



Pastoral Agreements: Content Ideas

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Pastoral agreements

Introduction

This guide gives an overview of content ideas for agreements between pastoralists 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 pastoral agreements or 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.

Before entering agreement negotiations parties need to be sure about what they want to achieve. Will so many issues be tied down that meeting the terms of the agreement becomes onerous or the agreement becomes unworkable? Or will things be left up in the air with no mechanism for resolution? Will the native title party be any better off under the agreement, or would they be better off by simply entering under a pastoral reservation? Parties may wish to consider encouraging the relevant State government to change the legislation to achieve some of the issues that are often covered in pastoral agreements. For example included in the recent amendment to the *Pastoral Land Management and Conservation Act 1989 (SA)*² are matters such as land use agreements binding lessees (assignment), liability, rights of Aboriginal persons, preferential access for ILUA parties including the right to travel across and camp on pastoral land, a public register, trespassers, and public access.

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 consider making.

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.

² *Pastoral Land Management and Conservation Act 1989 (SA)* Division 2A and 3.

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 alternatives³;
- a means to ensure to the greatest extent possible that 'outcomes promised in agreements actually materialise'⁴;
- 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, review⁵ (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'⁶, 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

³ Allbrook and Jebb 2004, page 26.

⁴ 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.

⁵ 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.

⁶ Issues noted by Allbrook and Jebb relating to 'community' included '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.

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 '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 provisions⁷.

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 Trigger⁸, 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 – may be 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

⁷ Malcolm Allbrook and Mary Anne Jebb 2004 'Implementing and resourcing native title and related agreements' Seminar, NNTT, Perth.

⁸ 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.

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 triggers for further inquiry. In addition some headings and elements that were not found in the pastoral 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 developments;
- 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;
- helping non-indigenous parties to identify the correct native title groups;
- reviewing and providing maps of the ILUA area;
- providing options for negotiations;
- providing land tenure information and conducting searches; 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.

Memorandum of Understanding or Accord

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 an Indigenous Land Use Agreement (ILUA)

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/>. 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.

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 the parties whether a pre-lodgement assessment might be useful.

The following material is based on the analysis of two Pastoral ILUAs.

Parties

These are the people, companies, unincorporated associations and governments who enter 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;
- mention if Subdivision Q is relevant⁹;
- acknowledge the relationship and traditional connection the native title party has to the pastoral property;
- acknowledge the lessee's rights;
- acknowledge that the agreement does not operate to extinguish or create native title rights in relation to the land;
- describe the effect of the agreement on the rights of the native title holders;

⁹Subdivision Q agreements are only applicable in limited circumstances and deal with conferral of access rights on certain native title claimants in respect of non-exclusive agricultural and pastoral leases. (*Native Title Act 1993* (Cth) ss44A-44G)

- acknowledge the responsibility of the State;
- acknowledge the history of colonisation on behalf of the State;
- describe who the agreement is between;
- describe the area covered by the agreement;
- describe the activity allowed under the agreement;
- describe the timeframe of the agreement; and
- describe whether the agreement is legally binding.

Definitions and interpretation

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

Description of Area

Describes the area covered by the agreement.

Tenure

May state:

- the objective of the agreement for the pastoralist eg increased security of tenure through the grant of a perpetual lease over the pastoral property. The process may be described.
- the objective of the agreement for the native title party eg in relation to specified parcels of land - recognition of native title rights and interests, perpetual lease for pastoralist and grant of freehold title for native title party. Implementation process may be described.

Warranties/Authority

May state that the native title party warrants and represents that:

- it has obtained all necessary authorisations, consents and approvals necessary to enter the agreement so as to bind the native title party including authorisation as defined in section 251A of the *Native Title Act, 1993* (Cth) (NTA);
- they will comply with the agreement; and
- they agree to be bound by the agreement.

May state that the pastoralist warrants and represents that:

- *they will comply with the agreement; and*
- *they agree to be bound by the agreement.*

Access

Do you need to consider access arrangements for non-native title and/or native title parties? An amendment to the South Australian *Pastoral Land Management and Conservation Act 1989* allows for preferential access to ILUA parties. Other items for consideration may include:

- a statement may be included about whose rights have precedence;
- native title party may give permission to native title party invitees to carry out or be involved in traditional activities;
- native title party responsible for the conduct of invitees and that they comply with any reasonable direction by pastoralist;

