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Hindsight for foresight:  
Lessons about agreement governance from  
implementing the Gulf Communities Agreement (GCA)

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## Centre for Social Responsibility in Mining

The Centre for Social Responsibility in Mining (CSRM) is a leading research centre, committed to improving the social performance of the resources industry globally. It is part of the Sustainable Minerals Institute (SMI) at the University of Queensland, one of Australia's premier universities. SMI has a track record of working to understand and apply the principles of sustainable development within the global resources industry. CSRM's focus is on the social, economic and political challenges that occur when change is brought about by resource extraction and development.

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## Disclaimer

This Report has been prepared with care on the basis of CSRM's research and experience with the Century project over many years and the literature on impact and benefit agreements. It does not constitute legal or technical advice and the University of Queensland and participating researchers and research centres accept no liability for any decisions or actions taken on the basis of the report.

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## Executive Summary

Agreements form the basis of an ongoing relationship between mining companies and native title parties around a range of issues. The management of agreements through structures and processes established for implementation is referred to as agreement governance. This report identifies features of the governance arrangements established by the Gulf Communities Agreement (GCA). It draws lessons about how these have influenced the achievement of mutually desired outcomes and impacted on long-term sustainability of relationships.

The GCA of 1997 establishes land use and benefit sharing arrangements in the lower Gulf of Carpentaria in Queensland, Australia between Century Zinc Mine, the Queensland Government and three native title groups (Waanyi, Mingginda and Gkuthaarn-Kukatj – the latter considering themselves one People with shared responsibility for looking after their land and saltwater Country although having two sets of clan ancestors). This involvement of multiple native title groups is one distinctive feature of the GCA. As well, it was the first agreement negotiated with native title claimants in advance of a determination of the relevant native title claims; and it included the Queensland Government as a party, and had a regional and community scope of benefits.

The signatories to the GCA exhibited considerable goodwill and high hopes that the agreement would ensure mining benefitted the whole lower Gulf region, facilitate opportunities for economic participation and self-determination for the native title groups (NTGs) and local Aboriginal communities, and leverage government initiatives to advance the socio-economic status of the region.

Through successive owners, the GCA facilitated mining for 16 years and annual compensation payments to NTGs for 20 years. Other opportunities realised through the GCA and its governance arrangements include significant outcomes in the areas of employment and training, expansion of the Indigenous land estate in the region and operation of a number of viable Indigenous businesses including a multi-million dollar pastoral enterprise. However, the wisdom of hindsight is often informed by examining challenges confronted as much as by celebrating achievements.

### Challenges posed by GCA governance arrangements

Despite the many positive outcomes, the unique aspects of the GCA, and the genuine efforts of the parties, the experience of the GCA highlights significant challenges in implementing agreements and ways in which the governance arrangements compromised the outcomes. These challenges included:

- The diversity and divisions among native title parties confounded the formation (or selection) of a counterpart organisation as the legitimate representative of the NTGs.
- The inclusion of State Government commitments in a project-related agreement complicated rather than facilitated lines of accountability and coordination tasks.
- The governance structures for implementing the GCA included a number of companies, committees and boards notably the Gulf Aboriginal Development Corporation (GADC), Aboriginal Development Benefits Trust (ADBT), Lawn Hill and Riversleigh Pastoral Holding Company (LHRPHC), Century Employment and Training Committee (CE&TC), Century Environment Committee (CEC) and Century Liaison and Advisory Committee (CLAC). This extensive array of entities proved complex, uncoordinated and difficult to sustain.
- Cross-sectional representative governance structures were not enough to ensure good governance when they did not employ legitimate and effective processes.
- GCA governance would have benefitted from more investment in capacity building and provision of adequate resources to fulfil functions effectively.
- The weak institutional context of the lower Gulf region and the prevailing socio-economic disadvantage and socio-political divisions inhibited development of a unified vision and shared purpose.

- Combining a regional, community-wide process with due recognition of the rights of subsequently determined native title holders proved unwieldy.
- It is difficult to achieve sustainable community development with inter-generational benefits by dividing compensation among a number of autonomous bodies with little access to independent expertise and few guidelines or principles for disbursing funds.
- Notwithstanding a recognition from the outset of the finite nature of mining and the desire of the parties to provide a post-mining legacy, there are questions about the continued relevance of the GCA during the decades after the cessation of large scale mining operations and any subsequent land use or rehabilitation.

#### **Ramifications of inherent governance characteristics.**

The performance of the committees and boards; and the persistent inter and intra-group divisions provide evidence of the consequences of these challenges. The GCA was premised on a misplaced expectation that committees and boards could act as proxies for the relevant communities or social groupings, without an adequate underlying process or methodology for engaging with the people of the lower Gulf. This proved particularly challenging for GADC and the CLAC. All GCA bodies struggled to provide genuine opportunities for active participation and involvement of beneficiaries.

The adoption of a regional approach rather than an NTG-specific one similarly embodied admirable intentions. However it implied uniform impacts and a commonality of interests that was not warranted in the context. Hence, rather than serving as a unifying force, the GCA has exacerbated some divisions during the years of operation.

As negotiated, the GCA directed untied compensation funds to separate eligible bodies for various NTGs to allow autonomous discretionary spending. However many of these had poor governance and lacked the will, capacity and scale to design and deliver projects with lasting, widespread benefits. Hence, the community development outcomes of the direct compensation arrangements over almost 20 years compare unfavourably with agreements where significant funds have been invested in community development projects typically through a trust structure involving independent expertise and a clear developmental mandate.

Given that zinc production at Century Mine ended late in 2015, and only some of the governance arrangements still persist, section four of the report raises a further series of questions. These relate to the GCA's continued relevance through the post-production years. Without a unified project footprint, shared objectives and specific mutually beneficial outcomes, and given the persistence of disparate interests and shortcomings of the structures, lines of accountability and dispute resolution processes, it is not evident that the GCA serves to maintain necessary relationships or assist with adjustments for the post zinc-production period. The report therefore suggests some adjustments and supplements to the GCA to deal with key challenges specific to the decades of rehabilitation and closure. A key issue to address is the recalibration of the relationships with NTGs in particular to emphasise the relationship with the Waanyi People.

In sum, agreements only achieve their outcomes to the extent that all parties see those as being in their interests, agreement structures and processes are legitimate and effective, have adequate capacity and resources, are appropriate to their context and are founded on strong and trusting relationships between parties. The report identifies the advantages and disadvantages of a range of governance design features that characterised the GCA from the perspectives of developer and local Indigenous parties. As section five concludes, careful consideration of these issues can guide the effective functioning of agreements throughout the whole life-of-mine to fully realise the opportunities that agreements offer and cope with common challenges.

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## 1 Introduction

Agreement making, since recognition of native title in Australia, has changed the relationship between Aboriginal Traditional Owners and mining companies. Agreements legally enshrine negotiated arrangements for compensating native title parties for the impacts caused by mining, and can also be a practical step towards improving local Indigenous development. Agreements can form the basis for an ongoing relationship between mining companies and native title parties around a range of issues including compensation payments, land tenure arrangements, employment and training, and environmental and cultural concerns.

The Gulf Communities Agreement (GCA) was the first agreement negotiated subsequent to the Native Title Act 1993 (Cth). It is a comprehensive Future Act Agreement about land use and benefit sharing in the lower Gulf of Carpentaria in the state of Queensland, Australia. The native title parties who signed the agreement (referred to as native title groups (NTGs) in the GCA) were Waanyi, Mingginda, and Gkuthaarn-Kukatj<sup>1</sup>. Rio Tinto Zinc-Conzinc Rio Tinto Australia (RTZ-CRA) was the original owner of Century Zinc Mine and negotiated the GCA with immediate transfer upon signing to Pasminco and then, with subsequent changes of owners, to Zinifex, OZ Minerals and MMG (see Box 3). The Queensland State Government, referred to as 'Queensland' in the GCA, was also a signatory. The GCA came into effect on 7 May 1997. While the mine ceased operations late in 2015 and economic activity (as defined by the GCA) ceased in early 2016, the agreement continues until lease relinquishment.

Negotiation of a mutually satisfactory agreement, however, does not guarantee its success. In large part this will lie in the capacities and resources of the parties, the relationship between them, and their collaborative efforts and processes for implementing the agreement over the 'life' of the mine. The stakes of agreement implementation are high for both mining company and native title parties, particularly in remote regions where mining may be one of few economic development options. All parties have an interest in seeing that agreements are implemented effectively. Previous research suggests that the ongoing management of agreements – referred to as 'agreement governance' – has a major impact on agreement outcomes.<sup>2</sup> Agreement governance includes all of the structures, processes and entities that are responsible for aspects of the agreement.

This report reflects on the governance arrangements established by the GCA and implemented over the past 20 years. It examines the extent to which a number of key features of the GCA enabled or inhibited the various outcomes outlined in section 1.2. The report also considers how the GCA has served as an agreement for the whole life-of-mine, from construction to relinquishment. In identifying features of the GCA, it draws lessons from 20 years of implementation that could contribute to the resilience and sustainability of future agreements from a forward-looking, long-term perspective. Appendix 3 provides background and general details of the GCA.

The report draws on three formal reviews of the GCA<sup>3</sup> and other accounts by close observers, as well as monitoring and assessment by the Parties to the GCA (see Appendix 1 for a summary of the methods used and sources consulted).

This **introductory section** of the report outlines seven key features of the governance of the GCA. It also summarises the outcomes of the GCA. Agreement governance played a crucial role in determining these achievements.

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<sup>1</sup> Gkuthaarn-Kukatj consider themselves one People with shared responsibility for looking after their land and saltwater Country although they trace their descent through two clans.

<sup>2</sup> See, for example, O'Faircheallaigh, 2002, 2004; Martin, 2009.

<sup>3</sup> Pasminco et al, 2002; The Right Mind, 2008; Everingham et al, 2013a.

**Section two** explains the dimensions of effective agreement governance, and the governance structures of the GCA.

**Section three** examines the governance structures and processes of the GCA. Where relevant it considers whether these were

- in line with the principles of good governance (notably legitimacy and effectiveness),
- equipped with the resources and capacity to fulfil their intended functions, and
- suitable to the context.

**Section four** looks forward to the post-production years, and discusses how GCA governance could work in the future.

The **final section** provides more general considerations for contemporary agreement-making, especially the governance arrangements to support an effective life-of-mine agreement.

## 1.1 Distinctive features of the GCA

As the first mining agreement under the Right to Negotiate provisions of the NTA, the GCA was forged in unfamiliar and indeterminate times. All parties were unclear about the requirements and opportunities of the native title regime. Negotiations established the following distinctive features of the GCA (which are discussed further in section 3):

1. **Queensland Government participation** – The GCA incorporated not just the mine owners and the native title groups but also the State Government as party to the agreement (Clause O and Schedule 1).
2. **Multiple native title groups** – There were eight registered native title claims at the time of the agreement (Clause C) involving groups with divergent interests and different potential land use impacts on their lands.
3. **Expressing community aspirations** – The introduction to the GCA (Clause E) lists seven goals and aspirations of the native title groups and members of the communities living in the lower Gulf. These relate to broad concerns about economic participation, land and environment, culture and community welfare (Clause 4).<sup>4</sup>
4. **Evolving native title context** – The GCA was described by one research participant as an “agreement made in a pre-determination environment and implemented in a post-determination environment”. Native title claims that had not been determined at the time of the agreement-making have subsequently been determined. Rights and legal representatives have progressively been defined. This circumstance contributed to the complex governance structure of the agreement.<sup>5</sup>
5. **Successive mine owners** – The GCA has been maintained by four successive mine owners in accordance with an assignment clause.<sup>6</sup>

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<sup>4</sup> The general agreements and undertakings in the body of the GCA are supplemented with 12 schedules. The schedules detail undertakings with respect to specific issues, benefits or arrangements including the establishment of special purpose organisations, companies and committees to implement and govern the Agreement.

<sup>5</sup> In particular, the establishment of Gulf Aboriginal Development Corporation (GADC) (GCA, Clauses 12-16 and Schedule 8) to represent the native title interests in the administration of the agreement.

<sup>6</sup> GCA, Schedule 11 Clause 40: “CZL [Century Zinc Ltd] may Assign any interest in the Project or in any of the Mine Site Titles, Pipeline Titles or Port Titles provided the Assignee acknowledges and accepts in writing (in the form contained in Annexure 1) that it is bound by the provisions of this Agreement and any transactions



6. **“Community” beneficiaries** – The GCA includes “Communities”, notably other local Aboriginal people, as beneficiaries of the agreement in addition to traditional owners.<sup>7</sup>
7. **Whole of life agreement** – The GCA was set up to govern the whole life of the mining project (Schedule 11 Clause 1).<sup>8</sup>

While the governance consequences of these key features is the focus of this report, they need to be considered in relation to the outcomes achieved.

## 1.2 Summary outcomes of the GCA

Century mine had a number of positive impacts for the NTGs and the lower Gulf region that were consistent with the aspirations expressed in the GCA. The varied benefits for NTGs and local Aboriginal people were predominantly economic, and included: employment, increased income flows, supply chain opportunities for businesses, business development and payment of rates and other government charges that could, at government discretion, be channelled to regional infrastructure development and economic advancement. For key outcomes of the GCA see Box 1.

Section three examines how aspects of governance impacted on these outcomes either by enabling or constraining achievements.

### Box 1: Outcomes of the GCA

From the company perspective, the GCA enabled Century to be developed and to operate without community-induced interruption through until the planned cessation of mining in 2015. The nine day sit-in in 2002 involved some representatives of NTGs protesting about issues including implementation of the GCA by occupying the canteen at the mine camp. While causing significant inconvenience, this protest did not disrupt mining operations. Production continuity was maintained despite this protest, ownership changing hands several times and shifting power dynamics in the local Aboriginal communities.

From the perspective of the local communities and NTGs, arguably the most successful element of the GCA is achieving employment outcomes that surpass the national average of Indigenous employment in the mining industry. The largest expenditures under the agreement were to support employment and training and business development activities, rather than direct payments to the NTGs. This was consistent with the agreement’s articulation of broader development aspirations of the communities, rather than limiting the focus to compensation.

Large-scale employment and training programs were delivered in a region where these are in short supply. With on average 15-20% of the workforce being local Aboriginal people living in the region or outside, Century proved a major provider of jobs to agreement beneficiaries. Indigenous women constituted 37% of these workers. It thereby contributed to individual and household

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contemplated by it, as if it was a Party and will assume all the rights and will observe and perform all of the obligations of CZL.”

<sup>7</sup> GCA Confirmation Clause 2 lists nine general benefits Century Zinc “will provide the Native Title Groups *and the Communities*” (emphasis added). The communities are defined in GCA, Schedule 12 as “other Aborigines residing in the local government areas of Burke, Carpentaria, Doomadgee and Mornington Island” and more specifically in some clauses and schedules relating to issues including employment and training, ADBT and the environment.

<sup>8</sup> Notwithstanding some varied provisions for termination of specific Clauses and provisions such as cessation of some measures at the end of *economic life* (Schedule 11 Clauses 1, 2, and 3). There are also a limited number of rights and obligations that persist beyond the term of the agreement e.g. GCA, Clauses 58-60; Schedule 4 Clauses 61-70 (confidentiality); and Schedule 11 Clauses 46-48.

economic benefits and also fostered a pool of experienced labour available to the wider regional economy.

By the time that production ceased in 2016, around 1000 Indigenous workers, mainly members of the NTGs and lower Gulf communities, had worked at Century at some time over the life of the project. For around one third of these employees, this was their first experience of participating in the mainstream workforce.

Other noteworthy outcomes that can be attributed to the GCA are as follows:

- Several viable Indigenous enterprises were established, both through direct contracting opportunities with Century and through the ADBT. Some of these being for individuals or families and others being community-owned initiatives.
- Cultural heritage was systematically managed in partnership with the NTGs.
- An extensive area of land is now under traditional owner control and 2010 saw the determination of Waanyi native title over 1.7 million hectares.
- A successful, multi-million dollar, majority Waanyi-owned pastoral business – the Lawn Hill Riversleigh Pastoral Holding Company (LHRPHC) – has been established.
- Establishment of ADBT which holds significant funds in trust to benefit future business development in the region.
- Mobility and inter-generational opportunity for around 20% of surveyed Aboriginal employees who moved out of the region after starting work at Century.

Local communities have also benefitted from region-wide improvements stimulated by the mine, such as better transport and communications infrastructure, and improved services (e.g. medical evacuation), although not all of these benefits will be sustained post-mining.

