



Local Government Agreements: Content Ideas

**Raine Quinn
Research Unit
August 2005**

Disclaimer

This document is provided by the National Native Title Tribunal as general information only. It is made available on the understanding that neither the National Native Title Tribunal and its staff and officers nor the Commonwealth are rendering professional advice. In particular, they:

Accept no responsibility for the results of any actions taken on the basis of information contained in this paper, nor for the accuracy or completeness of any material it contains; and

To the extent allowed by law, expressly disclaim all and any liability and responsibility to any person in respect of the consequences of anything done or omitted to be done by that person in reliance, either wholly or partially, upon the information contained herein.

It is strongly recommended that all readers exercise their own skill and care with respect to the use of the information contained in this document. Readers are requested to carefully consider its accuracy, currency, completeness and relevance to their purposes, and should obtain professional advice appropriate to their particular circumstances. This information does not indicate any commitment to any particular course of action by either the Tribunal or the Commonwealth.

© Commonwealth of Australia 2005

This work is copyright. It may be reproduced in whole or in part for study or training purposes if an acknowledgment of the source is included. Such use must not be for the purposes of sale or commercial exploitation.

Subject to the Copyright Act, reproduction, storage in a retrieval system or transmission in any form by any means of any part of the work other than for the purposes above is not permitted without written permission.

Information about this report and requests and inquiries concerning reproduction should be addressed to Manager, Research Unit, National Native Title Tribunal, GPO Box 9973, Perth WA 6484.

Telephone: (08) 9268 7272

Facsimile: (08) 9268 7299

E-mail: reports@nntt.gov.au

Web site: www.nntt.gov.au

Contents

Local Government Agreements	5
Introduction.....	5
Part 1: Key Themes	6
Part 2: Issues for Consideration	9
Indigenous Land Use Agreements	9
Process or Framework Agreements	10
Memoranda of Understanding or Accords.....	10
2.1 Issues to consider in developing Indigenous Land Use Agreements.....	11
Parties.....	11
Recitals/Background/Preamble/Objectives.....	11
Definitions and interpretation	12
Description of Area.....	12
Mutual respect and recognition.....	12
Commencement/expiry	12
Warranties/Authority	12
Registration of the ILUA	12
Recognition of Native Title	13
Native title.....	13
Future Acts.....	13
Compensation	14
Statutory Powers	15
Management of the Agreement Area.....	15
Cultural Heritage Acknowledgement and Protection	15
Access	16
Economic Development.....	16
Town Planning	16
Liaison/management/advisory committee	16
Dispute Resolution.....	17
Breach of agreement	17
Confidentiality/press releases	18
Employment, education and business opportunities.....	18
Entire agreement and variation	18
Succession.....	18
Insurance/liability/indemnity	19
Waiver.....	19
Notice.....	19
Governing Law	19
Counterparts.....	19
Severability	19
Independent Legal advice	19
Stamp duty	19
GST	19
Further Action.....	20
Execution of deed	20
Schedules	20
2.2 Issues to consider in developing process agreements.....	21
Parties.....	21

Acknowledgements.....	21
Definitions and interpretation	21
Purpose.....	21
Background	21
Description of Area.....	21
Process	21
Subject Matters	21
Principles.....	22
Resourcing	23
Confidentiality	23
Third Party Interests.....	23
Native title.....	23
Amendment.....	23
Termination.....	23
Effect of signing the agreement	23
2.3 Memorandum of Understanding (MoU).....	24

Local Government Agreements

Introduction

This guide gives an overview of content ideas for agreements between Local Government and native title parties. It provides a series of triggers to help parties canvass important issues during negotiations. It does not aim to be an exhaustive source of information on Local Government agreements or specify what they should include.

Part 1 sets out key themes that have been identified for agreement makers to consider to ensure agreements are durable or sustainable¹.

Part 2 lists by topic issues for consideration in the drafting and negotiation of the agreements. This list is not meant to be exhaustive. Many of the topics will not be relevant to some agreements, for example they may not apply to a small-scale or single purpose agreement. However, the topics, although not universally applicable, may be worth consideration. If they are not applicable, they may be ignored.

