



Mining Agreements: Content Ideas

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Contents

| | |
|---|----------|
| Mining Agreements | 5 |
| Introduction | 5 |
| Part 1: Key Themes | 6 |
| Part 2: Issues for Consideration | 9 |
| Indigenous Land Use Agreements | 9 |
| Agreements in response to a Section 29 notice | 10 |
| Parties..... | 10 |
| Recitals/Background/Preamble/Objectives..... | 10 |
| Definitions and interpretation | 11 |
| Mutual respect and recognition..... | 11 |
| Commencement/expiry | 11 |
| Warranties/Authority | 11 |
| Native Title | 12 |
| Description of Area..... | 13 |
| Mining Party | 13 |
| Access | 14 |
| Native Title Party..... | 14 |
| Liaison/management/advisory committee | 15 |
| Consultation | 15 |
| Payments | 16 |
| Environmental and Cultural Heritage | 17 |
| Employment, education and business opportunities..... | 20 |
| No Mining..... | 21 |
| Grant and renewal of mining lease | 21 |
| Future Acts – ILUAs dealing with mining | 21 |
| Validity of mining tenements..... | 22 |
| "Compensation" - ILUAs..... | 22 |
| Registration of the ILUA | 23 |
| Breach of agreement | 23 |
| Unforeseen circumstances/force majeure | 24 |
| Suspension of agreement/operations..... | 24 |
| Notice..... | 24 |
| Amendment..... | 24 |
| Schedules | 24 |
| Assignment and Novation..... | 25 |
| Change in Law | 25 |
| Dispute Resolution..... | 25 |
| Confidentiality | 26 |
| Governing Law | 26 |
| Independent Legal advice | 26 |
| Liability for expenses..... | 26 |
| Costs..... | 26 |
| Waiver..... | 27 |
| Severability | 27 |

| | |
|--|----|
| Entire agreement and variation | 27 |
| Indemnity/liability/insurance | 27 |
| Non-employment/relationship between the parties | 27 |
| Attorneys..... | 27 |
| Counterparts..... | 27 |
| Execution of agreement | 28 |
| Further action..... | 28 |
| <i>Specific Issues</i> | 28 |
| Property Issues | 28 |
| Outstation..... | 28 |
| Ranger..... | 28 |
| <i>Issues not included in these agreements but might be useful to consider</i> | 28 |
| Fly in/fly out | 28 |
| Alcohol..... | 28 |
| Guns and shooting..... | 28 |
| Review of agreement | 28 |
| Succession..... | 29 |

Mining Agreements

Introduction

This guide gives an overview of content ideas for agreements between mining companies 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 mining 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 paper will be most useful if read in conjunction with other Tribunal publications about the types of agreement parties 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:
 - face to face meetings,
 - 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, the sustainability of an agreement will entail taking into account issues that affect the Indigenous parties to an agreement, for example 'community', 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 individuals and provide benefits to them to the exclusion of others risk collapse. ... Thus negotiators need to

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.

'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 provisions⁵.

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 party';
- an 'agreement in principle', setting out the parameters and provisions of the expected agreement; and
- attention to drafting. Citing Blowes and Trigger⁶, 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

⁵ Malcolm Allbrook and Mary Anne Jebb 2004 'Implementing and resourcing native title and related agreements' Seminar, NNTT, Perth.

⁶ 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.

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 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. 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.

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 about whether to use an Indigenous Land Use Agreement 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 future developments;
- the relationship between native title rights and the rights of other people;
- access and/or management arrangements;
- surrender of native title;
- compensation.

Unlike other agreements, when 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>). Information provided on the website includes:

- information about ILUAs;
- 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.

Parties can also contact the Tribunal on Freecall 1800 640 501 to obtain a wide range of assistance at any stage of the agreement-making process. 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;
- reviewing and providing maps of the ILUA area;
- providing land tenure information and conducting searches;
- helping non-indigenous parties to identify the correct native title groups;
- providing options for negotiations;
- checking draft agreements for compliance with legal requirements and providing feedback.

Agreements in response to a Section 29 notice

Section 29 notices are issued by governments where it is intended, in certain circumstances, to grant mining tenements or where it is intended to compulsorily acquire land.