These benefits are generally recognised, but there is also considerable frustration amongst the NTGs and in the communities more broadly that their socio-economic circumstances did not improve more. High levels of unemployment, welfare dependence and socio-economic disadvantage remain, especially in the communities of Doomadgee and Mornington Island.

In terms of the broader regional development aspirations, results have been mixed and there can only be a qualified endorsement given of the GCA as a mechanism for delivering development outcomes to the Lower Gulf.<sup>9</sup>

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<sup>9</sup> Adapted from Brereton & Everingham, 2016. See also Everingham et al, 2013a; & Everingham et al. 2013b, p. 15-23.

## 2 Understanding GCA governance

This section outlines the dimensions of good governance, and the governance structures of the GCA.

### 2.1 Agreement governance

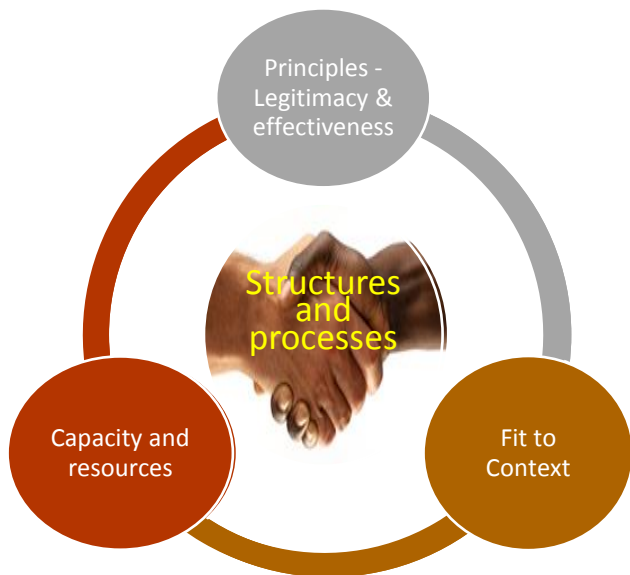
The ability of agreements to sustainably and effectively deliver the desired outcomes is in part a function of the agreement governance arrangements. In the context of a mining agreement, governance is about how the parties interact to make decisions about the aspects of the mining enterprise and the management of mining impacts that fall within the scope of the agreement. These can include compensation, economic opportunities, management of the environmental and cultural heritage impacts, broader community development aspirations, and maintenance of an ongoing cooperative relationship between the parties. The effectiveness of agreement governance will be judged, ultimately, on how well it enables the achievement of the parties' aspirations. Key factors that underpin good agreement governance are illustrated in Figure 1 and briefly elaborated below. They include:

- the form, composition and ways of operating of governance bodies being consistent with principles of legitimacy and effectiveness
- parties to the agreement and governance bodies having the capacity and resources to implement the agreement
- structures and processes being 'fit for purpose' and suitable to the context.<sup>10</sup>

Figure 1: Requisites of agreement governance structures and processes

I. **Principles of good governance:** A number of attributes are essential to 'good governance'. The form, composition and processes of GCA-related bodies should have legitimacy in the eyes of their constituency and function effectively. Legitimacy entails principles such as representation, inclusive participation, fairness, accountability and strategic engagement. Effectiveness is similarly multi-dimensional and relates to sound policy and structures and processes that produce results and demonstrate administrative efficiency, stability, and legal compliance.

II. **Capacity and resources:** GCA structures, processes and relationships should enable implementation throughout changing circumstances. The GCA established a system of structures and outlined processes for the operation and inter-relationship of constituent entities. These entities must manage multiple and complex relationships in order to progress implementation of the GCA. Formal, legal or administrative institutions must interact with counterpart institutions, the parties, and with informal collectives/groups. The structures and processes need adequate capabilities and resources to fulfil their roles and operate effectively.



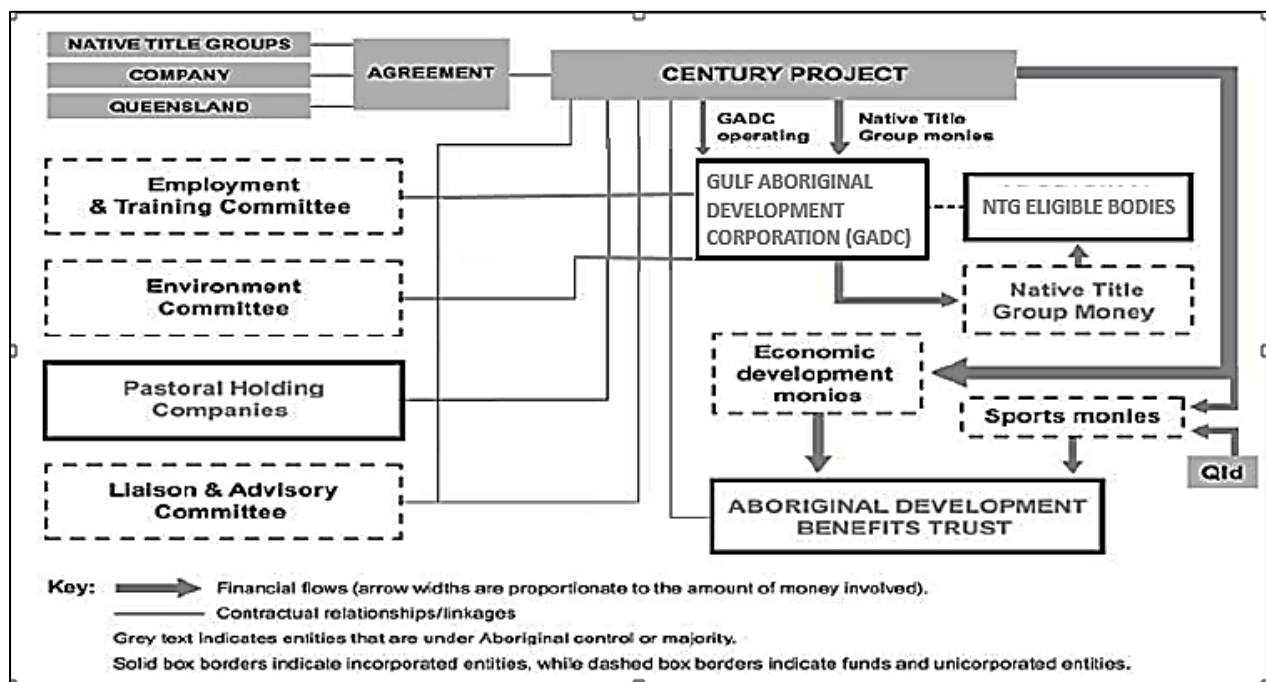
<sup>10</sup> Limerick, 2009; O'Faircheallaigh, 2004; Martin, 2009: 116.

III. **Contextual factors:** Any multi-party governance process is shaped by the convergence of the historical, social, economic and geographic realities of the parties. The performance of a governance process is therefore going to be impacted by how these factors enable or inhibit participation and collaboration at various points in time. For Aboriginal parties, these factors commonly include: historical, geographic and economic marginalisation, social capital, kin networks, factionalism and education, skills and capacities of individuals and organisations. For corporate parties, these factors can similarly include organisational capacity as well as: corporate culture and commitment to Indigenous participation, effective internal management systems and policies, economic viability of the business, profit imperatives and formal, legal contracts.

## 2.2 Governance structures and processes of the GCA

The governance arrangements for managing the GCA and ensuring it achieved its ambitious goals involved an extensive and complex array of companies, committees and boards, as illustrated by Figures 2<sup>11</sup> and 3.<sup>12</sup> The GCA establishes the basic structures and relationships between entities. In addition, the constitutions (or articles of incorporation or Terms of Reference) of these various organisations provide further detail as to the broad rights and responsibilities of various bodies, and expand on the implementation and governance arrangements.

Figure 2: Structures of the GCA



<sup>11</sup> Adapted from Martin, 2009: 105.

<sup>12</sup> Adapted from Everingham et al, 2013a: 15-16.

Figure 3: Governance arrangements established in schedules of the GCA

	Governance		Schedules pursuing goals and aspirations					
	Native title group interests representation	Liaison between parties & agreement oversight	Economic participation		Protecting land and environment	Maintaining Aboriginal sites and cultural heritage	Access to traditional land and pastoral leases	Other benefits /royalty payments
GCA	<i>Schedule 8</i>	<i>Schedule 10</i>	<i>Schedule 2</i>	<i>Schedule 6</i>	<i>Schedule 3</i>	<i>Schedule 4</i>	<i>Schedule 5</i>	<i>Schedule 7</i>
Body	Gulf Aboriginal Development Corporation A company with a governing board	Century Liaison Advisory Committee	Century Employment & Training Committee (Advisory)	Aboriginal Development Benefits Trust	Century Environment Committee (Advisory)	MMG and Qld Government with cultural heritage survey teams (formed by GADC)	Lawn Hill and Riversleigh Pastoral Holding Co. (LHRPHC). Turn Off Lagoons Co.	Eligible bodies of native title groups
Members	NTGs <ul style="list-style-type: none"><li>• Waanyi (6)</li><li>• Gkuthaarn (2)</li><li>• Kukatj (1)</li><li>• Mingginda (2)</li></ul> (11 members + executive officer)	<ul style="list-style-type: none"><li>• MMG (2)</li><li>• GADC (1)</li><li>• NTGs (W = 5; G-K = 2; M = 2)</li><li>• Qld Government (1)</li></ul> (13 members – MMG CSP Dept = secretariat)	<ul style="list-style-type: none"><li>• MMG (2)</li><li>• Communities and NTGs (4 appointed by MMG; 4 by GADC)</li><li>• Qld Gov’t (ATSIC)</li><li>• Federal Gov’t (13 members – MMG HR Dept = secretariat)</li></ul>	<ul style="list-style-type: none"><li>• MMG (1)</li><li>• Communities (facilitated by MMG) (4)</li><li>• NTGs (facilitated by GADC) (4)</li><li>• Aboriginal business (1)</li></ul>	<ul style="list-style-type: none"><li>• MMG (2)</li><li>• Wellesley Is (GADC appointee)</li><li>• NTGs (W = 5; G-K = 2; M = 2)</li><li>• Qld Government (1)</li><li>• Federal Gov’t (1) (15 members; MMG Env Dept = secretariat)</li></ul>	<ul style="list-style-type: none"><li>• MMG</li><li>• GADC</li><li>• NTGs</li></ul>	<ul style="list-style-type: none"><li>• MMG (4)</li><li>• GADC</li><li>• Waanyi representatives (4) (GADC appointed)</li></ul> (each board 8-9 members)	<ul style="list-style-type: none"><li>• GADC</li><li>• NTGs (per 7 eligible bodies)</li></ul>
Active life	Project end date and lease relinquishment End of GADC administrative functions with annual payment \$50k pa (indexed)	<b>2016:</b> CLAC ends (end of economic life of project declared)	<b>2016:</b> CETC ends (end of economic life of project declared)	<b>2015:</b> last annual payment of \$50k for business skills <b>2018:</b> last annual payment to ADBT of \$750k (indexed)	Project end date and lease relinquishment (Earliest estimate <b>2047</b> ): CEC ends	Most of these obligations cease at project end date and lease relinquishment (Estimated <b>2047</b> )	Pastoral companies continue <b>indefinitely</b> as independent entities	<b>2018:</b> Last annual payment for distribution to eligible bodies

	Governance		Schedules pursuing goals and aspirations					Other benefits /royalty payments
	Native title group interests Representation	Liaison between parties & agreement oversight	Economic participation		Protecting land and environment	Maintaining Aboriginal sites and cultural heritage	Access to traditional land and pastoral leases	
Key undertakings	Acting for and in the interests of the NTGs and in accordance with the views of the relevant native title holders as a group. Holding in trust and distributing monetary payments to NTGs.	Liaison between parties and advice to parties on working of the Agreement.	Century and contractors set up employment and training programs for local Aboriginal people. Conduct cultural inductions.	Century pay to ADBT \$1.5M per year for first 4yrs; then \$1M per year (indexed). Century and Qld Government to give a contribution to a trust for sport development.	Century maintain high standards of environmental management and monitoring. Develop an Environmental Management Regime.	Produce Aboriginal Site Management Plans and Work Programs. Operate so as to minimise interference with cultural matters.	Transfer pastoral holdings to Aboriginal control: Lawn Hill, Riversleigh & Turn Off Lagoons to Waanyi; Pendine and Konka to Ganggalida.	Eligible bodies have discretionary use of funds for whole of each NTG.
	Seeking additional funds from government for training. Appoints NTG reps to committees & ELO. Assists CETC in employment and training; and ADBT in business development.	A forum for discussing, exchanging information, formulating plans, and monitoring and reviewing plans and operations in relation to the Project.	(Sched.1): Qld will develop and implement an employment strategy in relation to the pastoral industry and contribute to other vocational training and to the CETC training plan in first two years.	ADBT will encourage Aboriginal businesses by providing loans, equity or grants. Facilitate personal development programs through sport.	Century covers costs of CEC. GADC employs an Environmental Liaison Officer (in a position funded by Century). CEC monitors risks and environmental issues of concern to Aboriginal people.	Century contribute to planning and establishment of Waanyi Cultural Centre/ Keeping Place. (Sched.1): Qld to fund GADC planning for Men's Business Association.	Aboriginal access to pastoral leases. (S1): Qld to Assist in NT claim for Boodjamulla National Park; Bidunguu infrastructure; and Outstation Resource Centre study.	Payments through the GADC to NTGs. \$750,000 per year for first 3 yrs; then \$500,000 (indexed) per year. Distributed according to specified formula.

### 3 In hindsight... Reflections on GCA governance

This section draws together the key features of the GCA, the complexity of the constituency and context of the lower Gulf communities and the outcomes of the GCA. It considers the impact of each key feature (from section 1.1) on agreement governance.

#### 3.1 Queensland Government participation

Government involvement in contemporary agreement-making is usually limited. The GCA, however, included Queensland to a degree that has not been replicated since. Under the Goss (Labor) and then the Borbidge (National-Liberal Coalition) Governments, Queensland enthusiastically supported Century's development throughout agreement negotiations. It welcomed the project's potential contribution to employment, regional development and State revenue.<sup>13</sup> Queensland's dual contribution was to assist the project as well as the NTGs and the communities. During negotiations Queensland was observed to be closely aligned with company interests<sup>14</sup> but remained at arms' length from the intense interactions with NTGs and communities.<sup>15</sup> Over half of Queensland's specific investments were for infrastructure and 60% of those funds supported mine access, with spending concentrated in the project commencement years.<sup>16</sup> This financial involvement was kept largely within Queensland departments. The inclusion of Queensland also promised coordination of the diverse expertise of many departments and alignment of GCA-related strategies with regional development goals. Concerns were raised during negotiation and implementation about State Government involvement. These were concerns that Queensland would abrogate its responsibilities to the lower Gulf<sup>17</sup> and about "what proportion of the State's commitments constitute normal government service delivery as opposed to compensation to the traditional owners."<sup>18</sup>

Queensland considered the company to have primary responsibility for ensuring benefits flowed to the NTGs particularly in relation to the mine site and the port, though it assumed more responsibility in respect of the pipeline corridor.<sup>19</sup> Less directly, changes in regional and Indigenous affairs policies in the ensuing decades have led to an increasing emphasis on participation in the mainstream economy as the route to Indigenous advancement. These contextual developments exacerbated the potential for state withdrawal and its focus on employment and training. A risk of including government in an agreement, is that the lines between citizen entitlement and expectations of the project become blurred, and accountability mechanisms are likewise confused.

Where transactions between Queensland and beneficiaries were required, the GCA specifies that the Gulf Aboriginal Development Corporation (GADC) is the main contact point.<sup>20</sup> This entity was

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<sup>13</sup> Trebeck, 2007.

<sup>14</sup> Trebeck, 2007; Howlett, 2010.

<sup>15</sup> Blowes & Trigger, 1999.

<sup>16</sup> The Right Mind, 2008: These enabling provisions included road works, an injection into vocational education, personal development sports grants, facilitating the Gregory outstation (Bidunggu) development application, support for the Century employment and training plan, compensation payments for the pipeline corridor lands and a regional social impact assessment (SIA) (GCA, Schedule 1).

<sup>17</sup> Trigger, 1997: 115-116.

<sup>18</sup> CLCAC, 2003: 49.

