

SMI CSRM

Centre for Social
Responsibility in Mining

Agreement-making with Indigenous Groups

Oil & Gas Development, Australia

Centre for Social Responsibility in Mining
Sustainable Minerals Institute
The University of Queensland, Australia
csrm@smi.uq.edu.au
www.csrn.uq.edu.au

Centre for Social Responsibility in Mining

SMI CSR M

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The Centre for Social Responsibility in Mining (CSR M) is a leading research centre, committed to improving the social performance of the resources industry globally.

We are part of the Sustainable Minerals Institute (SMI) at the University of Queensland, one of Australia's premier universities. SMI has a long track record of working to understand and apply the principles of sustainable development within the global resources industry.

At CSR M, our focus is on the social, economic and political challenges that occur when change is brought about by resource extraction and development. We work with companies, communities and governments in mining regions all over the world to improve social performance and deliver better outcomes for companies and communities. Since 2001, we've contributed significantly to industry change through our research, teaching and consulting.

Research Team

Project Leader	Professor David Brereton
Project Manager	Dr. Michael Limerick
BG Group	Dr. Kathryn Tomlinson
Researchers	Dr. Rosemary Taufatofua Mr. Rodger Barnes

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Glossary of Australian terminology

Aboriginal	A person who identifies as being of Aboriginal origin. May also include people who identify as being of both Aboriginal and Torres Strait Islander origin.
CDEP	Community Development Employment Projects. An Australian Government funded program that provides activities for unemployed Indigenous people to develop work skills and move into employment.
Determination of native title	Decision by the Federal or High Court of Australia or other recognised Body that native title does or does not exist in a particular area of land or waters.
Future act	Proposed activity or development on land and/or waters that will affect native title by extinguishing it or creating interests that are inconsistent with the existence, enjoyment or exercise of native title.
Indigenous Australian	An Indigenous Australian is a person of Aboriginal or Torres Strait Islander descent and is accepted as such by the community in which they live (ABS).
Indigenous Land Use Agreement (ILUA)	A Voluntary agreement about the use and management of an area of land or waters where native title exists or might exist'. The agreement is made between one or more native title groups and others (for example mining companies or governments). A registered ILUA is legally binding on the people who are parties to the agreement as well as all native title holders for that area (NNTT 2011).
Land rights	Various Aboriginal and Torres Strait Islander interests in the land recognised and protected (through legal tenure) by State or Commonwealth legislation.
Mabo (No 2) decision	The High Court of Australia decided that the doctrine of <i>terra nullius</i> should not have been applied to Australia and that the common law of Australia recognises native title held by Aboriginal and Torres Strait Islander people.
National Native Title Tribunal	Assists people to facilitate timely and effective native title outcomes. Set up under the <i>Native Title Act 1993</i> , the Tribunal is a federal government agency and is part of the Attorney-General's portfolio.
Native Title Act 1993 (Commonwealth)	Legislation enacted as a result of the decision made by the High Court of Australia in <i>Mabo v Queensland (No.2)</i> 1992. The Federal Parliament reviewed and amended the Native Title Act in 1998, 2007 and 2009.
Native title holder	Person or people who have had their native title rights and interests recognised over a particular area of land or waters through a determination of native title, or a prescribed body corporate registered on the National Native Title Register as holding native title rights and interests on trust.
Non-Indigenous	A person who does not identify as Aboriginal and/or Torres Strait Islander.
Registration of Indigenous Land Use Agreement	Occurs when the Tribunal enters the details of an ILUA on the Register of Indigenous Land Use Agreements.
Torres Strait Islander people	People who identify as being of Torres Strait Islander origin. May also include people who identify as being of both Torres Strait Islander and Aboriginal origin.

Abbreviations

ABS	Australian Bureau of Statistics
ABS Census	Australian Bureau of Statistic Census of Population and Housing
AHMAC	Australian Health Ministers' Advisory Council
AHRC	Australian Human Rights Commission
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
APPEA	Australian Petroleum Production & Exploration Association Ltd
CSG	Coal seam gas
CSRMM	Centre for Social Responsibility in Mining, University of Queensland
Cth	Commonwealth
EBRD	World Bank and European Bank for Reconstruction and Development
FPIC	Free, Prior and Informed Consent
GLNG	Gladstone LNG project of Santos
IBA	Impact and Benefit Agreement
ICMM	International Council on Mining and Metals
IFC	International Finance Corporation
ILUA	Indigenous Land Use Agreements
KLC	Kimberley Land Council
LALC	Local Aboriginal Land Council
LNG	Liquefied natural gas
MOU	Memorandum of Understanding
MTPA	Million tonnes per annum
NSWALC	New South Wales Aboriginal Land Council
NSW	New South Wales
NNTT	National Native Title Tribunal
NT	Northern Territory
NTA	<i>Native Title Act 1993 (Cth)</i>
Qld	Queensland
RTN	Right to Negotiate process stipulated under the <i>Native Title Act 1993 (Cth)</i>
SA	South Australia
TO	Traditional Owners
WA	Western Australia
WCCCA	Western Cape Communities Co-existence Agreement

Overview

Why this resource document has been developed

This resource document was jointly prepared by CSR and BG Group, to provide source material and an analysis of trends in Australia regarding the challenges of negotiating and implementing agreements with Indigenous groups. Reflecting the business focus of BG Group, this document pays particular attention to agreement-making in the context of oil and gas projects. The publication of this report in part reflects BG's desire to contribute to the overall knowledge base in this area.

The document is mainly focused on the Australian context for agreement-making but positions this in the broader international context, including a discussion of Canadian developments in Appendix 3.

How this resource document was developed

Key sources used in the preparation of the document included:

- Public domain literature on agreement-making with Indigenous groups, including:
 - Academic research
 - Good practice guides for industry and Indigenous groups
 - Government reports
 - Resource company websites and reports
 - Conference presentations and seminars.
- Published and unpublished case studies of agreements between Indigenous groups and resource companies, including interviews with practitioners involved in the agreements
- Interviews with experts in the field, including industry negotiators, land council representatives, native title lawyers, academic researchers and representatives from Indigenous groups.

How to use this resource document

The purpose of this document is to provide relevant background information, reference material, analysis of leading practice and case studies for each of the key aspects of negotiating and implementing agreements with Indigenous groups.

It is not intended as a step by step guide, which *must* be read from beginning to end. Rather, it is designed to be used as a reference tool in which the separate parts may be read at any time, in the order they are most useful.

Figure 1 provides a map for the different parts of the document.

Table 1 provides a summary of the main content in each of the six parts.

Figure 1. Road map for the resource document

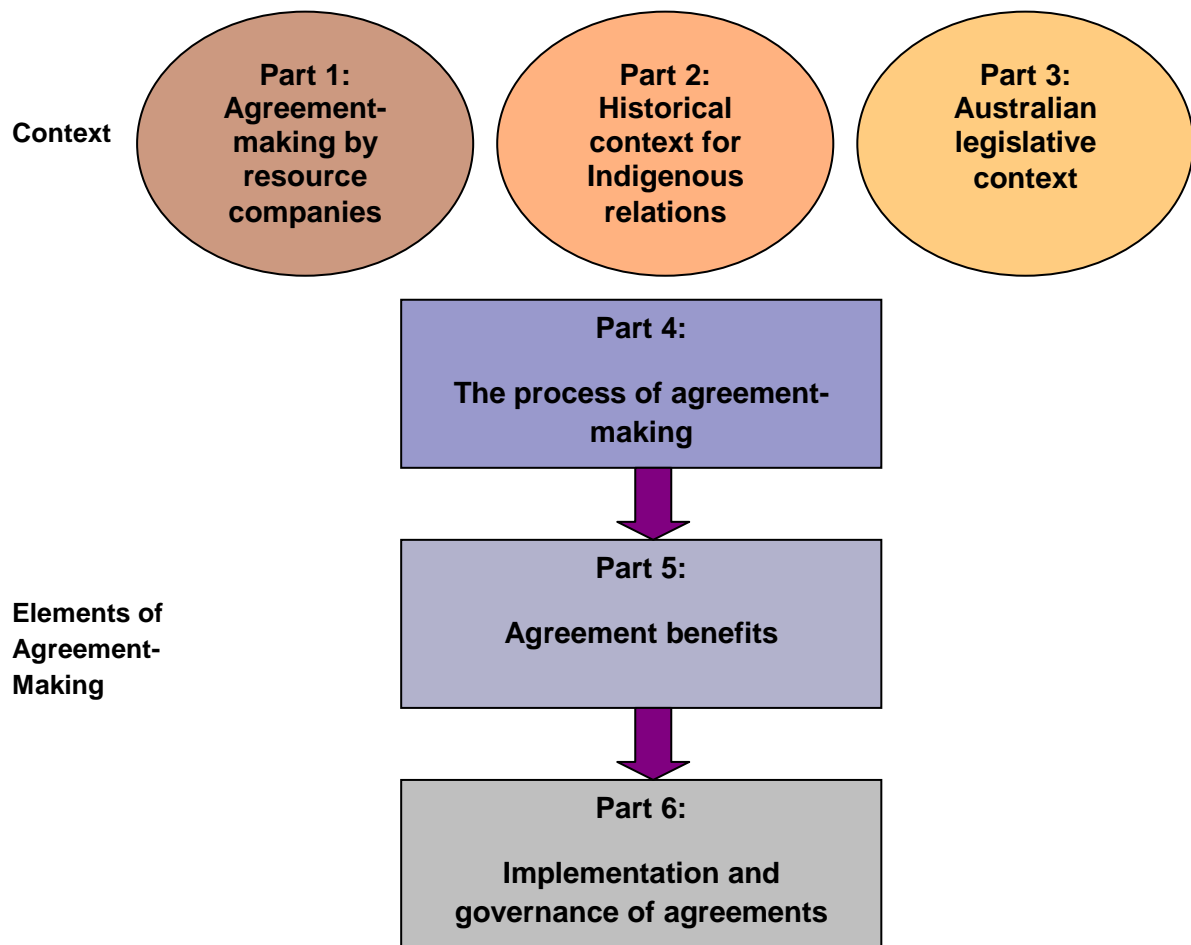


Table 1: Summary of information in each part of the resource document

<p>Part 1: Agreement-making between Indigenous people and resource companies</p>	<p>Information on the emerging practice regarding agreement-making by oil and gas companies with Indigenous groups, including:</p> <ul style="list-style-type: none"> • The international context • Key drivers for agreement-making • Similarities and differences between the oil and gas sector and the mining sector and how this might contribute to different approaches to Indigenous agreements.
<p>Part 2: Historical context for Indigenous relations and agreement-making in Australia</p>	<p>An overview of the changing landscape for resource developers' relations with Indigenous groups in Australia, including:</p> <ul style="list-style-type: none"> • How relations have evolved over time between Indigenous people and resource companies • Relevant characteristics of Australian Indigenous people (socioeconomic, cultural, historical and geographical differences) • Recent agreement-making between oil and gas companies and Indigenous groups.
<p>Part 3: Australian legislative context</p>	<p>Background information and analysis about key Commonwealth and state laws that impact on agreement-making, including:</p> <ul style="list-style-type: none"> • The emergence of land rights and native title laws • How native title law operates in practice to affect agreement-making • A summary of relevant legislation in different jurisdictions.
<p>Part 4: The process of agreement-making</p>	<p>Practical guidance and case study examples about the process of negotiating agreements, including:</p> <ul style="list-style-type: none"> • The principles underpinning negotiation • Indigenous aspirations • Relevant guides and toolkits for agreement-making • Key negotiation challenges • The strategic choice between a whole of project agreement and separate agreements • The role of government in agreement-making • The role of Native Title Representative Bodies.
<p>Part 5: Agreement benefits</p>	<p>Guidance about the typical benefits contained in agreements, including:</p> <ul style="list-style-type: none"> • The principles that underpin the value of benefits • The types of benefits that may be included • Financial benefits, their value, how they are calculated and some examples of recent practice • Non-financial benefits.
<p>Part 6: Implementation and governance of agreements</p>	<p>A summary of the success factors for implementation, including:</p> <ul style="list-style-type: none"> • New 'sustainability principles' proposed by the Australian Government • Options for governance structures to manage benefits from agreements • Options for governance structures to manage the implementation of agreements • Issues regarding governance capacity and performance, and some possible solutions.