An agreement in response to a s. 29 notice is known as a s. 31(1)(b) agreement under the *Native Title Act 1993* (C'th) (NTA). It requires the negotiation parties to negotiate in good faith with a view to obtaining the agreement of the native title parties to the doing of the future act the subject of the s. 29 notice. The parties are required to provide a copy of the agreement to the NNTT (s. 41A).

For help in deciding whether an ILUA or s. 31(1)(b) agreement is most suitable the Tribunal's website has a table comparing the features of each type of agreement (see <http://www.nntt.gov.au/ilua/Comparison.html>).

The headings used in this guide are based on the analysis of four mining agreements, including two Indigenous Land Use Agreements (ILUA) and two Section 29 agreements, between mining parties, Native Title Claimants and various other parties including the State government, and Indigenous Representative Bodies. The elements are included in dot point form under each heading and form the trigger for further inquiry. Clauses which were unique to only one agreement have been included under the heading of Specific Issues. In addition, some headings and elements that were not found in the mining 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.

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.

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;
- mention if Subdivision Q is relevant⁷;
- describe who the agreement is between;
- describe the area covered by the agreement;
- describe the type of agreement; 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 description of 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;
- recognition of the past and how the parties came together openly and honestly to develop the new agreement; and
- will the agreement set out 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 agreement or different 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;

⁷Subdivision Q agreements are only applicable in limited circumstances and deal with conferral of access rights on native title claimants in respect of non-exclusive agricultural and pastoral leases. (*Native Title Act 1993* (Cth) ss44A-44G)

- that where the agreement states that it binds the native title party it binds the native party collectively and as individual members;
- that the agreement is valid, binding and enforceable on all members of the native title party;
- that the people have been consulted and consented to the representative body being part of agreement (limited situation); and
- that if there is a PBC, it has complied with the relevant regulations.

Native Title

This may set out the effect of the agreement on native title rights. For example:

- whether the native title rights and interests of the native title party are affected by the agreement;
- whether the mining party by entering the agreement makes any admissions as to the existence/extinguishment of native title rights and interests;
- whether the non-extinguishment principle applies to all acts authorised by the agreement;
- whether there are parts of the agreement area over which native title is irrelevant or where native title is to be extinguished.

Native Title application

- will any Native Title Determination Application 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 not oppose the claim?
- 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 native title party agree not to lodge any applications under the NTA for the duration of the agreement?
- does the non-native title party acknowledge the existence of, or proposal for, such an application and agree to support it?
- 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?

Native Title compensation

- *do the provisions of the agreement represent full and final compensation?*
- *does the agreement provide for amounts paid to be set off against any further claim for compensation?*
- *if an ILUA, does the agreement limit compensation for the acts (see sections 24EB and 24EBA of the NTA)?*
- a statement may be made that the agreement can not be used as evidence of native title in any legal proceedings or claim for compensation;
- once the agreement is registered can the native title party pursue compensation – for past and intermediate period acts?

- is the right to pursue compensation for future acts covered by the agreement capped?

Native Title Determination

- 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?
- what will be the effect on the agreement of a determination that native title exists over the area?
 - if the native title holder is already a party to the agreement?
 - if the native title holder 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?

Description of Area

This may describe the area covered by the agreement and may also note the leases applied for and their purpose, eg for a certain project including an airstrip, mining camp and access roads.

Mining Party

This section may address the following issues:

Significant sites

- does the mining party agree to abide by the relevant State cultural heritage legislation in relation to:
 - sites previously identified; and
 - any sites that may be identified in the anthropological survey report?
- does the mining party ensure that all of its employees, contractors, subcontractors etc comply with the requirements?

Training of mining party staff

- does the mining party agree:
 - to provide relevant cross-cultural education and training to staff; and
 - to foster positive relationships between Indigenous and non-Indigenous peoples?

Training and employment for local Indigenous people/native title party persons

- does the mining party agree to employ a certain percentage of Indigenous people on the project, priority to native title claimants living in the area?

Use of local Indigenous businesses and service industries

- does the mining party agree to formulate strategies to promote use of appropriate local Indigenous businesses and/or service providers?