- native title party have rights to enter, travel across and stay on the pastoral lease¹⁰ and while there carry out traditional activities;
 - how are these dealt with in the ILUA?
- can native title party invitees enter and while there carry out traditional activities?
- do other Indigenous people not parties to the agreement have access or other rights¹¹?
- in carrying out traditional activities do the native title party and invitees agree to:
 - give notice to the pastoralist;
 - specified timeframe for notice;
 - the name of a contact person to liaise with the pastoralist and to be responsible for ensuring the agreement's guidelines are adhered to;
 - may include a list identifying Elders and Indigenous rangers;
 - the contact person/pastoralist to be informed of the area, general purpose of the visit, length of stay, camping locations, number of visitors, names of key contact people for the group; names of any licensed firearms holders who intend to hunt; approximate number of vehicles; name and relationship of any invitees, places to be visited;
 - follow any reasonable direction of the pastoralist about such things as:
 - where not to camp;
 - temporary restrictions to an area;
 - use of station roads and tracks;
 - lighting and extinguishment of fires;
 - control of dogs or other animals;
 - where not to hunt using firearms;
 - safety; and
 - environmental conservation.

Where a direction would require a breach of Indigenous law and custom by the native title party, the pastoralist and native title party will discuss other arrangements. Until resolved the native title party will comply with the direction; this may trigger the dispute resolution process.

- pastoralist may notify native title party about any difficulties arising out of access;
- pastoralist to not intentionally interfere with Indigenous Law business;
- any burials to be carried out in accordance with the burial protocol¹²; and
- a list of access and camping use rules may be instituted.

¹⁰ In South Australia section 47(1) of the *Pastoral Land Management and Conservation Act 1989* (SA) provides a general right for Indigenous persons to undertake traditional pursuits on pastoral land. Section 47(3) allows an ILUA to add to, remove or qualify this general right. For example, an ILUA can provide that rights under section 47(1) are varied so that Indigenous persons apart from the native title party do not have section 47(1) rights unless invited by the native title party or subject to specific requirements.

¹¹ In South Australia if Indigenous persons outside the native title party do not have general rights under section 47(1) because of an ILUA they may have particular rights set out in the ILUA including as invitees of the native title party or may access pastoral land under section 48 of the *Pastoral Land Management and Conservation Act* (some public rights of access are set out) or by invitation of the pastoral lessee.

¹² A burial protocol has been developed by the Pastoral Board for use on SA leases.

Alcohol

May consider whether:

- alcohol is allowed on the pastoral property; and
- *if not, who will be responsible for ensuring alcohol is not brought on to the property?*

Firearms

These obligations could apply equally to the native title party and other parties. As well as acknowledging the relevant legislative restrictions this part may specify whether:

- high-powered rifles are allowed on the property;
- other guns are allowed on the property;
 - if so, you will need to consider:
 - how many?
 - what type?
 - is notice required?
 - are there restrictions about where firearms can be used?
 - if a party is using a firearm they need to keep the other party informed.

State assistance to the parties

- *will the State assist the pastoral lessee in any way eg fencing?*
- *will the State assist the native title party in any way?*

Privacy

This part may specify that the privacy of the native title party to conduct traditional activities shall be respected and may only be disturbed:

- for the purpose of giving reasonable direction; and
- to deal with immediate threats to person and property.

It may also specify that the pastoralist's privacy ought to be respected.

Things to observe while on the pastoral lease

This part may specify the things to which the native title party agrees (without prior approval of pastoralist) including to do or omit to do anything that would be contrary to the law or cause the pastoralist to be considered in breach of any provision of the pastoral lease or any other law, for example:

- not to interfere with station facilities;
- if dogs and other animals are allowed keep them under strict control;
- not to interfere with stock;
- light fires only for cooking, light and heat;
- not to camp within a specified distance from man made watering points or homesteads;
- times within which native title party may call at the homestead;
- use of roads;
- not ride motorcycles;
- litter and rubbish to be removed;
- gates to be left as they are found;
- high calibre or high power firearms not to be used on the area covered by the agreement;

- not to travel on station tracks or roads while the public roads which provide access to the station have been closed to traffic by the State authorities except:
 - in case of an emergency;
 - if the native title party is already on the station and need to return to their homes – appropriate precautions to be taken to avoid damage.
- not to construct any tracks;
- not to erect any permanent structures;
- native title party may cultivate bush medicine at locations agreed to by the pastoralist;
- native title party may collect and use natural resources – identify any conditions;
- native title party may collect flora for seed collection;
- a conservation protocol which includes guidelines for bush tucker collection may be established – review mechanism, timeframe;
- not to commercially exploit any flora and fauna;
- native title party agrees to assist with the control of rubbish, noxious weeds, pests and feral animals; and
- native title party agrees to abide by closures of rivers or other locations for conservation/breeding purposes.