The National Native Title Tribunal (the Tribunal) has a wide range of detailed information about agreement-making. This guide will be most useful if read in conjunction with other Tribunal publications about the types of agreement parties are considering.

The Tribunal can also provide assistance to parties at all stages of the agreement-making process. Members, case managers and specialist employees have extensive knowledge and experience in different types of agreements. Contact the Tribunal on Freecall 1800 640 501 for more information or to request assistance.

¹ According to Allbrook and Jebb, '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', Malcolm Allbrook and Dr Mary Anne Jebb 2004, *Implementation and Resourcing of Native Title and Related Agreements*, NNTT, Perth, page 2. Other parties may view sustainability differently.

Part 1: Key Themes

Themes to consider are:

- parties need to be committed to the agreement;
- if developing an on-going relationship between the parties then a communication strategy needs to be set, including:
 - out of session communication (e-mail, telephone, written etc);
 - respect and goodwill; and
 - mutual acknowledgement of rights;
- the terms, legal procedures and timeframes need to be understood by the parties throughout the agreement;
- the parties need to be kept informed of achievements, milestones and the alternatives²;
- a means to ensure to the greatest extent possible that 'outcomes promised in agreements actually materialise'³;
- preferably achievement focussed;
- an implementation plan/schedule needs to be set which specifies who is responsible for what actions and when;
 - the plan may also include provisions for resourcing the implementation of the agreement – immediate support post agreement and longer term support to build stability; and
- specific provisions for monitoring, review⁴ (periodic and regular), management and liaison may be agreed to if appropriate for the agreement.

According to Allbrook and Jebb, agreements will be more durable if they take into account issues that affect the Indigenous parties to an agreement, for example 'community'⁵, communications, governance, succession and capacity' (2004, page 11). Further,

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, ... will inevitably have an impact on the eventual effectiveness of an agreement ... 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

² Allbrook and Jebb 2004, page 26.

³ R. Kelly and C. O'Fairchellaigh 2002, 'Native title, mining and agreement making: best practice in commercial negotiations' in *Native Title and Cultural Heritage in 2002*, Novotel Hotel, Brisbane, page 9.

⁴ ATSIC 2001, *Regional Agreements Manual*, p. 23 cited in Malcolm Allbrook and Dr Mary Anne Jebb 2004, *Implementation and Resourcing of Native Title and Related Agreements*, NNTT, Perth, page 9.

⁵ Allbrook and Jebb described 'community' matters as 'larger numbers of people, representation, individual vs. community benefit' (2004, page 11). S. Holcombe included equality vs hierarchy as an issue. S. Holcombe 2004, 'Early Indigenous engagement with mining in the Pilbara: Lessons from a historical perspective', *CAEPR Working Paper No. 24/2004*, Centre for Aboriginal Economic Policy Research, ANU, Canberra, page 11.

individuals and provide benefits to them to the exclusion of others risk collapse. ... Thus negotiators need to 'factor in' this diversity and consider 'hybrid' arrangements that reflect the dynamism, complexity and diversity of Indigenous communities. ... 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 [a] 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? (2004, page 12)

Recently Allbrook also noted that sustainable agreements are based on sustainable relationships between the parties and this relationship and the intentions of the parties may be reflected in the implementation provisions⁶.

Other factors impacting on the sustainability of agreements include:

- the involvement of the relevant Indigenous organisations in the agreement;
- 'an effective interface between the broad community and the company';
- an 'agreement in principle', setting out the parameters and provisions of the expected agreement; and
- attention to drafting. Citing Blowes and Trigger⁷, Allbrook and Jebb noted that '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' (2004, pages 13 and 17).

This emphasises the importance of an agreement that is practically sustainable, taking into account the capacity of the parties to meet their obligations and exercise their rights under the agreement for its duration.

Other practical considerations include:

- the potential impact of the agreement on Centrelink and other payments;
- the taxation implications for individuals including 'the taxation status of Aboriginal lands' (2004, page 26) and rateability;
- how financial and other benefits may be distributed – perhaps in a different instrument; and
- employment and training targets and business development assistance.

