

**IMPLEMENTATION AND RESOURCING
of
NATIVE TITLE AND RELATED AGREEMENTS**

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May 2004

NATIONAL NATIVE
TITLE TRIBUNAL

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Implementation and Resourcing of Native Title and Related Agreements

Malcolm Allbrook and Dr Mary Anne Jebb

EXECUTIVE SUMMARY

This project entailed exploratory research on the subjects of implementation of native title and related agreements, and their sustainability. It is intended to provide pointers for further development of information on implementation and sustainability for the information and use of NNTT Members and staff. To date, a lack of attention to implementation and sustainability issues in agreement making literature is apparent. This may indicate a general failure to effectively monitor and implement agreements. The apparent absence of interest in agreement implementation appears illogical given the level of resources, both financial and human, that go into establishing agreements.

Examination of a range of extant agreements found that, while most include provisions relating to implementation, there is little evidence of consistency or a framework to assist analysis. No established models or frameworks exist in relation to implementation issues involved in agreements between indigenous peoples, developers and governments, with little writing or research in the implementation area to draw on.

In relation to sustainability of agreements, research to date has tended to define sustainability in this context as meaning an agreement that brings about lasting positive change in the broad socio-economic status of Indigenous communities. In working toward sustainable agreements account needs to be taken of the ‘structural limitations’ of Indigenous communities, the need for multifaceted agreements which take account of their, social relations in all their complexity and the need for existing Indigenous organisations to be involved at some level in the agreement, regardless of matters such as their perceived capacity, representativeness, legitimacy and standards of governance.

Specific issues relating to implementation and sustainability include:

- “Bedding down” as many outcomes as possible early in the process rather than relying on subsequent discretionary engagement.

- Agreement at an early stage of negotiation on resources for implementation, including levels of immediate support to Indigenous parties post agreement to ensure effective implementation and the availability of longer term support to build sustainability.
- Structures are required for the purposes of management, monitoring and liaison of agreement provisions.
- Formal implementation deeds or agreed implementation schedules.
- Attention to the distribution of financial and other benefits requires detailed and careful consultation, informed agreement and sometimes anthropological advice on group membership.
- The kind of relationships that exist and develop between the parties will inevitably dictate or at least strongly influence the effectiveness of an agreement and its sustainability.
- There is a continual need to look at governance issues, including authority - decision making and execution of decisions, resolving problems and the multiple capacities needed to make an agreement effective in achieving its desired ends. There needs to be an agreed structure and process behind the representative negotiators to progress the agreement from the agreement-in-principle stage.
- Succession is a governance element impacting on longer-term sustainability. People may move away from the region, cease to be involved or die and this can remove important motivators from the picture such as people who may hold 'corporate memory' that keeps the agreement together.

1. INTRODUCTION AND BACKGROUND

The National Native Title Tribunal (NNTT) commissioned this research on October 17th 2003 as an exploratory study to identify key issues in implementation and resourcing of native title and related agreements. The research report was intended for the information of NNTT Members and staff, to assist them in their functions of mediating and facilitating agreements between native title and other parties. The need for such exploratory research has become increasingly evident to Members as more and more native title and related agreements have been reached, as a consequence of the legal function of the NNTT under the *Native Title Act 1993*. Emerging questions included those such as how can the NNTT ensure that outcomes envisaged by agreements are implemented? What advice can the NNTT give during negotiations to allow agreements the best possible chance of being effective in the long term, and how can this advice be reflected in the provisions of an agreement?

The aim of the research was therefore to identify key issues in implementation and sustainability, and to provide practical case examples from extant agreements in which such issues appear to have been dealt with effectively. To achieve this, the researchers utilised existing resources, including published information, and where possible interviewed representatives of parties to some key agreements about their perceptions on implementation and sustainability issues. The research report was thus intended to provide a reference document for Members and staff that can be put to immediate use in their role of supporting and facilitating agreements. The researchers are aware of other longitudinal research in progress exploring similar issues in much greater depth, the results of which should become publicly available over the next few years (Section 3).

In keeping with the NNTT's expectations of this research, a short time frame and small budget was provided – initially the researchers were asked to submit a draft within two months, with a final report due mid-January 2004. Due to the practical difficulties inherent in research of a participatory nature (as well as the holiday season), the time frame was subsequently extended to mid-February 2004, with a final report due end of April to allow Members and staff time to respond to the draft.

2. TERMS OF REFERENCE AND METHODOLOGY

The terms of the contract required¹:

(a) A scan of relevant and recent agreements with Indigenous peoples in the mining and exploration and local government areas, as well as other areas of agreement making. Examine and analyse agreements, with a particular emphasis on the issues covered and the way negotiations were undertaken as those factors might affect sustainability. The scan included a sample of mining and exploration, local government, pastoral and other land use agreements.

(b) A search of existing literature on effective agreement making, focussing on issues of process and implementation across a range of types of agreements such as native title, heritage and land use agreements.

(c) Consideration of specific agreements that have been, or show the potential to be effective in meeting their objectives.

(d) Interviews with Tribunal Members and other key parties to case study agreements to gain information relevant to issues of implementation and sustainability.

(e) A report on issues of implementation and sustainability of agreements, providing a framework that may operate as a checklist for the use of the NNTT. The framework is intended to serve as a guide for Tribunal Members for achieving sustainable outcomes, and address issues such as key elements and principles of achieving sustainable agreements.

The consultants were at all times required to respect the confidentiality of all parties, including those involved in facilitating negotiations. Thus, in general, information in this report is publicly available either in published format or on-line and appropriately attributed. Information derived through interviews with NNTT Members or others is not reproduced in this report unless it is also on the public record or has been checked with the source for its authenticity.

¹ Variation of contract, February 2004.

3. REVIEW OF EXISTING AGREEMENTS AND LITERATURE

This section gives an overview of literature on implementation and sustainability in native title and related agreements, as well as how some current agreements address these matters. The next Section 4 endeavours to narrow the coverage into specific issues as a start to developing a framework for the use of the NNTT in performance of its agreement making function. A checklist is provided as an attachment to the report which will be further developed by the NNTT as an internal training and resource document for the use of Members and staff.

As the majority of agreements relate to mining and exploration, the focus of the discussion is on those areas. In particular, we have taken note of a number of well-known and significant mining agreements and frameworks including:

- Gulf Communities Agreement (Century Zinc);
- Yandicoogina Regional Land Use Agreement;
- West Cape Communities Coexistence Agreement;
- Cape York Model Agreement (a model which applied to the West Cape Coexistence Agreement 1999, Cape Flattery Silica Mine (1991-2), Skardon River Kaolin Project (1994), Alcan Bauxite project agreements (1997 and 1999);
- BHP Area C Agreement.

The authors also draw on their professional experience dealing with a range of mining, exploration and pastoral land use agreements through past employment mainly with Native Title Representative Bodies in WA, in particular smaller-scale bilateral agreements involving native title parties and 'junior' mining companies. These negotiation processes and resultant agreements and implementation arrangements are largely unheralded and unrecorded, and involve limited ethnographic research and community consultation because of limited budgets and pressing time frames. Yet they raise similar issues to larger agreements, and thus help inform the discussion on the effectiveness and sustainability of agreements.