Native title party

This part specifies the rights of the native title party. It may include:

- right to enter the pastoral lease for the purpose of exercising native title or access rights subject to notice being given to pastoralist;
- pastoralist not to unreasonably object to access; and
- native title party may exercise native title or access rights but will not engage in other activities without prior approval of pastoralist.

Pastoralist

May specify the rights or intentions of the pastoralist including:

- the right of the pastoralist to conduct pastoral activities is not limited by the agreement;
- pastoralist agrees not to unreasonably interfere with native title party's exercise of native title rights and interests;
- pastoralist agrees to respect religious and cultural sensitivities of the native title party;
- pastoralist agrees to use reasonable endeavours to protect sites of significance eg from cattle;
- pastoralist shall clean up all rubbish created by them;
- pastoralist has right to burn off:
 - notice to be given;
- pastoralist agrees to produce a property development plan, exclusive of the homestead area, within a specified timeframe
 - process for amendment;
- pastoralist has the right to develop the homestead area;
- native title party agrees to access homestead area only to visit sites of significance:
 - notice and consent required;

- pastoralist agrees to control and prevent spread of noxious weeds, vermin and feral animals (as far as is reasonable and practical); and
- pastoralist can exclude any member of the native title party who is on the pastoral lease not in accordance with the agreement.

Aboriginal heritage and other laws

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 the law. If a process of environmental and cultural heritage protection is to be developed, details about how it operates needs to be included. Sometimes this is included as a schedule to the agreement. May include:

- a statement that the pastoralist respects and acknowledges the need to protect and preserve areas of cultural significance;
- native title party to inform the pastoralist of the location and dimensions of any sites of cultural significance:
 - timeframes for notification;
 - fencing of sites;
- new sites of significance may be created in accordance with the native title party's traditional laws and customs; and
- at whose expense are site investigations completed?

In accordance with the relevant environmental and cultural heritage laws the process may be described. Sometimes this is included as a schedule to the agreement. May include:

- notice;
- native title party's response within specified timeframe;
- if likely to cause damage, disturbance or interference then an extended timeframe to consult with Indigenous representatives with the authority to make decisions with respect to the area and any experts if required;
- meeting with parties to confer;
- if proposed works will be detrimental to the area of significance then native title party will use best endeavours to indicate alternative options and indicate areas which are cleared; and
- within a specified timeframe native title party to write to the State and/or associated third party notifying them as to whether proposed works can go ahead, subject to conditions;
 - if approval is not given then information on other areas where the work can go ahead may be given, including any conditions.

Visitors and campers

This part may include a list of rules for visiting tourists and campers including invitees of native title party, eg:

- notice; and
- monitoring of activities of visitors;
 - describe process if inappropriate activity detected.

Meetings and communication

This part may include information on how often the pastoralist and representatives from the native title party meet to discuss the operation of the agreement and other issues.

Employment and training

This part may include a statement that the pastoralist may consider any training, employment and contractual opportunities and, if any opportunities exist, notify the native title party.

Future Acts

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

- notify the other parties eg pastoralist, 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 Native Title Act?

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?
 - 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 prior to the agreement and prior to registration? (Validation requires the government to be a party and any person is liable to pay compensation.)
- does the non-extinguishment principle apply?
- do the parties consent to the grant of a perpetual lease?

Dispute resolution

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

- notwithstanding the dispute, the parties will continue to abide by the agreement;
- protocols for dealing with disputes, eg honesty, respect etc, where meetings are to occur; and
- who bears the costs of the process?

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

- parties to use best endeavours to resolve the dispute;
- good faith negotiations/informal discussions;

- if dispute is not resolved within a specified timeframe then the dispute will be referred to a mediator/negotiator;
 - how this is to be decided; 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;
- can a breach 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.

Governing/applicable law

Specifies the law which is to be applied in interpreting the agreement, eg the law in force in Western Australia. It may also include a list of acts with which the parties must comply.

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;
- a description of the termination process; and
- which clauses if any continue after expiry/termination of the main agreement.

Review of agreement

To ensure that the agreement remains relevant a review clause may be included.

Registration of the ILUA

It may include:

- 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.