PART 1 –

**Agreement-making between
Indigenous people and resource
companies**

1. Agreement-making between Indigenous people and resource companies

Key messages:

- Over the last few decades there has been growing recognition that Indigenous people have certain rights and interests, particularly in relation to the lands they have traditionally inhabited (Part 1.1).
- As Indigenous rights have grown as important legal and policy considerations, companies have been coming under increasing legal and social pressure to minimise and mitigate the negative impacts of their projects on Indigenous peoples, make sure that Indigenous peoples derive benefits and that their rights are respected (Part 1.1).
- As a result, a growing trend among companies wishing to operate on Indigenous peoples' lands has been to negotiate different types of compensation and benefit-sharing agreements with the Indigenous peoples concerned (Part 1.1).
- Key drivers for companies to invest in effective agreement-making are the increased legislative obligations and a business case built around ease of land access, minimising risk to operations and reputational benefits (Part 1.2)

1.1. Overview

Resource companies (oil and gas, and mining) and Indigenous people have increasingly been coming into contact with each other over the last few decades as the search for new mineral resources has led companies progressively into lands that Indigenous people traditionally occupy.

Historically, companies have been able to gain access to Indigenous lands through government permits, with minimal consultation and involvement of Indigenous people. However, over the last few decades, there has been growing recognition that Indigenous people have certain rights and interests, particularly in relation to the lands they have traditionally inhabited.

At the international level, both the International Labour Organization (ILO) and the United Nations (UN) have acknowledged that Indigenous people hold rights to the lands and natural resources that they traditionally use. Some multi-lateral institutions (e.g. the International Finance Corporation (IFC) and the World Bank) have developed standards and guidelines for how resource companies should engage with Indigenous people.

As Indigenous rights have grown as important legal and policy considerations, companies have been coming under increasing legal and social pressure to minimise and mitigate the negative impacts of their projects on Indigenous people, and ensure that Indigenous communities derive long term benefits from resource projects.

In many national contexts (e.g. Australia, Canada, Philippines, and many Latin American countries including Bolivia), Indigenous people have been gaining land territorial and resource rights, and in some cases sub-surface mineral rights.

In addition, Indigenous people have demanded that companies operating on their lands respect their rights by fully addressing the impact of the company's projects and by providing opportunities for wealth generation and long term sustainable development. Ultimately, this often involves

enabling Indigenous peoples' economic participation in a project, whilst respecting and upholding their right to maintain and strengthen their institutions, cultures and traditions.

In response to this changing environment, companies are increasingly required to negotiate different types of compensation and benefit-sharing agreements with the Indigenous people concerned.

Negotiated agreements have been an emerging trend since the 1990s, particularly in North America and Australia, where explicit legal frameworks that recognise and protect Indigenous rights and encourage negotiations have been emerging. Company-Indigenous agreements are also increasing in Latin America and other regions where Indigenous people have been gaining various land and territorial rights.

Different local contexts, company approaches and national legislative frameworks have resulted in a variety of negotiated agreements between Indigenous groups and resource companies. However, there has been a trend away from narrowly structured agreements that focus on up-front compensation payments. Best practice now sees a broader approach that views agreements as an important mechanism for improving the economic status and well-being of Indigenous communities in the short and longer term.

Reflecting this approach, a 2009 discussion paper by the Australian Government (FaCHSIA 2010) defined good agreements as those that provide for:

- Financial benefits proportional to the impact of the mine or other operation for the long term, through trusts and regular ongoing payments
- Indigenous business, employment and training opportunities
- Community development payments and initiatives
- Indigenous involvement in cultural, heritage and environmental projects
- Indigenous control of funds, combined with mentoring and support by independent parties
- Appropriate governance structures aligned with the specific community needs and group composition and the purposes of the agreement
- Regular reviews of the long term objectives of the agreement and the extent to which these are being met.

The Canadian case study in Appendix 3 illustrates that, although the legislative context is different, the practice of agreement-making in Canada has evolved in parallel to that of Australia and has also become an increasingly significant part of doing business in the resource industry in recent decades.

1.2. The drivers for agreement-making

There are a range of reasons why resource companies in both the mining and increasingly, the oil and gas sector, are placing a greater emphasis on effective agreement-making with Indigenous groups. The key drivers are:

1.2.1. Legislative requirements

Countries such as Australia, Canada and Bolivia have increasingly stringent legislative regimes designed to ensure Indigenous interests are accommodated in resource development. (The Australian legislative context is discussed in more detail in Part 3. The Canadian legislative context is discussed in the case study in Appendix 3). The bottom line is that in order to gain access to land for

resource development, in most situations developers are now required by law to enter into agreements with Indigenous groups.

1.2.2. Business case considerations

The business case for developing mutually beneficial agreements is underpinned by reputational issues for companies, risks involved in disputes and conflict, and the need for certainty and security of access to resources (see Box 1).

Research into the motivations of Canadian mining companies for voluntarily entering into Indigenous agreements revealed that although company executives usually stated their rationale as “it was the right thing to do”, this was more about business-related reasons than ethical reasons. The agreements “allowed them to gain their social licence to operate, to build trust and a good relationship with communities, to remain competitive in the mining industry, to take advantage of an increasingly more capable and educated population, to speed up regulatory approval, and to maintain a good reputation in the eyes of the public and the communities” (Lapierre and Bradshaw 2008, p.6).

Box 1. The business case for good agreements

According to ‘The International Council on Mining and Metals’ (ICMM):

- Companies that act ethically will gain a reputation that will make it easier to access resources in the future
- Companies with a poor reputation or poor skills in negotiating agreements will be more likely to experience delays and hurdles in meeting the increasing number of legal requirements regarding agreement-making
- Companies that fail to recognise Indigenous peoples’ rights are more likely to become embroiled in disputes and conflicts that affect current and future business performance
- Companies that perform well in agreement-making will gain reputational benefits including “improved relations with governments and international organizations, and more constructive engagement with civil society groups” (ICMM 2010, p.2).

At the project level, the business case for achieving stable and mutually beneficial agreements with Indigenous groups is fundamentally to gain certainty and security in the access to land and resources over the longer term. This creates confidence for commercial decision-making and capital expenditure and reduces the risk associated with unpredictability.

The business case for agreements that focus on training and employment and business development opportunities for Indigenous groups may also be driven by a need to develop a local workforce to meet labour needs and to build sustainable and responsive business supply chains in remote locations.

1.2.3. Other drivers in agreement-making

Other factors that are contributing to the growing focus on sustainable agreement-making include:

- *International human rights instruments*: International treaties and conventions since the 1980s have given greater recognition and emphasis to the rights of Indigenous groups
- *International agency policies*: Peak agencies such as the International Council on Mining and Metals (ICMM) have developed policy frameworks and guides to good practice in dealing with Indigenous groups
- *International financial institutions*: Financial institutions such as the International Finance Corporation (IFC), the World Bank and European Bank for Reconstruction and Development

(EBRD) have developed policies and standards that they expect borrowers, which may include resource companies, to comply with.

See Appendix 4: International human rights instruments and international agency policies relevant to agreement-making with Indigenous people for further information about relevant international instruments.

Box 2. The principle of Free, Prior and Informed Consent (FPIC)

International Finance Corporation (IFC) Performance Standard 7 on Indigenous Peoples (PS7), April 2006

PS7 aims to foster respect for Indigenous rights and aspirations, avoid or minimise adverse impacts on Indigenous groups, encourage good relationships, foster good faith negotiation and informed participation of Indigenous peoples in projects and respect and preserve their culture, knowledge and practices (IFC 2006). It is intended to be applied during the social and environmental assessment process for a project.

Issued in 2006, PS7 has been criticised by some organisations for not requiring resource companies to comply with the principle of Free, Prior and Informed Consent (FPIC) in the negotiation of resource developments on Indigenous land. Instead, PS7 refers to the “free, prior and informed consultation”.

The requirement for *consultation* falls short of the FPIC principle, which implies that an Indigenous group has a final veto over whether any development should proceed or not on their traditional lands. FPIC is embodied in a number of international human rights instruments, including the UN Declaration on the Rights of Indigenous People (2007) and the International Labour Organization Convention 169 (1989).

The IFC has reviewed the wording of the standard, as part of a broad review of its sustainability framework. Responding to feedback from stakeholders and the passage of the 2007 UN Declaration on the Rights of Indigenous People, an important change by the IFC is that the new Standard incorporates the principle of “Free, Prior and Informed Consent (FPIC) on project design, implementation, and expected outcomes”, but only in the specific circumstances, such as “projects with impacts on lands and natural resources subject to traditional ownership or under customary use”, where Indigenous people are to be relocated or where commercial use is to be made of Indigenous cultural resources or knowledge.

The practical consequence of this change would seem to be a strengthening of the obligation on resource companies that operate under IFC Standards to conduct good faith negotiations with Traditional Owners to obtain their consent.

1.3. Key differences between the oil and gas and mining sectors

Agreement-making with Indigenous people has historically been much more extensive for mining companies than oil and gas companies. This is partly because the prevalence of offshore developments in the oil and gas industry has tended to minimise direct impacts on Indigenous lands and traditional land tenures.

In addition, even where oil and gas developments are onshore, they do not have the same physical impacts as mining activities, which transform landscapes and are likely to confront Indigenous responsibilities to care for ancestral lands to a greater degree than a petroleum development. As a result, many offshore developments in the past have proceeded without agreements with Indigenous people. Agreements for terrestrial developments have tended to be narrowly based royalty arrangements, often tightly governed by legislation.

The faster rate of evolution of agreement-making for mining projects means that many of the leading practice examples are agreements by mining companies for development of terrestrial

mineral deposits. Now that agreement-making is taking on greater significance for oil and gas companies, it is important to consider the extent to which mining industry precedents can and should be applied to the oil and gas sector.

Key differences between the sectors can be summarised as follows:

- The mining sector is made up of a large number of companies of varying sizes who mine a diverse range of minerals and metals, while the oil and gas sector tends to be dominated by fewer large companies specialising in petroleum exploration and development.
- The early exploration phase of minerals extraction is considerably less capital-intensive than the oil sector, with consequent different labour-intensive periods. Petroleum exploration is on a vast scale, usually surveying whole geological basins. Petroleum drilling is extremely expensive and a very high risk investment. Joint ventures between major petroleum players are therefore a feature of the industry.
- Mining activities tend to have a more concentrated impact on landscapes than petroleum developments, but a petroleum development will often have a wider footprint than a mine.
- There are diverse roles within the minerals extraction sector, with small and large companies working alongside each other. In contrast, petroleum developments are characterised by massive construction activity involving an amalgam of specialised engineering contractors. Expert skills are required in the field of engineering fabrication.
- Greater opportunities exist for involving unskilled labour from local communities in mining. Production workforce numbers in petroleum facilities are generally lower and largely involve specialised trades skills such as fitting and turning, and boiler making.
- Petroleum developments are almost always long term developments as the capital cost is amortised over longer periods than mining. The revenue stream is comparatively stable as resource projects tend to be linked to long term contracts with buyers. Long term prices for oil and gas products are negotiated rather than being subject to market fluctuation as in the case of metals sold into world markets.
- The mining industry has an increasing body of experience and knowledge in dealing with affected communities. Mining companies often voluntarily, or by law, contribute significant amounts of money to community development, mine safety and environmental rehabilitation (Banks 2003).
- A coordinated and explicit strategy exists within the global mining industry, championed by association bodies such as the ICMM, which aim to position the mining industry within the global pursuit of sustainable development. Peak bodies for the oil and gas sector, such as the Australian Petroleum Production & Exploration Association Ltd (APPEA) have to date developed only general principles of conduct rather than specific standards for dealing with Indigenous groups (see Box 3).
- Many oil and gas companies operate under legal or constitutional arrangements which redistribute revenues to regional and local governments, but these do not always directly link to the local communities or regions where the operations occur and where the effects operations are most obviously felt.
- Impacts on Indigenous groups will differ depending on whether oil and gas production is offshore or onshore. For example, onshore developments (and sometimes offshore developments as with the ENI Blacktip gas project) usually involve pipelines across vast distances. Whereas the focus for mining intensifies geographically during the process from exploration to developing a mine, a petroleum field can cover relatively large areas.

Depending on the nature of Indigenous land interests, it is likely that a particular petroleum development will impact on a greater number of Indigenous groups as compared to mining. This is particularly so where onshore pipelines are constructed to deliver petroleum products.

Box 3. APPEA Principles of Conduct

The Australian Petroleum Production & Exploration Association Ltd (APPEA) is the peak national body representing the interests of Australia's upstream oil and gas exploration and production industry.

Principles of Conduct

APPEA members will continuously seek opportunities for improvement in our business practices and our economic, health, safety, environment and social performance. In striving to achieve this, APPEA and its members endorse the following nine Principles of Conduct:

1. Ethical and responsible business practices.
2. Sustainable development considerations integrated into company decision making.
3. Foster economic growth and business development, generate government revenue, provide commercial returns to the industry and contribute to the wealth generated by Australia's natural resource base.
4. Health, safety, environmental and community risk management strategies that are based on sound science and effective communication.
5. Continuously seek opportunities to improve health, safety and environmental performance in addressing risks posed by our operations to employees, contractors, the public and the environment.
6. Contribute to the conservation of biodiversity and protection of the environment through responsible management of our operations and their impacts.
7. Foster economic and social development of the communities in which we operate.
8. Respect the rights and dignity of our workforce, and deal fairly with our workforce, suppliers and the communities in which we operate.
9. Open and effective engagement with the communities in which we operate.