Some recent agreements relating to National Parks (Arakwal Indigenous Land Use Agreement and Mungo) and multi-land use agreements on pastoral leases in Queensland, Western Australia and South Australia are considered in relation to sustainability issues. The

Western Yalanji Agreement provides a worthwhile case study on pastoral land use issues. Brief mention is also made of a number of local government agreements, notably the Redlands Shire Quandamooka Process Agreement, and the Rubibi Shire of Broome MOU. The Kaurareg Consent Determinations and ILUAs include tripartite arrangements dealing with key implementation issues over land tenure, authorisation and funding for post agreement operations. Finally, the Burrup and Maitland Industrial Estates Agreements (2003) are a comprehensive and public series of agreements that display a number of unusual features in the agreement-making environment. Although they were concluded quite recently and thus it is too early to assess the effectiveness of their implementation, the ‘Burrup agreements’ are considered by this study because they are all available on-line for public scrutiny, and furthermore place considerable emphasis on implementation through a specific implementation deed.

Regardless of the type or scope of an agreement, common issues of implementation and sustainability apply. While there are many and obvious differences in the detail of mining, exploration, pastoral or local government agreements, certain implementation and sustainability issues are universal, and equally applicable to different sectors. In a sea of variety and difference, the one constant in all of the agreements and agreement environments is the presence of Aboriginal people as a party.

3.1 Literature on implementation issues

There is a growing amount of Australian literature on the general subject of native title and related agreements between Indigenous and other parties, which matches the ever-increasing number and variety of agreements either under negotiation or already finalised². Without going into the subject to any depth, it is by now widely accepted practice that formal agreements can be an effective way of dealing with native title future act and heritage matters, and also holds the promise of delivering substantial benefits to Indigenous people and communities. Large numbers of agreements have been concluded since the passage of the NTA in 1993, and these show a diversity that equals the situations, aspirations and circumstances of both the Indigenous and other groups that have been involved in their negotiation. Existing data-bases demonstrate the numbers and scope of such agreements, for

² See Select Bibliography

example *Agreements, Treaties & Negotiated Settlements Project: Agreements Database*³, and this provides a readily accessible on-line source of information on certain aspects of agreements.⁴

Most of the literature by and large ignores issues of implementation and sustainability, preferring to focus on matters of process such as setting up and conducting negotiations. This is as one would expect in an environment where the emphasis has been on encouraging engagement and negotiation, rather than the pursuit of other options such as litigation. Thus, a lot of the existing literature appears to conclude with signing off an agreement, ‘closing the deal’, while not addressing what happens after this has been done.

Problems are starting to arise with such a limited focus, as questions are asked about the actual impact of mining agreements, in particular large scale ones, in delivering benefits to Indigenous parties. Altman (2002) for example, drew attention to the fact that statistics are not showing improvement in Aboriginal socio economic indicators, despite the fact that they might be living near a mine site and entering into agreements aimed at providing benefits and developments⁵.

Kelly and O’Fairchellaigh comment on the relative lack of attention to ‘ensuring that the outcomes promised in agreements actually materialise’, and are not aware of ‘any published papers specifically focusing on monitoring and implementation’. This, they suggest, might indicate a ‘widespread failure ... to effectively monitor and implement agreements,’ citing their own research as evidence that there may be;

... numerous cases of non-compliance with terms of agreements, including those related to financial payments, cultural heritage protection and employment and training. Non-implementation of agreements represents another source of conflict in Indigenous communities. It can also lead to a cynicism about the likely benefits

³ Indigenous Studies Program, *Agreements, Treaties & Negotiated Settlements Project: Agreements Database*, The University of Melbourne, June 2003
<http://www.atns.net.au/atns.html>

⁴ The NNTT web-site includes copies of some important agreements.

⁵ Altman J “Partnering sustainable regional development; Indigenous community organisations and miners” CEDA Research project, at www.ceda.com.au/ResearchNew/Publications/Files/altman.pdf

of agreements, creating a significant obstacle to their continued negotiation’⁶.

A number of publications refer generally to implementation. An ATSIIC Regional Agreements Manual, published in 2001 but never publicly released, was prepared in order ‘to assist ATSIIC Regional Councils in considering, developing and implementing regional agreements of different sorts.’⁷ It considers that implementation is an element of agreement development that should be considered from the very start of a negotiation process, but goes into little detail apart from suggesting a few basic measures. Implementation of an agreement may well start even before an agreement is formally signed off, but an ‘implementation plan that specifies who is responsible for what actions, and when they should occur’ is essential. The implementation plan should include specific provisions for monitoring and review, performance indicators and also address matters to do with resources to implement the agreement. As such, it ‘can be a good vehicle for agreeing the implementation budget.’⁸

O’Fairchellaigh has been prolific in his calls for greater attention to issues of implementation. His research findings suggest some major problems with implementation. In a review of 40 recent agreements in Australia and Canada undertaken on behalf of HREOC, he concluded that in general terms the agreements dealt poorly with implementation or ignored it entirely⁹. Few contained clear or specific goals to facilitate implementation, and only half of the 40 agreements included any provision allowing for a formal review.

It is critical to successful implementation that agreements be reviewed on a regular basis and amended to ensure that goals are still relevant, to amend provisions that have proved ineffective or have served their purpose and to adjust to changes in the external environment¹⁰.

A critical point in implementation is the provision of resources, but O’Fairchellaigh found that fewer than 20% of the examined agreements allocated resources to the implementation of

⁶ Kelly R and O’Fairchellaigh C (2002) ‘Native title, mining and agreement making: best practice in commercial negotiations’ (p. 9) in *Native Title and Cultural Heritage in 2002*, Novotel Hotel, Brisbane

⁷ ATSIIC (2001) *Regional Agreements Manual*, p.2. The checklist developed as a part of this Manual is available on line at http://www.google.com.au/search?q=cache:Wa43271P0FeJ:www.atsic.gov.au/About_ATSIIC/Docs/Checklist.pdf+checklist+agreements+atsic&hl=en

⁸ ATSIIC (2001), p. 23

⁹ O’Fairchellaigh C (2003) ‘Native title and agreement making focussing on outcomes for Indigenous peoples’ in *Native Title Conference*, Alice Springs.

¹⁰ O’Fairchellaigh (2003), p. 12

agreement provisions. Further there appeared to be little support from key decision-makers within organisational parties to be involved in implementation and contribute to costs.

This apparent absence of interest in agreement implementation appears illogical given the level of resources, both financial and human, that go into establishing agreements. Further it suggests a short term focus where the emphasis is on the immediate goals of satisfying statutory rights to negotiate or heritage provisions, while ignoring the substantial issues and difficulties in addressing matters that might actually make an agreement effective, such as evaluation, equitable distribution of benefits, and the capacity of the parties to manage an agreement.

3.2 Implementation provisions in agreements

This research encountered similar problems to those expressed by O’Fairchellaigh (2003):

It must be acknowledged ... that no established models or frameworks exist in relation to implementation issues involved in agreements between Indigenous peoples, developers and governments. Indeed despite the fact that the importance of implementation is increasingly acknowledged, there is little research or writing in this area to draw on.¹¹

While most of the agreements examined in the course of this research include provisions relating to implementation there is little evidence of consistency or a framework to assist analysis. The broad types of implementation provisions include:

- Establishing co-ordinating, monitoring and liaison structures with the role of ensuring that the objectives of the agreement are fulfilled and its provisions are enacted;
- Committing funds and resources to the activities of such structures, either through direct funding of their activities by the industry party, from beneficial trusts established pursuant to an agreement, or from government funding programs;
- Arrangements for the management of beneficial trusts;

¹¹ O’Fairchellaigh, C., 2003, *Implementing Agreements Between Aboriginal People and Resource Developers in Australia and Canada*, Aboriginal Politics and Public Management Research Paper No. 13, Griffith University, Brisbane, p. 2.