Dispute resolution procedures are included in most agreements. Allbrook and Jebb point out that dispute resolution procedures should be unambiguous and should set out procedures that all parties understand and are happy with. The procedures should allow the parties to try to identify and resolve a disagreement internally before it

⁶ Malcolm Allbrook and Mary Anne Jebb 2004 'Implementing and resourcing native title and related agreements seminar', NNTT, Perth.

⁷ R. Blowes and D. Trigger 1999, 'Negotiating The Century Mine Agreements: Issues of Law, Culture and Politics', in Mary Edmunds (ed), *Regional Agreements in Australia: Vol 2: Case Studies*, AIATSIS, Canberra, page 101.

becomes identified as a formal 'dispute' which would then proceed to external mediators or arbitrators for resolution (2004, page 23).

Part 2: Issues for Consideration

Each agreement will turn on its own facts and other important issues may also need to be included in them. No attempt has been made to provide precedent clauses, as Tribunal Members' experience suggests that these are of limited value. Each agreement will have its own nuances and peculiar focus that makes the use of "off the shelf" clauses potentially problematic. However, the agreements negotiated to date seem to embody the concepts of reciprocity and mutuality to a greater or lesser extent.

The headings used in this guide are common to a number of actual agreements. The elements are included in dot point form under each heading and form the trigger for further inquiry. Some clause headings and elements that are not found in the Local Government agreements sampled have been included. These are italicised for ease of identification.

Within the text the parties are phrased in the singular but it is recognised that there could be more than one native title party or non-native title party to an agreement.

Indigenous Land Use Agreements

An ILUA is a statutory agreement about the use and management of land that can be made between a native title party and other interested parties such as State governments. ILUAs allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances. While ILUAs can be made separately from the formal native title process, they may also be stepping stones towards, or be part of, native title determinations. A decision whether to use an ILUA needs to be made on a case by case basis and readers should refer to other Tribunal guides to assist them in this decision (see <http://www.nntt.gov.au/ilua/Info.html>).

ILUAs may be made about matters such as:

- native title holders agreeing to a future development;
- the relationship between native title rights and the rights of other people;
- access and/or management arrangements;
- surrender of native title; and
- compensation.

Unlike other agreements, once it is registered on the Register for Indigenous Land Use Agreements, an ILUA binds all native title holders to the terms of the agreement even if they are not a party to the agreement. Only ILUAs that comply with the legal requirements can be registered. By contacting the Tribunal early in the negotiation process, you will receive the assistance and information you need to ensure that the ILUA you are negotiating meets the requirements for registration (see 'Getting help from the Tribunal' at <http://www.nntt.gov.au/ilua/Info.html>).

The kind of help the Tribunal may give to parties includes:

- negotiation assistance;
- project management;
- technical information and support relating to ILUAs;
- conducting preliminary consultations;

- background research support;
- helping non-indigenous parties to identify the correct native title groups;
- reviewing and providing maps of the ILUA area;
- providing land tenure information and conducting searches
- providing options for negotiations; and
- checking draft agreements for compliance with legal requirements and providing feedback.

Process or Framework Agreements

A Process or Framework Agreement is an agreement between a native title party and other interested parties. Such agreements generally bind parties to a particular process rather than substantive issues. For example, a framework or process agreement may set out the process agreed to between the parties for the negotiation of an ILUA.

Memoranda of Understanding or Accords

Memoranda of Understanding (MoU), or Accords, are non-legally binding documents which demonstrate political will. They can be used to create a framework for further action, clarifying the roles and responsibilities of the parties. MoUs can be based on community consultations and negotiations rather than on a legal framework and the involvement of lawyers. The aim is to reach an amicable and workable arrangement for the longer-term benefit of the community.

2.1 Issues to consider in developing Indigenous Land Use Agreements

A number of complex issues arise in relation to the drafting and registration of an ILUA.