<sup>19</sup> "Queensland considers it appropriate that CZL, as proponent of the Project, provides the majority of the benefits given to the Native Title Groups" (GCA, Schedule 1, Clause 9).

<sup>20</sup> E.g. For small pipeline compensation monies, the development of a Men's Business Association and planning of an outstation resource centre. (GCA, Schedule 1, Clauses 46, 49).

established to represent the interests of the native title parties to the GCA.<sup>21</sup> However, minimal support and capacity building was provided after set-up for the GADC to fulfil the considerable consultative responsibility implied for this company.<sup>22</sup> This under-resourced intermediary role, combined with disputation among the NTG constituents, potentially compromised effective performance of this governance body and its legitimacy (GADC is discussed further in section 3.2).

Governance of the significant training commitments was assigned to the Century Employment and Training Committee (CE&TC). Like most of the GCA committees, this body involved the NTGs, company and government (both State and Federal in this case). This committee devoted time to dealing with competing interests and complaints about job and training opportunities being allocated inequitably across the main lower Gulf communities and the NTGs. It also experienced contention over achievement of employment and training goals. Nevertheless the GCA arrangements for this body enabled significant achievements with regard to employment and training (see Box 1). The multi-sector committee membership and the availability of some designated resources as well as the existence of a memorandum of understanding with Queensland were enabling factors. Queensland's participation in this committee was a positive governance feature of the GCA in enabling Century to leverage considerable training funding and expertise. This involvement did not however ensure Queensland's active engagement and a consistent, strategic focus on long-term training goals and regional training needs. Nor did it facilitate linkages and synergies between the various training and vocational programs and initiatives in the region.

Through envisaging an ongoing role for Queensland in activities including training, the GCA provided a major opportunity. It anticipated that Queensland would assist the region to build capacity, strengthen institutions and prepare for the transition to diversified employment in a post-mining economy upon completion of the Project.<sup>23</sup> Unfortunately, most Queensland support for the administration of the agreement diminished after the initial years. Queensland representation on committees came from different departments, the personnel changed and attendance was inconsistent rather than providing stability and enhancing the legitimacy of these bodies in the eyes of stakeholders. Many of the performance areas that remained unrealised and provoked community dissatisfaction with GCA outcomes were dispersed among various Queensland departments.<sup>24</sup>

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<sup>21</sup> During the 6 month negotiation period established by the Right to Negotiate process, the National Native Title Tribunal introduced a 'protocol' for the consultations. This put constraints on either Queensland or the company directly communicating with the native title parties in the absence of legal representatives and advisers. It thereby set a precedent for indirect dealing through an intermediary (See Howlett, 2007: 138).

<sup>22</sup> Scamby 2007:111-112; Pasminco et al 2002:94; Martin 2009:106

<sup>23</sup> "Queensland will, over the Project Life, in consultation with the Communities, develop and implement an employment and training strategy in relation to the pastoral industry and pastoral lease management with a view to maximizing the benefit of ownership of the Pastoral Holdings proposed to be transferred and with a view to achieving a diversification of the skills base and employment opportunities of Local Aboriginal People in the Region, particularly the members of the Native Title Groups. The Parties acknowledge that such a strategy will assist in *the ultimate transition to a post mining economy* upon completion of the Project" (emphasis added). (GCA, Clause 23).

<sup>24</sup> For instance the regional Social Impact Assessment (SIA) (Department of Premier and Cabinet), birthing centres (Queensland Health), training and vocational education (Department of Training and Industrial Relations), road and bridge infrastructure (Department of Main Roads) and the Outstation Resource Centre (Department of Families, Youth and Community Care). There was also support committed to the Lawn Hill National Park land claim (Department of Natural Resources). Unlike the native title claim, this was not federally funded through the land council and was not pursued as actively meaning that it took more than a decade to finalise.



In sum, many opportunities that could have been leveraged by the inclusion of Queensland as a party to the GCA were missed because of a combination of contextual conditions, loose terms of the agreement, lack of coordination, Queensland's preference to remain 'at a distance' rather than closely engaged, and lack of detail beyond the short-term. The GCA arrangements did not ensure a transparent means of tracking Queensland's delivery of its express commitments. In hindsight, there is little to suggest that agreement governance or outcomes were improved by inclusion of Queensland as a party to the GCA.

### 3.2 Multiple native title groups (NTGs)

A significant aspect of the GCA is the inclusion of multiple native title groups (NTGs) in a single agreement.

During negotiations there was a critical difference between those Aboriginal people with

...concerns for cultural and environmental integrity of significant country ... [and] ... those who stress the value of what appear to be promises of substantial economic benefits (employment, training for young people, funds for new business operations).<sup>25</sup>

The GCA embodies the desire to be equitable and spread the benefits broadly. This is premised on an assumption of considerable homogeneity and uniformity of views among the NTGs. In fact, the mine meant different things to different people from the outset. This situation continued throughout operations. The Century Environment Committee (CEC), for instance, balanced environmental concerns about pipeline spills with cultural and spiritual concerns about exposure of ochre in the pit and the location of the cyclone mooring buoy in the Gulf. This is the only committee that is designated by the GCA as continuing to have a function post-production. The CEC is formed by Century Zinc and includes a defined number of representatives from the NTGs as well as encompassing a spread of lower Gulf communities and other parties (i.e. Queensland and the mine owning company).<sup>26</sup> Each of the signatory NTGs has experienced different impacts from the mining operations, and has different interests in the future development of the project area. The majority of the disturbed land is Waanyi Country, and this is also the most prospective area for future development. Concerns of traditional owners of the pipeline and the port areas have focussed more on issues such as the integrity of the aquatic environment of rivers and the Gulf. The CEC's environmental focus is now primarily related to disturbed Country (i.e. Waanyi land) rather than the areas of the other NTGs. However all representatives have continuing involvement, which creates potential for different engagement and conflicting priorities in a context where Waanyi People have primary responsibility to care for Country in accordance with their custom. It is not culturally appropriate for other NTGs to have a voice in those matters. For these and other reasons, the committee is not functioning post-production as envisaged in the GCA.

Under the GCA there is also NTG representation on other boards and committees – with nominations in most cases facilitated by the GADC. The members are nominated to fulfil GADC's obligations "as an agent or representative of the Native Title Groups" (Schedule 8 Clause 10). Consistent with good practice for agreement governance<sup>27</sup> there is provision within the agreement for funding of these bodies. However, only the CEC's activities and the GADC representational and administrative functions

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<sup>25</sup> Trigger, 1997: 114; see also Sullivan, 1997: 138.

<sup>26</sup> GCA, Schedule 3 Clause 8.

<sup>27</sup> Rio Tinto & CSR, 2016; Gibson & O'Faircheallaigh, 2011.

are funded in the post-production years of the agreement. Resourcing and capacity building of the governance bodies has been a point of contention throughout the life of the GCA (see also Section 3.8). The modest capacity support was problematic for the multiple NTGs and the fragmented under-resourced eligible bodies<sup>28</sup> of varying capacity. Those unable to afford paid staff struggled to maintain compliance and eligibility. Other problems for these groups included their poor definition of beneficiaries; adversarial relationships within the groups; short-term, individualistic expenditure strategies; and opaque accountability.<sup>29</sup> The GCA's expectations of collective interests of the NTGs and the insistence by these groups that distributing untied funds to their own eligible bodies was the only acceptable way to accord them self-determination and autonomy were at odds. One result of the GCA provisions has been that, rather than being spread generally, some benefits have accrued to individuals, families or factions.

The inclusion of multiple NTGs in the GCA also created issues concerning relationships and trust and undermined the legitimacy of governance bodies in the eyes of some. The company's insistence on a single regional agreement as a way to promote cohesion and unity in the region manifested in requirements for people to work together on multi-party bodies. However the effect has often been to the contrary particularly when some complex inequalities and disadvantages intersected with committee roles. For instance the Century Employment and Training Committee (CE&TC) struggled to meet its goal to maximise employment of NTG members because of the range of factors, inadequately foreseen in the GCA, that impinge on employability – for instance education, health and fitness, and drug and alcohol usage. Many intended beneficiaries proved ineligible to access benefits, and agreement provisions for training and capacity building were not structured to address the health and addiction issues.

In designating several multi-party bodies along with the eligible bodies as participants in agreement governance, the GCA placed a great personal strain on some long-serving individuals. This affected the overall implementation of the agreement. Participating in committees and boards is a time consuming and demanding responsibility. Individuals undertaking these positions over the years received little support and overall there was insufficient investment in developing the necessary leadership and management skills to enable these organisations to function effectively. Nor was the GCA clear about succession planning to ensure both continuity and renewal.<sup>30</sup>

As noted at an early stage, the “convoluted and fraught political relations among different Aboriginal groupings in the region characterised the negotiations and will continue to have an impact on the implementation of strategies to realise these benefits.”<sup>31</sup> Indeed over the life of the GCA, lack of trust, conflicts and temporary alliances have characterised relationships in the region and challenged the effective functioning and legitimacy of governance bodies. Some have been dominated at times by a

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<sup>28</sup> An Eligible Body was defined in the GCA (Schedule 7, Clause 14) as “an incorporated body or a trustee:

- (a) whose membership is restricted to members of a Native Title Group;
- (b) which maintains standards of accountability;
- (c) which the Native Title Group agrees to recognise as an Eligible Body;
- (d) which is not in administration, receivership or liquidation under the Corporations Law; and is not an undischarged bankrupt.”

<sup>29</sup> Altman, 2001: 112.

<sup>30</sup> Everingham et al, 2013a.

<sup>31</sup> Martin, 1998:1; see also Trigger, 1997; Scambary, 2009; 2013.

particular faction and most have lacked stability, smooth transitions of membership and leadership succession. One observer described relationships as “changing day-to-day”.

The changing landscape of native title claims – as the body of law developed, claims were determined and claim membership established – compounded the situation. These dynamics have played out in the governance structures whether or not the issues relate to the work of the committee. For instance, the stipulations for a quorum for most bodies sought to uphold representation of each of the NTGs at every meeting. On numerous occasions multi-party committee or board meetings were unable to proceed effectively because one NTG was not represented as a result of internal disputes over representation or participation. One observer has commented,

[We] could see all the distrust ... Distrust of [the Mine Managing Director] and CLC [Carpentaria Land Council] and also within the groups. Still today all the groups are fighting amongst themselves. They wanted more for their families. Some groups didn't know what was going on.

The lack of a strategy for comprehensive engagement with and transparent reporting to members on behalf of eligible bodies and the GADC further compromised trust and legitimacy. This pervasive distrust and instability has undermined the viability of the NTGs' eligible bodies such that many were unable to maintain compliance and receive their allocated funds – a source of further dissatisfaction. The GCA's governance structures and processes were based on idealised assumptions of unity and collective interests rather than an understanding of the real politick of traditional alliances and self-interest.<sup>32</sup>

Over the course of the mine life, the operation of the agreement governance structures fluctuated. Problems with legitimacy, effectiveness, capacity and resourcing have been evident. Committees did not meet for long periods, or meetings were poorly attended. The GADC, in 2007, operated with no paid staff, reliant on voluntary administrative support. With external support, it held multi-year AGMs in 2008 and in 2015 to rectify omissions in previous years.<sup>33</sup> The Century Liaison and Advisory Committee (CLAC) did not meet between 2002 and 2012 and the CE&TC and CEC suffered periodically from poor attendance and a lack of focus.<sup>34</sup> Even when the committees were meeting, there were concerns about the variable capacity of people in the Gulf to engage as, or with, representatives in the GCA governance structures. There were frequent complaints that the members were not providing adequate information flow between company and community. These observations highlight that the GCA did not make adequate provisions for training, nor establish and resource an effective process for community engagement with dispersed NTG members.

Although the respect for the autonomy of Indigenous-controlled and managed organisations such as the GADC and the eligible bodies is commendable, the GCA experience shows that it must be accompanied by adequate resources, strong support and capacity building. Accountability and transparency face particular challenges where information is seen as power and therefore tightly controlled by some parties. More recent agreements, and other GCA governance entities (e.g. ADBT)

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<sup>32</sup> Martin, 1998; Trigger, 1997.

<sup>33</sup> In 2015, a board member of the GADC was charged with fraud relating to use of GADC funds. The Australian Not-for-profits and Charities Commission issued GADC with a compliance notice relating to issues of poor governance and compliance.

<sup>34</sup> Brereton & Everingham, 2016.

designate a role for independent directors who can provide mentoring, skills transfer and checks and balances without unduly infringing self-determination.

Despite offers of governance training in recent years for some bodies (notably GADC), not enough was done by the parties at the outset to strengthen governance capacity or leverage funding from programs of various agencies for governance support and skills development in all GCA entities.<sup>35</sup> For instance, subsequent agreements have been able to incorporate the GADC equivalent under the legislation administered by the Office of the Registrar for Indigenous Corporations (ORIC) rather than under the Corporations Act. ORIC provides board governance training and other capacity-building support to Aboriginal Corporations.<sup>36</sup> The GADC was meant to maximise the autonomy of Indigenous groups while retaining transparency and accountability, but each of the three GCA reviews noted that it was functioning poorly, lacked accountability and needed more effective resourcing and enhanced capacity.

People involved with the GCA have acknowledged that there is a degree of confusion about the detailed contents of the agreement. Part of this was due to political and commercial imperatives during negotiation not allowing comprehensive engagement, the difficulty of understanding a complex agreement, and distrust between neighbouring groups, as well as of the company and Queensland. At times, different understandings contributed to significant disputes between the NTGs about distribution of funds, lack of accountability and allegations of 'capture' by particular families, and exclusion of others.<sup>37</sup> The governance arrangements enshrined in the GCA to involve the multiple NTGs were based on notions of representation that were ill-suited to the context, did not align with the principles of good governance – being neither legitimate nor effective – and led at times to paralysis on implementing the agreement rather than enabling performance. The GCA sought to accommodate within a single agreement the stated desires of the multiple NTGs to have separate corporate forms recognising their different historical connections to different traditional areas. In hindsight, separate agreements with each of the NTGs may have served the purpose better, reduced complexity, and coped with the further divergence of interests once production ended. However, at the time the broader community wanted a single agreement so that the benefits groups received were transparent to all affected parties; and the company wanted a single agreement to ensure all necessary land access was in place for the operation to proceed.

### **3.3 Expressing community aspirations**

Agreements provide important frameworks for recognising the interests of various parties and managing the expectations they have of each other. In the case of the GCA, the broad expectations of the native title parties and communities are expressed in seven aspirations. Support for these broad and interconnected goals is demonstrated through the undertakings outlined in the GCA and the associated schedules. Although the schedules allowed for an element of flexibility to meet changing circumstances, with hindsight, it is evident that these were not sufficient to deliver the ambitious outcomes that were desired.<sup>38</sup>

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<sup>35</sup> The Right Mind, 2008; Webb, 2016.

<sup>36</sup> Incorporating under ORIC was not an option at the time.

<sup>37</sup> Scambary, 2013: 208.

<sup>38</sup> Martin, 2009; Everingham et al, 2013a; Scambary, 2013.

It has been reported that both Century and Queensland sought to confine the scope of the GCA to issues they regarded as flowing directly from the mine.<sup>39</sup> Both of those parties expressed concern during negotiations that a single agreement around a single mine which would operate for about 15 years could not achieve the aspirations articulated in the GCA to “remove the Native Title Groups and the other members of the Communities from welfare dependency”<sup>40</sup> or “ensure that the standard of health, employment rates, education opportunities and other social indices of Native Title Groups and other members of the Communities is comparable to ordinary Australian standards.”<sup>41</sup> Despite this, many Aboriginal parties had aspirations that the GCA would deliver broad ‘social justice’ in light of historical injustices and disadvantage.<sup>42</sup>

The agreement has been described as specific, even rigid, in some respects about deliverables and vague in many others – hence successive reviews called for more clarity around goals, targets and performance indicators (e.g. for employment) but also for greater capacity to review and revise undertakings that may have no longer served the intended purpose. For example, the GCA included a commitment to provide birthing centres in the majority Aboriginal centres of Doomadgee and Mornington Island within two years and to investigate a similar centre for Normanton.<sup>43</sup> The intention was to increase the safety and cultural appropriateness of childbirth for women of this remote region. Subsequent consideration of health evidence and practicalities proved the centres would not be viable and suggested alternative solutions as preferable. This example illustrates that the climate of urgency, high emotion and political pressures during agreement negotiations resulted in insufficiently investigated commitments.