- Management plans for cultural heritage and sites of significance, including on occasions employment or assistance (i.e. through CDEP ‘top-up’) with the employment of a person to monitor heritage protection;
- Employment of cultural heritage officers to act as monitors in relation to heritage provisions of agreements, including exploration activities;
- Review mechanisms, including in some cases, external evaluation;
- Dispute resolution provisions;
- Establishing targets in relation to employment and training provisions, and business development assistance, although many such provisions build in flexibility to targets by including clauses such as ‘the company will use its best endeavours’.

Very few agreements include penalty clauses for breaches of an agreement provision.

O’Fairchellaigh commented that in his study of 40 ‘right to negotiate’ agreements, only one provided for penalties or sanctions for failure to implement provisions.

3.3 Sustainability in agreements

There has been some attention in the literature on the general subject and desirability of reaching agreements that are sustainable and a growing interest in what makes for a sustainable agreement. Much of the research commissioned or funded by mining companies seeks to define the elements of sustainability in agreements, notably those that bring about lasting positive change in the broad socio-economic status of an Indigenous community. There is evidence to support the view that Indigenous sustainability issues are usually the most pressing because of matters relating to ‘community’ (i.e. larger numbers of people, representation, individual vs. community benefit), communications, governance, and capacity. Failure to deal with such Indigenous concerns may well be the main reason a lot of agreements either fall apart or simply fail to progress, and become artefacts of a negotiation process.

Research in progress by CAEPR¹² aims to extend the discussion on sustainability from a focus on financial benefits to how Indigenous community organisations in regional Australia can better develop capacity to maximise the long-term benefits of nearby long-life mines. This project is undertaken in partnership with Rio Tinto, and focuses its case research

¹² “Partnering sustainable regional development; Indigenous community organisations and miners” CEDA Research project, at www.ceda.com.au/ResearchNew/Publications/Files/altman.pdf

on areas and populations around major and comparatively long-life mining projects subject to comprehensive agreements. In this situation high level company support for the sustainability of its operations and the local community is largely guaranteed, demonstrating an expressed commitment and acceptance of the responsibilities and obligations of corporate citizenship and a desire to develop 'best practice' approaches in its dealings with populations effected by its mines. Unfortunately, this is not typical of the context in which many agreements are formulated.

However, preliminary research findings suggest some key points¹³ that are commonly applicable:

1. Agreements need to take account of the 'structural limitations' of Indigenous communities, including their socio-economic status, education, welfare and health. These can introduce capacity issues, which may result in major limitations as far as agreement outcomes are concerned. The capacity of a population to exercise the benefits envisaged in an agreement, for example employment and training, will inevitably have an impact on the eventual effectiveness of an agreement. This can in turn lead to political instability and problems in relationships between miners and Indigenous communities when a key measure such as employment and training fails.

Thus, defining and meeting goals on which all parties agree is crucial, defining and taking account of these 'structural limitations' that may affect agreement provisions further down the track. This includes the need to clarify terms so that everyone including the diverse Indigenous people have a common understanding of what is being talked about.

2. It is critical that the diversity and complexity of the community of Indigenous parties is understood, acknowledged and helps to inform negotiations. Agreements that seek to 'mark out' selected individuals and provide benefits to them to the exclusion of others risk collapse.

As with any other community, Indigenous communities are inherently complex, but seeing the Indigenous community as a 'block' of interests and failing to understand its complexity can pose problems in agreement sustainability. Thus negotiators need to 'factor in' this diversity and consider 'hybrid' arrangements that reflect the dynamism, complexity and diversity of Indigenous communities. For example, employment on the mine may be welcomed by some members of an Indigenous party, but not everyone will be interested.

¹³ Personal comment, Dr David Martin 25th February 2004

Some may be opposed to western style measures, seeing participation in some of the programs as 'anti-culture', others might be more interested in other industries such as pastoralism, while others still will not want to work at all. Some may not want to engage with the company at all, but want funds to develop their own separate economies perhaps based on notions of traditional economy.

People will want benefits of different kinds. The dimensions of interests are complex and broad, reflecting the kind of 'hybrid' economies currently in existence. Agreements that take account of this diversity stand a much better chance of being sustainable.

However, while a multifaceted agreement may result in a robust agreement, this may also be too complex and too expensive for companies. There has to be careful look at the human resources needed to sustain monitoring and liaison structures. Does the structure 'fit' with the system on the ground – is it realistic?

3. Agreements should acknowledge and operate along principles of social sustainability. Mining companies are often 'technician rich' but have little understanding of social complexity or the delicacy of social relations. Social relations in all their complexity and diversity, between the company and Aboriginal communities are major elements of sustainability.

4. Existing Indigenous organisations such as NTRBs, PBCs, and Community councils are part of the organisational landscape and may need to be involved at some level in the agreement. This is regardless of matters such as their perceived capacity, representativeness, legitimacy and standards of governance; they still need to be dealt with. There has been a tendency for mining companies to bypass existing organisations, sometimes on the advice or urging of Indigenous participants, but this carries risks, particularly if an agreement seeks to set up a new structure.

For example, it is reported that one mining agreement set up a monitoring and co-ordinating structure with sub-committees that was overly complex and without the power and authority to be effective. It was costly without providing an effective interface between the broad community and the company. When the structure inevitably collapsed, this created a vacuum for hostility which in turn threatened the agreement. Thus the benefits stopped flowing creating even more hostility in the community. On the other hand, the Yandicoogina negotiation process involved extensive consultations with members of three traditional owning groups with rights over the impact area, members of which lived over a wide area of the Pilbara. There was no existing organisation or organisations considered by members to be

in a position to oversee the terms of the agreement. Thus an entirely new organisation was established on agreement between members of the three groups¹⁴.

Significant international research on legitimate governance structures has been undertaken by the Harvard Institute¹⁵, while research focussed on Australia is anticipated by Reconciliation Australia¹⁶. The vulnerability of individuals and structures needs to be uppermost in the minds of mining parties – they are vulnerable to agreements that may in the long run prove to be unsustainable.

3.4 Burrup and Maitland Industrial Estates Agreements (2003)

Although only recently concluded, the Burrup and Maitland Industrial Estates Agreement(s) are discussed in this report because implementation is specifically addressed and the parties formally and legally committed themselves to putting the terms of agreement into force within agreed and specified time frames. As would be expected from the literature reviewed above, this is a unique approach in Australia.

The fact that the details of the agreements are available publicly may serve to assist their eventual sustainability, although the benefits of public disclosure are yet to be researched¹⁷. Making the terms of the agreement and other consultation and negotiation documents public may help to alleviate conflict and encourage informed participation in this and comparable processes both by Indigenous, industry and Government parties.

The agreements were between the State of Western Australia, the WA Land Authority and three native title applicant groups in the West Pilbara region.¹⁸ It includes the surrender and permanent extinguishment of native title, as well as a range of other arrangements including land use, financial benefits, employment and training, and the funding for the establishment

¹⁴ Clive Senior, *The Yandicoogina Process: a model for negotiating land use agreements*, Regional Agreements paper no. 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998

¹⁵ Cornell, S. 1993, *Accountability, Legitimacy and the Foundations of Native Self-Governance*, Malcolm Wiener Centre for Social Policy and Harvard Project, J.F. Kennedy School of Government, Harvard University; Cornell, S. and Kalt, J. 1992 'Reloading the dice: Improving the chances for economic development on American Indian reservations', in S. Cornell and J. Kalt (eds), *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, American Indian Study Centre, Los Angeles, CA.