Parties may refer to the information provided on the National Native Title Tribunal website at <http://www.nntt.gov.au/ilua/> which includes:

- information about ILUAs, including '[Negotiating native title in local government](#)';
- how to apply for registration of an ILUA;
- information about how to request Tribunal assistance;
- guidelines and application forms for registration of ILUAs; and
- summary information about all registered ILUAs.

The Tribunal can provide a wide range of assistance, including negotiation assistance and assessing ILUA applications before lodgement to check whether they meet the registration requirements. It might be relevant to check with parties whether a pre-lodgement assessment would be useful.

The information below was gleaned from the analysis of four ILUAs between Local Government, Native Title Claimants and various other parties including the State government and Indigenous Representative Bodies.

Parties

These are the people, companies, unincorporated associations and governments who upon execution of the agreement agree to be contractually bound to the terms of the agreement. For an ILUA to meet the requirements for registration, it is essential that the right parties are involved for the type of ILUA you are negotiating. (See Steps to an ILUA – step 4, Parties to ILUAs at <http://www.nntt.gov.au/ilua/Info.html>)

Recitals/Background/Preamble/Objectives

The recitals/background/preamble/objectives may or may not form part of the agreement. However, they set the scene, provide the background and give an overview of matters which will be subject to specific clauses in the agreement. This part may:

- describe the existing state of affairs;
- give the reasons for entering into the agreement;
- provide an explanation of intention;
- describe who the agreement is between;
- describe the type of agreement and whether it is legally binding;
- *specify that the Shire, Council etc is duly constituted under the relevant Local Government Act; and*
- specify whether the agreement allows for the doing of future acts or the validation of previous acts and whether the right to negotiate procedure applies.

Definitions and interpretation

Defines the terms used in the agreement including a definition of the agreement area.

Description of Area

Describes the area covered by the agreement.

Mutual respect and recognition

This sets the tone of the relationship between the parties. It may include:

- a statement of mutual respect and recognition;
- a statement of cooperation eg the parties will work to give full effect to the agreement and refrain from actions that may hinder the performance of the agreement; and
- a statement of expected behaviours;
 - if so, these may be clearly specified.

Commencement/expiry

Specifies:

- when the agreement commences;
- whether particular rights and obligations under the agreement commence and cease simultaneously or at different times;
- how long the agreement lasts;
- timeframe to negotiate an extension;
- *which events trigger commencement or expiry of the entire agreement or specific terms under the agreement; and*
- which clauses, if any, continue after expiry/termination of the main agreement.

Warranties/Authority

May state:

- that the registered native title claimants, prescribed body corporate (PBC), Representative Body etc. have the authority to enter the agreement or have been given the authority to enter the agreement;
- that all reasonable efforts were made to ensure that all persons who hold or may hold native title have been identified;
- that all persons identified authorise the making of the agreement; and
- if there is a PBC, it has complied with the relevant regulations.

Registration of the ILUA

It may include:

- a general provision that the parties will do all things necessary to aid and maintain the registration of the ILUA;
- time frame for registration and the effect if the agreement is not registered within the timeframe;
- details of who makes the application for registration of the ILUA;
- when the application is to be made;
- that the parties agree to the ILUA being registered; and
- a statement on the effect of registration of the ILUA - that it binds all native title holders in the area.

Recognition of Native Title

- will the agreement recognise the native title party and their [specified] native title rights and interests?
 - if so, a list of these rights and interests may be included as a schedule;
- will the agreement recognise that a particular area of land is to be used exclusively by the native title party?
 - if so, a full description including map/s may be included as a schedule; and
 - how will that be given effect?
- a statement may be made that the agreement cannot be used as evidence of native title in any legal proceedings or claim for compensation.

Native title

What happens to the underlying Native Title claim?