Site rehabilitation

- in accordance with terms of mining lease and the Environmental Impact Study (EIS);
- in keeping with requirement of relevant legislation;

- will requests by the native title party be considered for alternatives to the site rehabilitation already agreed to?
- will a report on rehabilitation be provided by the mining party to the liaison/advisory/management committee?
 - if so, when?

Environmental protection

- agreement to abide by terms of mining lease and EIS;
- agreement to abide by relevant environmental legislation;
- agreement to the extent reasonably possible:
 - to conserve and protect the environment;
 - to not adversely alter the natural water systems;
 - to minimise disturbance to vegetation and soil;
 - to minimise erosion and pollution; and
 - to use the best technology in its mining operations.

Access

Do you need to consider access arrangements for non-native title and/or native title parties? If so, you may need to consider:

- notice;
- restricted access areas;
- a list of the purposes for access;
- mining party to minimise interference/restrict access;
- native title party to minimise interference;
- use of roads;
- third party access;
- effect on existing permit system for access by tourists etc;
- use of mining party facilities/infrastructure;
- indemnification, insurance coverage, public liability; and
- safety issues as basis for refusing access.

Native Title Party

Does the native title party agree:

- not to hinder, impede or prevent the grant of any of the project approvals;
- to support mining party interests and activities;
- that the mining party shall be able to work unhindered;
- to comply with terms of agreement;
- not to commence proceedings in any court or other forum challenging project approvals or the validity of the Section 29 notice; (This statement may be used by the mining party as a bar to proceedings.)
- not to lodge any objections, comments, claims or appeals in relation to the project; (This statement may be used by the mining party as a bar to proceedings.)
- to comply with all obligations on their part specified in the agreement and to ensure complete and timely implementation; and
- to cooperate with the committee and mining party to ensure the agreement has full effect?

You may need to consider:

- what if anything should the native title party do if a native title application or determination is made over the area covered by this agreement by any person not a party to the agreement; and
- what if anything should the native title party do if the validity of the Section 29 notice is challenged by any person not a party to the agreement.

Liaison/management/advisory committee

Specific information about the formation/duties/responsibilities of the management/liaison/ advisory committee is sometimes included as a schedule. It 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 including members to be nominated by the native title party;
- specify a timeframe for first meeting, how often meetings to be held, the venue, what makes up a quorum, election of Chairperson, ability to change members etc;
- describe decision making arrangements eg consensus, majority vote;
- note whether an Indigenous and/or mining representative will be employed;
- set out the responsibilities of mining party representatives;
- set out the responsibilities and functions of the Committee, for example:
 - to provide a forum to discuss matters of concern;
 - to receive and review reports from the Trustee of the trust/fund;
 - address relevant environmental issues;
 - advise relevant people on issues concerning management of the agreement area;
 - to assist in preparing or making recommendations in relation to amendments to a management plan for the area;
 - establish subcommittees if required;
 - develop communication protocols, codes of conduct which could be added to the agreement as schedules;
 - liaison between parties;
 - cultural heritage issues;
 - employment and training issues;
 - any issues that arise and are not covered by the agreement;
 - review and monitor process of the agreement;
- specify who will fund the committee, for example, meeting costs including travelling costs; meeting fees, secretariat support etc;
- specify who will provide the secretariat support;
- set a timeframe for minutes of committee meetings; and
- specify that the mining party is to provide regular reports on the mining operations.

Consultation

This section may describe the consultation process, for example:

- parties agree to meet at regular intervals, for example every 12 months;
- at these meetings the proposed Work Program for the next 12 months and other issues will be discussed; and

- the mining party will consider the views of the native title party.

Payments

In some agreements a number of payments are made to the native title party including:

- an initial annual payment;
- an annual payment during the term of the lease;
- a payment on renewal of the lease;
- ongoing annual payments during the renewed term.

In other agreements payments are given for a particular purpose eg scholarships, administration. A combination of both is also possible. The payments may be calculated by a variety of methods: according to the value of the ore produced, at a flat rate or on a sliding scale etc. The agreement will need to specify the timing of payments, by whom, how, and to whom. Payment clauses may also make provision for the following:

Establishment costs

- will monies be paid to cover legal, administrative and travel costs of the native title party? Will this be a one-off sum on an as needs basis or periodic payments?
 - if so, what will happen to any surplus or unused portion?
- will an Indigenous corporation be formed?
 - if so, what is the timeframe for establishment of the corporation and under which legislation will it be incorporated?
 - who will pay for the establishment of the corporation?