Native Title Determination

- *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?*
- *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?*

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;
- other parties have a right to see the insurance policy and its certificate of currency;
- each insured person will provide reasonable assistance to the insurer and any injured person; and
- other options, for example the amendment of State legislation to cover indemnity, see *Pastoral Land Management and Conservation Act 1989* (S.A.) Division 2A (46B).

Assignment and encumbrances

Covers assignment of interests to persons not parties to the agreement. Amendments to the *Pastoral Land Management and Conservation Act 1989* (SA) state that:

- an ILUA is binding on the current lessee of the land whether or not the lessee was the person with whom the ILUA was made; and
- an ILUA is binding on the occupier of land over which an ILUA has been made.

In other states, the clause may specify:

- 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?
- are 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?
- what are the notice requirements?
- can the native title party assign their interests?

Confidentiality

States whether the agreement is confidential or not and may describe:

- the process for disclosing information;
- which information stays confidential after the termination of the agreement (cultural and economic information); and
- *rules for press releases.*

Notice

May include:

- addresses of parties for the purpose of giving notices under the protocol;
- the means by which notices may be given under the protocol;
- the timeframe for receipt; and
- the procedure for amending notice obligations.

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.

Costs

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

Entire agreement and variation

Specifies:

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

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.

Schedules

The information in the schedules may be included in the body of the agreement. If not, a reference to the information can be included in the body of the agreement and the bulk of the information can be included as a schedule. This makes the agreement easier to read. Schedules might include:

- ILUA area plan;

- the relevant dates and contact details of the parties;
- burial protocol¹³;
- draft letter to Registrar re termination of the agreement;
- Deed of Assumption;
- State Aboriginal heritage procedures;
- Current mining tenures;
- Previous mining tenures;
- Land tenure agreement; and
- Land Use and Access Agreement.

¹³ A burial protocol has been developed by the Pastoral Board for use on SA leases.

2.2 Issues to consider in developing a Pastoral Access Protocol

The following material is based on the analysis of one pastoral access protocol. A protocol generally sets out an accepted or established code of procedures and rules.

Parties

These are the people, companies, unincorporated associations and governments who agree to the protocol.

Recitals/Background/Preamble/Objectives

The recitals/background/preamble/objectives may or may not form part of the protocol. 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 protocol;
- provide an explanation of intention;
- mention if Subdivision Q is relevant¹⁴;
- acknowledge the relationship and traditional connection the native title party has to the station;
- acknowledge the lessee's rights;
- describe who the protocol is between;
- describe the area covered by the protocol;
- describe the activity allowed under the protocol;
- describe the timeframe of the protocol; and
- describe whether the protocol is legally binding.

Definitions and interpretation

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

Warranties/Authority

May state that the native title party warrants and represents that:

- it has obtained all necessary authorisations, consents and approvals necessary to enter the agreement so as to bind the native title party;
- they will comply with the protocol; and
- they agree to be bound by the protocol.

May state that the pastoralist warrants and represents that:

- *they will comply with the protocol; and*
- *they agree to be bound by the protocol.*

Description of Area

Describes the area covered by the agreement.

Rights of the native title party

This part specifies the rights of the native title party. It may include:

¹⁴Subdivision 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)

- right to enter the pastoral lease for the purpose of exercising native title or access rights subject to notice being given to pastoralist;
- pastoralist not to unreasonably object to access; and
- native title party may exercise native title or access rights but will not engage in other activities without prior approval of pastoralist.

Access

Do you need to consider access arrangements for non-native title and/or native title parties?

- notice – consequences if an objection to the notice is raised eg good faith negotiations may trigger dispute resolution process;
- the name of a contact person to liaise with the pastoralist and to be responsible for ensuring the protocol's guidelines are adhered to; and
- the contact person/pastoralist to be informed of the area, general purpose of the visit, length of stay, camping areas, number of visitors, names of key contact people for the group, names of any licensed firearms holders who intend to hunt, approximate number of vehicles.

Native title party

This part may specify the things to which the native title party agrees, eg:

- not to interfere with station facilities;
- keep dogs or other animal under strict control;
- not to interfere with stock;
- light fires only for cooking, light and heat;
- not to camp within a specified distance from man-made watering points or the homestead;
- times within which native title party may call at the homestead;
- use of roads;
- litter and rubbish to be removed;
- gates to be left as they are found;
- high calibre or high power firearms not to be used on the area covered by the protocol;
- not to camp or travel over excluded areas;
- not to give permission to people other than native title party members or immediate kin to enter area covered by the protocol;
- not to erect any permanent structures;
- not to commercially exploit any flora and fauna;
- not to do or omit to do anything that would be contrary to the law; and
- not to do anything that may cause the pastoralist to be considered in breach of any provision of the pastoral lease or any other law.