Source: APPEA 2003

PART 2 –

Historical context for Indigenous relations and agreement-making in Australia

2. Historical context for Indigenous relations and agreement-making in Australia

Key messages:

- There are wide-ranging local and regional differences between Indigenous groups in Australia, arising from cultural differences, geographical factors and different historical experiences of colonisation. A characteristic common to all Indigenous groups is high levels of socioeconomic disadvantage compared to the mainstream population. Indigenous groups in Australia are also represented by many different organisational forms (Part 2.2).
- The relationship between the resources industry and Indigenous groups has evolved considerably in recent decades, reflecting a growing concern to manage the impacts on Indigenous populations and negotiate for the benefits of resource development to be shared. These changes have been brought about by increased global recognition of Indigenous rights, legislative frameworks that compel negotiation with Indigenous groups, and greater industry awareness of the reputational consequences and business case around Indigenous engagement (Part 2.3).
- Contemporary industry approaches to Indigenous relations emphasise negotiation and consultation, social sustainability, partnerships with Indigenous communities and other stakeholders (e.g. government, training and not for profit sectors), and a focus on agreements as the predominant tool for benefit-sharing and relationship-building (Part 2.3.3).
- Future trends include greater emphasis on long term relationship building, sustainability of agreement benefits, and leveraging agreements to train and employ Indigenous people to meet labour shortages (Part 2.3.4).
- Agreement-making with Indigenous groups is a growing issue for oil and gas companies in Australia, and will increase with the development of onshore processing facilities and terrestrial developments such as coal seam gas (Part 2.4).

2.1. Overview

A range of factors impact on the agreement-making process carried out between Indigenous people and resource companies. Understanding these broader factors and the context in which agreement-making takes place is crucial for developing and implementing successful agreements.

It is also important to be aware that Indigenous agreement-making has been rapidly evolving particularly since the common law recognition of native title in 1992. The pace of change is, if anything, increasing as greater attention is focused on learning from past experience and developing new and innovative models.

This part of the resource document will review the range of factors that form the broader context for agreement-making in Australia and highlight some of the emerging trends.

2.2. Characteristics of Indigenous people in Australia

2.2.1. Regional and local differences

There is sometimes a tendency to treat Indigenous people in Australia as a homogeneous group, with similar attributes, aspirations and challenges. However, in approaching agreement-making, it is important to understand the diversity of Indigenous people in Australia, because every location will be different. Each Indigenous community and society has its own unique mixture of cultures, customs and languages.

Key aspects of diversity include:

- Indigenous people in Australia comprise two distinct groups: Aboriginal people and Torres Strait Islander. However, for historical reasons, many mainland communities and towns have significant populations of Torres Strait Islanders and many Indigenous Australians have both Aboriginal and Torres Strait Islander heritage.
- Prior to colonisation, there were a very large number of highly localised Aboriginal people with distinct languages, customs and culture. Although the traditional boundaries for various Aboriginal groups' lands are sometimes disputed, Appendix 1 Map outlining the boundaries of Aboriginal language groups across Australia, which provides some indication of their territories.
- There have been significant differences in historical experience of colonisation. Relevant factors include:
 - Physical dispossession and resettlement: To enable pastoral land use on Aboriginal land and manage the 'Aboriginal problem', policies were developed to relocate many Aboriginal people to reserves (AAR 1997). This began in the 1820s and continued until the 1970s. Restrictions were put on Aboriginal peoples' ability to move around on and outside the reserves. Dispossession from land began on the east coast of Australia, which was settled first. Torres Strait Islanders were not dispersed from their homelands to the same extent as Aboriginal people.
 - 'Stolen generations': A strategy undertaken between 1869 and the 1970s whereby between 10 - 30% of all Aboriginal children were forcibly removed from parents and placed in church missions or foster homes.
 - Queensland history saw a greater number of removals and placement in missions than other states.
- Indigenous people living in remote areas on their traditional lands have different lifestyles and opportunities to those living in regional centres and cities. The majority of Indigenous Australians live in urban areas.

Part 4.4.2 explores more fully the implications for agreement-making that arise when dealing with Indigenous groups in different parts of Australia. In practice, the makeup and history of the local Indigenous group will be one of the most significant factors in deciding how to approach the agreement-making process.

2.2.2. Levels of socioeconomic disadvantage

Regardless of their location, cultural context and historical experience, Indigenous groups across Australia all share a high level of social and economic disadvantage compared to non-Indigenous Australians. These levels of disadvantage are well documented, most recently in the *Overcoming Indigenous Disadvantage* key indicator report prepared every two years by the Productivity Commission (Productivity Commission 2009).

The following is a summary of key statistics highlighting some of the major gaps between the life circumstances of Indigenous and non-Indigenous people in Australia:

- Life expectancy is approximately 12 years lower for Indigenous people:
 - 67 years for Indigenous men vs 79 years for non-Indigenous men
 - 73 years for Indigenous women vs 83 years for non-Indigenous women
- Indigenous infant mortality is triple that of non-Indigenous babies
- There are significantly higher rates of chronic and communicable diseases, disabilities and mental health problems amongst Indigenous people
- Indigenous students are half as likely to stay at school until the end of Year 12 as non-Indigenous students
- The average Indigenous household income is only 62% of the national average (this means Indigenous households get an average of \$364/week compared to \$585/week for non-Indigenous households)
- Over 50% of Indigenous people get most of their income from government welfare
- The Indigenous unemployment rate is about three times higher than that of non-Indigenous people. Many Indigenous people rely on government-funded work programs, such as the Community Employment Development Projects (CDEP)
- Indigenous people are much more likely to be renting a house (63.5% for Indigenous people vs. 26.6% for all Australians)
- Approximately 12.6% of Indigenous people own their own home in comparison to 40.5% for all Australians
- Houses are often overcrowded with up to 17 people sharing a 3 bedroom house in many Indigenous communities
- Indigenous people are much more likely to be victims of violence. For example, although Indigenous people make up only 2.3% of the population, they account for approximately 15% of murder victims
- There are considerably higher levels of substance abuse, family violence and suicide occurring in Indigenous communities
- Levels of child neglect or abuse is increasing, with Indigenous children more than six times as likely as non-Indigenous children to be abused or neglected in 2007-08.

Source: ABS 1301.0 - Yearbook Chapter, 2009–10; OID 2009

The human capacity constraints that are endemic to disadvantaged groups will affect the ability of Indigenous groups to effectively negotiate and subsequently manage the benefits of agreements with resource companies. This is explored further in Part 4.4.1.

2.2.3. Indigenous Australians' representative bodies

Indigenous groups are represented through many different organisational forms in Australia. These include:

- **Land Councils:** The form and function of land councils differ according to jurisdiction, but in all cases they are established to represent the interests of Traditional Owners of land. Variations include:
 - The Northern Territory Land Councils: These are bodies established under legislation with specific functions to represent and administer Traditional Owners' interests under the Northern Territory land rights legislation.
 - New South Wales Aboriginal Land Council: This peak body is established under NSW land rights legislation with a range of specific functions, including to "determine and approve/reject the terms and conditions of agreements proposed by Local Aboriginal Land Councils to allow mining or mineral exploration on Aboriginal land".
 - Local Aboriginal Land Councils (LALCs) (NSW): 119 LALCs are created under NSW land rights legislation with a range of functions, including managing services for housing, legal affairs, employment, training, property acquisition and management.
 - Incorporated community land councils: Across Australia, many Traditional Owner groups have incorporated their own community organisations as 'land councils' to provide local services and seek government grants for various purposes. These land councils may have no formal functions under legislation and are usually incorporated under special incorporation legislation for Aboriginal groups (*Corporations (Aboriginal and Torres Strait Islander) Act 2006*).¹ These may be regional (e.g. Cape York Land Council) or local (e.g. Quandamooka Land Council, North Stradbroke Island).
 - Native Title Representative Bodies (NTRBs): These are incorporated Aboriginal community organisations that have been recognised by the Commonwealth Government as NTRBs for the purposes of performing certain functions under the *Native Title Act 1993 (Commonwealth)*.
- **South Australian land rights bodies:** In northern and western regions of South Australia, two statutory bodies hold land for Indigenous Traditional Owners and deliver services and local governance to residents of these lands: Anangu Pitjantjatjara Yankunytjatjara (APY) Council and Maralinga Tjarutja Council.
- **Aboriginal land trusts:** In many jurisdictions, Aboriginal land rights legislation has led to the creation of trusts incorporated solely for the purpose of holding Aboriginal land. For example, in Queensland, former Crown land has been handed back to Traditional Owner groups through the creation of Aboriginal Land Trusts and Torres Strait Islander Land Trusts. These organisations have very little administrative capacity and may largely be a list of trustees who need to be brought together occasionally for decisions about land use.
- **Indigenous local governments:** Across Australia, there are many local governments that are either majority controlled or fully controlled by local Indigenous groups:

¹ An organisation incorporated under this Act or its predecessor (the *Aboriginal Councils and Associations Act 1976*) will always have "Aboriginal Corporation", "Aboriginal and Torres Strait Islander Corporation" or "Torres Strait Islander Corporation" in its title.

- Aboriginal Shire Councils: In Queensland, many discrete Aboriginal communities have their own Aboriginal Shire Council with the status of a local government under the *Local Government Act 2009*. These councils are also the trustees of the Aboriginal land within their jurisdiction, so they are de facto land councils.
- Northern Territory Shires: In the regional areas of the Northern Territory, local government is provided by large shire councils, which are majority controlled by Indigenous people.
- Western Australia Shires: A couple of remote area shires in Western Australia are majority controlled by Indigenous people.
- **Indigenous community organisations:** There are several thousand incorporated community organisations representing Indigenous groups across Australia:
 - These range from:
 - Very small organisations representing only one family group and with very little funding
 - Organisations providing specific services in Indigenous communities or regions (e.g. health, legal or employment services etc.)
 - Organisations representing an entire Indigenous community and delivering a range of services (including local government services). More common in Western Australia and Northern Territory
 - Large regional organisations.
 - They are mostly incorporated under special incorporation legislation for Aboriginal groups (*Corporations (Aboriginal and Torres Strait Islander) Act 2006*)² but may sometimes be under state legislation for incorporated associations or even company legislation where they run business enterprises.
- **Advisory Councils:** Some states have appointed or elected advisory councils that represent Indigenous interests and provide advice to government.
- **National Indigenous Representative Body:** The Commonwealth Government disbanded the Aboriginal and Torres Strait Islander Commission (ATSIC), which featured elected regional councils across Australia and a national representative body. It has recently established a new national Indigenous representative body, the National Congress of Australia's First Peoples, which has a purely advisory and advocacy role.

2.3. The changing nature of the relationship between Indigenous people and resource companies in Australia

Over the past 40 years there has been a fundamental shift in the relationship between Indigenous people and the resources industry in Australia. There are many factors at play in this transformation, including:

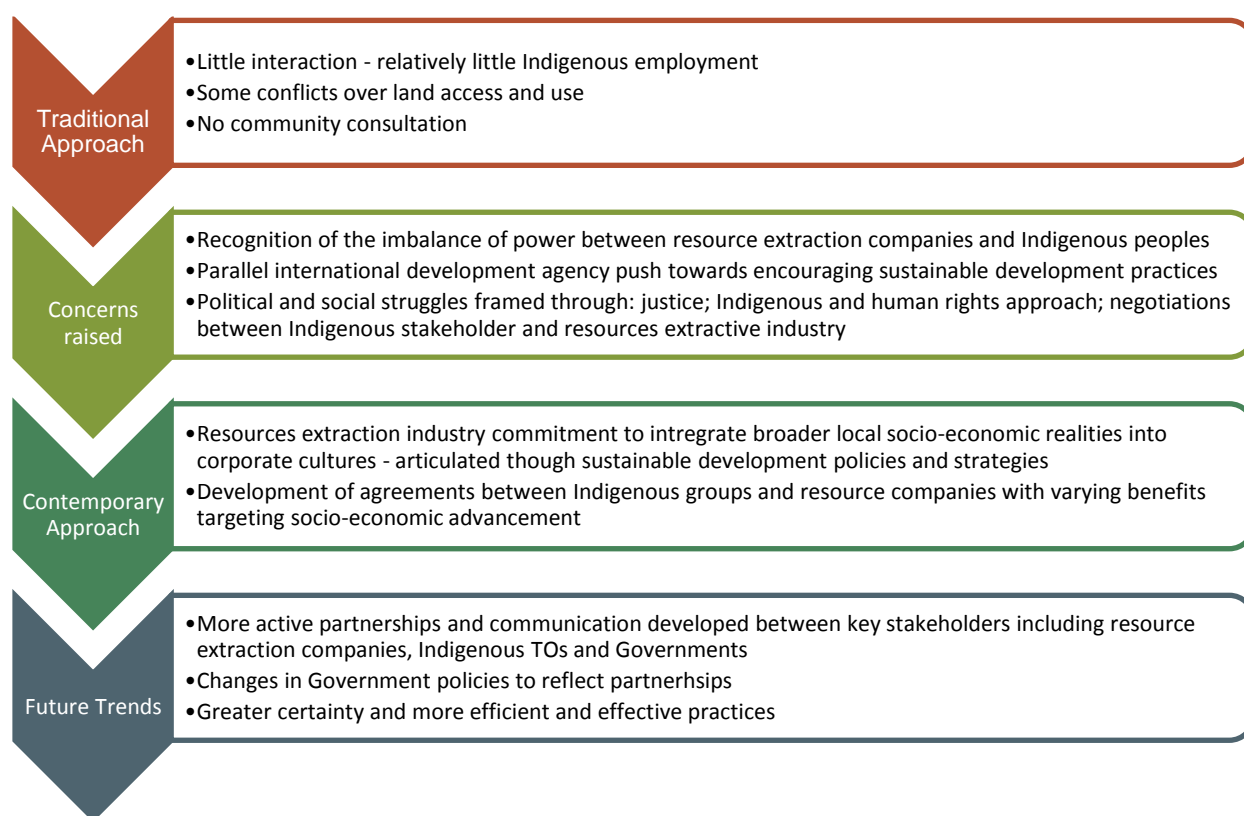
- Increased legal recognition of Indigenous rights to land
- International trends in the recognition of Indigenous rights and a focus on social sustainability in resource development
- Growing empowerment and capacity for political advocacy on the part of Indigenous groups

² See previous footnote.

