Equipoise & Co



What's it going to cost you to win?

Seven disputes, and the discipline we built to resolve them: Social Licence Resolution

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by Nick van der Hoven and Craig Morris

THE STORY

A farmer, a mine, and twenty years

Nick van der Hoven

He'd farmed that land his whole life. So had three generations of his family before him. Then a mine went up nearby, legally, within every limit the regulator had set, and dust started settling on his water tanks, noise carried across his fields, and at night he said he could feel the vibration through the floor of his house. He was an elderly man, a multi-generational farmer. He believed the mine had devalued his property, and he wanted his property bought by the mine at a premium to its market value.

The mine could produce the reports proving it was complying with its licences — detailed and technical, and fully within its approved limits. He didn't trust a word of them. They were written by people he'd never met, about reverberations and noise in a house he'd lived in for years, and no report was going to talk him out of what he could feel through his own floor. He had no interest in going to a regulator or a court. The dust and the noise were real; that was never in doubt. But they were also leverage. He complained about almost everything, as often as he could, for years, on the theory that wearing the company down would get him the price that arguing never would.

It worked, in a sense. The dispute ran for twenty years. Legal and consulting costs alone came to an estimated $2 million. Staff left the mining company because they couldn't deal with the complaints anymore. An expansion approval worth hundreds of millions sat exposed to a man who had every reason left to keep objecting to it. And his own health, physical and mental, was going backwards under a fight that didn't seem to have a winner in it for anyone.

When someone finally sat down

I was brought in as the mediator. The science didn't change and neither did the reports. What changed was that someone sat down with the mine's people on their own, then with him on his own, and worked out what was actually driving twenty years of complaints rather than answering the complaints themselves. Most of that work had nothing to do with dust. It was getting each side to say plainly what it would do if no agreement was ever reached.

What came out of it wasn't a settlement. The mine was clear that it would not buy him out at a premium. What it offered was narrower: if he ever sold, and an independent valuer put the price below what the land would have been worth without the mine beside it, the company would pay him the difference. He turned it down. No agreement was signed. But the complaints reduced substantially and the relationship stopped being poisonous. I think he refused because he had finally worked out what refusing was worth. With the premium off the table the choice was a simple one — take the money, or stay and go on farming — and staying was worth more to him than anything the mine was going to pay. His health improved for the same reason. A man who knows what his alternative is worth has little reason to keep fighting for something he has decided he does not want.

> *The Lesson · Know what you will do if you never reach agreement. That is your BATNA — your best alternative to a negotiated agreement — and it is the only honest measure of an offer. He refused the last offer on the table and he was right to: staying on his farm was worth more to him than the money. My job was never to get him to yes. It was to get both sides clear enough about their alternatives that yes and no were both real choices.*

I've been on both sides of situations like this — as the CEO of a mining company under this kind of pressure, and later as the mediator called in once the lawyers were already involved.

Both times taught me the same lesson the hard way: the project doesn't stop because of the dispute. It stops because of what the dispute does to the company's reputation, its relationships, and its ability to raise money or progress other activities while the fight is still going.

THE DIAGNOSIS

It was never a legal problem

That's not something a lawyer can fix alone, because underneath it, it isn't really a legal problem. We call this discipline Social Licence Resolution — a form of non-adversarial stakeholder dispute resolution. It isn't about who's right. It's about whether the people whose consent you need to keep building or operating still want to give it to you.

If you're General Counsel, a Chief Legal Officer, or a Project Director at an ASX-listed resources, energy or renewable company, you know the moment we're talking about. Three weeks into an impasse with a community, a landholder or a Native Title party, and your litigation team has just told you they'll fight it. They're probably right that you'd win. That's not really the question. The question is what winning costs you in the meantime — the timeline, the financing, and the relationships you'll still need in five years when you want to expand the same project.