¹⁶ Jackie Huggins, Co-Chair Reconciliation Australia, at <http://www.onlineopinion.com.au/view.asp?article=784> (cited 28/4/04)

¹⁷ Personal discussion, Mr Bill Carr, Office of Major Projects, Government of Western Australia, 4th May 2004.

¹⁸ Burrup and Maitland Industrial Estates Agreement 2003, <http://www.atns.net.au/biogs/A001468b.htm> cited 27.4.04

of a body corporate. The details of the agreement and the agreements themselves are available on-line, and thus are not reproduced in detail in this report. However, their provisions include:

1. Freehold land grant to native title party, leased back to the government, and joint management as a conservation area.
2. Commissioning and funding (\$500,000 over 18 months) of an Independent Study to develop a Management Plan for the land in accordance with specified terms of reference and advised by an Advisory Committee.
3. Management funding of \$450,000 per year, over 5 years, for management of the land.
4. A Visitors/Cultural/Management Centre on the land worth \$5,500,000.
5. Infrastructure funding on the land worth \$2,500,000.
6. Financial Compensation totalling \$5.8 million, and on-going annual payments:

An Implementation Deed operates both as an implementation monitoring document and as an agreement in itself. At the time of execution, the Deed created certainty for those parties that had been working toward the earlier agreement, and acknowledged their good faith as well as allowing for inclusion of the third Indigenous party which, until that point, had not participated in negotiations and thus put their successful conclusion at risk.

The Deed is now in place and targets are being reached because the government and the other parties are committed to the agreement and the necessary resources are being provided through government agencies. Timeframes are set in the Deed in many areas; achievement of employment benefits, review, draft management plan, establishment of various structures to manage, and dispersal of benefits. Setting time-frames in the Deed was important for sustainability, in order to show good faith and to allow for some early targets to be achieved.

Flexibility is built into the Deed although it is sufficiently prescriptive to allow targets to be set, and to establish structures and processes for implementation. For instance the management plan may be amended as indicated by the following clause:

The parties agree that the Management Plan may be amended from time to time in accordance with the terms of the Management Agreement, or if there is no Management Agreement then by agreement between the parties.

There are few explicit penalties set out in the Deed. It is more 'achievement oriented', with prescribed reviews and monitoring structures that are entitled to make decisions on the details of some of the targets. For example the employment strategy will be reviewed yearly.

Key structures as well as implementation costs are set out in the Deed. For example, clause 17 deals with the funding, membership, establishment and operations of the Approved Body Corporate, as set out in **Attachment One of this report** “Burrup Implementation Deed; Sample Clauses”.

4. ISSUES IN IMPLEMENTATION AND SUSTAINABILITY

This section defines specific issues in relation to the implementation and sustainability of agreements, drawing on existing agreements as well as the limited body of literature focussing on the specific matters, and case information derived from interviews.

4.1 Conceptualising the process

The elements of agreement making should be considered as a whole – it is neither realistic nor useful to set boundaries between considerations of process, content, implementation and sustainability. They all influence and feed off one another, and lack of attention to one will inevitably have an impact on the others. Thus, it is important to consider the reality of what is likely to be sustainable during negotiations, and to ‘bed down’ as many outcomes as possible early in the process instead of relying on subsequent discretionary engagement. Workability is the main issue, and it is important that promises or agreements are not made when there is any reasonable doubt that they can be kept. There may be a tendency in the early stages to avoid consideration of complex issues, but these will need to be dealt with at some stage and working through these matters can actually have positive rather than negative outcomes, even if these issues bring up conflict between the parties. This includes the need to recognise and understand the full range and diversity of groups, and not deal only with groups who are positive about developments. Groups and individuals who do not participate in negotiations or support the activities of a mining company will still be around, so it is preferable to try and engage with them early in the process, even if these dealings are difficult and raise contentious issues. As O’Fairchellaigh comments:

It is tempting to delay dealing with these difficult ‘internal’ negotiations given the often urgent need to prepare for negotiations with the developer or with government. Unless the need to deal with them is clearly recognised and integrated into models of project negotiation, however, the prospects for achieving positive agreements will be substantially reduced. Also, the chances of achieving successful implementation of agreements will be dramatically reduced—conflicts which are not identified and managed may remain dormant while the need to maintain a ‘united front’ in negotiations with the developer is

at a premium, but they are likely to emerge as soon as the ink on an agreement is dry.¹⁹

In some situations comprehensive agreements covering a range of matters may bring later problems with sustainability, and it may be more effective to break broad agreements into elements that allow for more effective monitoring, audit and review.

It is important that the parties are clear about the goals of an agreement, and that these are canvassed widely and continuously throughout the negotiation process. In most cases, general goals may be established and agreed through the use of an ‘agreement-in-principle’, sometimes conceptualised as a ‘white board’ agreement, in which the specific parameters and provisions of an agreement are spelt out and agreed to. Getting to the stage of an agreement-in-principle may take a long time and a lot of meetings, but it is clearly a vital part of the process when later issues of implementation are considered. Following agreement-in-principle, drafting ‘... should not play second fiddle to the drama of negotiation. ... A well-drafted document can potentially mean the difference between a long-term workable relationship between the parties and an incessant struggle over just what really was agreed’²⁰.

Implementation of some agreement provisions may not need to be delayed until the agreement is formally signed off, indeed it may be of enormous value to the whole process as well as help provide ‘reality checks’ if the parties agree to implement certain measures immediately. For example, the South Australian State-wide ILUA process sought to establish a negotiation process that delivered some things along the way, for example respect for culture, high level recognition, capacity, trust, understanding, relationship building, and a structure for decision making, thus avoiding end point pressure that derives from all or nothing style of agreement making. ‘We therefore targeted a process that would produce positive outcomes along the way even if people walked away from it before concluding an agreement, or even before they got to the negotiating table’²¹. Much of the process of negotiation was directed towards the long-term aim of building trust between the parties, an

¹⁹ O’Faircheallaigh, C., 2000, *Negotiating Major Project Agreements: The ‘Cape York Model’*, AIATSIS Research Discussion Paper No 11, Canberra, p. 26

²⁰ Blowes, R. and Trigger, D., 2000 *Negotiating The Century Mine Agreements: Issues Of Law, Culture And Politics*, in Edmunds, M. (ed), 1999, *Regional Agreements in Australia: Vol 2: Case Studies*, AIATSIS, Canberra, p. 101

²¹ Agius, P., Davies, J. Howitt, R. and Johns, L (2002) *Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia*, Native Title Research Unit Issues Paper, Vol 2, No 20, AIATSIS, Canberra

effort that was understood as facilitating the longer term goals of implementing agreed provisions. This included:

- a. 'The claimants decided that respect for everyone and their different cultures and ways must be a priority' shown through recognition of cultural protocols that 'ensured nobody was speaking about or for another person's land.'
- b. Understanding of terms - Language based meetings, using diagrams and drawings.
- c. Feedback and communication – 'a lot of effort went into feeding people's own words back to them in 'on the spot' summaries during the meetings and in follow up meeting reports. We introduced regular newsletters and video newsletters for wider circulation'.
- d. Face to face meetings of parties – to overcome 'fundamental lack of understanding that the other stakeholders had about Aboriginal ways of life'.²²

4.2 Implementation structures and their funding

The availability of resources for implementation, including the funding of institutional arrangements, need to be agreed at an early stage of negotiation, whether these are to be carried by the State or another party, and how they are to be managed and distributed. One State government is trialling implementation costs in lieu of compensation payments. In the 'Burrup Agreements' the WA State Government has agreed to meet the bulk of implementation costs including providing funds for the Approved Body Corporate for a period of four years. The level of immediate support to Indigenous parties post agreement to ensure effective implementation, and the availability of longer term support to build sustainability are important matters that need to be considered as part of the negotiations. In some cases, costs of effective implementation may be high, and thus have an impact on the sustainability of agreements in the longer term.