- Changes in government policy frameworks
- A centralisation of the resources industry with the increasing dominance of large multinational mining corporations with greater sensitivity to reputational issues in dealing with local Indigenous groups
- Increased recognition of the business case for positive Indigenous relations.

The evolution of this relationship is illustrated in Figure 2.

Figure 2. Evolving relationship between Indigenous people and resource companies in Australia



2.3.1. Traditional approach

Prior to the 1970s, Indigenous involvement in resource developments on Indigenous traditional lands was limited. Compensation or benefit-sharing agreements with resource companies were sporadic and small scale. In the absence of significant land rights legislation or recognition of native title, companies were seldom legally bound to enter into agreements, although they could and often did provide some payments to local groups as part of ‘good neighbour’ programs.

Paternalistic government policies and laws left Indigenous groups with little say in the development of their traditional lands. For example, to make way for bauxite mining in western Cape York in 1963, the government forcibly removed residents of the Mapoon Aboriginal community on a police barge and relocated them to a new location on the tip of Cape York. Police burnt most of the houses and buildings to prevent residents returning. This illustrates that historically resource companies in Australia have allied with the government, especially in times of conflict, in order to prevail over Indigenous views about resource development on their lands (Altman and Martin 2009).

The history of subjugation of Indigenous interests has had a pervasive impact on Indigenous groups’ relationships with resource companies, which is still felt in many regions today. In many cases, the relationship was openly adversarial, with conflict over developments such as the Ranger uranium mine in the Northern Territory in the 1980s. In other cases, there was simply a quiet resentment by Indigenous groups as resource companies went about their business with little consultation or participation of Indigenous people, and limited employment or other opportunities arising from resource development.

From the 1970s, the advent of new land rights legislation began to improve the bargaining position of Indigenous groups, leading to the negotiation of larger scale agreements with resource companies. For example, in the Northern Territory, the *Aboriginal Land Rights (Northern Territory)*

Act 1976 (Commonwealth) vested Traditional Owners, through their regional land councils, with rights that obliged resources companies to negotiate comprehensive agreements to access traditional lands.

2.3.2. Concerns raised

From the early 1990s, there was a growing literature raising concerns about the impact of multinational mining operations on Indigenous people (Geddicks 1993; O'Faircheallaigh 1998; Howitt 2001). Academic writing and public debate focused on issues such as:

- The environmental, social and cultural impacts of minerals extraction on Indigenous people and their lands
- The considerable inequalities in wealth and livelihood opportunities
- The imbalance of power between resource companies and Indigenous people
- Conflict between companies, Indigenous people and the state over resource access, land rights, revenue distribution and environmental impacts, which are often, debated using moral terms such as justice, human rights and Indigenous rights.

Shifts in the resource industry's approach to mining, environment and socio-cultural development (Bridge 2004) became evident throughout the 1990s. The peak mining lobby group (now the Minerals Council of Australia), shifted to a more conciliatory approach to Indigenous relations, as the industry started to acknowledge both the need for, and the benefits arising from, being socially responsible citizens.

2.3.3. Contemporary approach

Impact of land rights legislation

It was the High Court's recognition of native title in the *Mabo* decision and the passage of the *Native Title Act 1993* that created the most significant new impetus for resource sector agreement-making with Indigenous groups.

Through various Aboriginal land rights legislation programs during the 1970s to 1990s, Indigenous groups had already gained control of more of their traditional lands. By 2010, around twenty percent of the Australian land-mass is owned by Aboriginal people. However, legislation for native title and cultural heritage protection has entrenched greater procedural rights in resource development across other land tenures not directly owned by Indigenous people.

From the perspective of resource companies, the initial impact from the *Mabo* decision was a rise in uncertainty surrounding land access and security of tenure.

Shift towards proactive engagement with Indigenous groups

The growing acknowledgment by resource companies of their ethical imperatives for more socially sustainable development became reinforced by new legal obligations to engage proactively with Indigenous groups affected by their developments.

Resource companies needed to change their mode of operation and work more closely with local communities, gaining a better insight into their socio-cultural variables and community aspirations in order to identify where industry commitments and agreement benefits could provide a sustainable input. While many challenges have persisted, there has been a shift in the resource company attitudes towards proximate Indigenous communities.

Mainstream shift towards reconciliation

The changes in mining companies' dealings with Indigenous groups were reflective of a more general shift in mainstream Australia's relationship with Indigenous people, which has also permeated the Australian business community.

The reconciliation movement starting in the early 1990s has sought to heal the wounds of the past and create bridges between mainstream Australia and Indigenous Australians.

The peak body for this movement, Reconciliation Australia, has encouraged mainstream organisations to develop Reconciliation Action Plans to embody their commitments to Indigenous Australians. There is a strong trend towards large Australian businesses, including resource companies, developing and implementing Reconciliation Action Plans.

Current trend:

Some Australian resource companies, such as BHP Billiton, QGC, Woodside, Wesfarmers and Transfield are adopting the Reconciliation Action Plan (RAP) approach encouraged by Reconciliation Australia as their policy framework for Indigenous affairs. See:

<http://www.reconciliation.org.au/home/reconciliation-action-plans>

Characteristics of the contemporary approach

The contemporary relationship between the resources industry and Indigenous communities is characterised by the following features and trends:

- *Greater consultation and negotiation:* Companies have become much more proactive in developing relationships with local Traditional Owners (Bridge 2004). Mining companies such as Rio Tinto and Newmont have led the way in formally recognising obligations to Traditional Owners and local Indigenous communities and have taken a strong leadership role working within the native title statutory framework (Australian Human Rights Commission, 2006; Altman, 2009; AHRC, 2006). Rio Tinto also recognises the potential role that mining companies can play as a catalyst for sustainable regional development (for example, see Rio Tinto's publication, *The Way We Work*).
- *Agreement-making focus:* Agreements, especially Indigenous Land Use Agreements (ILUAs), have become the dominant tool for entrenching the relationship between mining companies and Indigenous communities. There were 310 ILUAs registered with the National Native Title Tribunal (NNTT) by the end of 2007 (Strelein 2008).
- *Indigenous issues integrated into community development and social sustainability frameworks:* Resource companies are integrating the socio-economic concerns of Indigenous communities into community development policies and strategies to alleviate negative impacts and positively influence socio-economic outcomes. For example, Rio Tinto (WA) has integrated these concerns into their *Sustainable Development Report 2008 – Iron Ore Group in Western Australia*. In it, Rio Tinto views Indigenous employment and agreements as forming the basis of Aboriginal economic independence (PACA 2010).
- *Partnership approaches:* There has been a rise in collaboration and partnership approaches between industry, government and Indigenous communities. Examples include:
 - A Memorandum of Understanding (MOU) was developed between the Commonwealth Government and Minerals Council of Australia (MCA) in 2005 to develop a comprehensive approach to address Indigenous economic disadvantage and build 'sustainable prosperous communities in which individuals can create and take up social, employment and business opportunities' (AHRC 2006).

- The Commonwealth Government established the Working in Partnership program in 2001 to support and promote long term partnerships between Indigenous communities and the mining industry in regional areas.
- Several MOUs have been developed between state governments and state peak mining industry representative bodies. A leading example of this is the 2007 MOU between the Queensland Resources Council (QRC) through its member companies and the Queensland Government. The partners work together with relevant Indigenous groups and organisations, to develop and implement regional resource industry employment and enterprise development projects. For example, the North West Queensland Indigenous Resources Industry Initiative (NWQIRII). This initiative facilitates a partnership between North West Queensland resource companies, government agencies, training organisations and Indigenous communities to increase Indigenous participation in employment and economic development in the resources sector.

Flagship agreements between Indigenous groups and resource companies

Starting in the late 1990s, a series of flagship agreements have come to symbolise the new relationship between the resources sector and Indigenous communities. Significant large scale agreements have included:

- *Gulf Communities Agreement (GCA) 1997*, between Century Zinc Limited, Traditional Owners from the Gulf of Carpentaria and the Queensland Government, for the development of the Century Zinc mine.
- *Olympic Dam Aboriginal Heritage Management Agreement and the Olympic Dam Community Development Agreement 1999*, between Traditional Owners and Western Mining Corporation, for the expansion of the Olympic Dam uranium mine in South Australia.
- *Western Cape Communities Co-existence Agreement (WCCCA) 2001*, between Traditional Owner groups and Indigenous councils from Western Cape York and Comalco, for future bauxite mining on Western Cape York.
- *Argyle Diamond Mine Participation Agreement 2005*, between East Kimberley Traditional Owners and Argyle Diamond Mine (owned by Rio Tinto), for the underground extension of the Argyle Diamond Mine.

Further information:

An overview of many resource agreements can be found on the Agreements, Treaties and Negotiated Settlements (ATNS) Project's online database at www.atns.net.au.

While these large scale agreements receive significant attention, there have been hundreds of agreements negotiated by resource companies with Indigenous groups since the late 1990s.

Although the number of agreements being negotiated has increased exponentially, as O'Faircheallaigh (2003) has pointed out, there has not been a "lineal progression" in agreement-making, with each agreement becoming more sophisticated or following a trend. This is perhaps due to the absence of a learning process, whereby new agreements learn from the experience of previous ones. The prevalence of confidentiality clauses has hindered the ability to review previous agreements as precedents. The variability in outcomes has also been the result of lack of consistent government funding for negotiations, differences in company policy, differences in community capacity and differences in governments' willingness to contribute to agreements.

Nevertheless, O’Faircheallaigh (2003) identified two trends in agreement making over the previous decade:

- A significant increase in the value of agreements (except in the Northern Territory)
- A trend to more sophisticated financial provisions in agreements, incorporating different types of benefit-sharing models calculated in different ways.

These matters are discussed in more depth in Part 5.

2.3.4. Future trends

The future will see a continuation of the recent pattern of increasingly sophisticated and mature relationships between resource companies, Indigenous communities and other stakeholders (e.g. government and not for profit sector). In particular, the following trends are emerging:

- *Focus on long term relationship building:* Resource companies have learned that Indigenous relations are not a one-off exercise focused on the agreement-making process. Rather, companies are recognising the need to build long term, mutually beneficial relationships with Indigenous groups in order to maintain their ‘social licence to operate’. Agreements are increasingly aimed at cementing long term relationships rather immediate access to land. See Part 5.
- *Emphasis on sustainability of benefits:* Benefits from resource projects offer Indigenous groups the opportunity for long term, sustainable solutions to Indigenous levels of disadvantage. Through income flows, training and employment opportunities, and business development, resource projects can contribute to ‘closing the gap’ in living standards between Indigenous and non-Indigenous people. The capacity of agreements to provide inter-generational benefits for Indigenous groups is increasingly recognised as the hallmark of good agreement-making. Mining companies such as Rio Tinto have sought to design royalty packages and governance arrangements in agreements with this objective in mind. See Parts 4 and 5.
- *Benchmarking against leading practice principles:* Sustainable inter-generational benefits derived from resource development comprise the central emphasis in the Australian Government’s policy approach to Indigenous involvement in the resources sector. Despite the leadership shown by companies such as Rio Tinto and Newmont, the Government has expressed impatience with industry’s approach to this issue. In response, the Government has proposed a regulatory framework that will enhance the sustainability of agreements by benchmarking proposed agreements against ‘leading practice principles’. See Part 3.6.
- *Partnership approaches.* The trend towards developing partnerships between the resources industry, government and Indigenous communities is set to develop further in the coming years. In March 2011, the Australian Government announced various initiatives in response to the report of the National Resources Sector Employment Taskforce. These included the appointment of five local Coordinators and a Pilbara Regional Coordinator to facilitate increased employment and business development opportunities for Indigenous people in mining and related industries. The Government also announced a partnership with stakeholders to develop an employment model in the Pilbara that could be replicated in other regions.
- *Indigenous employment as a solution to labour shortages.* There is a growing labour shortage confronting the resources sector in regional areas. Resource companies have come to realise the strong business case for investing in Indigenous training and employment as a means of meeting future workforce needs. This tie in with the emphasis on ensuring

sustainable inter-generational benefits from resource development as a means of ‘closing the gap’. See Part 5.5.