- will it be withdrawn?
- if it is withdrawn what happens to the issue of legal costs?
- if the claim is not withdrawn will the non-native title parties withdraw as parties to the claim or support the claim or at least not oppose it?
- can the native title party claim any further native title rights and interests?
- does a statement need to be included that describes whether the native title party can assist other Indigenous people to make a Native Title Determination Application in relation to the area covered by the agreement, after the agreement is registered?
- does the non-native title party acknowledge the existence or proposal for such an application and agree to support it?
- does the native title party agree not to lodge any applications under the NTA for duration of the agreement?
- under the terms of the agreement can the native title party apply for a determination in relation to their native title rights and interests under the NTA?
- what happens if a person not a party to the agreement wants to become an applicant or registered native title claimant in respect of the Native Title Claim?

Native Title compensation

- once the agreement is registered can the native title party pursue compensation – capped for future acts covered by the agreement (see sections 24EB and 24EBA of the NTA)?

Native Title Determination

- what will be the effect on the agreement of a determination that native title exists over the area?
 - if the recognised native title party is already a party to the agreement?
 - if the recognised native title party is not a party to the agreement?
- what will be the effect on the agreement of a determination that native title does not exist over the area?

Future Acts

May state that where an activity proposed by a party is a future act that party will:

- notify the other parties eg local government, native title party, the State; and

- consult with the other parties about the proposed activity.

If an alternative regime is proposed, from when does the alternative regime apply? Is the regime described additional to or replacing some or all of the Future Act regime and in relation to which acts under the NTA?

State provisions may apply. If not then:

- if a proposed activity falls within the Future Act provisions of the NTA then the provisions of the NTA will apply;
- where consent is required does the native title party agree to the doing of future acts?
 - if so, a clear list of the future acts or classes of future acts which will be consented to may be included (sometimes as a schedule);
- is it necessary to include a statement that the parties consent to the doing of future acts and that ensures future acts are valid (see sections 24EB and 24EBA of the NTA)?
- do the parties agree to exclude the right to negotiate provisions?
 - if yes, then the agreement needs to include a statement that Subdivision P is not intended to apply to the act or class of acts;
- is there a need to validate acts done prior to the agreement and prior to registration?
- compensation is capped (see sections 24EB and 24EBA of the NTA);
- does the non-extinguishment principle apply?
- do you need to include the process to be followed when future local government works need to be undertaken, including notice, consultation, if money/consideration payable for permission from native title party to do the future act?
- *do you need to consider procedures for land grants?*
- *do you need to consider procedures for compulsory acquisition processes/surrender?*
- *do you need to consider emergency events which do not follow the normal procedure eg disasters – fire/floods, spillages etc. and health and safety activities.*

Compensation

For past acts and intermediate period acts

- do the provisions of the agreement represent full compensation?
 - if so, is it necessary to include a statement that no further claim will be made for compensation for those acts?
 - if not, is a set-off clause necessary?
- does anything in the agreement affect the right of the native title party to claim compensation for any future act (see sections 24EB and 24EBA of the NTA⁸)?
- are all persons holding native title in relation to the area covered by the agreement, including people not party to the agreement, entitled to a share in the compensation provided under the agreement?
- who is entitled to share in the compensation provided?

⁸ The NTA caps compensation for future acts covered by ILUAs.

Surrender

- does the agreement provide for surrender of any native title rights or interests?
Is it intended to extinguish those native title rights and interests?
 - if so, is the issue of compensation for that surrender dealt with?
 - if so, when is the surrender intended to occur (must not be before the registration of the agreement); and
 - if not what happens in the future?

If an act under the agreement involves the surrender of native title then:

- a statement that the surrender is intended to extinguish the native title rights and interests needs to be included; and
- the government to whom the native title is surrendered must be a party to the agreement.

Statutory Powers

This may include a statement that:

- the statutory rights and powers of the Local Government are not affected by anything in the agreement; and
- the parties agree to comply with all laws when exercising or proposing to exercise their respective rights in the area covered by the agreement.

Management of the Agreement Area

This may specify how the agreement area is to be managed eg management plan, under appropriate Act.