A major criticism of mining agreements is that many “do not in fact deliver substantive and meaningful benefits to the Aboriginal Parties.”<sup>44</sup> This question of whether real benefits might flow to them was critical to Aboriginal people from the outset of GCA negotiations.<sup>45</sup> In the case of the GCA, successive reviews have documented performance falling short of expectations and relationships faltering.<sup>46</sup> A number of factors contributed to these situations as outlined below.

- (a) **Over-promising and high expectations:** The agreement was described by one research participant as a “mine developer’s agreement” – providing approval for construction and the start of production, but not well considered for the longer term. The rhetoric of company, Queensland and the media during agreement negotiations reportedly inflated the potential benefits.<sup>47</sup> Subsequent mine personnel gave informal undertakings to advance short term goals without fully considering the company’s capacity to deliver upon these promises. This further raised expectations. Exaggeration of anticipated benefits is common in approval phases of mine development – but when that becomes enshrined in an agreement it creates inevitable discontent. Similarly when promises are made but not documented to allow monitoring and accountability, good governance is undermined. There is obvious value in ensuring that all undertakings (formal and informal) are fully documented to allow accountability. In particular, any revised intentions should be fully explained and subject to

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<sup>39</sup> Blowes & Trigger, 1999: 109.

<sup>40</sup> GCA, Introduction Clause E (a).

<sup>41</sup> GCA, Introduction Clause E (g).

<sup>42</sup> Blowes & Trigger, 1999: 109.

<sup>43</sup> GCA, Schedule 1 Clauses 31-34.

<sup>44</sup> Martin, 2009: 99.

<sup>45</sup> Blowes & Trigger, 1999.

<sup>46</sup> Pasminco et al, 2002; The Right Mind, 2008; Everingham et al, 2013a.

<sup>47</sup> Trigger, 1997.

inclusive consultation about alternative options. Thorough monitoring, evaluation and reporting will also support full appreciation of the direct, indirect and induced benefits achieved. For instance the evidence is that the millions of dollars a year in wages paid to local Aboriginal employees benefitted local businesses and extended families and allowed many workers to relocate their families to centres with better educational opportunities.<sup>48</sup> These benefits are sometimes underestimated or regarded as company ‘spin’ in the absence of trusted monitoring and reporting.

- (b) **The mismatch between Aboriginal aspirations and short-term economic objectives:** The GCA has been hailed as an example of best practice because of its “perceived capacity to deliver substantial and sustainable benefits to Indigenous people.”<sup>49</sup> Scambary argues instead that limited outcomes have been attained for Indigenous people partly because of the scale of Indigenous disadvantage but also because the GCA emphasised mainstream economic participation. A well-governed trust (such as that established by RTZ in agreements it negotiated subsequently) could have resulted in investment in regional economic development.<sup>50</sup> In contrast, the GCA directed untied funds to the eligible bodies. Little of this money was allocated to the pursuit of broad regional development aspirations of the NTGs and lower Gulf communities. Observers concur that agreements, including the GCA, struggle to deliver broader Aboriginal objectives beyond participation in the mainstream economy.<sup>51</sup> This resonates with debates about Aboriginal participation in the ‘real economy’. While economic participation is embraced by some as the ideal goal for agreements and way to counter Indigenous economic disadvantage, others note the dissonance with Aboriginal culture and values.
- (c) **Divergent interpretations of the status of the aspirations in the agreement:** From the perspective of the company and Queensland, the aspirations were carefully placed in the Introduction and as something the parties to the agreement acknowledged, and undertook to avoid compromising, during the project – rather than committing to deliver these outcomes.<sup>52</sup> In contrast, many NTG members anticipated or understood the agreement to be fully engaging with their broader livelihood and lifestyle objectives. To them it was not just a temporary opportunity to leverage some opportunities for partial progress towards their goals, but an expectation that the GCA would deliver upon these.
- (d) **Context:** The legacy of Indigenous disadvantage limited participation in employment, training and business development. There were also geographic impediments to development in the remote lower Gulf region; and limited governance experience and support. Lack of understanding of such contextual factors limited the degree of transformation achieved by implementing the GCA and constrained the effectiveness of the governance bodies established to deliver specific undertakings to people with competing interests. For instance,

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<sup>48</sup> Everingham et al, 2013b.

<sup>49</sup> Scambary, 2009: 171.

<sup>50</sup> For example the Western Cape Communities Co-existence Agreement (WCCCA) Trust, had sub-Trusts which could conceivably apply for three different NTGs. See: <http://www.westerncape.com.au/structure/>

<sup>51</sup> For example, Trigger (1997: 118) notes that what some saw as “the potential to generate absolutely massive wealth”, others regarded as repeating their colonial “dispossession”. Similarly, Strelein (2003) points to the increasing gap between Aboriginal goals and aspirations and what can actually be delivered.

<sup>52</sup> For example there is acknowledgement that “Indigenous people and communities have expressed concerns about how CZL’s proposed mining and related activities in the Gulf might affect these goals and aspirations” (GCA, Introduction Clause F).

the GCA channelled funds to NTG beneficiaries through a number of organisations initially ill-equipped to meet eligibility criteria and to function as financial collectives.<sup>53</sup>

- (e) **Structures and processes:** A number of specific structures were established for delivering categories of benefits related to aspirations. For example concerns about impacts on Country are separated into undertakings about protection of cultural heritage, lands and environmental management with separate schedules dealing with each and separate governance bodies (Box 2).

**Box 2: Sample of issue-specific Schedules and related governance bodies**

Schedule 2	Employment and training	Century Employment and Training Committee
Schedule 3	Environment	Century Environment Committee
Schedule 4	Heritage and cultural sites	Gulf Aboriginal Development Corporation
Schedule 5	Lands	Pastoral Holding Companies
Schedule 6	Business Development	Aboriginal Development Benefits Trust

This plethora of bodies to respond to the aspirations loses sight of the pervasive significance of Country and kin to Indigenous Australians and of the interconnection between issues such as land, culture and environment in the eyes of the NTGs.<sup>54</sup>

The specific-purpose structures also suffered from a combination of under-resourcing, inexperience and poor leadership in the communities, limited succession planning or turnover in the membership and representatives, and variable support and commitment from the company and Queensland. In those respects they were unable to perform in full accord with the broad principles of good governance. For example, many of the GCA companies and committees struggled at times to generate a level of interest and momentum for the work. They have gone through periods of dormant or ineffective administration partly resulting from ill-defined roles and functions as well as from a perception they lacked genuine influence and decision-making power. They have not benefitted from stable membership, effective processes and administrative support. Expectations concerning transparent reporting and accountability were either not clear in the GCA or not met – especially where relationships weakened and trust was lacking.

The Aboriginal Development Benefits Trust (ADBT)<sup>55</sup> and the Gulf Aboriginal Development Corporation (GADC)<sup>56</sup> were established under the terms of the GCA to deliver most of the community benefits. The arrangements for ADBT have served the test of time. It has secured an effective regional presence and stable operating model with prospects to achieve self-sufficiency and a sustainable future in its regional economic development roles. Its board comprises representatives of all the NTGs as well as communities (represented by capable people in the form of the mayors of three lower Gulf councils), Century Zinc, an Aboriginal business leader (this role has been vacant for some time) and co-opted business administration expertise. The board undergoes regular directors' training. Although the

<sup>53</sup> For example, both Scambary (2013) and Pasminco et al (2002) observe that the eligible bodies lacked stability and capacity to deliver compensatory payments to all relevant NTG members.

<sup>54</sup> The focus and procedures of such groups were, for example, unable to accommodate the expectations that each of the main extended family groupings should be included in all areas – including employment, land connections and business development.

<sup>55</sup> GCA, Clauses 47 and 48 and Schedule 6.

<sup>56</sup> GCA, Clauses 12 to 16 and Schedule 8.

distribution of its business development funds has been criticised at times as favouring a narrow group of entrepreneurs, recent decisions promise a wider flow of benefits. The intention is to make strategic investments in industry development in addition to supporting small entrepreneurial initiatives. There is contention surrounding this decision about whether these investments should be restricted to local businesses that are specifically initiatives of the NTGs and local communities. This illustrates an inherent tension in conflicting interpretations of the intent of the GCA's specification of "the benefit of the Native Title Groups and the Communities."<sup>57</sup>

In contrast, the arrangements for representing the NTGs and distributing benefit monies to the NTGs were less resilient and less effective. These were designated functions of the GADC (discussed in section 3.4). In establishing the GADC, the GCA also envisaged that alternative bodies could perform these functions.<sup>58</sup> However, there was no viable alternative at the time of negotiating the agreement since the eligible bodies resisted intrusion by the land council (CLCAC) and reportedly all parties regarded them as partisan and being opposed to the mine 'in-principle'.<sup>59</sup>

- (f) **Relationships and representation:** The various bodies established under the GCA fostered different relationships. For instance, some included representatives of all parties to the agreement which had the advantage of introducing some complementary perspectives and expertise and providing a venue for collaboration. The GADC, in contrast, was specifically established to represent and protect the interests of the NTGs and, as a result, operated autonomously without company or State involvement. This had the effect of distancing the company from the NTGs and their eligible bodies, as the GADC served as an intermediary. This promised reduced transaction costs for the company, but also increased its vulnerability to criticism for matters not directly under its control. Another effect was to require disparate groups with no strong tradition of working together to relate to (and through) an 'artificial' body (the GADC) which had no established credibility or authority with those it represented and limited ability (and resources) to draw in additional expertise. There was a flawed assumption that the GADC would have the capacity and resources to engage effectively with its diverse constituents and that having a representative structure meant it had legitimacy with them.

In the end, the governance of the GCA, and the ability to achieve its stated objectives, was impacted by some inherent limitations in the structure of the agreement – which separated out specific aspirations, e.g. in schedules and the institutions established under the GCA. In seeking to be inclusive and comprehensive, the GCA assumed capacities, alignments and resources that were not evident. It also became very complex with an array of interlinked structures and relationships that overlapped, were ill-defined, and lacked effectiveness, and that likewise impacted implementation of the GCA.<sup>60</sup>

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<sup>57</sup> GCA, Schedule 6 Clause 1.

<sup>58</sup> For example, the GCA states, "If each of the Eligible Bodies referred to in Schedule 7 Clauses 13 and 14 agree, the Carpentaria Land Council Aboriginal Corporation ("CLC") may perform any of the functions of GADC provided for in this Agreement (as nominated by those Eligible Bodies)" (GCA, Schedule 7 Clause 26).

<sup>59</sup> Blowes & Trigger, 1999.

<sup>60</sup> Pasminco et al, 2002.



### 3.4 Evolving native title context

The governance arrangements enshrined in the GCA were among the earliest negotiated after the 1993 Native Title Act (Cth) established that registered native title claimants have a 'right to negotiate' about 'future acts' in relation to their traditional lands. The Waanyi claimants lodged an application for a native title determination in 1994, but at that stage no claims had been determined. The company, supported by Queensland, initially negotiated outside of the Native Title Act (NTA) provisions and did not bring the negotiations under the Act until 1996. The NTGs had not yet established membership criteria, incorporated (for instance as prescribed bodies corporate, PBCs<sup>61</sup>) or established their own decision-making processes aligned with the NTA.<sup>62</sup> Legal and tenure issues were similarly still unclear. Significantly, there was no established body accepted as representing all Aboriginal interests. Indeed, attempts to identify such a body rested on misapprehensions about Indigenous political authority. Anthropologist Patrick Sullivan asserts legitimate representatives of interests tends to vary with specific Country and over time; and that NTGs will have overlapping and varying memberships according to their purposes; and will tend to factionalism and group fission rather than aggregation, collectivism and corporate-ness.<sup>63</sup>

The Carpentaria Land Council Aboriginal Corporation (CLCAC) as the Native Title Representative Body was strongly committed to active involvement in land issues in the region. It played a crucial role in GCA negotiations though aligned with one set of interests rather than brokering a unified position. However, as a Representative Body, the CLCAC lacked the mandate to represent the sometimes conflicting aspirations and interests of all the NTGs<sup>64</sup> or be party to the agreement. It, along with representatives of fifteen other local organisations including eight native title groups, and the two Aboriginal community councils, formed the United Gulf Region Aboriginal Corporation (UGRAC), as an umbrella body to facilitate negotiations. This group had a central role. The now-disbanded Aboriginal and Torres Strait Islander Commission (ATSIC) also actively engaged in negotiations to broker common ground. The UGRAC-negotiated position was put to a vote in Burketown in 1996. While initially endorsing the project, strong opposition in the communities saw the decision overturned a week later resulting in the demise of UGRAC. This precipitated a request to the NNTT to mediate and initiate the formal Right to Negotiate process.

In the absence of a formally constituted unifying representative body, the GCA required the establishment of the Gulf Aboriginal Development Corporation (GADC), empowered to represent the interests of the NTGs and communities. During negotiations all three NTGs, as well as the company and Queensland, had their own legal and negotiating teams, but there was a desire to streamline relationships upon signing. The GADC was the GCA's mechanism for establishing an adequate and effective relationship of the NTGs with Queensland and the company. Participants at the time predicted the special-purpose representative body established by the GCA would need time and investment to become a viable, professional entity.<sup>65</sup>

Subsequently, during operations, a Waanyi PBC was formed – and other NTG corporations served as separate eligible bodies. None represented the combined interests outlined in the GCA. Hence the

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<sup>61</sup> A PBC has a designated function under the NTA to hold native title on behalf of determined native title holders. Other bodies, incorporated under the Corporations Act 2001 or under The Corporations (Aboriginal and Torres Strait Islander) Act 2006 (the CATSI Act) or the Aboriginal Councils and Associations Act 1976 (ACA Act) can also receive and hold native title compensation funds.

<sup>62</sup> Trigger et al, 2014: 182.

<sup>63</sup> Sullivan, 1997: 131, 146.

<sup>64</sup> Blowes & Trigger, 1999.

<sup>65</sup> Blowes & Trigger, 1999: 127.

GADC continued its intermediary role. It experienced many of the challenges and criticisms that typically plague similar bodies including alleged nepotism, corruption, inefficiency and lack of transparency. Regardless of the validity of these accusations, it is evident that the entity had periods when it was near-dormant and only functioned to attend meetings and disburse benefit monies. With limited succession planning or turnover of directors, control remained in a small number of hands. Any impression of administrative stability and continuity that contrasts with the flux in company and Queensland is deceptive. It masks a dynamic of cross-cutting and ever-shifting political allegiances among the NTGs. GADC's directors have felt under-resourced and at times overwhelmed by the representation task of consulting and communicating with such a disparate set of NTGs, many without an eligible body to receive their share of funds (as non-compliant bodies were disqualified).<sup>66</sup>

Few of the principles of good governance were demonstrated by this special-purpose representative body, which was established in less than ideal conditions. In terms of relationships, trust between GADC and many segments of the NTG constituency has faltered; the relational aspects of the contract between GADC and other parties to the agreement is severely damaged.<sup>67</sup> With the compensation payments to NTGs due to expire in 2018, the GCA provides that the annual administration amount can be continued to maintain the consultation and communication role. However, given the severe breakdown in relationships, and the reduced likelihood of a common set of interests in a post-production era, this aspect of GCA governance is unlikely to prove useful in the post-production years and the NTGs may choose to assert their disparate interests through other avenues.

Another consequence of invoking the Right to Negotiate provisions of the NTA was the potentially perverse incentive to reach a speedy agreement rather than extend negotiations. The s29 process can impose statutory time limits for reaching agreement before requiring the determination by the NNTT. As well, the concentration of benefits in the years immediately following the 'granting of project rights', and the possibility of some benefits being promptly available, encouraged minimal delays in negotiation. While more negotiation may not have achieved consensus among the disparate groups in the lower Gulf, more comprehensive consultation may have allowed development of planning and decision-making processes with more legitimacy. Time pressures were compounded when the company (RTZ – CRA) announced the sale of the project to Pasminco (subject to the satisfactory conclusion of the Agreement). Uncertainties of the pre-determination situation and the infancy of legislation meant the protracted negotiations were highly publicised and the national and international media coverage had impacts on share prices. The market situation attached further urgency to final negotiations.

Given these incentives to reach a conclusion without a body capable of representing the general interests of the native title parties,<sup>68</sup> the GCA established the GADC with an unenviable brief. This body was charged with doing what had not proved possible during negotiations – consulting inclusively with the rights bearers, facilitating communication between the native title parties and the communities, speaking for others and operating in unfamiliar, formal legal and business situations. The heavy reliance on the newly created and initially meagrely resourced GADC compromised the GCA's

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<sup>66</sup> Martin (2009: 107) observed that, "By 2000 GADC was essentially a hollow shell of an organisation with little capacity to undertake its specified functions and little active support from its nominal constituency."