2.4. Recent agreement-making between oil and gas companies and Indigenous groups

While the majority of resource company agreements with Indigenous people in Australia have been for mining rather than oil and gas, since the 1980s there have been several significant arrangements established between oil and gas companies and Indigenous groups related to onshore and, more recently, offshore developments. This is due to an increase in activity in the oil and gas industry and a greater recognition of the need to engage with, and create benefits for, Indigenous groups, even where there is no legal obligation to do so.

The systematic search for oil and gas across Australia’s continental basins has brought the petroleum industry into contact with Aboriginal people, particularly in the remote areas in the centre of Australia. The Amadeus Basin in the Northern Territory and the sedimentary basins in northern South Australia have been historically the focus of this engagement.

See Table 2 for details of the onshore oil and gas developments and associated agreements.

Other recent examples involve arrangements related to the development of significant offshore gas projects that include substantial terrestrial infrastructure (e.g. onshore processing plants or gas pipelines). These developments have led to a significant phase of agreement-making between oil and gas companies and Indigenous groups.

See Table 3 for details of offshore oil and gas developments and associated agreements.

Table 2. Onshore oil and gas developments and associated agreement-making in Australia

State/Territory	Description
<p>Northern Territory</p>	<p>Mereenie Oil and Gas Field</p> <ul style="list-style-type: none"> • One of Australia’s few onshore oil fields. Discovered in 1963 and commenced production in 1983 following an agreement with Aboriginal land owners under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). Currently operated by Santos Ltd. • A similar agreement exists with Magellan Petroleum at its nearby Palm Valley Gas which supplies gas to generate power in Alice Springs. • Agreements over each of the fields were renegotiated with the Central Land Council on behalf of Aboriginal land owners in 2002 and 2003 following the expiry of the original licences.
	<p>Amadeus Basin</p> <ul style="list-style-type: none"> • Covers a vast area. Central Petroleum Ltd has licences to explore the entire basin. • Exploration agreements in place with Aboriginal people through both the <i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i> and <i>Native Title Act 1993 (Cth)</i>.
	<p>Beetaloo Basin, near Daly Waters</p> <ul style="list-style-type: none"> • Oil and gas exploration leading to an agreement was made by Sweetpea Petroleum with the Northern Land Council in 2003.
<p>South Australia</p>	<p>Cooper Basin, north-east SA</p> <ul style="list-style-type: none"> • Exploration led to developments including the major oil and gas production area at Moomba, operated by Santos which led to the development of Cultural Heritage Management Plans with the Dieri, Boonthamurra and Yandruwandha Yawarrawarrka Traditional Owners.
	<p>Officer Basin, north-west WA</p> <ul style="list-style-type: none"> • Agreement between Pitjatjantjara Council and Indonesian petroleum explorer, Ahava, which has interests in the Officer Basin covered by Maralinga Lands.
<p>Queensland</p>	<p>Gladstone Liquefied Natural Gas</p> <ul style="list-style-type: none"> • The GLNG project will involve piping coal seam gas (CSG) from Santos’ eastern Queensland fields to a plant at Gladstone, where the gas will be liquefied. In August 2010, Santos announced it had signed 42 individual ILUAs with Aboriginal people for the GLNG project. Agreements are now in place from Gladstone through to Roma and cover production areas in the Surat and Bowen basins in central Queensland and a pipeline corridor to Gladstone. Exports are expected to commence in 2015.
	<p>Queensland Curtis LNG project</p> <ul style="list-style-type: none"> • The QCLNG project will pipe gas from the QGC’s Surat Basin Gasfields in Southern Queensland to a liquefaction plant on Curtis Island, near Gladstone in Central Queensland. QGC reached agreement with eight Native Title claimant groups in March 2010, covering the gasfields, pipeline route and Curtis Island site. All of these agreements were registered as ILUAs by the first half of 2011. The focus has now shifted to implementation and ongoing governance.

Table 3. Offshore oil and gas developments and associated agreement-making in Australia

State/Territory	Description
<p>Western Australia</p>	<p>Burrup and Maitland Industrial Estates Agreement</p> <ul style="list-style-type: none"> • In the Pilbara region, the Burrup and Maitland Industrial Estates Agreement Implementation Deed (the Burrup Agreement) with three Aboriginal groups was signed in January 2003. • The industrial estate contains onshore facilities of Woodside’s North West Shelf Venture, one of the world’s largest LNG producers. • The Burrup Agreement allowed for the acquisition of native title and provides for the establishment of an Aboriginal Body Corporate, the Murujuga Aboriginal Corporation, to manage financial and other benefits of the agreement.
	<p>Browse Basin</p> <ul style="list-style-type: none"> • Woodside’s Browse Basin project off the Kimberley coast involves the construction of a LNG plant at James Price Point north of Broome. • In April 2009, Woodside, together with the Western Australian Government and the Kimberley Land Council (KLC), on behalf of Traditional Owners, signed a Heads of Agreement to support the establishment of the LNG Precinct at James Price Point. • The total social and economic benefits package is reportedly worth \$1.5 billion to local Aboriginal communities over 30 years, including \$250 million from Western Australian Government. • Difficulties obtaining consent of all the native title parties prompted the Western Australian Government to announce in September 2010 that it intends to compulsorily acquire the land.
<p>Northern Territory</p>	<p>Wickham Point LNG, Darwin</p> <ul style="list-style-type: none"> • The Conoco Philips LNG plant at Wickham Point commenced in 2006 and has a long term contract with Tokyo Electric Power and Energy. A pipeline from Bayu-Udan Gas Field Joint Petroleum Development Area in the Timor Sea delivers the gas to Darwin. • An agreement was made in 1999 with the Northern Land Council over the Wickham Point gas plant site which includes payments to Aboriginal land owners, a liaison committee, and an Aboriginal employment strategy.
	<p>Ichthys Project, Darwin</p> <ul style="list-style-type: none"> • INPEX is currently building an LNG processing plant at Blaydin Point on Middle Arm Peninsula, Darwin. Gas is piped from the Browse Basin, off Western Australia. Part of the Darwin LNG project. • The LNG site is not subject to native title, the land being compulsorily acquired by the government (the Larrakia native title claim subsequently failed). • However, in November 2009, the Larrakia Development Corporation and INPEX signed an MOU to identify employment, training and business opportunities for the Larrakia, and support with other initiatives.
	<p>Bonaparte Basin (Blacktip field)</p> <ul style="list-style-type: none"> • ENI has a 25 year contract to supply gas to the NT Power and Water Corporation. • Gas is brought from the Blacktip field in the Bonaparte Basin to an onshore facility on Aboriginal land near the community of Wadeye. • The onshore facility is subject to a long term lease agreement pursuant to <i>Aboriginal Land Rights (NT) Act 1976</i>. • An onshore pipeline was built from Wadeye to the existing north-south, Darwin to Mereenie pipeline. Further agreements with the Northern Land Council exist over the pipeline, registered with the National Native Title Tribunal in March 2009.

PART 3 –

Australian legislative context

3. Australian legislative context

Key messages

- Aboriginal land rights were being legislated in several Australian jurisdictions from the 1970s, but the *Mabo* High Court decision finally gave common law recognition to native title (Part 3.2).
- The Federal Government passed the *Native Title Act 1993* to create a legislative framework for native title claims and determinations, but perhaps the most significant development for the resources industry was the introduction of the framework for Indigenous Land Use Agreements (ILUAs) in 1998. Even where native title has not been determined, the ILUA process enables resource developers to negotiate with native title claimants to create certainty for projects (Part 3.2.3).
- The Indigenous land rights considerations for resource developers will differ depending on the tenure on which the project is located (Part 3.2.2).
- Native title law provides for two avenues for agreement-making:
 - Indigenous Land Use Agreements (ILUAs) – a more flexible process based on open negotiation
 - The right to negotiate provisions, leading to section 31 agreements – less flexible, but often used as a fallback where ILUAs cannot be negotiated (Part 3.3).
- All jurisdictions have laws requiring cultural heritage protection, but Queensland legislation goes further in requiring proactive negotiation with Aboriginal parties for a Cultural Heritage Management Plan for major developments (Part 3.4).
- There are key differences in applicable laws and types of Indigenous land tenure between different State and Territories in Australia (Part 3.5).
- The Federal Government has proposed several reforms affecting agreement-making, including establishment of a body to oversee agreement-making, reforms to taxation treatment of benefits and streamlining ILUA provisions in the Native Title Act (Part 3.6).

3.1. Overview

This part reviews the Australian legislation that is relevant to the process of agreement-making between Indigenous parties and resource companies. The historical context for the development of the current legislative framework is briefly outlined.

A particular focus in this section concerns the key provisions of the *Native Title Act 1993* (NTA) that are specifically applicable to onshore coal seam gas exploration and production in Australia. Although largely focusing on onshore exploration and production, the ‘right to negotiate’ under the NTA can also be applicable for offshore plants.

3.2. A brief overview of Indigenous land rights and native title in Australia

3.2.1. Historical development of land rights legislation

The story of Indigenous Australians' long struggle for recognition of their native title in the common law of the land is well documented. The High Court's *Mabo* decision in 1992 ended two centuries of the doctrine that the Australian continent was the property of no one at the time of the settlement – the doctrine of 'terra nullius'.

However, even before the *Mabo* decision entrenched recognition of native title in the common law, Australian State and Federal Governments had been legislating to reinstate ownership of some Crown lands and reserves (either vacant or already dedicated to Indigenous purposes, such as missions) to Indigenous groups since the 1970s.

With native title rights layered on top of these existing legislative schemes, this has created a patchwork of land tenures and property rights that make Indigenous land law one of the most complicated areas of Australian law.

From settlement in 1788, the British legal system and colonists treated the Australian land as ownerless and available for acquisition: the *terra nullius* doctrine. The Aboriginal people received no grant from the Crown and they had no title to land. From the 1930s Aboriginal activists fought to uphold their links to reserve lands, with some successful struggles against the forcible closure of reserves in the 1960s in NSW, and against dispossession and exploitation, such as the Gurindji struggle, which began in 1963.

A federal referendum in 1967 altered the Constitution to allow the Commonwealth to make laws for Aboriginal people. However, land rights for Indigenous people were rejected as Australian common and property law did not recognise Indigenous rights to land. This position was consolidated in 1971 in the Northern Territory with Justice Blackburn rejecting the Yolngu people's challenge against the removal of the Nabalco bauxite mine from traditional lands at Yirrkala.

The *Aboriginal Land Rights (Northern Territory) Act 1976* was the first law in Australia to allow a claim of land title if Aboriginal claimants could show evidence of their traditional association with the land. Where traditional land was proven, it was placed in Aboriginal land trusts to be held in perpetuity for Traditional Owners. This put into place the legal recognition of the Aboriginal system of land ownership and into law the concept of inalienable freehold title.

From the late 1970s to the early 1990s, other States began legislating to reinstate ownership of some Crown lands and reserves (either vacant or already dedicated to Indigenous purposes, such as missions) to Indigenous people. For example, in Queensland, the former missions were granted to Aboriginal Councils as Deeds of Grant in Trust in the mid 1980s and in 1991, the *Aboriginal Land Act 1991* made certain reserves and national parks claimable by Aboriginal groups as a special form of Aboriginal freehold to be held by Aboriginal Land Trusts.

Finally, in the 1992 *Mabo* judgment, the High Court of Australia made a historic decision to overturn the previous legal precedents and hold that Australian common and property law could recognise Indigenous rights to land. The court held that native title has continued to exist since before colonisation and can co-exist within Australian common law provided it had not been subsequently extinguished. The judges of the High Court, except Dawson J, agreed that:

- There was a concept of native title at common law
- The source of native title was the traditional connection to, or occupation of, the land

- The nature and content of native title was determined by the character of the traditional connection or occupation
- Native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was manifest (Bartlett, 1993).