Administration payment

- will an annual sum be paid to cover the native title party's administration, legal, accounting, travel and accommodation, costs associated with the fulfilment of their obligations under the agreement, for example, consultation procedures contemplated by the agreement?
 - if so, how is it to be assessed, how is it to be paid and to whom?
 - what happens to any surplus or unused portion of the payment?

Royalty payments

- is a royalty payment to be paid?
 - if so, describe how it will be calculated and the payment process.
 - to whom will it be paid?
 - the auditing process.

Trust payments

- will a trust/fund be established and by whom?
- who will administer the trust/fund?
- will payments be made by the mining party to the trust/fund?
 - if so, how much and when?
 - once production is ceased will payments cease or continue for a fixed time?
 - will an administration payment be paid to the trust/fund?

- what happens if payment falls due and the trust/fund has not been established?
- will the payments be held until there is an Approved Determination of Native Title in relation to the area covered by the mining lease?
 - if so, where will the money be held?
 - what will happen to the trust/fund if there is a determination that native title does not exist?
- what is the purpose/s of the trust/fund?
- does an allocation policy need to be developed?
- who are the trustees?
- who makes the decisions?
- is it a charitable trust or not?⁸
- who are the beneficiaries?
- how are the benefits to be used and distributed?
- will it cover trust/fund administration costs?
- proper financial and accounting practices to be followed,
- who will receive copies of audits and reports?

Community payments

- will the mining party pay an annual sum or services in kind to the local Indigenous community?
 - will this sum be indexed for CPI?
 - if so, how will CPI be calculated?
- if there is an advisory/liaison/management committee does the mining party intend taking its views into account in relation to payment or services in kind?
- what is the intention of such funds?

Individual payments

- will payments be made to individuals?
 - if so, describe process for payment;
- if these people pass away will the money be paid to their children or other beneficiaries?

Environmental and Cultural Heritage

Such clauses may include either an acknowledgment that the relevant environmental and cultural heritage laws apply or a process for environmental and cultural heritage protection, in addition to the operation of law. If a process of environmental and cultural heritage protection is to be developed details about how it operates need to be included. Sometimes this is included as a schedule to the agreement. A clause may be included stating that a collaborative approach will be taken in dealing with environmental and cultural heritage management.

General considerations may include:

- protection of culturally sensitive material;
- a process for consultation with the native title party;

⁸ Detailed legal and accounting advice should be sought particularly if benefits are to be paid to individuals. Consideration should be given to the effect of any payments on any government benefits being received by individuals.

- a clause requiring any employees, contractors, agents etc to be informed about the process and to comply with the process; and
- OH & S issues.

Site clearance

- who undertakes the site clearance?
- how many members of the native title party are to be involved?
- does the mining party pay for the site clearance?
 - is there an upper limit on the cost of the clearance, including the costs for a report, payment of consultants and Indigenous persons including travel, accommodation etc?
 - does there need to be a budget and schedule?
 - do you need to include an audit of expenses?
- confidentiality of information.
- if a consultant is employed who agrees to the terms of reference and who chooses the consultant?
- describe the process if the terms of reference are not agreed to.
- what happens if the site clearance is not completed:
 - because of non-performance by native title party?
 - because of non-performance by non-native title party?
- specify the consequences if the mining party defaults on its obligations;
- specify the timeframe for a copy of the site clearance report to be sent to the mining party after receipt by native title party;
- are sites to be identified in the report? If not, a general location may be provided so the site is not disturbed;
- can the mining party forward copies to other parties?
- will the mining party will provide any information including circulars, procedures etc in relation to site protection;
- is the information to be placed on the sites register? For example, in NSW there is a legal obligation to register sites, if known.

Process for management of significant site/object

- protocol/management plan for existing significant sites/objects;
- exclusion zones – exclusion zone management plan;
- 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.

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.