Examples of arrangements to provide resources for implementation activities may be found in some of the agreements considered in this research. A number of agreements establish some kind of structure for the purposes of monitoring, liaison and co-ordination of agreement provisions, and make various arrangements for their resourcing. The size and scope of such arrangements will generally relate to the kind of agreement, the value of the project both for

²² Agius et.al.

proponents and respondents, the numbers, diversity and geographic dispersal of the Indigenous parties.

Key issues in relation to such structures are:

- How they reflect and represent the requirements of the Indigenous parties in all their diversity and complexity;
- The need to provide continuity between negotiations and the implementation, administration and management of an agreement;
- Structures of governance - how they interact and relate to existing Indigenous structures and their roles and functions, some of which (for example ATSIC Regional Councils, Native Title Representative Bodies, Prescribed Bodies Corporate, Community Councils), may have statutory functions;
- Their functions, and authority and ability to undertake these functions, including issues such as capacity, the work load required to monitor and manage sometimes complex functions, and their credibility within the community;
- Funding for the activities of the structures, including attention to regular meetings, community meetings, and the activities of specialist sub-committees.

Examples of such ‘implementation structures’ can be seen in a number of existing agreements:

a. Western Cape Communities Co-existence Agreement; A co-ordinating committee oversees implementation of the agreement and consults on:

- Comalco operations and plans;
- Cultural heritage and site management;
- Employment and training initiatives;
- Environmental and rehabilitation;
- Land access.²³

²³ Agreements, Treaties and Negotiated Settlements database

The Committee has broad representation from all signatories to the agreement; made up of one Traditional Owner from each of two separate families in each Traditional Owning group, the four councils, Comalco, the native title representative body Cape York Land Council, the State Government, a Weipa town representative and the Executive Officer.²⁴ The Executive Officer is employed from the beneficial trust established pursuant to the agreement, but meetings are sponsored by Comalco. They are held quarterly and at different centres around the region.

Three sub-committees, (1) agreement monitoring and review, community relations and public affairs (2) employment education and training (3) environment, heritage and land management, have been established.

b. Gumala Aboriginal Corporation, established as a result of the Yandicoogina Land Use Agreement negotiations in the Pilbara. Gumala is intended to represent the interests pursuant to the Agreement, including management of trusts, heritage protection, employment and training, and business development provisions, of the three traditional owner groups whose lands are within the mine impact area. Because there was no existing organisation with the necessary representational structure or authorised functions to undertake the role of managing the agreement provisions on behalf of the three groups, it was decided following an extensive period of consultation and bush meetings, that an entirely new organisation was needed²⁵.

Gumala operations are funded through trust monies, although Hamersley Iron has provided additional support, particularly in relation to training and business development. The organisation has experienced some initial problems in clarifying its goals and objectives, and has also suffered from the varying expectations of the wider community of members.

Part of the initial problems lay with the structure of Gumala itself, for although the Yandicoogina Land Use Agreement was aimed at community development, through the development of infrastructure, education, employment and training, social services and health programs, enterprise development and cultural and heritage initiatives, the objects of Gumala were heavily oriented towards native title. "This has created a lot of confusion for members". As a result an administrator was appointed by the Registrar of Aboriginal Corporations to

<http://www.atns.net.au/biogs/A000088b.htm> (accessed February 2004).

²⁴ Mapoon website <http://www.mapoon.com/section/27.html> accessed February 2004.

²⁵ Senior (1998), cited above, gives a detailed description of the process leading to the formation of Gumala.

‘remould the organisation ... to the type of structure that it probably should have been in the first place’.²⁶

What Gumala lacked from the very beginning was a formal agreed strategic direction and the professional support enmeshed within its structure to ensure that objectives were set and measured against financial management, assets and personnel. Clearly, unless this is in place services and programs, both innovative and sustainable will never be implemented successfully²⁷.

c. The Cape York Model Agreement was developed by the Cape York Land Council²⁸ to meet a number of objectives:

- To place Aboriginal people in a position to make informed decisions relating to proposed and existing developments;
- To put Aboriginal people in as strong a position as possible to maximise financial and non-financial benefits, and minimise costs they incur from any activities;
- To create a process which places as much control as possible in the hands of the traditional owners and other community members.

It has been utilised to guide and inform the negotiation process in a number of other key agreements, for example:

- Cape Flattery Silica Mine (1991–2);
- Skardon River Kaolin Project (1994);
- Alcan Bauxite project agreements (1997 and 1999);
- Comalco negotiations (West Cape Coexistence Agreement 1999).²⁹

²⁶ Van der bund J and Jackson Q, (2000) ‘You’ve signed the agreement, now the hard work begins!’ in *Negotiating Native Title*, Perth, May 2000

²⁷ Van der Bund and Jackson (2000)

²⁸ Description of the Cape York Model is taken largely from an article by Ciaran O’Faicheallaigh, *Negotiating major project agreements; the ‘Cape York Model’*, AIATSIS, 1999. See also Agreements, Treaties and Negotiated Settlements database <http://www.atns.net.au/biogs/A000917b.htm> (accessed February 2004)

The model envisages a seven step process of agreement development, the last of which deals with implementation:

- attention to implementation early in the process;
- agreement should contain some of the fundamental requirements to ensure effective implementation;
- provisions should be unambiguous and concrete yet flexible;
- funding of implementation activities and initiatives should be allowed for in the agreement;
- an agreement should make allowance for structures (such as joint Aboriginal community – mining company co-ordination committees) whose primary purpose is to ensure that implementation occurs as planned.

4.3 Managing implementation of agreements

a. Review mechanisms

Review mechanisms are important elements in helping to maintain and keep an agreement ‘on-track’, ensuring that the respective expectations and objectives of the parties are managed, as well as to ensure on-going communication between the parties. Few agreements appear to make provision for periodic or regular review despite the fact that it provides clear opportunities for the parties to get together to objectively examine the progress of an agreement. They do not need to wait for a dispute to arise to trigger communication. It may be a useful strategy to ‘stage’ implementation, and to undertake reviews when identified objectives or targets are reached.

b. Formal implementation arrangements

The ‘Burrup Agreements’, discussed in Section 3.4 of this report, provide probably the only Australian example of an implementation schedule that actually forms a part of the substantial agreement. Although the Burrup arrangements have commenced only recently early indications are that the agreements are being implemented effectively and according to the

²⁹ Agreements, Treaties and Negotiated Settlements database
<http://www.atns.net.au/biogs/A000917b.htm> (accessed February 2004)

agreed intentions of the parties. The circumstances leading to the Burrup Agreements, as with most agreements, were unique in their own right, and these strongly influenced the eventual nature of the agreement. An important reason for the Implementation Deed lay in the specific background to the agreement negotiations where, because one native title party was hesitant about entering negotiations, the others desired a strong demonstration of the good faith of the government party that it was in everyone's interests to keep negotiating³⁰. Thus, even if all of the native title parties had not eventually signed off on the agreements, those who had participated in negotiations and would be entitled to receive benefits under the resultant agreement.