Litigation and formal approval processes are good at working out who's technically right. They're not built for keeping a relationship intact that both sides are stuck with for the next twenty years, or for working out why a community is really digging in. Sticking to a position instead of asking why the other side holds theirs just locks both sides into a fight where the only way to move is to lose. Every pattern below cost real time and real money before anyone tried Social Licence Resolution.

None of this is unusual. If you're in resources, telecommunications, energy (including renewables) — or the shipping and infrastructure that moves what they produce — some version of at least one of these is probably happening somewhere in your business right now. It just hasn't been named yet.

PATTERNS FROM THE FIELD

The lesson drawn from each of these is framed in the language of principled negotiation.

01 · Platinum mining — a listed operation

Nick van der Hoven

An underground operation with an open pit alongside it, five hundred people on site, and a land access agreement that had lapsed. The community that owned the ground wanted a rental increase well above inflation; the company, carrying the debt from the shaft it had just sunk, could not go past inflation. Negotiations moved to the lawyers and stayed there — months of marked-up drafts by email, each round further from agreement than the last. Then a Magistrates Court order arrived, obtained ex parte, giving us notice to vacate.

I was CEO at the time. An eviction order against a running mine is not a negotiation problem, and I did not treat it as one: chairman, in-house counsel, external counsel, and a senior barrister in a car within the hour for the eight-hour drive to the regional court. The order was set aside inside a week, on the ground that it should never have been brought without notice. That week cost us more than the increase ever would have.

What came out when we went back to the table was that we had been negotiating for months with the wrong man. The elder we had been dealing with was being removed by his own community, and was inflating the demand to shore up his position before it happened. Once the right representatives were at the table, a market-related increase took weeks.

The Lesson · Confirm the person across the table can bind their side — and know when the method is the wrong tool.

02 · Exploration & mining — Asia Pacific

Nick van der Hoven

An exploration company transitioning into mining. A community group opposed the environmental impact of the project — not mining generally, but what this mine would do to land they lived on. The company tried something well-meant: an open day at the community hall, information boards, food. Almost none of the people in dispute with the company turned up. If you already think you're in a fight with someone, you don't go to their open day. None of which makes open days a bad idea. Held early, they inform people, answer the ordinary questions before they harden, and build the social licence a project runs on. They are simply the wrong instrument once a dispute is already live. The few who did come looked at generic material on noise limits and safety standards, put together by people they'd never met, and left without saying much at all. Meanwhile the environmental approval process dragged on for years, cost millions, and a public campaign made the relationship worse the entire time.

I was brought in as co-negotiator. Instead of another open day, we found the specific landholders who were at odds with the project and sat down with certain of them privately, working out what was really bothering them rather than what the public campaign had been saying. Two years in, support has been obtained from several of them. Not all — the rest is still open, and it's cost around $1 million in legal and consulting fees to get this far. It isn't a clean result, and I won't pretend it is. But it's moved further than the public process, or the open day, ever did.

The Lesson · Communication is a people problem, not a materials problem. An open day builds social licence; it does not repair it. It broadcasts, it hears nothing back, and the people actually in dispute were never in the room. Find them, and go one at a time.

03 · Major Infrastructure Project — Australia

Nick van der Hoven

An infrastructure project in Australia needed easement agreements from a group of landholders with genuinely different interests — some wanted compensation, some cared more about the impact on their farming operations, some had environmental concerns of their own. One of them had made himself the group's spokesperson and was running his own agenda under that cover. Talks stalled, and the company was close to walking away from the project altogether, while an informal public campaign built pressure in the background.

The company was listed, and its share price was already wearing the uncertainty. Every week of delay was a straight cost — capital tied up, nothing being built, while one person's agenda held up dozens of landholders who mostly just wanted a fair outcome. Once we worked out the self-appointed leader wasn't actually speaking for the group, the fix turned out to be simpler than expected: go to each landholder individually. This is close to what's now our formal method, something we call the Social Licence Resolution framework — listen first, before any commercial term is on the table; bring both sides together under ground rules that take the adversarial edge off; turn positions into interests; negotiate against objective criteria rather than leverage; document agreements built to survive the staff turnover most

of these relationships outlast; and check back in on a schedule, because agreements go stale if nobody's responsible for them. Four years and around $2 million in legal and consulting costs after it started, the easements were signed at a fair price, and the project went ahead.