The court recognised Torres Strait Islander Eddie Mabo's legal claim to having an unbroken connection to his land on the island of the Mer. This set a legal precedent for future recognition of native title on Australian land that is Crown or government land (comprising at least 12 per cent of land). The effect of the decision was to create considerable uncertainty about land tenure in Australia. It also raised the prospect of lengthy court processes for other Indigenous groups in Australia to have their native title determined and recognised.

To resolve this uncertainty about land tenure and to provide a statutory process for legal recognition of native title, the Australian Parliament passed the *Native Title Act 1993* (Cth). The NTA provided a framework to determine where native title still exists, as well as to ensure that existing land interests (largely non-Indigenous) were valid and ensure there were processes for creating interests over native title land, such as mining tenements.

An important landmark native title decision since the Mabo decision was the *Wik Peoples v the State of Queensland Ors; The Thayorre People vs The State of Queensland Ors* (1996) HCA 40 ('*Wik*'), in Cape York. This decision recognised that native title could co-exist with pastoral leases and that whilst disputes or uncertainty rendered pastoralists' rights upheld over native title interests, the 'right to negotiate' would give Indigenous people some control over developments such as mining or harvesting on their traditional land.

In 1998, the Howard Government passed amendments to the NTA with the purported objective of creating greater 'certainty' around native title. These revisions were criticised by the United Nations Committee for the Elimination of Racial Discrimination, which suggested that it actually reduced the Indigenous right to traditional lands.

While the 1998 amendments diminished native title rights, a significant development was the creation of an agreement-making framework to enable access to land where native title exists or is under native title claim. The amendments provided an improved legal framework to enable three types of Indigenous Land Use Agreements (ILUAs) which were more flexible and secure (Sheehan and Mascher 1998).

The development of the ILUA framework has been perhaps the most significant development in native title laws from the perspective of resource companies. Although negotiated settlement relies on all parties having the 'will' to negotiate and the procedural requirements may involve considerable resources, ILUAs provide a mechanism for resource companies to achieve mutually beneficial outcomes with Indigenous groups affected by new developments. ILUAs are discussed in more detail in Part 3.3.

3.2.2. Conventional land tenures vs native title rights

It is important to distinguish conventional forms of land tenure from native title rights. Indigenous land holdings in some parts of Australia may include conventional forms of land tenure such as:

- Aboriginal Land Trusts held by Traditional Owners: Freehold land (or some special communal variant of freehold) granted to trusts comprising Traditional Owners under legislation (e.g. *Aboriginal Land Act 1991* (Qld))
- Crown reserves set aside for the benefit of Aboriginal groups: For example in Queensland, 'reserves for Aboriginal purposes' and in Western Australia, reserves held on behalf of Indigenous communities by the State Government's Aboriginal Lands Trust

- ‘Normal’ freehold purchased for Indigenous groups by the Indigenous Land Corporation
- Deeds of Grant in Trust (DOGITs) over former reserves held by Aboriginal Shire Councils in Queensland: A special type of tenure that is ultimately Crown land but is granted by the State to Aboriginal communities in perpetuity through a grant that can only be revoked by an Act of Parliament³

Many of these forms of land tenures are in fact more robust than native title because they may include a full range of ownership rights that have a commercial value in the wider economy. They are land rights that have been specifically granted by government.

Native title rights, on the other hand, comprise only the bundle of residual rights related to land that have continued without extinguishment for the last two centuries since colonisation. What these rights are will depend on the local customs of particular Traditional Owner groups and many of them, such as the right of exclusive possession of land, will have been extinguished by the processes of colonisation. This leaves native title holders with a bundle of continuing rights that mostly include rights to use the land to hunt, fish, gather or conduct ceremonies on an area and to negotiate about what happens on that land. These are not ownership rights in the sense of the ability to exclude others from the land and they are not commercial rights in the conventional sense.

Box 4. Where native title can be claimed

Native title can be claimed in the following areas:

- Vacant (unallocated) Crown land
- Some state forests, national parks and public reserves depending on the effect of state or territory legislation establishing those parks and reserves
- Oceans, seas, reefs, lakes and inland waters
- Some leases, such as non-exclusive pastoral and agricultural leases, depending on the state or territory legislation they were issued under
- Some land held by or for Aboriginal people or Torres Strait Islanders.

Native title can be claimed on some pastoral or agricultural leases but this will depend on the state or territory legislation under which the lease was granted and the terms of the lease itself.

Native title cannot be claimed:

- On freehold land, other than freehold land held by or on behalf of Aboriginal or Torres Strait Islander people
- When certain things have been done with the land, such as freehold grants, grants of exclusive possession, residential and other leases and public works like roads and hospitals.

Native title is said to be extinguished when these occur.

Source: National Native Title Tribunal

³ These DOGIT lands can be transferred as Aboriginal freehold to new Aboriginal Land Trusts under the *Aboriginal Land Act 1991*, but to date only certain non-township parts of the DOGITs have been transferred to traditional owners because many of the residents of Aboriginal townships on DOGITs are not actually traditional owners and would therefore feel dispossessed by a transfer to traditional owners.

Thus, for a resource company seeking to develop a project on land in a regional area, the first question will be: *what type of land rights are held by local Indigenous groups?*

- *Conventional tenure*: Where it is a conventional form of land tenure directly held by Indigenous groups over the area (such as reserve or trust or freehold land), then a more conventional commercial negotiation may be applicable
- *Native title rights*: Where the land is some form of Crown tenure (such as a pastoral lease) over which Indigenous groups hold or claim native title rights, then the native title legislative framework will dictate particular processes for agreement-making.

3.2.3. Native title claimants vs native title holders

An important part of the native title legal framework is that negotiations with Indigenous groups must occur even where the existence of native title has not yet been proven. The NTA sets out a sequential approach where an Indigenous group must first pass a threshold test to enable them to be registered as ‘registered native title *claimants*’. This test is known as the ‘registration test’. Claimants must then establish their case and achieve a native title determination, upon which they become ‘native title *holders*’. Under the NTA, a resource company may be obliged to negotiate not just where there are native title holders, but also where there are only registered native title claimants.

Box 5. The registration test to become a registered native title claimant

A person or group claiming native title must first submit their claim to a registration test in order to become a ‘registered native title claimant’. Becoming a registered native title claimant means that the person or group has a procedural ‘right to negotiate’ in relation to new developments on land within the native title claim.

To satisfy the conditions of the registration test, the applicant must provide the following information:

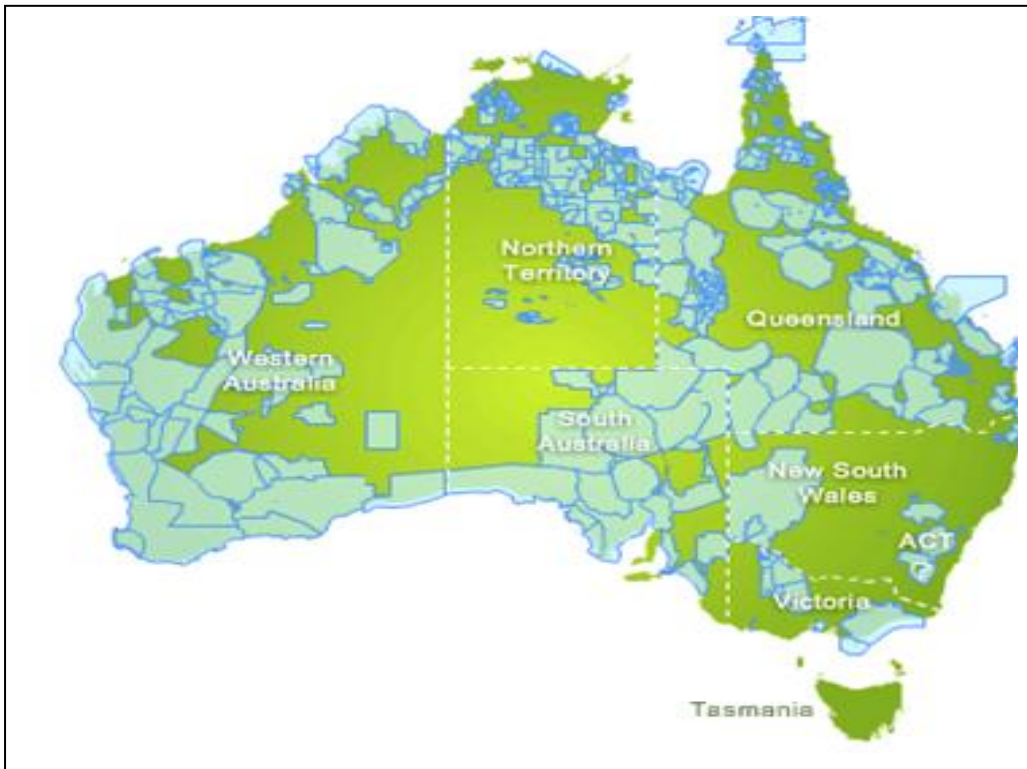
- Identification of the area subject to the native title claim
- A sufficient description to identify the persons in the native title claim group
- A clear description of the native title rights and interests claimed
- A sufficient factual basis for the assertion that the claimed native title rights exist, including the native title claim group’s continuing association with the area and continuing observation of traditional laws and customs
- A current or previous traditional physical connection by at least one member of the native title claim group with any part of the area.

A further requirement is that the application has been certified by the relevant representative body, or that the applicant is authorised to make the application by members of the native title claim group and is a member of that group.

Source: National Native Title Tribunal

In reality, few native title claims have proceeded to determination. Maps 1 and 2 contrast the land that is subject to native title claims and the land where native title has actually been determined. The maps illustrate that while large areas of land are under claim, there have been determinations in only a small proportion of areas, mostly in Western Australia. It takes on average six years to process each native title claim and by April 2010 there were still 420 due (NNTT 2010).

Map 1: Land subject to native title applications



Source: NNTT 2010

Map 2: Where native title has been determined



Source: NNTT 2010

3.3. The native title agreement-making framework

There are two significant types of agreements that are made pursuant to the *Native Title Act 1993* (NTA):

- Agreements to resolve the determination of native title
- Agreements to resolve future acts on land where native title exists or may exist.

It is the second category that is directly relevant to resource companies in negotiating new projects. A 'future act' is a proposed activity – such as the grant of an exploration permit or mining lease – that may affect native title in the future. For a resource development that is a future act, the NTA provides two pathways for resolving the potential impact on native title:

1. An Indigenous Land Use Agreement (ILUA); or
2. The right to negotiate (RTN) process (leading to what are known as section 31 agreements)

A significant practical difference between these two pathways is that:

- If an attempt is made to resolve native title issues through ILUA negotiations, there is no process to ensure the agreement is finalised one way or another if the negotiations fail to result in the signing of an agreement.
- On the other hand, if the right to negotiate process fails to result in an agreement, any party can apply to the National Native Title Tribunal (NNTT) to finally determine whether the future act can proceed and under what conditions.

These two pathways to an agreement are not mutually exclusive and can occur in parallel. In some negotiations, the parties start with an attempt to negotiate an ILUA but end up in the right to negotiate process. An ILUA might be the preferred outcome for a resource company, but if it fails, the opportunity to have the matter resolved through the RTN process is a useful fallback position.⁴ In order to keep this fallback option open, some proponents commence the RTN process at the same time as the ILUA negotiations.

Each of the two agreement-making pathways has its own advantages and disadvantages for mining companies and Indigenous groups. The decision about which pathway to follow involves a number of considerations – an excellent comparison of the ILUA and right to negotiate processes is available from the NNTT.

Further information:

Some simple fact sheets about future act processes, including an excellent comparison of the ILUA and RTN processes, can be found on the NNTT website at:

<http://www.nntt.gov.au/Future-Acts/Pages/reading.aspx>

3.3.1. Indigenous Land Use Agreements (ILUAs)

An ILUA is a statutory agreement about the use and management of land made between a native title party and other parties that may include the resource company and/or government. ILUAs can cover matters such as:

- Surrender of native title
- Native title holders agreeing to future developments

⁴ This is subject to the proviso that the RTN process applies only to tenements and thus is not a fall-back option for non-tenement infrastructure, such as a pipeline or LNG plant. The only fall-back in such cases is compulsory acquisition.

- The relationship between native title rights and the rights of other people
- Access and management arrangements
- Compensation.

There are two common types of ILUA (body corporate agreements and area agreements) and one less common type (alternative process agreements):

- *Body corporate agreements:* If there has been a native title determination for an area, then native title will have been vested in a 'native title body corporate', which is an Aboriginal organisation that holds the native title on behalf of the native title holders. In this case, an ILUA will be negotiated with that body corporate and will be called a 'body corporate agreement' under the NTA.
- *Area agreements:* If, as is usually the case, there has not yet been a native title determination, then the ILUA is negotiated with the registered native title claimants and the resulting agreement will be called an 'area agreement'. As native title has not been determined in the majority of cases, the vast majority of ILUAs are area agreements involving native title claimants. One survey in 2008 suggested that 91.7% of ILUAs were area agreements (AIATSIS, 2008, p.10).