<sup>67</sup> As evidenced in consultations for Everingham et al, 2013a & 2013b.

<sup>68</sup> As outlined earlier in the report, the GCA countenances the CLC as an alternative body to exercise GADC functions if it achieved support across the NTGs. That condition did not prevail at the time of negotiation and there are potential conflicts with its functions as a Native Title Representative Body under the NTA.

arrangements for ensuring distributional equity with payments directed to appropriate rights holders, and for achieving representation of the diverse native title interests as they were determined.

During negotiations and at times throughout operations, the NTGs have been able to assert demands that required urgent corporate attention using a variety of tactics including delaying strategies, mobilising influential supporters, challenging corporate reputation and physical actions.<sup>69</sup> The most notorious example was the nine-day occupation of the mine camp by disaffected Waanyi Traditional Owners in 2002. The capacity of the NTGs to solicit corporate response in such ways reflected unfolding changes to the legal context faced by Indigenous Australians. Legal recognition of (some) Indigenous land rights in legislation and common law compelled acknowledgement of Indigenous people as stakeholders in mining. It also encouraged maintenance of dynamic relationships between the company, the regional land council, the NTGs and their representative bodies. However the effectiveness of these relationships for all parties has been constrained by a number of factors. The representational and governance capacity of existing and newly formed organisations with a role in GCA governance was underdeveloped because of factors including historical marginalisation and underfunding of Indigenous representative organisations.<sup>70</sup> Such circumstances call for institutional strengthening and capacity building to ensure the ongoing management of agreements and the resilience of the arrangements to changing circumstances. However the GCA did not make strong provision for this. Rather than enshrine structures and processes based on tenuous principles of representation, recent agreements have developed separate agreements with the individual NTGs and then invited participation in an umbrella regional framework deed as an optional extra.<sup>71</sup> Such an approach may have been less vulnerable to inter-group differences.

The GCA governance arrangements were also interpreted inflexibly at times and were only marginally adjusted to changing circumstances as new eligible bodies incorporated and implementation challenges and relationships altered. For instance, Queensland and the company, at the time of the 5-year Review were criticised by the CLCAC on behalf of the Waanyi NTGs for assuming they were required to engage only with GADC as the sole representative of the NTGs rather than engaging directly with those other parties. That review occasioned calls for a specific re-examination of the role and functioning of the GADC and rejection of it operating to exclude more direct relationships between parties.<sup>72</sup>

Rather than providing opportunities for coordination and cooperation among parties, all GCA bodies have, at times, struggled to meet their aims. The GADC in particular has struggled over the life of the agreement. Given that GADC representatives are members of other governance bodies, the effectiveness of these committees as a mechanism for collaboration and coordination of development activities has been impacted. Some members of the Gulf community, see little chance of restoring trust in the GADC, and regard the organisation as not worthy of further investment.<sup>73</sup>

### **3.5 Successive mine owners**

It is not uncommon for the corporate owners of a mining lease to change over the life of an operation. In the case of Century, company ownership changed four times (Box 3). The GCA foresaw potential

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<sup>69</sup> Trebeck, 2007

<sup>70</sup> Trebeck, 2007; Webb, 2016.

<sup>71</sup> For example Rio Tinto's Pilbara Iron Ore agreements <http://www.riotinto.com/australia/pilbara/land-agreements-9619.aspx>

<sup>72</sup> CLCAC, 2003, e.g. page 20.

<sup>73</sup> As expressed during community consultations of fieldwork for Everingham et al 2013b.

changes of ownership. Clause 69 binds all future owners and operators of the mine – and their sub-contractors – to the terms and conditions of the agreement.<sup>74</sup> As the GCA also acknowledged, in some jurisdictions there are legal impediments to binding sub-contractors, though the practice of an assignment clause is widespread.

**Box 3: Corporate ownership of Century**

CRA/Rio Tinto: 1990-97

Pasminco: 1997-2004

Zinifex: 2004-2008

OZ Minerals (a merger of Oxiana and Zinifex): 2008-9

MMG: 2009 – present

Although the agreement transferred to the new companies, changes to ownership impacted the implementation of the GCA on the ground. Differing performance, differing degrees of commitment and different systems and standards influenced agreement implementation by sequential owner/operators. Changes in ownership (which generally corresponded with changes in the economic viability of the mine), meant that the corporate memory of the fraught agreement negotiation period was lost and focus was diverted to acute financial issues. Often, changes in corporate ownership coincided with changes in operational and

management staff. This meant the loss of personal relationships with the Gulf communities, and a loss of focus on GCA activities in the re-establishment period. Community representatives found the changes in ownership difficult to follow and explain to their NTGs, and the uncertainty of changing management approaches caused considerable stress. Inconsistent approaches and ill-explained changes led to perceptions that some individuals or groups were able to manipulate the GCA to suit their own purposes.

Another result was a high level of turnover of company representatives on the Employment and Training and Environment Committees, with the agenda and reporting processes for these committees becoming inconsistent or ill-defined through some transitions. Many GCA activities (e.g. corporation meetings, regular community engagement activities, monitoring and reporting on commitments) were inconsistently implemented over the life of the mine, and this was exacerbated by consistently poor corporate systems for tracking even specifics such as Human Resources data. This constrained transparency and accountability and led to perceptions that the agreement did not reach its potential, despite the acknowledged positive outcomes (see section 1.2).

Moreover, agreement implementation responsibilities that spread across numerous boards and committees and require multi-party collaboration do not sit easily within the traditional 'line management' approach of mining companies without concerted effort and management commitment. The initial agreement was designed to express the centrality of the GCA to Century's operation. Indeed, in the early years, employees reported that knowledge and understanding of the GCA was high within the workforce and management. With changes in ownership, though, the concept of 'mainstreaming' the agreement was lost, and the GCA Unit became a distinct entity in the organisation.

This originated when a new owner asserted the "importance of the GCA, and its complexity" necessitated dedicated management. However, many saw this as "devaluing of the GCA" and positioning the agreement as peripheral instead of embedded as the core business of the whole

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<sup>74</sup> However the extent to which the company is in a position to 'ensure' behaviour of sub-contractors – as undertaken in GCA, Schedule 2 Clauses 73 and 76, and Schedule 4 Clause 62, for example – is questionable.

operation.<sup>75</sup> With reduced visibility within the company, questions were raised about the accountability and transparency of the GCA Unit and it was viewed by some as an enclave of a small number of people that entrenched some unsustainable practices in the interests of placating local communities (e.g. flights for community members; support for Bidunggu<sup>76</sup>). By specifying the establishment of a GCA Unit and the appointment of Community Liaison Officers to regional offices in Doomadgee, Mornington Island and Normanton, the GCA sought to influence the company's internal management systems. However, without strong mentorship and clarity of purpose, the undoubted potential of having capable and extremely well-connected individuals in those roles was an opportunity not fully realised. Vital contextual understanding was confined to a small group rather than permeating the company. People in these roles focussed on employment and training and operated in an ad hoc rather than strategic fashion. They responded to an array of pragmatic and concrete community issues.

In contrast to mine ownership and management, membership of the NTGs remains more stable, as have many of the community representatives on governance bodies. Although this surface impression of stability is deceptive in some ways, it has meant that much GCA knowledge was held within the community and the long-term GCA staff, so the burden of explanation and liaison rested with them.

The GCA's assignment clause smoothed formal transitions to new owners during the years of zinc production. However it was not sufficient to ensure the crucial renewal of the 'spirit' of the GCA after such changes. A further ambiguity emerges in the post-production years about re-activating the GCA if an alternative (but less lucrative) economic use is proposed. While the GCA distinguishes uses that are "deemed to be substantially different from the Century Project Description,"<sup>77</sup> the resilience of the GCA through such ownership transfers has not been tested.

### 3.6 Including 'community' beneficiaries

The GCA is intended to ensure a "significant sharing of benefits and opportunities provided by the Project to the Native Title Groups *and the Communities*"<sup>78</sup> (emphasis added). This was a principle the company strongly advocated during negotiations. Notwithstanding the modesty of the actual Indigenous share of the mine economy that eventuated,<sup>79</sup> the structures and processes the GCA established to distribute benefits speak directly to the principles of inclusiveness, fairness and equity. The broad specification of the 'Gulf Communities' (see Figure 4 in Appendix 3) and inclusion in the GCA of regional traditional owner groups whose Country was not affected enlarges the pool of potential beneficiaries, and potentially bypasses issues related to group membership that plague other agreements. Given the residential mobility, multiple land connections inherited by many Aboriginal people in the lower Gulf, and relationships of marriage, defining an uncontested list of people with native title rights is difficult. Instead, this broader regional agreement has caused contention about the dilution of benefits that accrue to those whose land is impacted by the project.<sup>80</sup>

Distribution of benefits is a fundamental challenge for all mining benefits sharing agreements – including questions of whether benefits should go to Aboriginal people other than those whose native

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<sup>75</sup> e.g. Trebeck, 2007: 552.

<sup>76</sup> The Bidunggu Aboriginal Corporation is an Aboriginal Land Trust that holds former Aboriginal reserve land at Gregory Downs, in the township of Gregory, which was transferred in 1994. The land is also known as Gregory outstation and is held for the benefit of Waanyi Aboriginal people, their ancestors and descendants.

<sup>77</sup> GCA, Schedule 9 Clause 8.

<sup>78</sup> GCA, Introduction 'L' p. 6.

<sup>79</sup> Scambary, 2009: 173.

<sup>80</sup> CLCAC, 2004; Martin, 2003; Scambary, 2013.

title rights are impacted. Different solutions will suit different contexts and there are compelling arguments for both aggregating benefits to the region or registered native title rights holders being the sole beneficiaries. There are also inevitable pitfalls associated with each option. Some of these were revealed in the GCA experience.

The GCA could not recognise the full diversity of the Aboriginal population of the region, but it did recognise two key sets of Indigenous interests. However these two groups of intended Indigenous beneficiaries were vaguely defined. On the one hand, are those designated the 'native title groups'. They assert native title rights in the land (discussed in section 3.1), and some (but not all) of them live on or near project lands. Elaborate arrangements were made to ensure compensation and benefits were paid to the appropriate rights holders in the identified NTGs wherever they might live (see particularly section 3.1, and also 3.2 and 3.3). On the other hand, there was the broader population residing in the various communities of the lower Gulf but without native title interests connected to project lands. They are identified in the GCA as the 'Communities' and the GCA recognised that they should also receive a portion of the benefits. Consequently benefits and opportunities are directed to Aboriginal residents of designated lower Gulf communities, including Doomadgee and Mornington Island. However, these are not consistently applied throughout the GCA and, in particular the inclusion of long-term residents of the region who are not Indigenous as eligible to receive some benefits (e.g. employment and training) has been contentious.<sup>81</sup> These categories are also 'blind' to a fundamental division within the NTGs and the communities between those supporting and opposing mining on the basis of differing ideals for Country.<sup>82</sup>

The 300km extent of the project from the large open-cut mine pit, along the pipeline to the port at Karumba, required the company to gain acceptance of a large number of Aboriginal people over a wide area. This approach also suited Aboriginal people in the region without native title connection to the specific project lands, but who were potentially impacted by the project. One result was that regional groups who were not parties to the agreement have benefited (for example the Gangalidda people receiving title to Pendine and Konka Stations<sup>83</sup>). However, contextual factors also worked against the intention to broaden the intended beneficiaries. Some Indigenous people of the lower Gulf, both of affected NTGs and others, were precluded from participating in employment, training or business development opportunities because of chronic health issues, alcohol and drug use, limited skills and education or other manifestations of entrenched Indigenous disadvantage. Cultural factors also precluded participation. For example, rather than holding training locally, the training centre utilised (MYUMA) is located on the Country of the Kalkadoon and Indjalandji Peoples who run the training. Several Doomadgee and Mornington Island People cannot attend training at this location. Female participation was further limited because some families within the communities did not allow their daughters to attend the 12 week residential training at MYUMA with mixed male and female participants.

The GCA governance structures also failed to provide a strategic response to issues of distributional justice. The main structural arrangement for recognising and incorporating the broader community interests was through Schedules 2 and 6 (economic participation) and Schedules 3 and 5 (land, environment and pastoral leases). For instance, the 'salt-water people' of the Wellesley Islands are specified in respect of environmental management in recognition of the impacts of the port. Communities are also specifically represented in other bodies – usually facilitated by the company. For example, the CE&TC includes four representatives facilitated by GADC – at least one required to

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<sup>81</sup> Everingham et al, 2013a.

<sup>82</sup> Trigger, 1997: 118.

<sup>83</sup> Scambary, 2013: 206.

be a NTG rep – and another four community representatives facilitated by MMG. ADBT has four community representatives facilitated by MMG. Hence there was representation of the signatory NTGs in the committees and boards and also of the broader regional community most of whom are related to NTG members. In this way, the GCA attempted “to capture the diversity of the particular constituency in the board structure itself.”<sup>84</sup> As outlined earlier, there were not strong processes to support these structures in their representation functions.

The implementation of the local employment policy illustrates a key area of ambiguity and lack of clarity in the GCA.<sup>85</sup> There has always been intense interest in the specific numbers of NTG employees and trainees with considerable dissatisfaction about the distribution of jobs and training places. For example Normanton and Burketown, with more year 12 graduates, consistently had more trainees than Doomadgee or Mornington Island. This is predictable since a year 12 level of education is required for Century trainees. Similarly, such prerequisites meant that Aboriginal people not from the lower Gulf communities or NTGs benefitted. Moreover, GCA governance assumed the defined agreement beneficiaries would have collective interests which overlooked the powerful influence of Indigenous conceptions of relatedness and allegiance. In hindsight, the challenges of representation in a fractured social context (see section 3.2) were exacerbated by inclusion of the even more disparate ‘Communities’.

### **3.7 A whole-of-project-life agreement**

The GCA is an agreement negotiated at a particular point in time that had inter-generational implications and was expected to survive many transitions – only a few of which were anticipated in the agreement. For instance, the assignment clause (Clause 69 - see section 3.5) envisaged a transfer of ownership; and the extended project rights clause (Schedule 12) anticipated further exploration success. The economic life of the mine was predicted, with a fair degree of accuracy, to be 15-20 years, and the subsequent period of active and passive rehabilitation until lease relinquishment and end of the project life may be double that. Other than these points in the mine’s life-cycle, consideration of the agreement life poses considerable uncertainty.

The GCA has been implemented through a range of conditions including different phases in the mine life cycle, changing government policies, varying community fortunes and market fluctuations. Some of the relations and context prevailing through the extended period of negotiation in the 1990s that shaped the agreement have been described above. The construction period has been described by one employee at the time as “hectic ... Everything had to be done at 190 mph.” One result of the haste was that the structures and processes for GCA implementation were not systematically established. Implementation began for instance with recruitment. There were ad hoc processes to fill an immediate demand for 1000 people – about 200 of them Indigenous. This was before companies, committees and the final NTG eligible bodies were established and before the CE&TC had convened for strategic planning. Opportunities to further other GCA goals such as local business development were missed before the ADBT began operating.

There was little capacity to invest in the establishment of the GCA governance structures. ATSIC dedicated personnel to this task during 1997-8. When GADC was first established it was based in Mt Isa which distanced it from the control of many NTG members. The eligible bodies, and pastoral companies were also formed early and the ADBT and committees followed. However, follow-through was limited and the Century Liaison Advisory Committee (CLAC) for instance was formed, elected and met only once in the first ten years of the GCA. A common challenge with managing new mining

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<sup>84</sup> Martin, 2009: 120-121.

<sup>85</sup> The Right Mind, 2008: 19.

projects is that little is done in advance of approvals for fear of wasting investments. Once construction begins there is no time for the valuable advance preparation that would lead to smooth and effective management (including agreement implementation). The fact that the GCA did not receive priority attention in the construction years and early operations no doubt contributed to the dissatisfaction underlying the 2002 Waanyi sit-in at the camp. The main trigger issue was disillusionment over employment opportunities for NTG members at the mine. Other sources of discontent included dissatisfaction with the Queensland Government and its involvement in the GCA, difficulties accessing agreement payments, cultural sensitivities about recent exposure of a red ochre deposit in the pit, unsatisfactory arrangements for storing cultural heritage items disturbed by mining, and perceived inequities among the NTGs.