The Lesson · A group is not a party. Treated as one bloc it had a single loud spokesman and no agreement. Treated as a dozen people with genuinely different interests — compensation, farming operations, environment — those differences became the material the agreement was built from. Differing interests are not the obstacle; they are the currency. This is the matter that became our Framework.

04 · Shipping — a remote anchorage

Craig Morris

A medium-sized bulk carrier, anchored two weeks off the coast with no engine power and a full cargo of combustible bulk in the holds, bound for a utility in Japan. The ship's mechanic had tried makeshift repairs and failed. The parts weren't in onboard stores, and it had taken Operations the better part of a fortnight to get replacements and mechanics moving. The hatch covers were open — the crew's judgement that heat building in a closed hold was the greater of the two risks available to them. On a cargo like that, under that sun, a spark was not a theoretical problem. The owners were cash-strapped and hadn't provisioned for a breakdown in remote waters. The cargo owners wanted their cargo. And the crew — unpaid for six weeks, sweating in the heat, running low on provisions — had stopped waiting. They took their own legal action and arrested the ship to enforce their priority claim for wages. So the vessel that needed towing somewhere safe was now legally pinned where it sat, with a combustible cargo, a demoralised crew, and open ocean around it.

I was instructed by the owners and their hull and machinery insurers. The standard move was available — go hard at the crew's lawyers, fight the arrest, escalate. On those facts it was close to reckless. Every week spent arguing was another week of a hot hold in an offshore anchorage, and the crew holding the ship were the same people the safety of it depended on.

What broke it wasn't persuasion. The crew's position was that they wanted paying, now. Their interest was narrower: they wanted to know they would be paid at all, by an owner they had every reason to doubt. Those two things could be separated. The owners secured the wage claims with an irrevocable letter of credit — a bank's undertaking, not their own. The crew were never asked to trust the owners, because the instrument meant they didn't have to. The arrest was lifted, the ship was towed to a safe berth for repairs, the owners kept the cash they needed to restore the vessel and move the cargo, and nobody had to concede their position to get there.

The Lesson · Search deeply for the reasons behind the parties' demands. And then create mutually beneficial options which speak to these reasons.

05 · Financial services — a mis–disclosure claim

Craig Morris

There is no mine in this one, no community and no licence to operate. It sits here deliberately, because the failure underneath it is the same failure. A group of retail investors — most retired, most self-directed — held a little over $4 million across three tranches of ASX-listed hybrid capital notes. A fixed margin over the bank bill rate, franked distributions, a call date seven years out. They believed they had bought high-grade corporate bonds. What they held were perpetual, subordinated instruments whose distributions were payable at the issuer's discretion, and which converted into ordinary shares — or were written off entirely — if the prudential regulator decided the issuer was no longer viable. When credit spreads widened and the share price came under pressure, the notes went with it.

Every feature they complained about had been disclosed. The document ran to just under 200 pages. There was a key risks section, a summary table, and a line on page one telling the reader to read the whole thing. The issuer had complied. Both of those things were true at once, and that was the problem. The headline yield appeared on the cover, in the overview, in the summary table and in the advertising. The one feature that made the product unlike the asset class its name had borrowed from appeared once, at page 94, in continuous prose, under a heading that gave no hint that capital was at risk.

It went to mediation in front of a retired commercial judge — a full day, hard start, experts on call. An argument purely about damages had already been run in correspondence and had gone nowhere. What moved it was that the settlement stopped being a single number and became a structure: a cash payment, an issuer-facilitated exit from the remaining holdings at an agreed price, a contribution to costs, and confidentiality carved out so the investors could still speak to their own advisers and to any regulator. The exit was worth more to them than the same money in cash, and cost the issuer less than the same money in cash. Eleven months from first letter to executed deed.