The *ATSIC Regional Agreements Manual* (2001) recommended the use of implementation plans that specify who is responsible for what actions, and when they should occur. It comments that 'resources to implement the agreement may need to be secured, and the implementation plan can be a good vehicle for agreeing the implementation budget'³¹.

The idea of implementation plans appears to follow precedents in Canada, under which they are to be negotiated and submitted with agreements following ratification of an agreement-in-principle. Ivanitz (1999) reports that implementation plans are turning out to be problematic in some situations³². They are very difficult documents to create and extremely difficult to cost, and they dealt with 'forecasts, estimates and best efforts'.

c. Dispute resolution

Dispute resolution procedures need to be included in agreements to facilitate their effective implementation and eventual sustainability, as it is inevitable that over time different interpretations will be given to various clauses as new people become involved in the management of the agreement. While it is good practice to try to be as clear as possible about the intent and objectives of agreement provisions, it is inevitable that differences in understanding will emerge at some point after an agreement is finalised.

The kinds of dispute resolution procedures in an agreement will of course depend on the scope, intent and parties to that agreement, but should aim to be unambiguous, setting out

³⁰ Personal interview, Mr Bill Carr, Office of Major Projects, WA Government 4th May 2004.

³¹ *ATSIC Regional Agreements Manual* (2001), p. 2

³² Ivanitz M (1999) 'The emperor has no clothes: Canadian comprehensive claims and their relevance to Australia' in Edmunds M (ed), *Regional Agreements in Australia; Volume 2 Case studies*, AIATSIS 1999, pp. 319 - 342

procedures that all parties understand and are happy with, and that allow the parties to try to identify and resolve disagreements internally before becoming identified as a formal 'dispute', and proceeding to external mediators or arbitrators for resolution.

The NNTT web-site lists a number of sample clauses to inform the development of agreements including some relating to dispute resolution, but does not provide any context or advice on the situations where they might be appropriately used. The sample clauses on the NNTT web-site include two (quoted below) that are appropriate to resolving intra-Indigenous disputes, and that aim to utilise as far as possible traditional methods of dispute resolution:

a. Disputes between the Aboriginal parties in relation to the claim and other land matters will only be raised within the two parties at a meeting of the parties called for that purpose and, where possible, resolution will be sought through the consensus of the two parties after discussion. If a consensual resolution is not obtainable then an independent mediator agreed to by both Aboriginal parties will be appointed to mediate the dispute.

b. We agree to settle any disputes we may have between clans over land matters in the following way:

- first, the elders of the clans in dispute will meet and try to settle the dispute themselves;
- if the elders of the clans can't resolve the disputes a Council of Elders will mediate the dispute;
- if the Council of Elders can't settle the dispute, the clans in dispute will refer the dispute to an inexpensive arbitrator who will make a final decision which the clans in dispute will agree to abide by.

Others set out mechanisms whereby the NNTT may be brought in to mediate disputes at the request of the parties:

The Parties are committed to resolving disputes through the use of dispute resolution mechanisms, where appropriate, which may or may not involve the National Native Title Tribunal. Such mechanisms may include, but are not limited to, mediation, or referral to facilitators or, in the case of technical issues, independent experts.

In the event that the Parties reach an impasse in the negotiations, they will approach the National Native Title Tribunal to assist them in obtaining appropriate dispute resolution services. Participation in a dispute resolution process will be with the consent of each Party.

Another establishes a procedure for dealing with disputes between a Manager and Committee:

In the event that there is a difference of view between the Managers and Committee, they will negotiate in good faith to try to resolve the difference and in the event that it is unable to be resolved by negotiation will appoint a mediator agreed by both the Managers and the Committee and in default of agreement, two people, one appointed by the <name of independent group/agency> (or their successors) the other by the Chairperson of the Land Council (or their successors).

4.4 Implementation issues in Pastoral agreements

This research considered the terms of two existing agreements dealing with issues of access to pastoral leases and other co-existent rights (Western Yalanji Land Use and Access agreement (Queensland) and the Jidi Jidi Access protocol (in Western Australia), but only reports on the former.

The Western (Sunset) Yalanji native title application included the 25,000 hectare Karma Waters Station located north west of Cairns, operated by the Pedersen family under an occupation license. The Western Yalanji agreement was Australia's first consent determination over a pastoral property, and was signed off in September 1998 after three years of negotiation and mediation. It includes a legally binding land use and access agreement as a schedule to the consent determination.

In one case the pastoralist emphasised that goodwill and mutual acknowledgement of rights had moved the agreement process to a successful outcome:

The first thing you need to do before you go into any negotiation from a pastoralist's point of view and probably from an Aboriginal point of view is recognition of each other's rights. Because if you can't recognise each other's rights you are not going anywhere, anyway.³³

In one case the parties negotiated the form of the agreement and at times requested mediation without the presence of legal representatives, until certain agreements had been reached. A key factor in the success of reaching agreements may relate to land tenure arrangements. State granted security of tenure may be enhanced to meet the pastoralists' needs while at the same time the Native Title Holders' access to land may be enhanced through land rights grants.

An implementation issue which may need careful consideration is the likelihood of differing timeframes applying to the respective land tenure arrangements. Different processes and hence different timeframes may lead to the perception that one party is receiving favoured treatment over the other. This emphasises the need for a clear understanding and explanation of the legal procedures and timeframes applying to land tenure.

4.5 Expectations and Perceptions

Perceptions of people not directly involved in negotiations may have an impact on the prospects for other agreements. For example there has been some public criticism in the print media of an agreement around the issue of benefits to the Indigenous party, that no-one had ever taken up their land access benefits and visited the subject country. Whilst there was no indication that the parties were concerned or disappointed with progress, such criticism can cause tension and uncertainty, and parties need to have a realistic expectation about this – people rarely get thanked by those outside of the process for achieving agreement. The focus tends to be on what is being traded off, rather than on what is being gained. Thus the negotiating parties need continual and objective briefing on achievements and milestones and the alternatives.

Individual benefits and income need to be carefully considered during negotiations, in particular the potential impact of payments to individuals under the terms of an agreement and their possible impact on social security payments. Such matters may be overlooked by all parties during negotiations, and result in individuals losing their public social security

³³ Alan Pedersen Transcript held by NNTT Library, also reported publicly.

payments or having them cut. Similarly the taxation implications of payments to individuals need to be thoroughly examined during negotiations and appropriate expert advice sought, including on matters such as the taxation status of Aboriginal lands, including those subject to a determination of native title. Failure to examine such matters can have an impact on the long-term sustainability of an agreement.

4.6 Distribution of benefits

There are examples of agreements that have failed because of a failure to do the necessary work with the parties on how financial and other benefits should be distributed. This will generally require detailed and careful consultation, informed agreement, and sometimes external anthropological advice on group membership. The issues can be magnified when agreements relate to large 'country claims' made on behalf of various but related groups of people. Agreed structures and mechanisms, as well as review mechanisms, for distribution of benefits are vital for the sustainability of agreements.

4.7 Relationships

The kind of relationships that exist and develop between the parties will inevitably dictate or at least strongly influence the effectiveness of an agreement and its sustainability. In some agreements the relationship between the parties have been the key, and have provided the framework for flexible practices that are not necessarily in the agreement or even amenable to being formally included. Thus it is not always possible to build sustainability in a technical sense, as formalising relationships can be very difficult.