May also specify that while on the area covered by the protocol the native title party agrees to comply with all reasonable direction of the pastoralist for efficient operation of the pastoral lease including in relation to:

- camping;
- use of station roads;
- lighting and extinguishment of fires;
- control of dogs;

- where to hunt using firearms;
- safety; and
- environmental conservation.

If a dispute arises about any direction given then parties will discuss in good faith to resolve the issue. Until the dispute is resolved the native title party will comply with the direction. If the dispute is not resolved then the dispute resolution process will be followed.

Pastoralist

This may state:

- that the rights of the pastoralist to conduct pastoral activities are not limited by the protocol; and
- whether the pastoralist can exclude any member of the native title party who is on the pastoral lease not in accordance with the protocol.

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;
- other parties have a right to see the insurance policy and its certificate of currency; and
- each insured person will provide reasonable assistance to the insurer and any injured person.

Excluded areas

Might state:

- pastoralist may provide notice to the native title party in relation to areas from which they are to be excluded for the efficient operation of the pastoral lease as a pastoral enterprise;
- the notice to include the reason, area and length of time for the exclusion;
- if an objection by the native title party then parties will discuss in good faith and native title party will not enter the excluded area during the period of discussions; and
- if objection not resolved within a specified timeframe then dispute will be resolved according to the dispute resolution process.

Notice

May include:

- addresses of parties for the purpose of giving notices under the protocol;
- the means by which notices may be given under the protocol;
- the timeframe of receipt; and
- the procedure for amending notice obligations.

Renewal of the pastoral lease

May specify:

- whether the native title party will object to the renewal of lease or extension of the term of the pastoral lease¹⁵; and
- the grant of an estate in fee simple around the pastoralist's homestead.

Aboriginal heritage and other laws

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 the law.

- native title party to inform the pastoralist of the location and dimensions of any sites of cultural significance.

Employment, training and contractual opportunities

This might state that:

- the native title party and pastoralist will meet at a specified time to discuss any employment, training and contractual opportunities; and
- the operation of the protocol.

Dispute Resolution

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

- protocols for dealing with disputes, eg honesty, respect etc, where meetings are to occur; and
- who bears the costs of the process.

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

- parties to use best endeavours to resolve the dispute;
- good faith negotiations/informal discussions;
- *the appointment of a mutually agreed facilitator or mediator; and*
- arbitration.

Assignment and encumbrances

Covers assignment of interests to persons not parties to the agreement. The clause may specify:

- 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?
- are 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?
- what are the notice requirements?
- can the native title party assign their interests?
- can the body corporate or native title party encumber the pastoral lease or any rights or obligations imposed by the protocol?

¹⁵ Future act processes may still apply.

Memorial on the Certificate of Crown Land

This might specify whether the parties and the Minister for Lands agree to a memorial being lodged so that any person who conducts a search of the Crown land title is informed of the existence of the protocol? If so, the Crown needs to be a party.

Execution of agreement

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

Schedules

The information in the schedules may be included in the body of the agreement. If not, a reference to the information can be included in the body of the agreement and the bulk of the information can be included as a schedule. This makes the agreement easier to read. Schedules might include:

- the relevant pastoral lease;
- the form of native title determination of the Federal Court;
- a map of the relevant pastoral lease to which the protocol applies; and
- the contact details of the parties.

2.3 Issues to consider in developing a Memorandum of Understanding (MoU)

Two MoUs have been analysed. One is an agreement between lessees and the Traditional Owners and the other is an MoU template developed at the industry/NTRB level. An MoU is not legally binding. Generally an MoU creates a framework for further action setting out what the parties hope to achieve and any agreed principles.

Parties

These are the people, companies, unincorporated associations and governments who agree to the MoU.

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 relevant¹⁶;
- acknowledge the relationship and traditional connection the native title party has to the pastoral property;
- acknowledge the lessee's rights;
- describe who the agreement is between;
- describe the area covered by the agreement;
- describe the activity allowed under the agreement;
- describe the timeframe of the agreement; and
- describe the type of agreement and whether it is legally binding.

Relationship between the parties

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

- a statement of mutual respect, honesty, courtesy and recognition;
- a statement to use 'common sense' practices in dealings with each other;
- a description of the first point of contact for the native title party;
- a description of the first point of contact for the lessee; and
- a statement that all contact will be through the nominated people.