> *The Lesson · Insist on criteria independent of either side's will. Not one number that moved this matter belonged to a party to it — an independent costs estimate, published outcomes in comparable proceedings, an expert's model, the regulator's own guidance. It's simple: never yield to pressure, only to principle. Where no standard is agreed, pressure is the only instrument anyone has left.*

06 · Mining equipment — a three-party claim

Craig Morris

An underground mining fleet, bought for about USD 26 million, failing repeatedly in service. The miner sued the overseas manufacturer in an Australian superior court — contract, statutory guarantees, negligence — for rectification, replacement and the production it had lost. The manufacturer said there was nothing wrong with its design or its build. The failures were the operator's: installed incorrectly, run outside duty cycles, serviced away from the manual, and lubricated with fluids outside specification. So it joined the lubricants supplier as a co-defendant, and cross-claims ran in both directions.

Three sophisticated parties, all insured, each with a realistic path to winning. Bargaining from positions is slow enough between two parties. With three it needs coalitions, and a position several people have signed up to is far harder to move than one. Everybody was dug in and nobody had a reason to go first. The expert evidence ought to have helped, but did the opposite — metallurgy, failure analysis, tribology, maintenance engineering, quantum — and the reports did not converge. Each party had enough support to hold its position and enough contradiction to make the outcome genuinely unpredictable.

The first decision was when, not what. I acted for the miner, and waited until the expert evidence had been exchanged before proposing mediation. The only sensible measure of an offer is what happens to you if you refuse it, and until the reports were in, none of the three parties could price that. They were guessing, and parties tend to guess in their own favour. Litigants are reliably too optimistic about trial and too vague about the cost of getting there — the years, the discovery, the senior operations people off site for months. Exchanging the evidence never resolved the engineering question. It made the uncertainty concrete enough that each party, and each insurer, could finally put a number against losing.

Then an objective standard rather than a contest of wills. We appointed a mediator with the technical fluency to test engineering causation rather than shuttle numbers between rooms, and position papers were exchanged on the issues, which exposed a band of genuine factual disagreement far narrower than the volume of evidentiary material and submissions implied. That is the point of arguing to a standard: when a number comes out of something both sides accept, everyone can move without anyone backing down. Nobody had to look weak.

They looked reasonable. Every party attended with its insurer present and authority to settle in the room, so the standard could actually be acted on that day.

The move that unlocked it was structural — cut the number of decisions. How the two defendants would split causation between themselves was lifted off the critical path entirely. The mediation ran to a single global figure, with contribution between manufacturer and supplier left to a separate negotiation afterwards, so three parties were no longer trying to settle two questions at once. It helped that all three expected to go on doing business with the others long after the file closed. It settled on the day: heads of agreement signed before anyone left the building, a tripartite deed inside a fortnight, the proceedings discontinued.

> *The Lesson · When a negotiation will not move, count the decisions. Three parties were being asked to settle two questions at once — what the claim was worth, and how the two defendants would divide it between them. Lifting the second off the critical path left one decision instead of two, and the one that remained was the only one the claimant needed. Solve fewer things at a time.*

THE RECKONING

What it costs to win

Seven disputes, seven different results. One resolved, but late enough that resolving it didn't undo the cost. One where no agreement was ever signed, because the man on the other side worked out he was better off without one. One still partly open after two years. One that got done and kept a project alive.

One where nobody conceded anything at all, and the answer turned out to be an instrument rather than an argument. One that moved only when the parties stopped arguing about a number and started building a structure. One that could not move at all until the evidence let three parties each price what losing was worth. None of them were fixed by the letter that kicked them off, and in every case, the real cost had already been paid by the time anyone tried talking instead of fighting.

If your litigation team has just told you they'll fight something, that's worth pausing on before it goes any further — not because they're wrong about the law, but because the law was never the actual problem. What's it going to cost you to win? Not just in fees. In time, in the relationship, and in whether the same community lets you operate the next time you need something from them.



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