or the right to negotiate process? A comparison for mineral tenement applications’, National Native Title Tribunal, December 2008, available online at <
<http://www.nntt.gov.au/Future-Acts/Documents/ILUA%20or%20the%20right%20to%20negotiate%20December%202008.pdf>>; also of relevance to this is the fact that the NTA does not give the NNTT jurisdiction to arbitrate on profit sharing or related matters – *Native Title Act 1993* (Cth) s 38(2).

⁷⁷ *Ibid*, s 5.

⁷⁸ Government of Western Australia, Department of Mines and Petroleum website, at <http://www.dmp.wa.gov.au/11337.aspx>, last accessed 20 October 2014.

⁷⁹ Government of Western Australia, Department of Mines and Petroleum, ‘Guidelines for Consultation with Indigenous People by Mineral Explorers’, at [http://www.dmp.wa.gov.au/documents/ConsultationGuidelinesIndigenous_Aug2014\(1\).pdf](http://www.dmp.wa.gov.au/documents/ConsultationGuidelinesIndigenous_Aug2014(1).pdf), last accessed 5 October 2014, p 1.

A.2 Ghana

The main legislation engaging with the intersection between mining and customary landowner groups in Ghana is the *Minerals and Mining Act 2006* a suite of interrelated land legislation, and the *Constitution of the Republic of Ghana 1992*. This section will examine the key elements of each. Heritage regulation is noticeable by its absence in this section, due to the fact that Ghana lacks heritage legislation.

i. Minerals and Mining Act 2006 (Act 703) and related legislation and regulations

The Minerals and Mining Act 2006 (Act 703) ('the Ghana Mining Act') is the main enactment regulating mining activity in Ghana. It replaces the Mineral and Mining Law 1986 (PNDCL.153) – regarded as a 'trailblazer' in sub-Saharan mining legislation – following a modernisation process beginning in the early 2000s.⁸⁰ This process featured extensive stakeholder consultation, including traditional authorities and local government authorities. This reflected a government policy focus on, among other things, equitable sharing of the financial and other benefits of mining and achieving a socially acceptable balance between mining and the physical and human environment.⁸¹

The Ghana Mining Act reserves ownership of all minerals to "the President in trust for the people of Ghana"⁸² in a provision echoing the Ghanaian Constitution.⁸³ It declares all land open for mining, other than land already the subject of mineral tenure and land expressly reserved by the Ghana Mining Act "or any other enactment".⁸⁴ It creates four classes of mineral tenements: reconnaissance licences,⁸⁵ prospecting licences,⁸⁶ mining leases⁸⁷ and small scale mining licences.⁸⁸ Reconnaissance licences may be granted for an initial period not exceeding twelve months and cover up to 5,000 contiguous 'blocks' (105,000 hectares).⁸⁹ Prospecting licences may be granted for an initial period not exceeding 3 years and cover up to 750 contiguous 'blocks' (15,750 hectares).⁹⁰ Mining leases may be granted for an initial period not exceeding 30 years and cover up to 300 'blocks' (6,300 hectares).⁹¹ Mining lease holders

⁸⁰ United Nations, 'A Report on Ghana's Mining Sector for the 18th Session of the UN Commission on Sustainable Development', 2010, at http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/ghana/Mining.pdf, at 3.2, last accessed 10 October 2014.

⁸¹ United Nations, 'A Report on Ghana's Mining Sector for the 18th Session of the UN Commission on Sustainable Development', 2010, at http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/ghana/Mining.pdf, at 3.1, last accessed 10 October 2014.

⁸² Minerals and Mining Act 2006, s 1.

⁸³ The Constitution of the Republic of Ghana, s 257(6).

⁸⁴ Minerals and Mining Act 2006, s 3.

⁸⁵ Ibid, ss 31-33.

⁸⁶ Ibid, ss 34-38.

⁸⁷ Ibid, ss 39-61.

⁸⁸ Ibid, ss 81-99.

⁸⁹ Ibid, s 31(2)-(3).

⁹⁰ Ibid, s 34(2)-(3).