What is the National Native Title Tribunal?

The NNTT is an Australian Government body that has a range of functions under the Native Title Act, including:

- Applying the registration test for native title claimants
- Mediating native title claims under direction of the Federal Court
- Notifying people about, and registering, native title claims and ILUAs

An ILUA will often be the preferred pathway for a resource company to resolve native title issues for a project (see Box 6 in relation to the Queensland context).

Box 6. The advantages of an ILUA to settle native title interests in the Queensland context

An ILUA will usually be the preferred form of agreement with Indigenous groups because:

- It is a flexible negotiation between the parties with few legislative parameters regarding timelines
- Future activities and multiple projects can be included in a single agreement
- It is a binding agreement in respect of all 'future acts'
- It binds all native title parties, including those who may emerge in the future
- The scope of the agreement can be flexibly negotiated. By contrast, to apply for a declaration that a project is of state significance under the Queensland Coordinator-General's legislation (thereby enabling a more expedited agreement-making process overseen by the Coordinator General) requires a very specific definition of the scope of project, which may not be known precisely at the time of negotiations with traditional owners
- If it embeds a cultural heritage management strategy, this satisfies Queensland cultural heritage legislation, avoiding the need for a separate Cultural Heritage Management Plan. This also simplifies the negotiation process, because a statutory CHMP may need to involve different parties than the ones who are involved in the ILUA negotiations.

The registration of an agreement as an ILUA with the NNTT can ensure that a resource company gains contractual certainty of the grant of titles for the enterprise. The most important feature of an ILUA is that it binds not only the parties to the agreement (i.e. for an area agreement, the registered native title claimants), but any parties that may subsequently become native title holders, even if they were not involved in the agreement.

Once registered, an ILUA is a binding agreement in respect of all ‘future acts’ permitting the parties to the agreement to contract out the ‘future act’ and ‘right to negotiate’ provisions. An ILUA is able to achieve this outcome because the NTA sets out processes to ensure that native title claimants are part of the negotiation and that the relevant Native Title Representative Body (NTRB) certifies that all reasonable efforts have been made to identify all persons who hold or may hold native title for an area and that all the persons identified authorise the making of the ILUA.

On the other hand, a disadvantage of an ILUA is that because it requires the agreement of all claimants and Indigenous representative bodies it can be difficult and costly at times to achieve. The timeline in Figure 3 outlines the process for registration of an ILUA. The process indicates that it typically takes a minimum of six months between lodgement and registration of an ILUA

The NTA indicates who must or may be a party to each type of ILUA (see Table 4). An ILUA cannot be registered until the appropriate parties are involved in the agreement (NNTT 2010). The NNTT can assist in identifying the appropriate native title claimants and NTRB for the respective area.

Government must be a party to the ILUA if it is intended that claimants will surrender their native title rights and interests via the agreement. Whether surrender or extinguishment of native title is required will depend on the nature of the project. For example, where it involves building an industrial estate, then surrender of native title rights will be required in order to sell lots as freehold to companies. However, where it is a resource project with a finite lifespan, then native title may not need to be surrendered and can instead be suspended and revive after the project is completed.

Table 4. Required parties for different types of ILUAs

People or organisation	Body corporate agreement	Area agreement	Alternative procedure agreement
Native title holders and people claiming to hold native title (including unregistered claimants)	Na	one or more must be a party if there is no: <ul style="list-style-type: none"> • registered native title claimant • registered native body corporate; or • representative body as a party – otherwise they may be a party 	may be party
Registered native title bodies	Na	must be a party if they exist	may be party
Registered native title bodies corporate	must be party	must be a party if they exist	must be a party if they exist
Cth, state or territory governments	must be party if the agreement: <ul style="list-style-type: none"> • extinguishes native title by surrender (i.e. when native title 	must be a party if the agreement: <ul style="list-style-type: none"> • extinguishes native title by surrender • validates future acts which have already been done invalidly 	the relevant government must be a party

	<p>holders agree to give up their native title)</p> <ul style="list-style-type: none"> validates future acts which have already been done invalidly 	<ul style="list-style-type: none"> allows for a change in the amount of extinguishment of native title caused by the validation of an intermediate period act – otherwise they may be a party 	
Representative bodies	may be party	<p>must be a party if there is no:</p> <ul style="list-style-type: none"> registered native title claimant registered native title claimant registered native title body persons claiming to hold native title <p>otherwise they may be party</p>	must be party
Others (local govt, miners, pastoralists & energy companies	may be party	may be party	may be party
Anyone liable to pay compensation	must be party if the agreement provides for validation of a future act or for a change in amount of extinguishment	must be a party if the agreement provides for validation of a future act or for a change in the amount of extinguishment of native title caused by the validation of an intermediate period act	must be a party if the agreement provides for validation of a future act

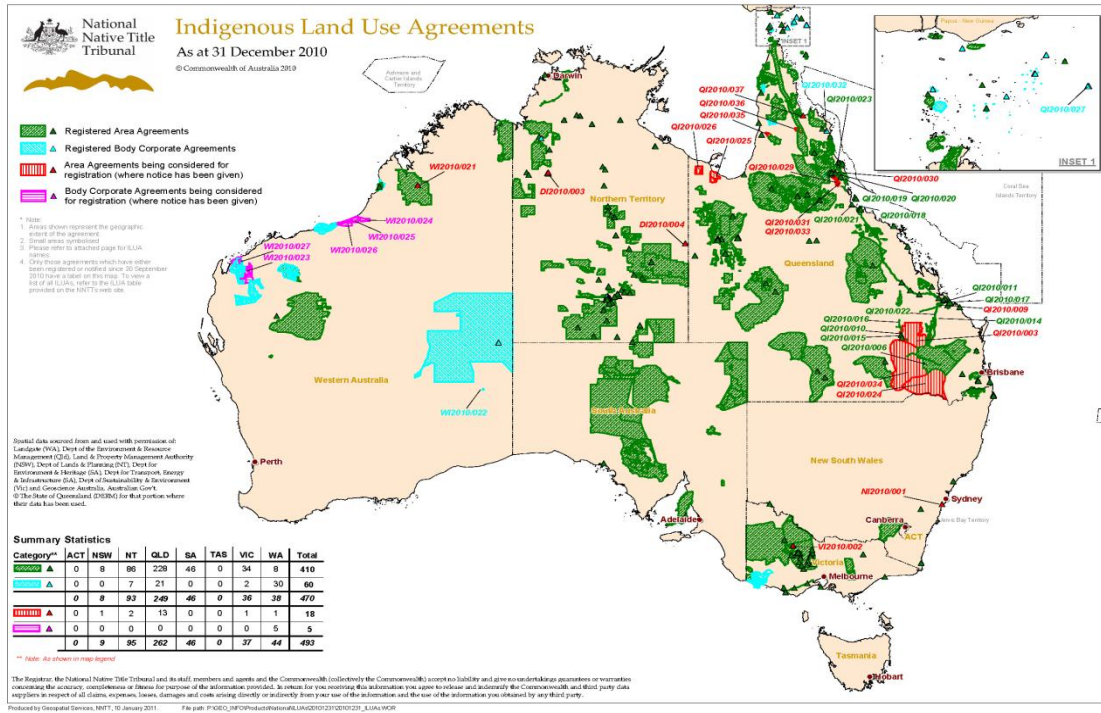
Source: NNTT 2008

Map 3 highlights the diverse range of ILUAs that exist across Australia. By comparing the map with Maps 1 and 2, it can be seen that although there have been few native title determinations, ILUAs have been made over large tracts of land where native title claims are currently in train or in areas where there are no native title claims. Table 5 shows the number of type of ILUAs existing in each of the States and Territories.

A key advantage of ILUAs is that the negotiations can proceed and agreements can be made irrespective of the status and progress of native title claims through the Federal Court. The *Western Cape Communities Co-existence Agreement* (WCCCA) 2001 and the *Argyle Diamond Mine Participation Agreement* 2005 are examples of significant ILUAs that paved the way for the expansion of major resource projects.

It should be noted that the ILUA may not contain all the relevant provisions agreed between the parties (AIATSIS 2008, p.9). In the Argyle negotiations, for example, the ILUA was part of a package of agreements that included a Management Plan Agreement governing day to day activities at the site. Parties often choose to include only the native title-related issues in the ILUA and include other commitments and implementation matters in an ancillary agreement. An advantage of this approach is that ancillary agreements can be amended by agreement of the parties, whereas it is very difficult to amend an ILUA once registered with the Tribunal.

Map 3: Existing ILUAs December 2010



Source: NNTT 2010

Table 5. National ILUA Statistics (31 December 2010)

State/Territory	Area Agreements	Body Corporate Agreements	Total
ACT	0	0	0
NSW	8	0	8
NT	86	7	93
QLD	228	21	249
SA	46	0	46
Tasmania	0	0	0
Victoria	34	2	36
WA	8	30	38
National Total	402	44	470

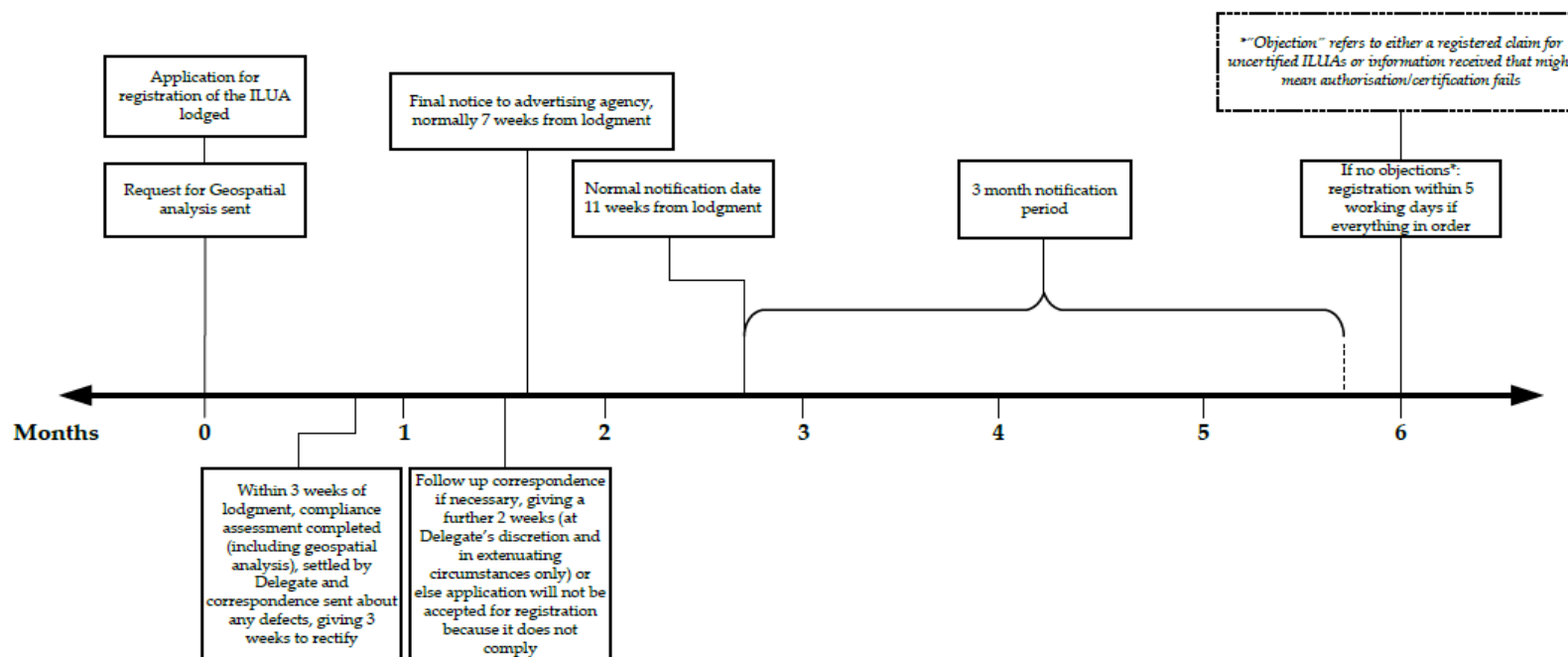
Source: NNTT 2010

Figure 3. Timeframes for registration of Indigenous Land Use Agreement



Indigenous land use agreement (Area agreement)

Indicative timeframe: lodgment to registration



NOTE: This timeline is designed to assist parties to focus on the steps and potential minimum timeframes involved in ensuring an ILUA Register prior to the proposed future acts. Timeframes are an example only and not indicative of every ILUA. Some ILUAs may take significantly longer or shorter to negotiate. The Commonwealth, the National Native Title Tribunal, its staff and officers accept no liability for any use of this material or reliance placed upon it.