Further changes during the production years include several periods when business pressures resulted in significant cost-cutting that had to be balanced against GCA commitments. The most dramatic was the transition accompanying the end of production – or what the agreement calls the end of Economic Life. The GCA envisages an ‘economic life’ of 20 years, though production actually ceased 18 years after agreement signing and after 16 years of mining when on average one shipload of concentrate per week was despatched from Karumba. Although the GCA provided for extended project rights in the event that further economic resources were identified, none of the growth options explored to date have proved viable. After three to four years of active closure including bulk earthworks, during which plant will be maintained, there is a possibility that the site will be decommissioned and passive closure will comprise monitoring of rehabilitation and ‘caring for Country’. The post-production period of rehabilitation until end of project life could potentially extend for 30 years during which time the GCA (though not all of its provisions) remains in effect. Modern agreements recognise the value in regular formal reviews with parties considering renegotiation of the agreement if the context has changed dramatically. The GCA provisions for reviews did not result in such adjustments as discussed in section 4.8. In this way, it was not a ‘living’ agreement and it had limited inherent flexibility.

In only a few respects were the evolving circumstances, needs and obligations anticipated. Schedule 11 Clause 2 envisages many of the governance arrangements ceasing at the end of the mine’s ‘economic life’<sup>86</sup> (including Schedule 2, Schedule 6 and Schedule 10). The arrangements that continue to end of project life (i.e. until lease relinquishment) include the Century Environment Committee (CEC); and the annual payment to GADC for administrative and consultation purposes. A small number of arrangements were specified to have a life beyond relinquishment (e.g. those relating to the pastoral holding companies), and some governance bodies can persist indefinitely if self-sustaining without Century support – ADBT, LHRPHC and GADC. The Agreement also envisaged NTGs potentially deciding to invest some of their benefits for the longer term.<sup>87</sup> It allowed for NTGs to delegate such investment initiatives to the GADC. However, this option was not pursued.

It is a common criticism of mining benefits sharing agreements that inadequate attention is paid to the implementation and monitoring stages.<sup>88</sup> Even more neglected is the inevitable issue of mine closure. Century, as a mine operated under the terms of a contemporary agreement, provides a valuable opportunity to reflect on ways to provide for a smooth transition to post-production years

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<sup>86</sup> This is defined as, “When CZL permanently stops shipping concentrate derived from ore that is mined pursuant to the mining leases granted in relation to the Mine Site” (GCA, Schedule 12).

<sup>87</sup> It says, “It is intended that the consultant [establishing GADC] shall raise for consideration by the members of the Native Title Groups whether to require that an agreed proportion of distributable funds will be invested to preserve the capital and provide an income stream beyond the End of the Economic Life of the Project” (GCA, Schedule 7 clause 21).

<sup>88</sup> e.g. Martin, 2009; O’Faircheallaigh, 2002.



and consider the longer-term. Like most mining benefits sharing agreements, the GCA concentrates on arrangements for the construction and production years but gives little explicit attention to the changing circumstances at various stages and specifically once production ends.

### **3.8 Conclusions about GCA governance**

The preceding sections have reflected on key features of GCA governance and the opportunities and challenges they posed during the negotiation, implementation and transition to closure stages. The agreement delivered a degree of legal certainty (though not without some ambiguities and contrasting interpretations). It facilitated unimpeded mining for 16 years with fluctuations in production and profitability being a function of weather, international markets and other external factors rather than of the local Aboriginal community interrupting activities (though the possibility for this was demonstrated on at least one occasion). It also facilitated regular annual compensation payments to the NTGs for 20 years (despite providing for suspension of these under certain circumstances). Each of these achievements can be qualified in some respects and there are certainly debates about the lasting legacy of the mine for the Aboriginal people of the lower Gulf. From the GCA experience it is clear that detailed attention to agreement governance is warranted.

#### **3.8.1 Alignment with principles of legitimacy and effectiveness**

The structures and processes established to manage the GCA were predicated on broadly accepted principles of good governance that expect agreement bodies and their processes to have legitimacy in the eyes of their constituency and partners and to conduct their activities effectively. There are significant advantages to agreements being negotiated between, implemented and monitored by, organisations that:

- have earned and retained trust and support
- are able to foster inclusive participation
- work to achieve consensus about a strategic vision
- represent a diversity of interests
- have respected processes for making transparent, fair and equitable decisions
- are accountable to their constituency and other parties.

The assumption is that such bodies can engage strategically with other parties to the agreement and with governments and regional organisations. Unfortunately, as shown above, key GCA bodies lacked legitimacy, and there was disappointing progress towards open, trusting and respectful institutional relationships between parties. This was partly a result of issues of capacity and resourcing and of the highly politicised context in the lower Gulf as discussed in sections 3.8.2 and 3.8.3.

The GCA experience highlights the real challenges in determining counterpart organisations as representatives of the native title parties. There are limited options for working with established legitimate bodies rather than creating new ones. There is a long-term benefit in investing in developing the legitimacy and vision of representative organisations. This will be a function of both structural arrangements that meet constituents' expectations about representation and also sound and explicit processes for operating in an inclusive and consultative manner, making transparent, fair and equitable decisions; and communicating openly and being accountable to their constituency and other parties. In the absence of such processes, the legitimacy of some GCA bodies was quickly undermined.

The structures and agreement bodies also need to demonstrate their effectiveness by having stable, coordinated, efficient and legally compliant administrative processes. They can do this by adopting good policies and procedures to guide decision-making and implementation. In the case of the parties

to the GCA and the bodies assigned a role in implementing the GCA, the agreement did little to ensure effective structures and processes. For example, the agreement apparently foresaw smooth transitions or minimal change rather than the considerable flux and shifting allegiances within all the parties that characterised the region. While providing for election of new directors for the boards of GADC and ADBT, there is no requirement for change and no encouragement of succession and renewal by measures such as alternates and junior directors.<sup>89</sup> The GCA included requirements that the GADC must consult with NTGs about certain decisions, and these are enshrined in the GADC's articles of association, but the GCA was not clear about *how* inclusive consultation was to occur.

While being overly-prescriptive is not desirable, some guidance around communication and consultation mechanisms can be provided in agreements. Partly as a result of the vague procedural requirements, some GCA entities have been subject to criticism as ineffective and even accusations of impropriety have occurred at times. Another misalignment, that probably explains why many of the GCA bodies struggled to maintain interest and attendance and to function effectively, was the reliance on formal meetings for community consultation and collective decision-making. Sophisticated presentations of key problems for solution, and framing of decision options in technocratic ways invites self-interested and opportunistic responses rather than a sense of ownership. Similarly, the complexity of the GCA has not necessarily engendered broad 'ownership' of the agreement.

Entities such as LHRPHC and ADBT seemed to provide some safeguards for effective administration and means to develop these over time. These included having independent directors to provide mentoring, skills transfer and external oversight. Long-standing examples of dissatisfaction with the effectiveness of governance arrangements have related to the Gulf Area Community Social Development Trust (GACSDT) and to some of the eligible bodies which were unable to maintain compliance.

Most agreements provide for some type of coordinating or management committee to oversee implementation. For the GCA, the CLAC was to perform this role. It was structured to involve all parties, and have legitimacy but, for many reasons, proved a generally ineffective committee. As an artificially created body with ill-defined responsibilities it added complexity without having clear performance measures or reporting requirements. Nor did it provide a forum for continual dialogue among agreement parties about satisfactory levels and forms of transparency and accountability. These requirements change over the life of a project and cannot be rigidly defined at the outset.

The GCA did not adequately ensure that the inclusion of Queensland in the GCA enhanced efficiencies and effectiveness of the bodies it participated in. As well, it needed to contribute to long-term, strategic outcomes and facilitate coordinated and effective operation by its modelling and mentoring.

### **3.8.2 Capacity and resourcing**

The design of the structures and organisations established by the GCA strongly influenced their performance capacity and the relationships established, which in turn affected the benefits, achievements and outcomes of the GCA. The complexity of governance tasks as designed was not proportionate to the resources provided and the capacity and experience available. This was particularly evident in respect of the GADC which was assigned the difficult task of being the agent and representative of the NTGs. There was little governance training provided for directors and inadequate resources in the agreement for the governance bodies to engage with their constituents. Resources are needed to ensure that information will flow out to constituents and enable them to have input into decision-making. Century tried to fill this gap occasionally. For example it funded a

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<sup>89</sup> Scambary, 2013.

GADC road trip of Gulf communities to consult the NTGs prior to an AGM. But this was ad hoc and beyond the provisions of the GCA. The CLAC and other entities established by the GCA would have benefitted from early and ongoing investment in capacity building and training on aspects such as the role of representatives, monitoring, policy development, participatory strategic planning and dispute resolution.

GCA provisions did facilitate some areas of performance – e.g. for employment and training. It seems that in the CE&TC common aspirations and commitment of the parties were evident and the GCA expressed some clear roles. This committee harnessed key capacities around human resources management and education and training held by the company and Queensland and was able to leverage resources of various parties. However there were limitations to the amount of capacity building and skills transfer within the committee. To a significant extent the momentum for the committee had to come from company management and the Human Resources department. For instance the committee’s role in preparing the annual employment and training plan and monitoring its implementation was largely reliant on reporting from the company, Queensland and contractors. This reporting suffered from a lack of systematic and reliable record keeping, that is, from limited capacity of the management systems. Another key aspect of the resourcing of these undertakings related to the placement of regional Community Liaison Officers in three key communities. However, the coordination and direction of some of the CLOs activities faltered at times and the positions were discontinued in the final years of production. Similarly, co-monitoring was insufficiently resourced.

One future-focussed provision of the GCA is evident in a vision of training serving a wider purpose and contributing to the post-production period. In this respect the GCA proved effective and the investments of the company in the final years of production continued to support apprenticeships and traineeships. These demonstrated a strategic approach – endorsed by the CE&TC – of preparing trainees for community employment rather than for jobs in mining. Performance in the employment and training area benefitted from some specific targets and requirements for systems as well as from harnessing available capacity and resources.

### **3.8.3 Suitability to context**

Another set of issues that shaped the design of the GCA and influenced the various phases of implementation is the dynamic social, political, economic and cultural context. The governance structures and processes established in the GCA did not reveal a deep understanding of the socio-political context neither at the time of negotiating nor throughout the years since. Some examples of the context of the GCA have been highlighted above as impacting effective governance. They include the regional legacy of disadvantage, and factionalised socio-political relationships. For instance, the well-documented historical, geographical and economic experience of marginalisation in the lower Gulf has resulted in low relative educational attainment, skills and capacities and high levels of welfare dependency and drug and alcohol use. This is not fertile territory for introducing demanding governance responsibilities without support measures. These contextual challenges reinforce the value of building strong support and capacity building into the agreement. The GCA provides lessons for agreement governance in areas with a poor history of human capacity development, administrative experience and economic development. In such areas, identification of clear functions and governance roles and structures – whether for volunteers or staff – and the specification of good governance processes must be supported by capacity development.

### **3.8.4 Summary**

The GCA experience highlights that to design and build robust agreement structures and processes requires the mutually reinforcing elements of a solid understanding of the community context, strong

and trusting relationships between parties, adequate resourcing and capacity, and adherence to principles of legitimacy and effectiveness.

In sum, it is evident that selected approaches adopted in the GCA had both potential advantages and possible disadvantages from the perspective of the developer and Indigenous groups. The design of the structures and organisations established by the GCA and the processes they adopted strongly influenced their performance and the relationships established. This in turn affected the benefits, achievements and outcomes of the GCA. Visionary ideas and idealistic innovations shaped the GCA. However some of these posed implementation challenges and compromised the outcomes.

In hindsight, the heavy representational emphasis of the GCA governance structures was ill-suited to communities with dispersed, factionalised and diverse interests. There was a misplaced expectation that committees and boards could act as proxies for the relevant communities or social groupings, without any underlying process or methodology for engaging with the people of the lower Gulf. This proved particularly challenging for GADC and the CLAC. Two other committees – CE&TC and CEC – reportedly had periods of more effective functioning. They had more concrete and clearly defined purposes close to the operational needs of the company for a skilled workforce and compliance with environmental management conditions. However they, too, struggled to provide genuine opportunities for active, let alone proactive, participation and involvement of beneficiaries in planning and decision-making. There are certainly dangers of appearing to ‘play people off’ against each other in divided communities if discussions are held without including all parties. Nevertheless, more attention could have been directed to a range of effective means of communication and two-way information flow including encouraging sound leadership, more informal and small-group consultation, participatory planning and respectful interactions.

Another feature that proved difficult to manage was the company’s insistence on a regional approach. This was understandable in the initial years of the native title era while processes and principles for establishing native title rights were still evolving. It also suited some aspects of the context with many interrelationships and overlaps between NTGs and other community members. Besides, the intention of building cohesion and being inclusive was admirable. However, the intention was not achieved and it instead exacerbated some divisions during the years of operation. Although this undoubtedly resulted in a range of benefits flowing to more of the Indigenous population of the lower Gulf, there were associated governance challenges that meant some of the envisaged regional outcomes were not achieved. The challenges continue with little capacity in the GCA to now treat groups differently on the basis of the change that has occurred in the balance of impacts on the diverse interests of various NTGs and local Aboriginal people.

A third legacy from the agreement negotiations that was enshrined into the GCA and limited the achievement of outcomes was the traditional owners’ assertion that their self-determination and autonomy could only be served by directing untied funding to their separate eligible bodies. Many of these had poor governance and lacked the capacity and scale to design and deliver projects for wider community benefit. The community development outcomes of the GCA’s compensation funds over almost 20 years therefore compare unfavourably with agreements where significant funds have been invested in community development projects that have widespread and inter-generational benefit. These typically operate with a community development trust structure – usually with independent or expert involvement – for at least part of the compensation monies. When carefully designed, trusts can build local capacity rather than usurping control. For example, the benefits channelled into the trust (ADBT) and into transitioning the grazing enterprise (LHRPHC) to Traditional Owners illustrate an alternative situation where Aboriginal control of significant assets has had a lasting legacy.

Table 1 provides examples of comparative advantages of alternatives in respect of some key strategic choices in formulating the GCA or any agreement. Although the views presented were expressed by some parties, it should be noted that there was not a unified position among the NTGs about the choices. Moreover, the discussion in section 3 has highlighted that there are caveats in respect of each of these points and risks associated with the various alternatives as well. In practice, the anticipated advantage was not always realised.

**Table 1: Potential advantages of agreement alternatives from dual perspectives**

Strategic choice	Century Zinc perspective	Native title group perspective
Including government	Plays a funding, coordination and support role in some respects. Gives strong endorsement of the project and industry.	Broadens the scope of agreement benefits beyond company 'core business.'
Government remaining at arms-length to the agreement	Reduces reputational risk to the company where government implementation is disputed. Less vulnerability to waning interest and support with political changes.	Protects against government 'cost-shifting' responsibility for citizenship entitlements to companies.
Including multiple native title groups	Broader scope of 'future acts'. Reduces 'transaction costs' in dealing with multiple groups separately and having many implementation groups. Removes obstacles to the project by ensuring land access to whole site.	Potential for greater 'combined' bargaining power. Potential 'economies of scale' in representing interests and administering benefits. Transparent benefits to all NTGs.
Separate agreements with each native title group	Reduces 'paralysis' by disputes between groups or lack of collective agreement. Reduces expense of bringing large, disparate groups together. Allows flexible bilateral arrangements about varied impacts.	Greater autonomy for separate interest groups not bound by collective decisions. Focuses implementation involvement on matters of direct relevance.
Broad aspirations	Allows genuine development partner relationships to develop with an outcomes focus. Avoids 'tick-box', compliance culture.	Not limited to narrow specifics of what will work now but can take a longer term, values-based view.
Specific targets	Easier monitoring and compliance reporting.	Easier for holding parties to account.
Providing for changes of ownership	Full conditions of sale are clear in advance.	Gives certainty that commitments will be honoured.
Re-negotiating with successive owners (an unlikely scenario)	May be easier to sell without 'encumbrances' and new owners can negotiate on their own terms. Ability to scale agreement to align to nature of activities	Can develop shared understandings anew. May be a chance to adjust benefits.
Confining benefits to NTGs	Clarity about established native title holding bodies to deal through.	Rights-holders are clearly defined.