Description of Area

Describes the area covered by the agreement.

Access

Do you need to consider access arrangements for non-native title and/or native title parties? For example, with regard to:

¹⁶Subdivision Q agreements are only applicable in limited circumstances and deal with conferral of access rights on certain native title claimants in respect of non-exclusive agricultural and pastoral leases. (*Native Title Act 1993* (Cth) ss44A-44G)

- notice:
 - timing;
 - who to;
 - form of notice;
 - when/whether it is necessary;
- specified place of entry for access by native title party;
- description of areas where native title party may access;
- the number of people who may access or camp on the land at any one time;
- maximum length of stay;
- the name of a contact person to liaise with the pastoralist and to be responsible for ensuring the MoU guidelines are adhered to;
- the contact person/pastoralist to be informed of the area, general purpose of the visit, length of stay, camping areas, number of visitors, names of visitors;
- any exclusion zones for Traditional Owners for camping and access, for example, homestead, bores, dams;
- use of roads – upkeep and maintenance costs, wet weather;
- third party access;
- times for access to lessee's homestead and native title party's campsites eg daylight hours; and
- indemnification, insurance coverage.

Camping

As well as acknowledging the relevant legislative restrictions, this part may specify:

- campsites to be properly constructed – for safety and to prevent damage to pasture, livestock etc;
- native title party may agree not to camp near bores, dams or any other infrastructure that may affect the operation of the pastoral lease;
- duration of the camp; and
- native title party to provide their own first aid kit.

Fires

As well as acknowledging the relevant legislative restrictions, this part may specify:

- fire to be used for camping purposes only; and
- campfire site to be cleared properly, contained and fire to be extinguished on departure.

Rubbish

- all rubbish to be removed from camp areas; and
- can the rubbish be left at the pastoral property's dump.

Gates and Fences

- gates to be left as found;
- specify if a specific gate is to be used for access;
- all new gates for traditional sites to be discussed between native title party and pastoralist; and
- fences or gates not to be damaged, cut or altered.

Firearms

These obligations could apply equally to the native title party and other parties. As well as acknowledging the relevant legislative restrictions this part may specify:

- whether high-powered rifles are allowed on the property;
- whether other guns are allowed on the property;
 - if so, you will need to consider:
 - how many?
 - what type?
 - is notice required?
 - are there restrictions about where firearms can be used?
 - if a party is using a firearm they need to keep the other party informed.

Use of flora and fauna

This part may specify that:

- the parties agree to work together to protect and conserve endangered and vulnerable species; and
- the native title party agrees that flora and fauna to be used for traditional purposes only.

Dogs

This part may state:

- whether dogs are allowed on the pastoral property;
 - if they are, do they have to be controlled and restrained?
 - whether companion and hunting dogs are allowed;
 - if hunting dogs are allowed is notice and the permission of the pastoralist required?
- pastoralist to inform native title party of any dog baiting programmes.

Alcohol

May consider:

- whether alcohol is allowed on the pastoral property; and
- *who is responsible for monitoring compliance?*

Infrastructure

This may state that pastoral property infrastructure is not to be interfered with or used.

Environmental and cultural heritage

Such clauses may include either an acknowledgment that the relevant environmental and cultural heritage laws apply or establish a process for environmental and cultural heritage protection, in addition to the operation of the law.

- to discuss areas of concern;
- to discuss the possibility of developing a management plan;
- to discuss and develop a mutually acceptable cultural heritage process to be implemented as soon as possible;
- native title party to map areas of significance;
- ongoing discussions about significant sites after cessation of the MoU;
- notice to be given to native title party about any new infrastructure;
 - timeframe for response; and

- parties agree to inform each other about third party campers and any principles about Indigenous cultural heritage to be extended to include the third parties.

Ongoing Discussion

This might state that the parties agree to discuss certain issues including tourism, training and employment, tenure issues, public liability insurance etc.

Dispute Resolution

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

- protocols for dealing with disputes, eg honesty, respect etc, where meetings are to occur; and
- who bears the costs of the process.

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

- parties to use best endeavours to resolve the dispute;
- good faith negotiations/informal discussions;
- the appointment of a mutually agreed facilitator or mediator; and
- *arbitration*.

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

Succession

- if one of the parties to the agreement passes away;
- provisions for role of RNTBC which is formed after the agreement is registered;
- if the company is wound up; and
- if the company is taken over.

Independent Legal advice

- states whether parties received independent legal advice;
- do you need to state which party pays?

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.