4.8 Understanding legal procedures

As noted above, an implementation issue may relate to tenure grants. The parties may not understand the different legal procedures to achieve the land tenure outcomes envisaged in the agreement. This may have a potential impact on the on-going relationship as it may cause some friction between the parties. Different procedures need to be more fully explored and better explained to the parties to ensure sustainable relationships. It is important that the relevant State land agencies are involved in proposals that require any tenure changes in order to avoid repetition and unnecessary delays.

4.9 Governance and capacity building

Underlying all considerations of effectiveness of agreements are those of governance, not only in relation to Indigenous parties but for industry groups as well. There is a continual need to look at governance issues, including authority - decision making and execution of decisions, resolving problems, and the multiple capacities needed to make an agreement effective in achieving its desired ends.

Indigenous negotiators and the full community of traditional owners need to have good channels of communication to ensure effective implementation and sustainability. In all agreements a small negotiating team is needed – logistics, including tight timeframes, dictate that the whole community just cannot be involved in all negotiations. Thus each party's representatives must be provided representative authority and communication channels. There needs to be an agreed structure and process behind the representative negotiators to progress the agreement from what has been termed 'the white board stage' or agreement-in-principle. Agreement in principle may be a very different matter to a fully drafted legal agreement. Parties may become uneasy about a perceived 'legalistic' approach, making the transition from principles to deed or legal document a key stage of agreement making whereby terms and relationships can be tested.

There are also issues of succession to be considered in longer-term sustainability. People may move away from the region, cease to be involved or pass away and this can remove important motivators from the picture, people who may hold that effervescent 'corporate memory' that holds the agreement together.

If agreements involve determinations of native title, PBCs will be involved at some stage. This means that PBCs must be properly resourced under an agreement to allow effective operations. This includes resources to hold meetings including travel, venues and secretariat. In Queensland a 'Tenure Resolution Package' may provide a State-funded process for consultations leading to agreement, but not following the agreement being implemented. Some flexibility in the matter of PBCs may be necessary, under which the body corporate that is a party to an agreement may exercise the functions of a PBC while not strictly complying with the requirements of the NTA in this regard.

4.10 Employment and training

Employment and training elements of an agreement need to be understood partly in the light of implementation and sustainability, as well as initiating measures that may satisfy some of the immediate employment and training needs of an Indigenous party. In some places, there has been a move away from mine site employment towards longer-term education and employment at the service end, leading to longer-term programs for Indigenous employment. Many Indigenous employees found it difficult to comply with occupational health and safety requirements. The presence of people with a long standing involvement with the community and the project may help to shift the emphasis from short term and immediate employment to a long term sustainable employment profile.

Compliance with employment and training provisions provides a relatively uncomplicated and public method of monitoring implementation of agreements and compliance with key provisions. Many mining agreements, perhaps most, include employment and training related clauses that establish targets whether in relation to percentages of the workforce within a set period, overall numbers of jobs and/or trainees, or in some cases, simply co-operative development of an employment and training strategy, such as the following sample clause listed in the NNTT website.

'<company> will co-operate with the <name of Aboriginal Corporation> in the development of a comprehensive employment and training strategy to be developed with the assistance from DEET funding. The objectives of the strategy will be the employment of <name> people in jobs created by the <company> project (including contractors). This strategy to be in line with the affirmative action requirements of state anti-discrimination legislation. To commence immediately.'

It is notable however that most agreements include “get-out” clauses in relation to employment and training, through the use of terminology such as ‘best endeavours’, or define targets that might be contingent on Government employment and training subsidies.

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Attachment 1

ATTACHMENT ONE

Burrup Implementation Deed - Sample Clauses

Approved Body Corporate

(a) The State will provide funding up to \$150,000 for the engagement of a consultant, nominated by the State after consultation with the Contracting Parties ("**ABC Consultant**").

17.3 Membership of Approved Body Corporate

(a) Membership of the Approved Body Corporate must:

(i) be open to all Contracting Parties and members of the Contracting Claim Groups who are 18 years or over ("**Eligible Persons**"); and

(ii) consist only of members who are Eligible Persons.

(b) The ABC Consultant must, at the commencement of the consultancy:

(i) request from each Contracting Party a list of names, addresses and telephone numbers of all Eligible Persons belonging to the Contracting Claim Group of the Contracting Party;

(ii) establish a list of the Contracting Parties and Eligible Persons of each Contracting Claim Group and provide copies of that list to each Contracting Party; and

(iii) convene a meeting to be attended by as many Eligible Persons as possible to:

(A) resolve any dispute raised by a Contracting Party as to the entitlement of any person to be an Eligible Person; and

(B) determine whether future meetings to be convened for the purposes of establishing the Approved Body Corporate can be convened with representatives of the Eligible Persons.

17.4 Process for Establishment of Approved Body Corporate

(a) The ABC Consultant shall be responsible for the establishment and incorporation of the Approved Body Corporate for and on behalf of the Contracting Claim Groups.

(b) In incorporating the Approved Body Corporate, the ABC Consultant must consult with, and obtain the approval of, the Eligible Persons to establish the procedure for determining:

(i) the rules and objects of the Approved Body Corporate; and

(ii) the appointment of the first governing committee of the Approved Body Corporate.

(c) If no procedure is established under clause 17.4(b), the matters in clauses 17.4(b)(i) and (ii) will be determined by the agreement of the simple majority of all Eligible Persons, or of their representatives, as the case may be.

(d) Notice of all meetings must be in writing and received by the Eligible Persons, or their representatives, as the case may be, not less than ten (10) Business Days prior to the meeting or such other period as approved by a simple majority of the Eligible Persons.

(e) All meetings will be conducted in Roebourne unless otherwise approved by a simple majority of the Eligible Persons.

17.5 Rules and Objects

The Approved Body Corporate must be established on such terms and conditions as first approved by the State, which approval must not be unreasonably withheld, and the rules and objects of the Approved Body Corporate must:

- (a) include a power to grant, and for the exercise of, a power of attorney for the completion, execution and registration of instruments and other documents against the certificate of title for land held by the Approved Body Corporate;
 - (b) provide for the Approved Body Corporate to conduct an audit of its financial records at least once each year;
 - (c) provide for the Approved Body Corporate to operate for purposes including the following:
 - (i) carrying out the rights and obligations of the Contracting Parties in accordance with the Ratification Deed;
 - (ii) taking the transfer of the freehold title to the Burrup Non-Industrial Land;
 - (iii) receiving, holding, managing, and investing on trust for the Contracting Claim Groups the moneys payable under this deed and any Undertakings and any income thereof;
 - (iv) at its discretion, allocating and distributing moneys for the general welfare of the Contracting Claim Groups for matters including:
 - (A) cultural development activities;
 - (B) education (including, bursaries, scholarships for secondary and tertiary studies);
 - (C) transportation, relief housing and resettlement of members of the Contracting Claim Groups in their traditional country;
 - (D) housing of members of the Contracting Claim Groups who are aged, sick or in need of special assistance;
 - (E) medical assistance and health related issues;
 - (F) sporting assistance;
 - (G) relief of poverty;
 - (H) child care and care for the aged and disabled;
 - (I) provision of community and social infrastructure;
 - (J) business development or participation in local or regional contracting opportunities;
 - and
 - (K) assisting the members of the Contracting Claim Groups to carry out their rights and responsibilities under this deed;
 - (v) encouraging the development of projects consistent with the purposes in clause 17.5(a)(iv) by members of the Contracting Claim Groups by providing, at its discretion and without limitation, loans, grants, goods or services; and
 - (vi) ensuring that the benefits arising from this deed are used and distributed equitably amongst the members of the Contracting Claim Groups having regard to the needs and priorities of those members both individually and collectively; and
- (d) not be amended in a manner inconsistent with this clause 17 without the prior approval of the State, which approval must not be unreasonably withheld.

