

## Dam busters: Aborigines battle BHP over water rights



A smelter at the Olympic dam mine in the far north of South Australia.

- Chris Mitchell  
Columnist
- March 4, 2022

In the driest state in the driest continent on earth, tremors from Rio Tinto's destruction of the Juukan Gorge sacred site have travelled through the outback dust to buffet BHP, the globe's second biggest miner – ironically over water.

The May 2020 Juukan fiasco has put the spotlight on BHP's giant Olympic Dam project, its use of Great Artesian Basin water and its ongoing failure to strike financial agreements with native title claimants on its giant mining lease.

BHP is defending legal rights providing it free access to artesian basin water and a mining tenement granted before the High Court's Mabo decision up-ended land rights in Australia three decades ago.

But Indigenous advocates say the Juukan fiasco has changed mining and the way it interacts with heritage issues and argue BHP needs to take into account developments in native title recognition in the decades since the original leases were struck with governments in the 1980s.

BHP's legal rights start with the 1982 Roxby Downs (Indenture Ratification) Act signed with former mine owner Western Mining. BHP inherited the rights when it bought the mine in 2005 and has almost unprecedented powers over resources and water within its 12,000sq km Stuart Shelf exploration lease.

BHP is also in discussions with native title groups about the original Olympic Dam Agreement it settled in 2008 with the Kokotha, Barngarla and Kuyani. Of these only the Kokotha have been granted formal native title over parts of BHP's Stuart Shelf exploration area.

Essentially BHP's problem now is how to balance the very valuable 40-year-old legal rights it has under the indenture with later rights found in a native title determination in favour of the Kokotha in 2014 and the rights of the other two claim groups. It is also negotiating with the Arabana and the Diyari (sometimes spelt Dieri) over other their rights associated with the Mound Springs. In the absence of firm commitments for change by BHP, Indigenous groups and conservationists are becoming increasingly frustrated at what they see as stonewalling by the mining giant.

The report into Rio Tinto's Juukan Caves destruction, released in October and titled A Way Forward, has shone a light on indigenous engagement in the mining industry. It contained criticism of BHP by Aboriginal interests, including the Arabana tribe, and South Australian conservation groups. They focused on Olympic Dam's heavy reliance on water from the Great Artesian Basin and expressed concerns it represented an environment risk – particularly to the Mound Springs Aboriginal heritage sites north of the mine.

"Unfortunately our springs are disappearing ... The cause ... is water taken from the GAB by BHP's mine at Roxby Downs," Arabana chairperson Brenda Underwood told the Juukan Caves report.

While BHP and the state government believe the springs remain healthy, environmentalists fear a possible expansion of the Oak Dam copper-gold-uranium project, 65km southeast of Olympic Dam, could take daily water use from the basin to well beyond 50 million litres a day. BHP says it is averaging 34 million litres a day now. BHP moved to allay concerns in February, backing a \$15m "study", partly funded by state and federal governments, into a desalination plant proposed for the Spencer Gulf to pump water to the state's northern mines.

New & improved business newsletter. Get the edge with AM and PM briefings, plus breaking news alerts in your inbox.

Sign up

But conservation and Indigenous groups see the move as a bid to alleviate political pressure on the company even as it tries to protect its rights under the 1982 (Indenture Ratification) Act, which confers almost unprecedented powers over resources and water within its 12,000sq km Stuart Shelf exploration lease.

Conservationists say BHP is trying to control the water agenda, to maintain its privileges under the Indenture Act. But some hope it will be pragmatic enough to cut water demand from the basin if it eventually decides to proceed with Oak Dam.

Asked last week if BHP management was formally committed to ending Great Artesian Basin water use, a spokesperson could not point to any firm commitments. "We continuously monitor and publicly report our water draw under a program approved by the South Australian government," the BHP spokesperson said.

Environment campaigner and consultant David Noonan, who provided extensive submissions to the Juukan inquiry, is sceptical of the desalination plant announcement first published in Adelaide's The Advertiser in February.

"BHP's Oak Dam copper-uranium project usurps due process. BHP is claiming 1982 legal privileges (under) the Indenture Act special water licence grant of priority rights to extract ... GAB public water resources free of charge for multi-decades."

Noonan says even if the desalination plant were built BHP could be taking Great Artesian Basin water until the end of the decade. He wants to hear a formal commitment from senior management about alternative water sources.

The company's position is not easy. It paid for a project that came with the rights set out in the indenture and these rights have a very substantial economic value to shareholders. Yet as Juukan shows, much corporate damage can be done when short cuts are taken in the area of Aboriginal heritage.

A BHP spokesperson said on heritage issues, "We recognise that the framework for protecting Aboriginal cultural heritage in South Australia can be improved. Our submission to the (SA) parliamentary inquiry (last year) suggests ways to further strengthen the 1988 Act, including requiring land users and traditional owners to prepare management plans, providing rights of appeal, and increasing financial penalties for breaches."

The company committed last year to updating the indenture, which was legislated on the 1979 Heritage Act.

BHP has publicly said it will work with the government to update the indenture in line with the 1988 Act, with which most of the State's miners must comply. The Kokotha fought a long battle to win their native title determination in 2014 after a claim was lodged in 1996.