	More defined group of beneficiaries to consider and, in post-determination era, prospects of a single legal entity to relate to.	Stronger recognition of rights holders and the requirement that they be consulted in advance.
Including broader regional community beneficiaries	Can target whole local community without special rights considerations. Opportunity for greater equity and inclusion of all local Indigenous people rather than selecting specific individuals or families – avoids ‘buying in’ to local politics. Suits regions that have experienced population dislocation and with multiple, overlapping NTG interests.	More inclusive and less likely to create division between Indigenous residents with native title and non-native title status. May ‘dilute’ benefits flowing specifically to those with rights associated with land. Recognises all local residents are impacted and can address shared problems.
Fixed term for the agreement	Gives certainty about extent of obligations. Greater freedom to change plans in response to business drivers.	Allows for renegotiation after an agreed period on the basis of greater knowledge about future possible activities on their land.
‘Whole of project life’ agreement	Allows flexibility to adjust project life as ore-body is better characterised or if new reserves are found.	Gives certainty of benefits throughout whole period of alienation from land.
Benefits being directed to trusts with robust governance structures	Allows for company or independent directors to influence management and allocation of funds and facilitate capacity-building of boards. Protects company from reputational risk associated with disbursement of funds.	With clear criteria for disbursement, can direct payments to broad community development purposes and access mentoring and expertise. Potential for accumulation of capital and intergenerational benefits. Reduces risk of capture by small number of powerful personalities.
Benefits being directed to autonomous eligible bodies	Can reduce company responsibility for supporting and developing capacity of those administering benefits.	Ensures Aboriginal control of funds and reduces perceptions of paternalism. Allows for more benefits to go to individuals or families for more immediate purposes.
Simple governance structures	Reduces (though doesn’t eliminate) transaction costs.	Easier to navigate and fewer demands on a small pool of dedicated people.
Complex governance structures	Prevents ‘all eggs being in one basket’ and spreads risks.	Provides opportunity for more people to participate in governance and gain experience.

## 4 Looking forward: the post-production years

Some elements of the GCA were forward looking and contemplated a post-mining future. Parties were also conscious of the need for the agreement to function once production ceased. It is notable that already at the time of the first 5-year review, the Waanyi people stressed the imperative to use the review “to set in place plans for the post-mining period.”<sup>90</sup>

Now that production has ended, and with some of the governance arrangements expired, it is pertinent to consider how the GCA provides for governing relations between NTGs and the company in the post-mining period (i.e. up until lease relinquishment). This section raises a number of questions in regard to the GCA’s continued salience through the post-production years.

### 4.1 Mutual Benefit

The GCA aimed to define considerations on which community support for the Century project was based and the terms of that support. Throughout the production years, a crude measure of the benefits for Indigenous people shows they have been effectively split with three streams of cash plus incidentals:

- a. Annual compensation to land rights holders – through GADC and the eligible bodies (last payment due in late 2018)
- b. Business Development – through ADBT (last annual payment to be January 2018)
- c. Nominated investment areas – some once-off and others (notably training) more on-going (but none specified for post-production years)
- d. ‘In-kind’ benefits: notably jobs, land, and supply chain contracts but also minor, ad hoc but valued, benefits that were not specifically defined in the GCA such as free or subsidised flights, assistance with generator power at Bidunggu, and sponsorship of community events.

The continuing relevance of the GCA after 2018 in respect of mutual benefits is questionable. At this stage, the company no longer gets economic returns, and benefit streams to NTGs will soon end. This raises a question of whether the GCA supports the resolution of outstanding matters. It is also pertinent to consider how the GCA provides an enduring legacy and a transition to financial independence of various groups that have been involved in governance of the GCA.

Some bodies created by the GCA, like LHRPHC and ADBT, have no specified end-point. LHRPHC and ADBT are now self-sustaining, autonomous entities though the mining company continues to play a role in these companies. The pastoral holding company, for example, is governed by a shareholders’ agreement, Constitution and the Corporations Act. The relationship established is only with the Waanyi NTG. Although this is a single NTG, it is factionalised and intra-community rivalries still prevail. ADBT has worked for some years on a self-sufficiency strategy, recently involving entrepreneurial ventures. It is governed by its own Trust Deed as well as the GCA. When payments end in 2018, it will have sufficient reserves and investments to continue operating. The GADC on the other hand, will receive the final annual payment for distribution to eligible bodies in the first quarter of 2018 at which time most of its assigned functions are fulfilled. Under the terms of the GCA, the more modest annual administrative contributions are available till the end of project life. It is worth noting that the GCA empowers the NTGs to nominate an alternative representative body and each to nominate an eligible body to receive its monies direct from the mining company.<sup>91</sup> The GCA also signals that an NTG may

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<sup>90</sup> CLCAC, 2003: 1.

<sup>91</sup> GCA, Schedule 8 Clause 6.



opt to be represented by and have funds channelled through CLCAC rather than GADC.<sup>92</sup> Obviously alternative arrangements are possible and were envisaged in the agreement.

Other commitments of the GCA were finite and will not continue now production has ended. This applies to the CE&TC, for instance, and its employment and training commitments under Schedule 2. Similarly Queensland commitments about roads and men's business support had prescribed implementation dates. In contrast, the commitments under Schedule 3, Environment, and Schedule 4, Heritage and sites of cultural significance, remain in effect until the end of Project Life. While many obligations under Schedule 4 may reduce without site surveys for clearances for example, obligations under Schedule 3 remain a prime focus in the years of active and passive rehabilitation and closure. Where GCA undertakings have not yet eventuated, as in the case of Queensland's commitment to women's birthing centres or the mining company's undertaking on a Waanyi Cultural Centre, one option has been for the relevant NTGs to make alternative use of the funds and sometimes supplement them separately.<sup>93</sup> Such measures have required some initiative on behalf of the parties as the GCA itself is silent on how to cope with 'unfinished business' and how to flexibly adjust undertakings to new circumstances post production. Another challenging situation has arisen with respect to 'incidental' and 'in-kind' benefits that were never direct obligations under the GCA but were additional contributions by the mining company that fostered some reliance. Examples include support for infrastructure and services (including emergency services, and power supplies at Bidunggu outstation for instance).

## **4.2 Shared objectives**

Much of the GCA no longer expresses objectives shared by all parties. The commonality of interests focussed around various packages of land all being part of the footprint of this one major project has dispersed now that it is smaller scale and no longer productive. For example, the rationale for the State's continued involvement as a party is not strong. The various NTGs are arguably even more disparate in their priorities for post-mining opportunities, which could potentially be implemented more directly through bilateral agreements. The disparate interests within NTGs, especially Waanyi, remain having reduced little during the past 20 years. Hence there is a lack of clarity about the priorities and objectives of all parties given the changes post-production.

## **4.3 Structuring institutional relationships**

Ideally agreements forge durable relationships and working partnerships that will serve throughout the life-of-mine and life-of-agreement. However the institutional landscape in the lower Gulf has changed, for instance with the formation of the Waanyi PBC and Waanyi Aboriginal Corporation. As well, more is now known about the comparative organisational robustness of GCA-specific bodies and the structured demise of others. There were prescient early observations about these bodies<sup>94</sup> given the lack of continuity between NTG representatives from the negotiation to the implementation processes. This seems likely to be exacerbated with the current transition. It is perhaps time to reconsider some structures – notably the GADC. Rather than continuing with the formal arrangements of the GCA, a possibility is to return to a situation where the company establishes direct face-to-face communications with Aboriginal people, and embraces "an effective style of informal and robust sociability."<sup>95</sup> Trusting relationships with existing strong and well-supported Indigenous organisations

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<sup>92</sup> GCA, Schedule 8 Clause 26.

<sup>93</sup> For example, the funding provided under the GCA for the establishment of the cultural centre is built upon in the 10 Mile Waterhole Agreement, 2011 (amended 2014).

<sup>94</sup> Blowes & Trigger, 1999: 127.

<sup>95</sup> Blowes & Trigger, 1999: 111.



could provide a sound basis for future collaboration and negotiation. The challenge is to establish this on a whole-of-region basis now that production is finished since it posed intractable problems during production. Inter-party relationships to be maintained henceforth should be based on maintaining viable, effective and legitimate structures and processes for any necessary collaborative action.

#### **4.4 Expressing measurable outcomes**

The GCA espoused outcomes for local employability and employment, local contracting, community involvement in operational planning, cultural heritage protection, community welfare and environmental co-management. The arrangements clearly envisaged these being substantially attained during the mine's economic life – even in the case of training where a clear transition was intended towards the end of production to training for non-mining jobs with salience in the communities.

Many of the commitments recorded in the GCA lacked specific measurable outcomes. This proved a challenge during implementation. Contemporary agreement practice seeks to be clear, but not rigid about performance measures so as to allow flexibility in implementation and maximise opportunities in agreed areas. Where there were defined outputs and activities in the GCA, for example with respect to annual spending on training, most have become redundant or lost relevance post-production. Clear responsibilities for monitoring and evaluation of rehabilitation and caring for Country sit with the CEC, though the rationale for maintaining an unchanged composition of that group has been questioned in section 3.2. Other than that it is not clear that the GCA envisaged the project life encompassing decades post-mining with little potential to continue delivering benefits. Arguably, the post-production years are a time for innovation. Environmental and cultural heritage aspirations for example could be served by exploring a range of options including progressive certification and relinquishment and alternative uses for site plant and infrastructure that may be unduly constrained by the terms of the GCA and legal requirements.

#### **4.5 Timeframes and resourcing**

As has been argued above, the urgency of final agreement negotiations so as to gain approval and commence construction, impacted on the GCA. It did not provide realistic timeframes and resourcing for governance arrangements to be put in place – notably its provisions for the GADC.<sup>96</sup> The GCA did anticipate the operational period in some respects. However, a fairly narrow range of future opportunities and challenges was canvassed.

For instance benefit payments were set to include indexing of a pre-determined annual amount. This had the advantage for the NTGs of giving them guaranteed payments at regular times that were not subject to commodity price fluctuations or varying profitability of the company. The indexing assured some adjustment with other costs. As is becoming the norm in contemporary mining agreements, payments were initially based on the estimated value of production and Net Present Value (NPV). They were perceived by the NTGs as compensation for 'value' forsaken, but also as sharing in the benefits of the resources taken from their land.<sup>97</sup> This quantum, though suited to the 'Big Zinc' years of the mine, is not a realistic amount for all potential productive uses of the land and infrastructure. The potential for the agreement to be re-activated if future economic activity on the site calls for extended mining project rights could constrain future options for all parties. This is just one example of how the GCA's contemplation of time periods in the project life, what would happen in each, and what

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<sup>96</sup> Limerick, 2012; Martin, 2009; Webb, 2016.

<sup>97</sup> Trigger, 1997.

resource flows would be appropriate in each did not fully engage with an extended period of rehabilitation, or post-mining uses, prior to lease relinquishment.

One of the ill-defined points in the GCA related to the longevity of the agreement itself and of various commitments within it. As well, mining projects inevitably have a finite lifespan but there are inherent difficulties in projecting the duration of various stages of the project lifecycle (exploration, construction, operation, rehabilitation and closure). One result is that, despite the agreement detailing which clauses remain in effect until end of 'economic life', three years later, end of 'project life' and indefinitely, the specified timeframes are subject to interpretation. In particular, the period between these two 'end' points is only vaguely portrayed in the GCA. With the exception of CEC and some limited administrative resources available to the GADC, governance arrangements are not resourced during this time.

#### **4.6 Maintaining accountabilities**

Continued relevance of the GCA would also be demonstrated if it served to maintain clear accountabilities for delivering agreement commitments of various parties and business functions during the post-production years. It would equally be expected to outline clear corresponding accountabilities on the part of the community representative institutions for this period. The lines of accountability between the parties and the various bodies involved in GCA governance (as per Fig 2) were unclear during implementation. The GCA provisions in these respects become even more obscure in the post-production period of the agreement.

#### **4.7 Enforceability and dispute resolution mechanisms**

The GCA was realistic in planning for disputes, unforeseen delays and other foreseeable and unforeseeable obstacles to carrying out activities. However, the processes outlined for dealing with such situations have been criticised as escalating to formal adjudication and litigation too readily. Century experienced one major dispute that did not use grievance processes defined in the GCA. This was the 'sit-in' at the camp canteen in 2002 triggered by the 5-year review. The agreement is largely silent on penalties and means to enforce performance. Environmental management is the main area where dispute resolution measures are spelled out. There would be enduring value of the GCA if it provided effective, mutually agreed means of enforcement and dispute resolution. However, such mechanisms have not been strengthened in GCA governance over the years. Most disputes will doubtless continue to be resolved outside of the formal GCA arrangements. Moreover, the Century Liaison Advisory Committee as the body which represented all parties and that had liaison, communication and coordination responsibilities, is now defunct. That removes one arena for negotiation and conciliation. Recent attempts to form GCA 'Close Out Groups' of various kinds incorporating all parties to the agreement have not gained traction. A further challenge is that disputes between and within NTGs are frequent and critical, but not resolved by GCA arrangements. There is little understanding of this area and research about possible ways of resolving such disputes would benefit all native title scenarios.

#### **4.8 Provision for flexibility and adaptive management**

More than ever, given the profound changes involved in the transition since production ended, there is a need for flexibility in the GCA and workable arrangements for modifying the agreement where there are defined and agreed purposes for any amendments. The inclusion of Clause 63 providing for periodic reviews recognised that the duration of the agreement and its complexity warranted regular opportunities for reflection and adjustment. Significantly, the clause was not couched as a monitoring exercise that would identify shortfalls but rather as an opportunity to suggest improvements. However there is little evidence of workable remedial action and adjustments being agreed after any of the

reviews. Indeed the reviews were not embraced by the NTGs and Communities as a worthwhile exercise. Instead of fostering consensus about remedial action they exacerbated differences of perspectives. This is particularly unfortunate since the GCA specifically excluded disputes arising from reviews from the formal dispute resolution process, presumably envisaging a period of robust debate and negotiation should proceed unfettered in the aftermath of reviews.<sup>98</sup> Consequently, all parties continued to labour under arrangements identified as dysfunctional. Greater scope to adjust the governance of the GCA would have been possible if less detail about the governance arrangements had been put in the agreement. The GCA itself could have documented the benefits. Governance arrangements could be detailed in supporting “management plans” so changes could be made more readily over time.

There is provision for the GCA to be amended.<sup>99</sup> Such changes need to be in writing and signed by all parties. However, where adjustments or supplementary arrangements have been made, it is notable that these have occurred outside the GCA rather than as part of the formal agreement. For example, extra payments to GADC for administrative functions after the sit-in were not written in to the GCA. There is no evidence of negotiation of amendments having occurred on any issue leading to the inference that the task of negotiating the signatures of all parties was regarded as too daunting. It is certainly conceivable that none of the governance bodies would agree to their own demise, as was recommended in specific reviews for the CLAC and GADC, for example.<sup>100</sup> Similarly the prospect of opening further aspects of the GCA to renewed debate would have provided a disincentive to initiating any amendments. Besides separating arrangements into management plans, an alternative approach to reviews may generate mutually agreed changes. Independent facilitation of the parties themselves collaboratively reviewing the GCA governance and implementation could be such a review process.

One form of flexibility that is largely missing from the GCA is guidance and realistic arrangements for the post-mining or closure phase. There is mention of the changed employment prospects once production ends. To an extent that supports the current focus on rehabilitation and caring for Country. Nevertheless, reliance on the GCA for the next 20 years or so, would likely raise more implementation challenges than have been experienced during production.

#### **4.9 Adjustments for the post-production period**

On the basis of the considerations outlined above, some adjustments and supplements to the GCA seem desirable to deal with key challenges specific to the post-mining period. A primary issue to address is the recalibration of the relationships with NTGs to recognise the post-determination landscape and the relationship with the Waanyi people, as native title holders whose lands and interests are now subject to most impacts and exposed to the most risks. Direct dealings between the company and Waanyi representative groups through the PBC will be appropriate. Nevertheless, given the social divisions that pre-dated the GCA and have been exacerbated by it, investments may be needed to heal some rifts.

As well as the specific adjustments relevant for Century Mine’s remaining project life, there is a clear lesson about future challenges that may arise if agreements do not explicitly address years beyond the economic life of the mine. General lessons for agreement-making are discussed in the next section.

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<sup>98</sup> GCA, Schedule 11 Clause 15 and Clause 40.

<sup>99</sup> GCA, Schedule 11 Clause 32.

<sup>100</sup> The Right Mind, 2008; Everingham et al, 2013a.