⁹¹ Minerals and Mining Act 2006, s 41(1)-(2).

must pay a royalty of between 3% and 6% to the Government of Ghana based on the value of minerals produced.⁹²

The small scale mining provisions are relatively extensive, covering matters including designated areas, registration, Small Scale Mining Committees and compensation. Small scale mining licences are available to Ghanaian citizens only.

The power to grant mineral tenure is held by the Minister Responsible for Mines, on the recommendation of the Minerals Commission. The Minerals Commission forms part of the Ministry of Lands and Natural Resources, and holds overall responsibility for the administration of Ghana Mining Act. Importantly, the Minister is obliged to give written notification of a pending application for a mineral tenement “to a chief or allodial owner [of the relevant land] and the relevant District Assembly”.⁹³ The Ghana Mining Act does go in to any further detail on the notification or consultation process to follow a tenement application. The minimum legal threshold for notification and consultation therefore appears to be low. A guideline produced by the Minerals Commission specifies that the notification is to be “for a period of 21 days to afford the general public the opportunity to examine the application and to react if necessary”.⁹⁴ No clarification is given on what is meant by the term ‘react’. In connection with this all stakeholders have the opportunity to negotiate about compensation and related payments after the grant of a tenement⁹⁵ but, at least in some cases, before any work begins.⁹⁶

A tenement holder is liable to pay compensation to any lawful owner or occupier of land subject to a tenement⁹⁷ for things including but not limited to the following:

- (a) deprivation of the use or a particular use of the natural surface of the land or part of the land,
 - (b) loss of or damage to immovable properties,
 - (c) in the case of land under cultivation, loss of earnings or sustenance suffered by the owner or lawful occupier, having due regard to the nature of their interest in the land,
 - (d) loss of expected income, depending on the nature of crops on the land and their life expectancy
- but claim [sic] for compensation lies,⁹⁸ whether under this Act or otherwise

⁹² Ibid, s 25.

⁹³ Ibid, s 13(2).

⁹⁴ Government of Ghana, Minerals Commission, ‘Application For a Mining Lease Originating From a Prospecting Licence Or An Area With Adequate Data On the Mineral Deposit’, at <http://www.eservices.gov.gh/MINCOM/SitePages/Guidelines-MiningLease.aspx>, last accessed 17 October.

⁹⁵ Minerals and Mining Act 2006, s 73.

⁹⁶ United Nations, ‘A Report on Ghana’s Mining Sector for the 18th Session of the UN Commission on Sustainable Development’, 2010, at http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/ghana/Mining.pdf, p 20, last accessed 10 October 2014.

⁹⁷ Minerals and Mining Act 2006, s 73(1).

⁹⁸ It appears this provision is intended to read ‘but *no* claim for compensation lies...’.

- (e) in consideration for permitting entry to the land for mineral operations,
- (f) in respect of the value of a mineral in, on or under the surface of the land, or
- (g) for loss of [sic] damage for which compensation cannot be assessed according to legal principles in monetary terms.⁹⁹

The owner of a mining lease (but not a reconnaissance licence or prospecting licence) – that is, after the lease is granted – must carry out a survey of crops on the relevant land and produce a map showing the results of the survey, presumably to inform the determination of compensation quanta.

Following the grant of any mineral tenement the holder has the right to enter the land covered by it,¹⁰⁰ subject to the Act’s compensation provisions discussed above.¹⁰¹ Reasonable qualifications on access may be imposed by the relevant Minister to augment the qualifications contained in the Ghana Mining Act.¹⁰² The Ghana Mining Act also references certain environment-related approvals on which the exercise of rights pursuant to the grant (but not the grant itself) is made conditional, including water and forestry rights.¹⁰³

Importantly the Ghana Mining Act requires that all tenement holders pay an annual ground rent “as may be prescribed”.¹⁰⁴ In stool lands, this rent is to be paid to Office of the Administrator of Stool Lands and applied in accordance with the relevant legislation (see A.2.2 *infra*).