Kokotha directors say dealing with BHP on the Olympic Dam Agreement before and after their native title court win has been challenging. At this point they are not receiving mining royalties and are unhappy with employment opportunities for Kokotha people.

BHP is powerful in South Australia. There has been a flow of senior company managers into the bureaucracy and vice versa for many years under both sides of politics.

Premier Steven Marshall is Minister for Aboriginal Affairs, and well regarded by stakeholders.

BHP paid the South Australian government royalties of \$136m last year. Its Olympic Dam project 560km north of Adelaide is the state's largest mining venture and the world's biggest uranium mine, a global top four copper mine and producer of gold and lead.

But it would be fair to say native title holders and groups with established heritage interests do not wield the sort of power in Adelaide that big miners do.

On royalty payments, BHP says its 2008 Olympic Dam agreement was originally negotiated for the proposed Olympic Dam expansion (ODX) that was shelved in 2020 for cost reasons and that a new agreement needs to be worked out. ODX a was to include an open pit 4.1km long, 3.5km wide and 1km deep.

The company's Aboriginal engagement team are mindful expectations have changed across the industry since Juukan and BHP will need to be seen to be engaging seriously on the expectations of traditional owners and groups with prior interests in heritage sites.

Some among the Kokotha believe that like the Indenture Act itself, an Olympic Dam agreement negotiated before the Kokotha achieved native title should be written off completely and an entirely new agreement established.

BHP's leadership is facing a different set of circumstances from either 2005 when it bought the mine or 1982 when the indenture was legislated.

Its commitment to try to comply with the 1988 Heritage Act could create an opportunity for the Kokotha, as native title holder, to demand more power over Olympic Dam heritage issues given it has just been appointed a RARB (Registered Aboriginal Representative Body) with formal power over heritage determinations in its native title area. Legal documents considered by the Kokotha board late last year make it clear one option now is to seek an entirely new Olympic Dam agreement.

The Kokotha board has also considered options for how its RARB status may work in the interests of the other ODA signatories, the Barngarla and the Kuyani.

BHP has flagged some changes to the way it operates that could reduce its own power over its own asset.

BHP's new local Indigenous engagement boss, Allan James, understands exactly how important it is to the company and a possible expansion to Oak Dam that BHP is seen to be negotiating with traditional owners in good faith. A Way Forward says mining companies need to ensure native title holders give "free, prior and informed consent" for future projects. This will also make miners work harder to improve the skills of board members on registered Native Title Bodies Corporate and to ensure they share internal company knowledge with traditional owners.

James is himself a native title holder from the northern Goldfields in WA where he was born and raised as a Wongi/Yamatji man. He was brought in to oversee local engagement across Australia four months ago and has previously worked for Rio and Newmont.

"We have a number of local traditional owners involved in this team and participating on the front line in these negotiations. The organisation is really serious about how we approach engagement. We are out there on the ground, having these really difficult conversations walking in both worlds. We are sitting in an industry perspective but we also know we wear a community hat."

It remains to be seen if BHP's senior management will prove as receptive to the changing expectations of miners in Aboriginal social performance as those who work in its engagement team – and traditional owners – want the company to be.

As for the state government, there seems to be little pressure on BHP. A spokesman this week said: "BHP currently complies with its obligations to the government but if its operations were proposed to change, then its obligations would also be reconsidered."

But Michael Turner, a former director of Kokotha and current adviser on the Kokotha Native Title Compensation Settlement Trust and the Kokotha Charitable Trust, says he has been dealing with BHP for much of his adult life and the experience has not been positive.

"Compared with dealing with OZ Minerals there is just no comparison really. In terms of our agreement with OZ Minerals we are all one. We successfully negotiated a long-term agreement between the two parties with little involvement of lawyers. We worked directly with OZ Minerals and the agreement took just over 12 months," Turner said.

OZ Minerals provides compensation, employment opportunities and long-term educational packages including scholarships to the Kokotha community from its Carapateena copper mine operations site. "The relationship between the Kokotha and OZ Minerals is very respectful," Turner said.

"Don't get me wrong. We have had our ups and downs but overall it's been great."

Negotiations on BHP's Olympic Dam Agreement had been disappointing.

"We have been calling for a review of the Olympic Dam agreement for many years and it has constantly been deferred. They're refusing to move forward but we have continually engaged with BHP. It would be great if BHP could keep to its word and respect the wishes of the Kokotha people and review the ODA for the benefit of generations to come," Turner said.

Former Kokotha Aboriginal Corporation deputy chair Chris Larkin, a director on the Kokotha Culture and Heritage Committee, doubts that BHP is negotiating in good faith.

"While Kokotha's lawyers think BHP's negotiating with them in good faith BHP is backdooring Kokotha by harassing the government to try to extend the Indenture Act," he said.

But a spokesperson for BHP said: "The ODA remains in effect notwithstanding the determination of native title, and requires all three groups to be consulted. While this can be complex at times, we have processes in place ... We will continue to work collaboratively and respectfully with all parties ..."

"BHP will continue to work ... on employment, training, business and community investment opportunities ..." the spokesperson said.