Site disturbance

- *is the mining party able to make an application to the Minister to allow disturbance of a site⁹*
 - *if so, is there a process for consultation or discussion which must be complied with before such an application is made?*
 - *the outcome of the discussion might be that the application to disturb the site is:*
 - *prohibited;*
 - *permitted with the consent of the native title party; or*
 - *permitted after consultation with the native title party.*
 - *what is the timeframe for that discussion?*

Environmental impact report

- is an environmental impact survey (EIS) required?
- who undertakes the EIS eg a qualified and experienced expert in environmental assessment?
- does the mining party pay for the EIS?
 - is there an upper limit on the cost of the EIS, inclusive of all costs?
 - where are the invoices to be sent?
- if an expert is appointed, who agrees to the appointment and terms of reference?
 - describe process if the appointment and terms of reference are not agreed to.
- timeframe for a copy of the report to be sent to the mining party after receipt by native title party.
- will copies of the report be forwarded to other parties?

Environmental application

- what is the process if the mining party intends to apply to any government agency under any legislation applicable to environmental management for approval in relation to their activities?
 - for example, a draft to be provided to the liaison/ management/advisory committee within a specified timeframe for comment; comments to be considered; any consultations with the government agency to include a representative of the committee.

Environmental monitoring

- will environmental monitoring information be supplied to the native title party?
- describe process for discussion of any concerns from the environmental monitoring information eg through advisory/liaison/management committee.

⁹ For example the section 18 process in Western Australia, *Aboriginal Heritage Act 1972* (WA).

- *does water use and water quality need to be considered?*

Employment, education and business opportunities

Addressing this issue in an agreement will depend upon the financial capacity of the mining party and what the parties are trying to achieve. If parties consider employment, education and business opportunities as part of the agreement

- do you need a means to identify employment/business opportunities?
- will an employment and positions register of Aboriginal people wanting work with the project be kept?
- preference to native title party when rated closely with non-native title party applicants for jobs;
- do you need to employ an Indigenous liaison officer?
- do you want to consider the adoption of an Indigenous training and employment policy. This 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.
- what will be the role of the liaison/management/advisory committee?
- will the working hours and conditions of Indigenous employees be adjusted to suit the cultural needs of those Indigenous employees?
- will an Indigenous relations policy be adopted?
- will the native title party be notified of any sub-contracting work?
 - if so, will preference be given to the native title party on tendered contracts?
 - will the mining party assist the native title party to take advantage of existing government programmes relevant to business and development opportunities?
- will the mining party and the liaison/management/advisory committee work together to obtain government funding in relation to training programmes etc;
- will cross cultural awareness training be provided for employees?
 - who will provide the training – process/costs/time?

Further considerations may include:

- whether a budget will be established for the employment and training programs;
 - if so, will a breakdown of the budget be needed in relation to expenditure?
 - will there need to be a review of the budget amount?
 - what happens if the expenditure is less than the budgeted amount?
 - reporting and reviews;
 - independent audit.

- will the native title party be notified of surplus mining property?
 - if so, will a public tender process be undertaken?
 - if a public tender process is undertaken will the process be explained to the native title party before it commences?

No Mining

Describe the process if mining does not proceed or is unlikely to proceed in the immediate future. May include:

- notice given to the native title party;
 - if so, how long is the notice period?
- once the notice period has expired, all obligations cease apart from which clauses?
- how much notice is required for the mining party to recommence operations?
- once the notice period has expired the provisions of the agreement will be reactivated; and
- describe the process to amend the length of notice.

Grant and renewal of mining lease

May include:

- native title party agrees to the grant and renewal, as relevant, of the mining lease;
- following the grant the native title party agrees to the mining party exercising its rights and discharging its obligations under the mining lease;
- acknowledgement that the agreement is an agreement for the purposes of which section of the NTA;
- should relevant governments receive copies of the agreement;
- native title party agrees not to start proceedings in a court or any other forum in relation to the project; rights unable to be exercised or enjoyed; invalid; (Mining party may use this statement as a bar to any proceedings.) and
- State agrees to grant the mining licence subject to the operation of relevant mining legislation.