The Ghana Mining Act also contains provisions relating to resettlement of displaced inhabitants, having regard to the economic well-being and social and cultural values of the displaced persons.¹⁰⁵

The Minerals Commission is established pursuant to the Minerals Commission Act 1993 (Act 450), as mandated by the Ghanaian Constitution.¹⁰⁶ It is responsible for the day-to-day regulation and management of the mineral sector and the “co-ordination of the policies in relation to [this]”.¹⁰⁷ The functions of the Minerals Commission relevantly include the following:

- (a) formulate recommendations of national policy for exploration and exploitation of mineral resources with special reference to establishing national priorities having due regard to the national economy;
- (b) advise the Minister on matters relating to minerals;
- (c) monitor the implementation of laid down policies of the Government on minerals and report on this to the Minister;

⁹⁹ Minerals and Mining Act 2006, s 74(1).

¹⁰⁰ *Ibid*, s 13(9).

¹⁰¹ *Ibid*, ss 73, 74.

¹⁰² *Ibid*, s 72.

¹⁰³ *Ibid*, ss 17, 18.

¹⁰⁴ *Ibid*, s 23(1).

¹⁰⁵ *Ibid*, s 74(4)-(5).

¹⁰⁶ Constitution of the Republic of Ghana, article 269(1).

¹⁰⁷ Minerals Commission Act 1993, s 2(1).

- (d) monitor the operations of the bodies or establishments with responsibility for minerals and report to the Minister;
- (e) receive and assess public agreements relating to minerals and report to Parliament;

...¹⁰⁸

Six items of delegated legislation were introduced in 2012 to supplement the Ghana Mining Act. These are the Minerals and Mining (General) Regulations, 2012 (L.I 2173), the Minerals and Mining (Support Services) Regulations, 2012 (L.I 2174), the Minerals and Mining (Compensation and Settlement) Regulations, 2012 (L.I 2175), the Minerals and Mining (Licensing) Regulations, 2012 (L.I 2176), the Minerals and Mining (Explosives) Regulations, 2012 (L.I 2177), and the Minerals and Mining (Health, Safety and Technical) Regulations, 2012 (L.I 2182). These regulations are understood to supersede the Mining Regulations 1970 (LI 665).

Overall, the administration of Ghana's mineral sector is recognised as featuring medium or 'partial' rating for its institutional and legal framework and transparency in decision-making, while ranking higher than Western Australian for safeguards and quality controls.¹⁰⁹

ii. The Constitution and Land Legislation

The Constitution of the Republic of Ghana 1992 ('Ghanaian Constitution') and the various pieces of Ghanaian land legislation will be considered together in this section because of the interconnectedness between the two. It plays a central role in the management of land and natural resources in Ghana. Aside from the Minerals Commission (discussed above) it establishes a Lands Commission and Regional Lands Commissions, the Office of the Administrator of Stool Lands and a National House of Chiefs and Regional Houses of Chiefs – all of which play a role in the administration of the mineral sector. Each of these agencies will be discussed further below.

The Ghanaian Constitution recognises customary law as one of the sources of law comprising the 'laws of Ghana'.¹¹⁰ It guarantees the institution of chieftaincy, and makes provision for the vesting of 'stool lands' in the appropriate stool on behalf of and in trust for the subjects of the stool.¹¹¹ This is to be done

¹⁰⁸ Minerals Commission Act 1993, s 2(2).

¹⁰⁹ Natural Resource Governance Institute, at

<http://www.resourcegovernance.org/countries/africa/ghana/overview>. See also Fraser Institute, Fraser Institute Annual Survey of Mining Companies 2012/2013, at <https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.fraserinstitute.org%2FuploadedFiles%2Ffraser-ca%2FContent%2Fresearch-news%2Fresearch%2Fpublications%2Fmining-survey-2012-2013.pdf&ei=oJIIVLrMKqXFmwXMgoCABA&usg=AFQjCNEFhtSk4e2Q5EllglaD0c9K8haZTQ&sig2=xSyOVvO1vs4vInhh34VMKQ&bvm=bv.77880786,d.dGY&cad=rja>, p 10.

¹¹⁰ Constitution of the Republic of Ghana, article 11(1)-(2).

¹¹¹ Ibid, articles 267(1), 270(1).

in accordance with ‘customary law and usage’.¹¹² The term ‘stool lands’ is not defined in the Ghanaian Constitution, but is defined inclusively in other legislation as “a land or an interest in, or right over, a land controlled by a stool or skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that stool or the members of that community or company”.¹¹³ The term ‘stool’ itself is not defined but can be understood as an emblem of power and authority analogous to a throne, symbolising the institution of chieftaincy. Additionally, the President of the National House of Chiefs is to be a member of the Council of State, whose function is to “counsel the President in the performance of his functions”.¹¹⁴

In addition, the Ghanaian Constitution makes provision for the payment of revenues and royalties deriving from stool lands separately to stools, traditional authorities and District Assemblies as well as the Administrator of Stool Lands.