Cultural Heritage Acknowledgement and Protection

This may include either an acknowledgment that the relevant cultural heritage laws apply or a process for cultural heritage protection, in addition to that provided in the statutes. If a process of cultural heritage protection is to be developed, details about how it operates needs to be included. This may include:

- a clause requiring any employees, contractors, agents etc to be informed about the process and to comply with the process;
- a process for consultation with the native title party;
- a cultural heritage process;
 - do you need consultants?
 - who selects the consultants?
 - which party meets the costs of consultants?
 - *does there need to be a budget and schedule?*
 - *do you need to include an audit of expenses?*
 - who and how many members of the native title party to be involved?
 - *will there be any remuneration for such things as transport, food?*
 - *dealing with culturally significant information; and*
 - OH & S issues.

Process for management of significant site/object

- *exclusion zones;*
- *fencing; and*
- *Keeping Place/Cultural Centre.*

Process for management of significant site/object discovered in process of carrying out work

- *do workers stop work;*
- *who do they notify;*
- *timeframe; and*
- *what happens.*

Description of meaning of damage/interference to significant site/object

- process if damage/interference to significant site/object;
- process if deliberate or negligent damage/interference to significant site/object;
 - process to work out compensation for damage/interference to significant site/object;
 - if compensation can not be agreed then dispute resolution mechanism triggered;
- process if significant site/object disturbed without knowledge of people carrying out the work.

Understanding

- developing community awareness; and
- training of council employees, etc.

Access

- do you need to consider access arrangements to local government lands;
 - notice;
 - restricted access areas;
 - use of surveyed roads;
 - third party access; and
 - indemnification, insurance coverage, public liability.

Economic Development

May specify:

- a commitment to the development of a greater community understanding of Aboriginal culture in the Shire;
- a commitment to support the economic aspirations of the native title party; and
- a commitment to increase the opportunities for cultural tourism.

Town Planning

- will a commitment be made to consult with the native title party when developing the Town Planning Strategy?

Liaison/management/advisory committee

Specific information about the formation/duties/responsibilities of the management/liaison/advisory committee is sometimes included as a schedule. This part may:

- include a commitment to foster and maintain positive relationships;
- specify the timeframe for the establishment of the committee;
- specify the composition of the committee and may include a percentage or number of members to be nominated by the native title party;

- specify a timeframe for first meeting, how often meetings are to be held, the venue, what makes up a quorum, election of Chairperson, ability to change members etc;
- specify decision-making arrangements eg consensus, majority vote;
- outline responsibilities and functions of the Committee, for example:
 - to advise relevant people on issues concerning management of the agreement area;
 - to assist in preparing a management plan for the area;
 - to make recommendations to the relevant people in relation to amendments to the management plan;
 - *to develop communication protocols;*
 - *liaison between parties;*
 - *cultural heritage issues;*
 - *employment issues;*
 - *training;*
 - *review and monitor process of the agreement;* and
 - *specify who will fund the committee, for example, meeting costs including travelling costs, meeting fees, secretariat support etc.*

Dispute Resolution

Sets out the dispute resolution process agreed between the parties, including:

- when and how dispute resolution processes are triggered;
- protocols for dealing with disputes, eg honesty, respect etc, where meetings are to occur, who bears the costs of the process;
- an agreement to provide to the mediator/arbitrator all information needed to mediate/determine the matter; and
- a statement about confidentiality issues.

The steps to be followed to resolve a dispute may include:

- written notice of the dispute with timeframes for resolution;
- good faith negotiations/informal discussions - where, when and for how long;
- the appointment of a facilitator and how this is decided;
- dispute referred to a mediator and how this is decided;
- dispute referred to an arbitrator;
- assessment by an independent expert; and
- court processes.

Breach of agreement

May specify:

- what constitutes a breach;
- the extent to which a breach will affect the agreement and rights under it eg no effect, suspension, deduction of payments;
- the implications of the innocent party failing to take action in relation to breach of the agreement by another party;
- whether a breach can form the basis of termination;
 - if so, what effect does that have?
 - if an ILUA is to be terminated all parties need to agree and notify the Registrar.