17.6 Provision of Funding

- (a) The State will provide, subject to the provision of a tax invoice that complies with the GST Act, \$100,000 per annum for four (4) years to the Approved Body Corporate for the operation of the corporation provided that such payment will only be due and payable:

Management Council

6.1 The management of the Land under this Agreement will be administered by a Management Council, which will comprise:

- (a) three (3) representatives of the Department nominated from time to time by the Executive Director and advised in writing to the ABC (CALM representatives);
- (b) four (4) representatives of the ABC nominated from time to time by the ABC and advised in writing to the Executive Director (ABC representatives);
- (c) one (1) person appointed from time to time by the Minister for Indigenous Affairs; and
- (d) any other persons agreed to be appointed by the ABC and the Executive Director.

[Also has directions for conducting meetings etc.]

6.7 The Department shall provide administrative and secretarial support for the Management Council. [and pay meeting costs etc]

Management Plan

[Funded by the state \$500,000 for the preparation of the draft management plan. Consultant named Steve Szarbo. sets out review etc also]

5.2 The Management Plan must set out how the Land is to be managed for the period of that Management Plan by the ABC and the Department

4. MANAGEMENT PRINCIPLES

4.1 The ABC and the Executive Director shall jointly manage the Land via the Management Council established for the public purposes set out in the following objectives:

- (a) the preservation and promotion of the Aboriginal cultural and heritage values of the Land;
- (b) the preservation and promotion of the natural and environmental values of the Land, including indigenous flora and fauna;
- (c) the preservation and promotion of the archaeological values of the Land;
- (d) the provision of recreational facilities and facilitation of recreational activities on the Land, including the regulation of public access to the Land to fulfil so much of the demand for recreation by members of the public as is fitting having regard to the matters set out in clauses 4.1(a), (b), (c) and (e);
- (e) the use of the Land by the ABC and its members from time to time in accordance with traditional laws and customs acknowledged and observed by the members of the Approved Body Corporate;
- (f) the use of the Land by the ABC and its members from time to time consistent with the matters set out in clauses 4.1(a) to (e);
- (g) employment and training opportunities for the members of the ABC within the Land;
- (h) commercial opportunities for the ABC within the Land;
- (i) the implementation, monitoring, assessment and audit of the effectiveness of the Management Plan; and
- (j) the provision, construction, repair, maintenance and replacement of buildings and infrastructure on the Land for any of the foregoing purposes.

Attachment 2

ATTACHMENT TWO

IMPLEMENTATION CHECKLIST

Key Implementation measure	Actions	Examples*
Agreement negotiations	Attention to implementation issues during negotiation process	Burrup Agreements; CY Model Agreements
Agreement drafting	<ol style="list-style-type: none"> 1. Drafting needs to reflect agreement in principle 2. Methods to ensure common understanding of agreement provisions 3. Achievement rather than penalty focussed provisions <p>Cross reference: Communications strategies; Expectations and perceptions</p>	<ol style="list-style-type: none"> 1. CY Model Agreements; SA ILUA 2. CY Model Agreements; SA ILUA 3. Burrup
Monitoring, management and liaison (MML)	<ol style="list-style-type: none"> 1. Establishing MML structures with the role of ensuring that agreement objectives and provisions enacted; 2. Liaison with existing body to undertake MML functions 	<ol style="list-style-type: none"> 1. Yandicoogina Agreement, Century Zinc; Western Cape Communities Co-existence; BHP Area C; Arakwal ILUA; Mungo 2. Western Cape Communities Co-existence; Rubibi, Redlands; Western Yalanji
Funding of implementation	<p>Committing funds and resources to establishment and activities of MML structures, through</p> <ol style="list-style-type: none"> 1. Direct funding by industry, or through beneficial trusts established pursuant to an 	<ol style="list-style-type: none"> 1. CY Model Agreement; Yandicoogina; BHP Area C; Western Cape Communities Co-existence

* Examples are taken from agreements and publications looked at during the research for this report, as identified on pp. 3 to 4, and in the select bibliography. Colloquial rather than formal names of agreements are used. **Confidentiality requirements as specified by the NNTT have been observed.**

	<p>agreement, or</p> <ol style="list-style-type: none"> 2. By direct government allocation 3. Government Funding in lieu of compensation 	<ol style="list-style-type: none"> 2. Burrup Agreements; CY Model Agreement; Arakwal ILUA; Mungo 3. Some Queensland ILUAs
Enactment of measures before full agreement to demonstrate good faith and 'test the environment'	<ol style="list-style-type: none"> 1. Agree on specific outcomes prior to final full agreement 2. Tackle complex issues as they arise or agree on ways to deal with them 	<ol style="list-style-type: none"> 1. SA ILUA; Burrup
Heritage protection and management	<ol style="list-style-type: none"> 1. Management plans for cultural heritage and sites of significance; 2. Employment of cultural heritage officers as monitors of heritage provisions of agreements, including exploration activities 	<ol style="list-style-type: none"> 1. Western Cape Communities Co-existence; Burrup; Yandicoogina, BHP Area C 2. Western Cape Communities Co-existence
Flexibility of agreement provisions through review mechanisms	Review mechanisms, including external evaluation	CY Model Agreement; Burrup; Yandicoogina; Western Cape Communities Co-existence
Implementation deeds or implementation provisions in agreements	Agreement includes measures to ensure effective implementation i.e. costs, timeframes, establishment and constitution of structures	Burrup Agreements; CY Model Agreement
Implementation plans	Schedule to agreement details plan for implementation of agreed provisions	ATSIC Regional Agreements Manual
Dispute/conflict resolution	Dispute resolution provisions	CY Model Agreement; Burrup; Yandicoogina; Western Cape Communities Co-existence; Western Yalanji; Queensland State-wide ILUA; Mutawintji
Communication strategy	Face to face meetings between main parties; Use of	SA ILUA; Argyle

	interpreters; Attention to culturally appropriate meeting procedure i.e. 'white board agreements'	
Expectations and perceptions	Efforts to define and clarify the expectations and perceptions of the parties and their constituencies cf. communications strategy	SA ILUA; Argyle
Distribution of benefits	Arrangements for management of beneficial trusts	CY Model Agreement; Yandicoogina; BHP Area C; Western Cape Communities Co-existence
Relationships	MML Structures; employment of MML staff	CY Model Agreement; Yandicoogina; BHP Area C; Western Cape Communities Co-existence
Governance	<ol style="list-style-type: none"> 1. Attention to effective and representative MML structures 2. Effort to identify and involve all concerned groups in negotiations and MML 3. Provision for issues of succession if appropriate 	<ol style="list-style-type: none"> 1. CY Model Agreement; Yandicoogina; BHP Area C; Western Cape Communities Co-existence; Burrup 2. Yandicoogina; BHP Area C; Burrup; Western Cape Communities Co-existence 3. SA ILUA
Employment and training	Establishing targets in relation to employment and training provisions, and business development assistance	Western Cape Communities Co-existence; Yandicoogina; Burrup; BHP Area C
Transfer of land titles as agreed	Establish mechanisms and timeframes for legal transfer or grant of titles as provided	Burrup; Western Yalanji