The effect of these provisions, in theory at least, is to give customary landowners a significant degree of agency in relation to land tenure and resource projects – particularly in terms of approvals processes and economic participation. As such, Ghana is a state “characterised by strong legal and institutional pluralism”, and Ghanaian governments since independence have been predominantly supportive of the traditional authority wielded by chiefs.¹¹⁵

As already discussed the Ghanaian Constitution reserves ownership of all minerals to the state, in a provision echoed in the Ghana Mining Act.¹¹⁶

The Ghanaian Constitution also makes provision for a system of local government “which shall, as far as practicable, be decentralised”.¹¹⁷ In support of this it divides Ghana into districts and establishes District Assemblies to exercise deliberative, legislative and executive powers at the district level,¹¹⁸ thereby forming the “bedrock of the country’s decentralisation policy”.¹¹⁹ These District Assemblies control “persons in the service of local government”,¹²⁰ and the Ghanaian Constitution tasks Parliament to build the capacity of these persons to initiate and execute policies “in respect of all matters affecting the people within their areas, with a view to ultimately achieving localisation of those activities”.¹²¹ By virtue of these constitutional provisions local authorities are given clear scope to have direct input into Ghana’s mineral sector regulatory and policy framework. District Assembly Presidents are required to

¹¹² Ibid, article 267(1).

¹¹³ Office of the Administrator of Stool Lands Act 1994 (Act 481), s 17.

¹¹⁴ Constitution of the Republic of Ghana, article 89(2)(b).

¹¹⁵ Ubink, 2008, ‘In the Land of the Chiefs’, p 20-21.

¹¹⁶ Ibid, article 257(6).

¹¹⁷ Ibid, article 240(1).

¹¹⁸ Ibid, article 241.

¹¹⁹ Draft National Mining Policy of Ghana, 2010, at <http://213.154.74.164/invenio//record/18584/files/mining%20policy%20of%20Ghana.pdf>, last accessed 15 October 2014, p.33.

¹²⁰ Constitution of the Republic of Ghana, article 240(d).

¹²¹ Constitution of the Republic of Ghana, article 240(b).

consult with the ‘traditional authorities’ about the appointment of District Assembly members.¹²² (The term ‘traditional authorities’ is not defined in the Ghanaian Constitution, but is defined in the Office of the Administrator of Stool Lands Act 1994 as “a House of Chiefs or any council or body established or recognized as such under customary law”.¹²³) The other members constituting District Assemblies include a person from each local government electoral area and the Member of Parliament from the relevant constituency.¹²⁴

In addition, chiefs from the relevant Regional House of Chiefs are to be represented on the Regional Coordinating Councils also established by the Ghanaian Constitution.¹²⁵

On top of the land-related provisions in the Ghanaian Constitution, there are a large number of legislative enactments relating to land. In the remainder of this section the key pieces of land-related legislation are examined.¹²⁶

Lands Commission Act 1994 (Act 483) and Lands Commission Act 2008 (Act 767)

The constitutionally mandated¹²⁷ Lands Commission and Regional Lands Commissions are established by the Land Commission Act 1994 (Act 483). Among other things these commissions are relevantly required to:¹²⁸

- (a) ...manage public lands...;
- (b) advise the Government, local authorities and traditional authorities on the policy framework for the development of particular areas to ensure that the development of individual pieces of land is co-ordinated with the relevant development plan for the area concerned;
- (c) formulate and submit to government recommendations on national policy with respect to land use and capability;
- (d) advise on, and assist in the execution of, a comprehensive programme for the registration of title to land...

The National House of Chiefs is to be represented in the composition of the Lands Commission.¹²⁹ Likewise, the relevant Regional House of Chiefs is to be represented in each Regional Lands Commission.¹³⁰

¹²² Ibid, article 242(d).

¹²³ Office of the Administrator of Stool Lands Act 1994, s 17.