Confidentiality/press releases

States whether the agreement is confidential or not

- *do you need to consider whether certain information needs to be kept confidential?*
 - *which information stays confidential after the termination of agreement (cultural and economic information)?*
 - *conditions for disclosure of information; and*
 - *rules for press releases.*

Employment, education and business opportunities

Use of this topic in an agreement will depend upon the financial capacity of the local government and what the parties are trying to achieve. Items for consideration may include:

- *do you need to consider employment, education and business opportunities?*
- *if so, do you need a means to identify employment/business opportunities?*
- *do you need to employ a liaison officer?*
- *do you want to consider adopting an Aboriginal training and employment policy. May include:*
 - *apprenticeships;*
 - *traineeships;*
 - *clear job descriptions;*
 - *notification of available jobs;*
 - *training programmes for those who do get jobs;*
 - *mentoring programme;*
 - *performance review process;*
 - *counselling & disciplinary procedures;*
 - *career development;*
 - *addressing health barriers to education; and*
 - *employee support.*
- *will working hours and conditions of Aboriginal employees be adjusted to suit the cultural needs of those Aboriginal employees?*
- *will there be an Aboriginal relations policy?*
- *will the native title party be notified of any sub-contracting work. Will preference be given to the native title party on tendered contracts?*
- *will cross cultural training be provided for Local Government employees?*
 - *who will provide the training – process/costs/time?*

Entire agreement and variation

May state whether:

- *the agreement is the entire agreement;*
- *it supersedes all prior arrangements; and*
- *how the agreement can be amended.*

Succession

This may state:

- *what will happen if the native title application is withdrawn?*
- *what will happen if parties to the agreement die?*
- *do you need to include provisions for role of RNTBC if formed after the agreement is registered?*

Insurance/liability/indemnity

Might state:

- the type of insurance applicable, eg mutual indemnities, public risk insurance, joint/several liability;
- the amount covered by the insurance;
- who is covered by the policy;
- how the insurance will be funded;
- *whether other parties have a right to see the insurance policy and its certificate of currency; and*
- *that each insured person will provide reasonable assistance to the insurer and any injured person.*

Waiver

Specifies whether failure to enforce an obligation under the agreement means that that obligation is waived, also stipulates whether waivers must be in writing between the parties.

Notice

Will specify:

- the addresses of parties and other relevant organisations for the purpose of giving notices under the agreement;
- the means by which notices may be given under the agreement;
- the time frame of receipt; and
- the procedure for amending notice obligations.

Governing Law

Specifies the law which is to be applied in interpreting the agreement, eg Western Australian laws.

Counterparts

Specifies whether different copies of the agreement can be signed which, when put together, constitute one and the same agreement. This allows for the agreement to be executed in more than one location.

Severability

Specifies that if part or all of a provision of the agreement is illegal or unenforceable it can be severed and the remaining provisions continue in force.

Independent Legal advice

May state whether parties received independent legal advice and who pays.

Stamp duty

May specify which party pays.

GST

May specify which party pays.

Further Action

May specify that each party is to use their best efforts to ensure the agreement is given full effect and will refrain from hindering performance of the agreement.

Execution of deed

Names and signatures of the parties to the agreement and witnesses and the date the agreement is signed.

Schedules

This might set out:

- a plan and description of agreement area;
- the native title parties;
- the native title and other rights and interests recognized;
- management arrangements including advisory committee;
- cultural heritage management plan – budget;
- future acts;
- significant sites; and
- validated acts; etc.

2.2 Issues to consider in developing process agreements

The purpose of a process agreement is usually to put in writing a process agreed to by the parties for negotiating an ILUA. The following material is based on the analysis of three process agreements.

Parties

Lists the parties to the agreement.

Acknowledgements

May specify:

- who the traditional owners are;
- the connections and rights and interests the traditional owners have in the area;
- who the Representative Body represents;
- that the Shire/Local Council is a duly constituted Local Government and has the statutory rights and responsibilities in relation to the area covered by the Agreement;
- acknowledgement of the history; and
- that the parties acknowledge and respect native title party and their right to speak for, look after Country etc.

Definitions and interpretation

Defines the terms used in the agreement including a description of the agreement area.

Purpose

Describes the purpose of the process agreement, for example:

- to agree to a process for negotiating an ILUA/Agreement;
- to state the parties' commitment to negotiating an agreement; and
- whether the agreement affects any common law or statutory rights of the parties.