## 5 The future of life-of-mine agreements

The Gulf Communities Agreement is a landmark agreement. It has undergone three independent reviews of its implementation and outcomes. The reviews have demonstrated significant achievements of the mine and the agreement. Like any agreement the GCA is a product of a particular time, context and set of circumstances and of the specific parties and unique issues involved. As well, there were benefits and disadvantages of each alternative adopted in the GCA. Many provisions that enabled certain outcomes that were welcome nevertheless proved challenging to implement or outlived their relevance. Hence generalisations and attempts to transfer elements from the GCA to other agreements or compare them, should be approached cautiously. Nevertheless, key issues to consider in the negotiation, design and implementation of contemporary agreement governance are suggested by the GCA experience. These can contribute to the structure, content and processes of agreements and their effective functioning throughout the whole life-of-mine. They relate to the requisites of agreements governance.

### 5.1 Consistency with good governance principles of legitimacy and effectiveness:

- Design should be guided by the dual requirement that arrangements need to have legitimacy as well as the capability to be effective (this can involve a trade-off. For instance complex representational structures may help legitimacy through every group being represented but can come at the expense of effectiveness because it becomes unworkable, e.g. a quorum is difficult to obtain).
- Caution should be exercised in assuming representativeness of governance bodies will guarantee legitimacy – good governance processes for bodies to engage constituents are at least as important as the structure.
- Governance structures and processes should have clear expectations, provisions and safeguards to ensure they follow principles such as inclusiveness, participation, consensus orientation, fairness, transparency and accountability. There may be requirements for accountability for annual budgets, open information-sharing, and mandatory independent directors on boards for example.
- Aim for membership stability, operating with good policies and procedures, strategic external engagement, workable grievance processes and staged dispute resolution processes.
- Adopt structures and processes without excessive formality and complexity to avoid transactional costs and administrative/operational burdens.
- Be clear about consequences for non-compliance with the agreement.

### 5.2 Appropriate tailoring to the context based on:

- A deep understanding of the political realities of the target communities.
- Appreciation of the different requirements and likely aspirations of parties for each of the phases during the mine life (construction, operation, closure, rehabilitation).
- Designing in advance for closure and post-production years.<sup>101</sup> Or embed flexibility to review if the purposes for land access and any impacts on native title rights change.
- Flexibility to adjust governance arrangements as circumstances change over time (e.g. progress of native title claims). Rather than locking in rigid governance structures and

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<sup>101</sup> Martin, 2009: 121.

processes, agree these in separate management plans that can be revised from time to time.

- Collaborative and flexible mine planning, and management planning to accommodate agreement implementation in terms of cultural heritage management, workforce planning, reporting, procurement and other activities.
- Review processes that enable collaborative review by the parties and have a mechanism for making agreed changes.
- Careful consideration of the advantages and disadvantages of design features such as:
  - including government
  - negotiating a single agreement with several NTGs as opposed to separate agreements with each NTG
  - setting out broad aspirations
  - binding subsequent mine owners
  - including the broader regional community in benefits packages
  - whole-of-project-life term for the agreement
  - disbursing benefits through a trust structure
  - simple vs complex governance structures.

### **5.3 Providing adequate resourcing and capacity building**

- Ensure the appropriate structuring and resourcing of the Company's internal management of the agreement (e.g. dedicated GCA Unit vs implementation responsibility embedded across operational areas; capacity of management systems including human resources records).
- Include plans and resources to build capacity throughout the project life. The GCA experience shows that limiting the resourcing of governance arrangements is a false economy because the mine will end up spending more to deal with the dysfunction. Understanding the capacity gaps for Indigenous and non-Indigenous parties in agreement governance and providing resources for capacity-building early in the agreement avoids loss of legitimacy and the challenge of attracting good people and restoring credibility.<sup>102</sup>
- Provide adequate resourcing of meetings of governance bodies and also for good governance processes such as strategic planning and inclusive engagement with constituents to ensure their participation and input.
- Use plain English, document meetings and encourage dialogue with constituents to enhance levels of understanding and ownership.

### **5.4 Opportunities and challenges in agreement processes**

There are some key opportunities to realise through agreement processes including:

- providing certainty and consistency over the whole life-of-mine
- structuring relationships between parties
- formalising mechanisms to hold parties to commitments
- expressing mutual understanding, and identifying shared interests and goals
- outlining agreed processes especially for monitoring, accountability and resolving differences
- resourcing and building the requisite capacity in bodies responsible for implementing the agreement.

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<sup>102</sup> Limerick et al, 2012.

There are also recurring challenges to be aware of such as:

- poorly designed and complicated governance structures including culturally inappropriate entities
- instability and lack of capacity in Indigenous organisations<sup>103</sup>
- adjusting with changing project impacts or land use requirements
- overlooking the considerable diversity and changing interests of parties to the agreement particularly when impacts will fall differently on different groups at different stages. The diversity of interests and positions among Aboriginal parties should be factored in, as should robust processes to deal with inter/intra group conflict.

In the past twenty years much has been learned about agreement processes. Now, we are approaching a time when large mines such as Century whose operation has been governed by an agreement, have depleted their ore bodies and are facing closure. These will be times of profound social change for the Indigenous parties whose lands have hosted these operations. They highlight the next frontier for agreement-making as designing in advance for the whole mine life-cycle and particularly to accommodate a long period of rehabilitation. The post-production phase of many mining leases will likely be longer than the actual years of production when both the company and the NTGs enjoyed income streams and other benefits.

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<sup>103</sup> Rio Tinto & CSR, 2016: 165.

## Appendix 1: Methods and sources for the study

MMG commissioned CSRM to produce this analysis of the GCA study for the following three reasons:

- (1) its trailblazing character as the first mining agreement under the Right to Negotiate provisions of the NTA,
- (2) the fact that the economic life of Century has ended and the closure phases of the mine have raised new challenges and opportunities, and
- (3) the approach of the 20 year anniversary of the signing of the agreement.

These made it a prime example for examining the early challenges and opportunities confronted in agreement governance and for drawing lessons about possible improvements in future and applicability to the post-production years.

The project was essentially a desktop analysis of a range of records and materials. It synthesises research material collected by CSRM on a number of research projects especially over the past four years. Much of that research gained first hand perspectives about the context and the strengths and limitations of the GCA on paper and in practice. These projects consulted people involved with various parties throughout the agreement's 19 year history gaining a diversity of perceptions although these people are not identified in this report. CSRM's research has also surveyed employees and examined company records. The current analysis selected material relevant to the GCA's suitability as a legal framework and governance mechanism for the implementation and post-mining phases.

In addition to various reports and material held by CSRM or provided by MMG-Century, the interpretations have been corroborated by drawing on relevant legal documents and legislation as well as information in the public domain and the growing body of literature on international best-practice experience about agreements between mining companies and Indigenous People.

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## Appendix 2: Acronyms

ADBT	Aboriginal Development Benefits Trust
ATSIC	Aboriginal and Torres Strait Islander Commission (1990-2005, Federal body)
CE&TC	Century Employment & Training Committee
CEC	Century Environment Committee
CLAC	Century Liaison Advisory Committee
CLC(AC)	Carpentaria Land Council (Aboriginal Corporation)
CSRM	Centre for Social Responsibility in Mining (The University of Queensland)
CZL	Century Zinc Ltd
GADC	Gulf Aboriginal Development Corporation
GACSDT	Gulf Area Community Social Development Trust
GCA	Gulf Communities Agreement
HR	Human Resources
LHRPHC	Lawn Hill and Riversleigh Pastoral Holding Co
MMG	Current owner-operator of Century Mine
NTRB	Native Title Representative Body
NNTT	National Native Title Tribunal
NTG	Native title group
UGRAC	United Gulf Region Aboriginal Corporation

### Appendix 3: Background – Century Mine and the GCA

MMG's Century Mine is located in the lower Gulf of Carpentaria region of far North West Queensland, a remote, monsoonal area with a substantial Indigenous population (See Figure 4). The lower Gulf region comprises the two local government areas of Burke Shire and Carpentaria Shire as well as the two Aboriginal Shire Councils of Doomadgee and Mornington. The mine itself is located on Waanyi Country in Burke Shire – the sparsely populated local government area that abuts the Northern Territory border and the Gulf of Carpentaria. Normanton and the port town of Karumba (where the ore from Century is shipped) are the main towns in Carpentaria Shire which encompasses the traditional Country of the Gkuthaarn, Kukatj and Kurtijar people. Doomadgee Aboriginal Shire occupies the area of a former Aboriginal mission and is comprised mainly of Waanyi and Gangalidda peoples. Mornington Island forms part of the Wellesley Group comprising some 21 islands in the Gulf of Carpentaria that are the traditional lands and waters of the Kaiadilt, Gangalidda, Yangkaal and Lardil peoples. In both Doomadgee and Mornington, Indigenous people make up more than 90 percent of the population and both are Remote Service Delivery sites where there are Local Implementation Plans instigated with the community by the Commonwealth and State Governments as part of the Closing the Gap strategy.

Century mine operated as a large mining and processing operation from 1999-2015. During its 16 years of operation, Century produced and processed zinc and lead concentrates at Lawn Hill. The product was transferred in slurry form via a 300km underground pipeline to Century's port facility at Karumba for shipping to smelters in Australia, Europe and Asia. The operation had a Fly in Fly out (FIFO) workforce drawn from Townsville, Mt Isa, Cairns and other parts of Australia, as well as from the Gulf communities of Doomadgee, Burketown, Normanton, Karumba and Mornington Island. Production ceased at the end of 2015 when the ore body was depleted.

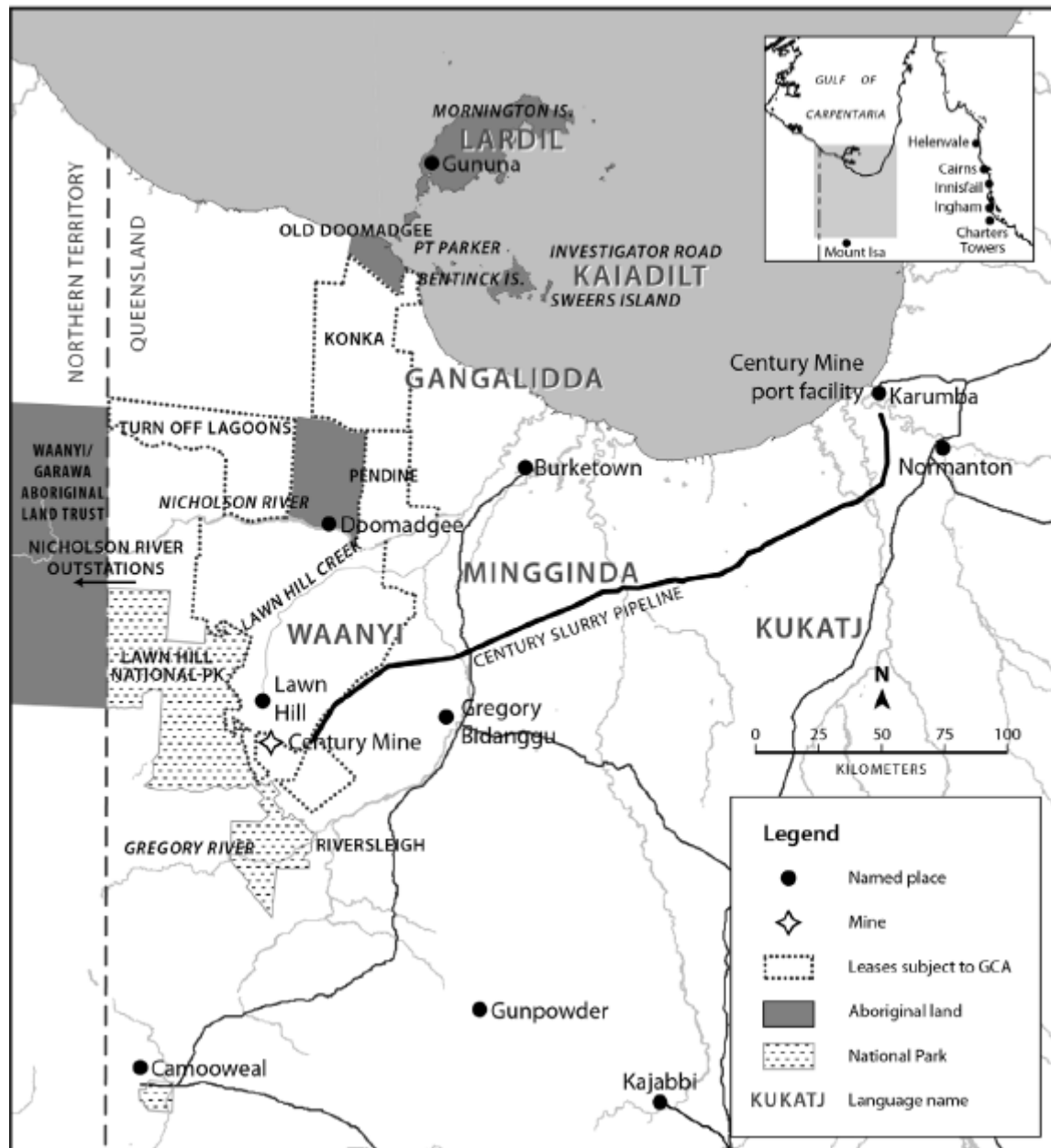
The Gulf Communities Agreement (GCA) was negotiated to facilitate the development of the large mining lease, the slurry pipeline corridor and the port area in Karumba. After a long and contentious negotiation period, this comprehensive land use agreement was signed in 1997 between the then developers of the mine, Century Zinc Limited, the Queensland Government, and four groups of traditional owners in the region – Waanyi, Kukatj, Gkuthaarn and Mingginda (two of whom identify as a unit for most purposes of the GCA).

The parties negotiating the GCA showed considerable vision and foresight in drafting it. In particular, the representatives and signatories for the NTGs recognised that this was a temporary venture but one that could be leveraged to provide a better future for their people economically and in other ways. The native title parties' broad aspirations are recorded in the GCA. They can be grouped into four focus areas: economic improvements, keeping Aboriginal culture and traditions strong, protecting the land and environment, and social improvements and stronger communities.

Inclusion of these aspirations in the Agreement did not create specific legal obligations on the other parties, but Century Zinc Limited (the original mining company) and Queensland did commit in the Recitals to working with the NTGs to help them achieve their aspirations. In making the agreement with the NTGs, Century acknowledged and respected these aspirations and agreed to measures that were aimed at supporting them, not only through compensation, but also commitments in relation to environmental protection, employment and training, the hand back of pastoral leases to traditional owners, protection of Aboriginal heritage and culture, and regional development and business opportunities. Likewise, Queensland made specific commitments in relation to training and vocational education, provision of infrastructure and various social support programs.

The commitments, which transferred to subsequent owners of the mine, conferred a range of specific benefits in these respects on native title parties in return for their agreement to, and support of, the Century project and commitment to a cooperative relationship with the mine owners.<sup>104</sup>

Figure 4: Map of lower Gulf of Carpentaria



Source of map: Scambary 2013: 189

<sup>104</sup> This appendix is adapted from Everingham et al (2013b).

**Figure 5: Timeline of key dates for Century mine and the Gulf Communities Agreement (GCA)**

1990	Century deposit discovered
1992	High Court Mabo decision recognising Native Title
1993	Native Title Act (Cth) establishes 'Right to Negotiate' provisions.
1994	Waanyi native title claim lodged and initially rejected by the courts
1997	Pasminco buys Century lease from CRA
1997	Gulf Communities Agreement (GCA) signed between Century Mine, the Queensland Government and the Waanyi, Mingginda and Gkuthaarn- Kukatj native title groups
'97-'98	Construction of mine, port, pipeline and formation of governance bodies including GADC and committees
1999	Formal filing of Waanyi native title claim after High Court ruled the NNTT should accept it
1999	First shipment of zinc concentrates
2002	Five Year Review "Sit-in" at camp canteen
2004	Zinifex listed and buys Century from Pasminco
2007	Ten Year Review
2008	Zinifex & Oxiana merge to form OZ Minerals as owner-operator
2009	MMG buys Century from OZ Minerals
2013	Fifteen Year Review
2015	End of open pit production
2016	Century Liaison Advisory Committee and CE&TC end
2018	Final payment to ADBT for encouraging the development of businesses (Three years after end of production) final payment to GADC for distribution to eligible bodies
~2045	(est) End of project life; Lease relinquishment; CEC ends; Admin funds to GADC end; GCA ends