¹²⁴ Ibid, article 242(a), (b).

¹²⁵ Ibid, article 255(1)(c).

¹²⁶ It is beyond the scope of this research to discuss every enactment relating to land in Ghana. According to the Ministry of Lands and Forestry in 2003 (now the Ministry of Lands and Natural Resources), there existed at that time more than 86 land-related legal instruments: Government of Ghana, Ministry of Lands and Forestry, ‘Emerging Land Tenure Issues’, 2003, p 14.

¹²⁷ Constitution of the Republic of Ghana, articles 258, 260.

¹²⁸ Lands Commission Act 1994, s 2(1) and Constitution of the Republic of Ghana, article 258(1).

Importantly, the Regional Lands Commissions have an effective veto over development proposals. This is because they can block any development proposal which is deemed to be inconsistent with “the development plan drawn up or approved by the planning authority for the area concerned.”¹³¹ The term ‘planning authority’, although not defined in the Lands Commission Act, refers to the relevant District Assembly.¹³²

Another factor is that the Minister for Lands and Natural Resources is constitutionally authorised to “give general directions in writing to the Lands Commission on matters of policy in respect of the functions of the Commission and the Commission shall comply with the directions”.¹³³ This enables the Minister to have direct input into the Lands Commission’s activities, subject only to the oversight of the President.

A new Lands Commission Act was enacted in 2008 (Act 767), which “substantially remodelled” the Lands Commission to increase efficiency and effectiveness.¹³⁴ One of the key features of the ‘new’ Lands Commission Act is that it integrates four formerly separate public sector agencies into the Lands Commission as new divisions: the Survey and Mapping division, the Land Registration Division, the Land Valuation Division and the Public and Vested Lands Management Division.¹³⁵ This process was carried out as part of the Ministry of Lands and Natural Resources’ Land Administration Project.

Office of the Administrator of Stool Lands Act 1994 (Act 481)

The Office of the Administration of Stool Lands Act 1994 (Act 481) establishes the Office of the Administrator of Stool Lands and specifies its functions, as mandated by the Ghanaian Constitution.¹³⁶ These functions are to establish an account for each stool into which monies deriving from stool lands are to be paid, collect all such monies and disburse them in accordance with the Office of the Administration of Stool Lands Act and the Ghanaian Constitution. Thus, as referred to above, the Ghana

¹²⁹ Lands Commission Act 1994, s 5(1); Constitution of the Republic of Ghana, article 259(b)(i).

¹³⁰ Lands Commission Act 1994, s 7(b)(i) – although this is not consistent with the Ghanaian Constitution, which requires representation by the National House of Chiefs: article 261(b)(i).

¹³¹ Lands Commission Act 1994, s 4(1); Constitution of the Republic of Ghana 1992, article 267(3).

¹³² GhanaWeb website, at

http://www.ghanaweb.com/GhanaHomePage/republic/district_assemblies.php, last accessed 26 October 2014.

¹³³ Constitution of the Republic of Ghana 1992, article 258(2).

¹³⁴ Government of Ghana, Ministry of Lands and Natural Resources, ‘Ghana Land Administration Project 2’, at <http://www.ghanalap.gov.gh/index.php/implementing-agencies/lands-commission>, last accessed 20 October 2013.

¹³⁵ Lands Commission Act 2007 (Act 767), ss 20-23.

¹³⁶ Constitution of the Republic of Ghana 1992, article 267(2). It is assumed that the Office of the Administrator of Lands Act 1994 (and the constitutional provisions giving rise to it) supersedes the Administration of Lands Act 1962 (Act 123).

Mining Act requires that payment of ground rent for tenements within stool lands be made to the Office of the Administrator of Stool Lands.¹³⁷

The Office of the Administration of Stool Lands Act 1994 specifies that 10% of all revenue accruing from stool lands be paid to the Office,¹³⁸ with the remainder (reflecting a parallel provision in the Ghanaian Constitution¹³⁹) to be disbursed as follows:

- (a) 25% to the stool through the traditional authority for the maintenance of the stool in keeping with its status;
- (b) 20% to the traditional authority; and
- (c) 55% to the District Assembly within the area of authority in which the stool lands are situated.¹⁴⁰

As mentioned above, ‘traditional authority’ in the context refers to the relevant House of Chiefs.¹⁴¹

The Office of the Administration of Stool Lands Act 1994 requires that the Administrator and the Regional Lands Commission ‘consult’ with stools and traditional authorities on matters relating to the development of stool land.¹⁴² No clarification is provided on the nature or extent of consultation required.