Background

Summarises the events leading to the agreement.

Description of Area

Describes the area covered by the agreement.

Process

This may describe the process agreed to by the parties to lead to an ILUA/Agreement, for example:

- the establishment of a Steering Committee/Working Group (provide information on composition, role, chair, decision making process, circulation of documents, dispute resolution process, timeframe for ILUA/Agreement); and
- the appointment of a Native Title Officer (list specific duties).

Subject Matters

This may list issues that may be addressed during negotiations, for example:

- access;

- administration of the Local Government area;
- capital works and infrastructure;
- community development;
- cross cultural training;
- cultural heritage protection;
- cultural resource management;
- development approval procedures;
- dispute resolution;
- economic development;
- environmental assessment;
- employment;
- financial resourcing;
- future act processes;
- intellectual and cultural property protection;
- land and natural resource management;
- land tenure;
- law enforcement;
- outstation development;
- planning;
- research and monitoring;
- reserves management;
- service delivery;
- third party interests;
- tourism management;
- water management;
- zonings;
- involvement of the NNTT;
- issues related to Indigenous people living in or visiting from other areas;
- management of reserves vested in the local government;
- Aboriginal signage;
- insurance and indemnity on lands managed/vested in local government;
- DIA reconciliation grants;
- potential partnerships on ILC and pastoral excision land;
- recognition of importance of National Aboriginal and Torres Strait Islander Week;
- Aboriginal community issues (eg coordinated service delivery);
- public and environmental health;
- development of a Statement of Commitment of Local Government Services to Aboriginal communities;
- *land grants; and*
- *rates.*

Principles

This may set out the principles that will guide the negotiation of the agreement, for example:

- good faith negotiations;
- necessary for parties to consult with constituents;

- obligations, aspirations and cultural decision making processes of native title party respected;
- rights and responsibilities of local government party respected;
- negotiations to foster reconciliation;
- whether the agreement is legally binding or not; and
- the agreement will require adequate resourcing.

Resourcing

Describes how the implementation of the agreement is to be resourced.

Confidentiality

States whether the negotiations are in confidence and may:

- describe the process for disclosing information;
- note that the Representative Body is still able to consult their constituents; and
- note how the elected representatives on the Council are consulted.

Third Party Interests

Describes the process for consultation with third parties eg by agreement of the parties.

Native title

This may state:

- that the agreement is not an acknowledgement that native title rights and interests exist or do not exist;
- whether the parties will encourage the Government to consent to an agreed determination; and
- what the effect will be if there is a determination of native title either in favour of the party to the process agreement or another party.

Amendment

Describes the process to amend the agreement.

Termination

This may specify:

- how long the agreement will remain in place;
- which events trigger expiry of the agreement; and
- how the agreement can be terminated.

Effect of signing the agreement

May specify:

- that the parties will work together to reach an agreement; and
- whether the agreement is legally binding.

2.3 Memorandum of Understanding (MoU)

The headings from the 1998 Port Phillip Memorandum of Understanding included:

- Introduction
- Statement of intent
- Principles
- Key issues to be addressed by MoU
- Strategies
- Action plan
- Port Phillip Indigenous community
- Signatories to MoU
- Signatories' statement of support
- References
- Statement of commitment to Indigenous Australians
- Koorie protocol for Civic functions/events
- Context report:
 - City of Port Phillip service provision;
 - Local Government area;
 - Indigenous community profile;
 - Protected sites of cultural significance; and
 - Record of City of Port Phillip initiatives.

The headings from the 2003 Memorandum of Understanding between the South West Aboriginal Land and Sea Council Aboriginal Corporation Native Title Representative Body and the Western Australian Local Government Association included:

- Introduction;
- Acknowledgements;
- Process;
- Guidelines and goals for developing template agreements;
- Legal facilitation; and
- Approval of this agreement

A copy of the MoU may be found on the National Native Title Tribunal's website at http://www.nntt.gov.au/media/1057629001_2452.html