Future Acts – ILUAs dealing with mining

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

- notify the other parties eg miner, native title party, the State government; 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 provisions of 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? (Consent is not always required for 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 section 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 of the NTA is not intended to apply to the act or class of acts;
- is there a need to validate acts prior to the agreement and prior to registration? Validation requires the government to be a party and any person liable to pay compensation.
- does the non-extinguishment principle apply?
- surrender?

Validity of mining tenements

- Native title party agrees not to challenge validity of mining lease, future acts etc or do anything to challenge agreement.

"Compensation" - ILUAs

- whether or not a waiver is given by the native title party in relation to any other compensation/liability payable under State, Commonwealth, Territory legislation or common law;
- may include a no future compensation claim clause;
- a cap on future act compensation – see sections 24EB and 24EBA of the NTA; and
- interest on overdue amounts.

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 NTA)?
- 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 shares in the compensation provided?

Surrender

- does the agreement include 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)
 - 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;

- the area over which the rights and interests are surrendered needs to be properly described;
- the government to whom the native title is surrendered must be a party to the agreement;
- is an area of the mining lease to be surrendered to the native title party after rehabilitation, cessation of mining or earlier?
 - if so, explain the process, conditions and requirements.
- are there any obligations after surrender?
 - for example, transfer of title by the State government eg to freehold, Aboriginal land, a conservation agreement, a public access area.

Registration of the ILUA

It may include statements to describe:

- that the parties will do all things necessary to aid and maintain the registration of the ILUA;
- what happens if the agreement is not registered or ceases to be registered?
 - notice of hindering event;
 - dispute resolution procedure;
 - effect on payments;
- timeframe for registration and the effect if the agreement is not registered within the timeframe;
- who makes the application for registration of the ILUA?
- when the application is to be made;
- who is responsible for any costs incurred incidental to the registration of the agreement?
- that the parties agree to the ILUA being registered; and
- a statement on the effect of registration of the ILUA.

The Tribunal can assess ILUA applications before lodgement to check whether they meet the registration requirements. It might be relevant to check with the parties whether a pre-lodgement assessment might be useful.

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 actions to be taken if there is a breach, eg native title party may make a request to the Mining Registrar to take action under the MRA; if a conference the native title party needs to attend; MRA to notify native title party of any action taken under MRA as a result; compensation; follow dispute resolution process; the implications of a failure by the innocent party to take action in relation to breach of the agreement by another party;
- whether a breach forms 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.
- the implications of the innocent party failing to take action in relation to breach of the agreement by another party.

Unforeseen circumstances/force majeure

If a Party is unable to carry out any of its duties or obligations because of unforeseen circumstances

- notice needs to be given to the other parties, including full particulars of the event, its likely duration, duties/obligations affected, steps taken to rectify it;
- duties/obligations suspended only during that time;
- parties must use their best endeavours to remove/overcome/minimise effects of force majeure;
- written notice of resumption of normal conditions; and
- is there an effect on payments?

Suspension of agreement/operations

May specify:

- period of notice;
- effects on payments;
- period of notice for re-commencement of operations;
- process for termination of the project; and
- which clauses survive the termination or expiry of the agreement eg confidentiality.

Notice

May set out:

- 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 timeframe for their receipt; and
- procedure for amending notice obligations.

Amendment

Describes the process to amend the agreement.

Schedules

These might set out:

- agreement making process – explaining the agreement making process including who was involved and their duties;
- a plan and description of agreement area;
- who the native title parties are;
- the native title and other rights and interests recognised;
- Indigenous relations policy;
- management arrangements including advisory committee;
- cultural heritage management plan – budget;
- future acts;
- surrender areas;
- significant sites;
- payments;
- Trust Deed;
- trust payments;

- land trust;
- Assumption Deed;
- Deed of Novation;
- authorised investments;
- model determination; and
- validated acts; etc.