National House of Chiefs and Regional Houses of Chiefs

The Chieftaincy Act 2008 (Act 759) establishes a National House of Chiefs and Regional Houses of Chiefs, as mandated by the Ghanaian Constitution.¹⁴³ It revises the Chieftaincy Act 1971 (Act 370).¹⁴⁴ The functions of the National House of Chiefs relevantly include the following:

- (a) advise a person or an authority charged with a responsibility under the Constitution or any other law for any matter related to or affirming chieftaincy;
- (b) undertake the progressive study, interpretation and codification of the customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin;
- (c) undertake an evaluation of traditional custom and usage with a view to eliminating custom and usage that is outmoded and socially harmful...¹⁴⁵

¹³⁷ Minerals and Mining Act 2006 (Act 703), s 23(2).

¹³⁸ Office of the Administrator of Stool Lands Act 1994, s 7(1).

¹³⁹ Constitution of the Republic of Ghana 1992, article 267(6).

¹⁴⁰ Office of the Administrator of Stool Lands Act 1994, s 7(1)(a)-(c).

¹⁴¹ *Ibid*, s 17.

¹⁴² *Ibid*, s 8.

¹⁴³ Constitution of the Republic of Ghana 1992, articles 271 and 274.

¹⁴⁴ Chieftaincy Act 2008, long title.

¹⁴⁵ Chieftaincy Act 2008, s 3(1).

Similar functions are given to the Regional Houses of Chiefs.¹⁴⁶

As reflected in the legislative provisions relating to functions, one of the key duties of the National House of Chiefs is to promote the development of customary law, specifically with a view to “evolving, in appropriate cases, a unified system of rules of customary law”.¹⁴⁷ Additionally, a Regional House of Chiefs may declare a customary rule in force in a region or part of a region.¹⁴⁸ It is clear that this function gives the National House of Chiefs the potential to have practical input into the framework, to the extent it incorporates customary law considerations.

iii. Ghanaian Policy

The Ghanaian government released a draft national mining policy in 2010 (the ‘draft mining policy’) engaging with, among other things, regulation of the sector and maximising benefits while minimising costs of mineral sector activity.¹⁴⁹ The draft mining policy makes reference to the historical decline in the Ghanaian mineral sector post-independence and its subsequent resurgence following the government’s launch of an economic recovery programme in 1983. It goes on to state that “[d]espite the significant progress made over the years, the sector faces many challenges which require attention”.¹⁵⁰ It cites matters including social conflicts, small-scale mining (and associated conflict between mining companies and small-scale miners), distribution of benefits and institutional capacity as challenges requiring policy attention. It also takes into account the Natural Resources and Environmental Governance (NREG) Programme initiated in Ghana in 2008, drawing on resources from the International Development Association and technical assistance from the World Bank.¹⁵¹ As an aside, one of the challenges expressly contemplated by the NREG Programme is to improve mining company-community relations. Arising from this the government of Ghana has issued guidance on corporate social responsibility in the mineral sector in the form of ‘Social Responsibility Guidelines for Mining Companies in Mining Communities’, which has since been adopted at three mine sites.¹⁵²

¹⁴⁶ Ibid, s 9(1).

¹⁴⁷ Ibid, s 49.

¹⁴⁸ Ibid, s 51.

¹⁴⁹ Draft National Mining Policy of Ghana, at <http://213.154.74.164/invenio//record/18584/files/mining%20policy%20of%20Ghana.pdf>, last accessed 15 October 2014.

¹⁵⁰ Draft National Mining Policy of Ghana, at <http://213.154.74.164/invenio//record/18584/files/mining%20policy%20of%20Ghana.pdf>, last accessed 15 October 2014, p 6.

¹⁵¹ The World Bank, ‘Ghana: Natural Resources and Environmental Governance (NREG) Programme’, at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:22701705~menuPK:64282137~pagePK:41367~piPK:279616~theSitePK:40941,00.html>, last accessed 15 October.

¹⁵² The World Bank, ‘Ghana: Natural Resources and Environmental Governance (NREG) Programme’, at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:22701705~menuPK:64282137~pagePK:41367~piPK:279616~theSitePK:40941,00.html>, last accessed 15 October.

The draft mining policy lists a number of ‘guiding principles’. These include respect for the rights of host communities and facilitation by the Ghanaian government of community participation “by removing impediments to free expression and providing for the dissemination of information to the public ... as a basis for informed participation”.¹⁵³ In a similar vein, it also emphasises the importance of effective consultation with mining communities as part of the minerals licensing process. The draft mining policy seeks to balance this against the need to provide ‘assurances’ to tenement holders to facilitate land access, and in relation to this provides for the recognition of the rights and interests of landowners through the provision of alternative livelihood programs to improve the economic conditions of communities – particularly where mining activity necessitates resettlement.¹⁵⁴

The draft mining policy also engages with issues around the distribution of benefits from mining. In particular, it states that the Ghanaian government “recognises that the benefits generated by mining in the form of fiscal receipts must be utilised to ensure an equitable sharing of benefits having regard, in particular, to the needs of local communities most directly affected by mining”.¹⁵⁵ It also expresses as an objective, greater transparency and consistency in the apportioning of funds to communities affected by mining and to District Assemblies and traditional authorities, as relevant. The Ghanaian Government administratively established a Minerals Development Fund (MDF)¹⁵⁶ to – among other things – support development in local communities, and the draft mining policy also cites the need to introduce transparency improvements in respect of payments from this fund.

Alongside its draft mining policy, the Ministry of Lands and Natural Resources has also undertaken extensive legislative and regulatory reform work over the last decade under its Land Administration Project. The objectives of this World Bank-supported project are centred on streamlining and harmonising the legislative framework for land, and creating an efficient and cost effective ‘One-Stop-Service centre’ for land-related processes.¹⁵⁷ It was as part of this project that the new Lands Commission Act 2008 (discussed above at A.2.2) was enacted. Also forming part of this project is a

¹⁵³ Draft National Mining Policy of Ghana, at <http://213.154.74.164/invenio//record/18584/files/mining%20policy%20of%20Ghana.pdf>, last accessed 15 October 2014, pp 10-11.

¹⁵⁴ Draft National Mining Policy of Ghana, at <http://213.154.74.164/invenio//record/18584/files/mining%20policy%20of%20Ghana.pdf>, last accessed 15 October 2014, p 29.

¹⁵⁵ Draft National Mining Policy of Ghana, at <http://213.154.74.164/invenio//record/18584/files/mining%20policy%20of%20Ghana.pdf>, last accessed 15 October 2014, p 28.

¹⁵⁶ The MDF was established in response to a minerals Commission proposal in 1993, and lacks a legislative basis: International Council on Mining and Metals, ‘Ghana Country Case Study’, July 2007, at <https://www.icmm.com/document/301>, last accessed 17 October 2014, p 76. It is responsible for the transfer of a portion of mining royalties to the Office of the Administrator of Stool Lands, as discussed *supra* at 2.2.2.

¹⁵⁷ Government of Ghana, Ministry of Lands and Natural Resources website, at <http://www.ghana.gov.gh/index.php/2012-02-08-08-18-09/ministries/264-ministry-of-lands-and-natural-resources>, last accessed 26 October 2014.

proposal for the consolidation of Ghana's various land laws into one piece of legislation. In addition a process to improve customary land administration has been undertaken through the establishment of new Customary Lands Secretariats, and strengthening of existing ones.¹⁵⁸ These land secretariats have been established by customary landowner groups on an ad hoc basis, to assist in the management of customary land.¹⁵⁹

¹⁵⁸ Government of Ghana, Ministry of Lands and Natural Resources website, at <http://www.ghana.gov.gh/index.php/2012-02-08-08-18-09/ministries/264-ministry-of-lands-and-natural-resources>, last accessed 26 October 2014.

¹⁵⁹ Government of Ghana, Ministry of Lands and Forestry, 'Emerging Land Tenure Issues', 2003, p 16.

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