Assignment and Novation

Covers assignment of interests to persons not parties to the agreement and novation:

- who is the assignor i.e. the party assigning their interests?
- which interests are assigned - part or all?
- who is the assignee i.e. the party to whom interests are assigned?
- what are the liabilities and obligations of the assignor/assignee?
- is there any proposed changes?
- does the assignment require the written consent of the native title party (not unreasonably withheld)?
- is a Deed of Assumption/Deed of Covenant required to assume the obligations under the agreement? You need to consider whether it will be legally effective in relation to native title persons who are non-native title parties.
- what are the notice requirements?
- can the native title party assign their interests?
 - if an approved determination of native title is made in favour of the claimant group, their right, title or interest may be assigned to a PBC¹⁰, this requires prior written consent of other parties;
 - describe process;
 - explain what happens if PBC ceases to exist, ceases to operate or fails to meet its obligations under the agreement.

Change in Law

Explains the process if a change in the law occurs that impacts on monetary payments, is beyond reasonable control of parties, could not have been foreseen, changes the mining party's liability. For example:

- written notice explaining effect;
- meet to negotiate in good faith; and
- if agreement not reached dispute resolution procedures triggered.

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 free access to all operations, sites etc; and
- a statement about confidentiality issues (see below).

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

¹⁰ Pursuant to sections 56 and 57 of the *Native Title Act*, 1993.

- a 'make good notice' in relation to a default event with timeframes for remedy;
- 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/negotiator and how this is decided;
- assessment by an independent expert;
- dispute referred to an arbitrator; and
- court processes.

Confidentiality

States whether the agreement is confidential or not and

- may describe the process for disclosing information eg as required by law;
- whether the agreement can be released on a confidential basis eg to members of communities;
- may note that the Representative Body is able to consult their constituents about the confidential information;
- which information stays confidential after the termination of the agreement (cultural and economic information); and
- rules for press releases.

Governing Law

Specifies the law which is to be applied in interpreting the agreement, eg the law in force in Western Australia.

Independent Legal advice

States whether parties received independent legal advice.

- do you need to state which party pays?

Liability for expenses

May specify:

- that each party pays their own expenses;
- that the native title party will receive a specific payment for administrative costs on execution of the agreement; and
- that a sum will be paid to contribute to the native title party's legal costs.

Costs

Specifies who pays costs eg each party will pay its own legal, accounting and other costs unless specified otherwise or agreed in writing.

Stamp duty

- may specify which party pays.

GST

- may specify which party pays.

PAYG

- may specify which party pays.

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.

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.

Entire agreement and variation

- is the agreement the entire agreement?
- does it supersede all prior arrangements?
- how may the agreement be amended?

Indemnity/liability/insurance

Might state:

- the type of insurance applicable, eg mutual indemnities, public risk insurance, joint/several liability;
- do the indemnities survive the expiry termination of the agreement?
- can a party recover a payment under an indemnity before it makes a payment in respect of which the indemnity is given?
- how will the insurance be funded?
- do other parties have a right to see the insurance policy and certificate of currency;
- other parties may be named in the policy; and
- other parties may have a say in the selection of an appropriate insurer.

Indemnities may not be insurable.

- who is liable?
- who can pay?

Non-employment/relationship between the parties

Specifies that the agreement does not create particular relationships between the parties.

Attorneys

Specifies that each person who executes the document on behalf of another party under a power of attorney declares they are not aware of anything that may affect that authority.

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.

Execution of agreement

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

Further action

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

Specific Issues

These elements were included in one of the agreements analysed:

Property Issues

- on completion of mining do you need to consider a transfer of title of parcels of land eg for significant Indigenous sites?
 - if so, will you include a description of the process?
- do the non-native title parties support the application for freehold by the native title party?
- what are the obligations after surrender?
- what is the process for surrender of overlapping mining lease?

Outstation

Describes a process for the development of an outstation.

Ranger

Describes a process for development of a ranger programme, eg money to be provided by the Trustee.

Issues not included in these agreements but might be useful to consider

Fly in/fly out

- to minimise impact of influx of mine workers on local area.
- social impact assessment.

Alcohol

- is it permitted/not permitted – where?
- who is responsible for monitoring compliance?

Guns and shooting

- conditions prohibiting use of guns and shooting near mine site – miners and native title party.

Review of agreement

- to ensure agreement remains relevant a review clause may be included.

Succession

- one of the parties to the agreement passes away;
- provisions for role of Registered Native Title Body Corporate which is formed after the agreement is registered;
- company wound up and company takeover.