National Native Title Tribunal
 Indigenous land use agreement (Area agreement)
 Created January 2009. Further information: Public Affairs 08 9268 7495
 Disclaimer and copyright: <http://www.nntt.gov.au/Pages/Copyright.aspx>

Source: NNTT 2010

3.3.2. Agreements arising from the right to negotiate process – section 31 agreements

The right to negotiate process is triggered when the government issues a section 29 notice indicating that it proposes to grant a mining or exploration tenement. A resulting agreement is made under section 31(1) (b) of the NTA and contains the consent of the native title parties to the grant of the tenement (the future act). Key features of the right to negotiate process are:

- The agreement can only deal with one future act (the one notified in the section 29 notice), although ancillary agreements may be negotiated
- The State or Territory government is required to be a party
- The Act requires that the resource company undertake the negotiations ‘in good faith’
- If the parties are unable to reach an agreement despite negotiating in good faith, then any party can ask the Tribunal to determine the matter if at least six months have passed since the notification day set out in the section 29 notice.

As the agreement can only relate to a specific mining or exploration tenement, these agreements are much narrower than an ILUA. They are more appropriate for dealing with a single aspect of a project. An ILUA, on the other hand, presents an opportunity for an agreement where native title parties consent to the issue of a whole range of mining or exploration tenements or other project activities, which provides greater certainty for the project as a whole.

An advantage of the right to negotiate pathway over the ILUA process is that it provides a degree of certainty to a company because, if negotiations fail after six months, the company can seek a determination from the NNTT as to whether the grant of the tenement can proceed. However, in terms of a negotiation process, this might also be considered a disadvantage insofar as the availability of this fallback may taint the negotiations with an atmosphere of duress, from the perspective of native title parties.

By contrast, as an ILUA is a negotiation that can only be finalised by agreement between the parties, the Indigenous parties can have no doubts about the resource company’s commitment to reaching agreement.

3.3.3. Application of Native Title Act to offshore oil and gas development

In 2001, the High Court in *Commonwealth v Yarmirr* (the Croker Island Sea Case) decided that native title can exist offshore within the limits of Australia’s territorial sea. The High Court held that offshore native title can only be non-exclusive. In other words, native title holders do not have the right to exclude others from accessing the sea or sea bed in the waters where native title exists.

Although native title can exist in offshore areas, the NTA deals with these issues differently to land-based native title:

- Native title parties do not have the right to negotiate for offshore developments. Instead, they have certain procedural rights (such as a right to be notified) that other non-native title parties have.
- Where an act that affects native title has been done, native title holders may be entitled to compensation, but the likely quantum that a court would consider appropriate is still unclear.
- *The Offshore Petroleum and Greenhouse Gas Storage Act 2006* requires that offshore petroleum operations be carried out in a manner that does not unduly interfere with other rights and interests, including native title rights and interests. The Australian Government consults with native title parties regarding Acreage Releases. According to the Government,

'It is recommended that individual companies initiate their own consultative processes to develop good working relationships with the Indigenous people in the area.' (Australian Government 2008)

It has been pointed out that there are other circumstances where the NTA may affect offshore oil and gas developments:

- Where an offshore oil and gas explorer is seeking exploration title where the offshore area includes land⁵
- Where an oil and gas producer seeks to convert its exploration permit to a production licence where the offshore area includes land (for example, WAPET has had to go through the right to negotiate process for Thevenard Island off WA's coast)
- Where an oil and gas producer requires land for the development of a facility to treat petroleum piped from offshore oil and gas fields (e.g. Burrup facility for the Gorgon Project).

Box 7. An example of an ILUA – The Western Cape Communities Co-existence Agreement

The Agreement known as the Western Cape Communities Co-existence Agreement (WCCCA) was registered as an ILUA with the NNTT, under the NTA on 24 August 2001, and is now also known as the Comalco Indigenous Land Use Agreement (Comalco ILUA).

The signatories include 11 Traditional Owner groups, four Indigenous Community Councils (Aurukun, Napranum, Mapoon and New Mapoon), Comalco Aluminium Limited and the Cape York Land Council on behalf of the Native Title Parties. The Queensland Government is also a signatory and agreed to provide additional financial benefits on registration of the WCCCA as an ILUA.

Under the Comalco ILUA, the parties agree to validate any acts that are defined as part of the "Comalco" and "Other" interests and activities in the area. The Comalco interests are defined in the ILUA as "The Mining Leases and various property interests" and "Any right or interest granted under the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* (Qld)."Other" interests are defined as the area of any Special Perpetual Mining Purpose Lease (SPMPL) granted within the Weipa Township - this includes land where the SPMPL has been converted to other title.

Without this ILUA, such activities would be subject to the future act provisions of the NTA, which require a right to negotiate process to be followed for all future activities that may affect native title. These provisions may also have found past activities done in the area to be invalid. The ILUA specifies that the right to negotiate, which would apply under the future act provisions, does not apply to any of the activities covered by the agreement. Under the agreement, native title is extinguished by these activities and any surviving rights are surrendered.

The ILUA covers two Mining Leases but includes consent for any "extensions, renewals or replacements" required to access and transport materials between the areas. The parties also consent to the Queensland Ports Corporation granting land and rights necessary for Comalco to carry out their interests in the agreement area, which includes shipping goods in and out of Weipa. The ILUA specifies that this consent is not intended "to preclude the application of any law concerned with the protection of Aboriginal cultural heritage or environmental protection".

Further items covered by the ILUA include:

- Consent to "construction, operation, use, maintenance or repair" of public facilities in Weipa, including roads, bridges, schools, hospitals, pipelines and communications facilities
- Consent to "rights to enable the supply of gas to the Weipa Operations and to any related gas pipelines or provide any storage installations and other facilities" subject to conditions including compensation payment; and
- Consent to transfer land to Traditional Owners. (ATNS 2001; Hunt 2001).

⁵ For example: Sandy Island within Scott Reef off Western Australia's Kimberley coast. Also, Adele Island, Koolan Island and the islands in the Bonaparte Gulf.

3.4. Cultural heritage legislation

All Australian jurisdictions have legislative requirements on developers to protect Indigenous cultural heritage. These requirements set out important procedural steps that a resource company will need to comply with. In practice, resource companies negotiate the management of cultural heritage issues at the same time as the Indigenous agreement. It should be noted that even where native title does not apply, the requirement to engage with Indigenous groups over cultural heritage matters may nevertheless still apply. For example, a pipeline project over freehold land or land where native title has been extinguished may still give rise to cultural heritage considerations.

While legislation differs between jurisdictions, the key requirement is usually the development of a cultural heritage management plan (CHMP) for the project. The Queensland cultural heritage legislation is outlined here by way of example. The relevant law is the *Aboriginal Cultural Heritage Act 2003* (Qld) or the largely identical *Torres Strait Islander Cultural Heritage Act 2003* applicable in the Torres Strait.

The ACH Act provides a duty of care, which:

- Requires those conducting activities in areas of significance to take all reasonable and practical measures to avoid harming cultural heritage
- Is enforced by penalties for non-compliance
- Is outlined in gazetted guidelines, which set out measures for meeting them.

Where there is a registered native title holder or registered native title claimant for an area to be developed, the Act provides certainty for developers by stipulating that that holder or claimant is the relevant Aboriginal party to deal with. In the absence of a native title party, the Aboriginal party is the party of the last failed NT claim or where no such claim has previously existed, the Aboriginal person with particular knowledge about traditions, observances, customs or beliefs and who is recognised in accordance with Aboriginal tradition as having responsibility for the area.

Under the Act, a resource company will be required to develop a CHMP for high-level impact activities, which is essentially an activity for which an Environmental Impact Statement (EIS) is required under legislation. A company can also develop a CHMP voluntarily in order to assist in managing its duty of care.

To develop a CHMP requires compliance with the statutory process in Part 7 of the Act:

- One month notification of intention to develop a CHMP, whereby an Aboriginal party interested in participating must respond within the one month period
- Approval of a plan developed by the developer by the relevant State agency if no Aboriginal party comes forward
- Maximum of three months process of negotiation with the Aboriginal party about the terms of the plan
- If necessary, recourse to the Land Court for mediation or, if this fails, a recommendation to the Minister.

Further information:

Guidelines for developing a CHMP in Queensland can be accessed at:

<http://www.derm.qld.gov.au/cultural-heritage/pdf/chmpguidelines.pdf>

Under section 106 of the Act, the types of issues that might be included in CHMP include:

- (a) When particular project activities are to happen
- (b) When particular activities under the plan are to happen
- (c) Arrangements for access to land for carrying out activities under the plan, including details of arrangements entered into with owners or occupiers of land
- (d) Identification of known Aboriginal cultural heritage, noting, if appropriate, any reference to the cultural heritage in the database or register
- (e) The way Aboriginal cultural heritage is to be assessed
- (f) Whether Aboriginal cultural heritage is to be damaged, relocated or taken away, and how this is to be managed
- (g) Contingency planning for disputes, unforeseen delays and other foreseeable and unforeseeable obstacles to carrying out activities under the plan
- (h) Other matters reasonably necessary for successfully carrying out activities under the plan.

Significantly, the CHMP process in the *Aboriginal Cultural Heritage Act 2003* (Qld) is not required if a project is covered by a native title agreement, such as an ILUA or a section 31 agreement (see section 86).

In other jurisdictions, such as South Australia and Western Australia, there is no legislative requirement to proactively negotiate cultural heritage management plans for a development project, although cultural heritage protection measures may be triggered where a heritage site registered under State laws is impacted. However, other jurisdictions are likely to follow Queensland's example by developing statutory frameworks for the negotiation of cultural heritage management between developers and Indigenous parties.

South Australia is currently reviewing its cultural heritage laws and the need for a statutory framework has been a strong theme in consultations.

3.5. Agreement-making in different Australian jurisdictions

The unique legislative and policy environment within each Australian State or Territory gives rise to a different set of considerations that will apply depending on which jurisdiction a resource company is operating within.

Table 6 summarises some of the different considerations that will apply in selected jurisdictions. It should be noted that the complexity of the legislative framework does not permit a comprehensive description of all relevant legislation in this summary format. Further, the table does not deal with legislation applicable to specific resource sectors, such as the *Petroleum Act 1923* (Qld), which include additional procedural requirements regarding project approvals.

Table 6. Legislative and policy considerations affecting agreement-making in selected Australian States and Territories

	Queensland	Northern Territory	Western Australia	South Australia
Relevant legislation (apart from federal Native Title legislation)	<ul style="list-style-type: none"> • <i>Native Title (Queensland) Act 1993</i>: complements the Commonwealth NTA and validates certain past acts • <i>Native Title (Queensland) State Provisions Amendment Act (No. 2)</i>: amended the Mineral Resources Act to provide for an alternative procedure (to the NTA’s ‘right to negotiate’ provisions) for low impact mineral development licences, low impact exploration permits and low impact prospecting permits. • <i>Aboriginal Land Act 1991</i>: grants Aboriginal freehold to trusts comprised of TOs or people with historical association (mostly former reserves, national parks, land declared as claimable). • <i>Torres Strait Islander Land Act 1991</i>: as per above. • <i>Local Government (Aboriginal Lands) Act 1978</i>: granted special 30 year leases in trust to the Aurukun and Mornington Island communities. 	<ul style="list-style-type: none"> • <i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i> (the ALRA): Commonwealth legislation that has resulted in significant areas (approx half the NT) being held under a communal form of freehold title. Access to Aboriginal land requires consent of the TOs and a prescriptive statutory process exists that requires agreements to be reached with Aboriginal groups. • <i>Aboriginal Sacred Sites Act (1989)</i>: Northern Territory legislation designed to protect sites held by Aboriginal people as sacred. Administered by the NT Sacred Sites Authority, certificates under the Act can be issued for work that may damage or disturb sacred sites. This normally follows a sacred site clearance process. • <i>Heritage Conservation Act (1991)</i>: Seeks to protect objects and sites with heritage significance including archaeological sites. Archaeological surveys are normally required for disturbance activities. In practice these can be built into procedures under agreements related to cultural and 	<ul style="list-style-type: none"> • <i>Titles (Validation) and Native Title (Effects of Past Acts) Act 1995</i>: complements the Commonwealth NTA, validates certain past acts between 1 January 1994 to 23 December 1996, and confirms WA’s ownership of natural resources. • <i>Native Title (State Provisions) Act 1999</i>: sought to introduce alternative state provisions to the ‘right to negotiate’ process in the NTA. However, in 2000 the federal Senate voted to disallow the Act, so the key provisions have never taken effect and the Commonwealth NTA provisions continue to apply. • <i>Aboriginal Heritage Act 1972</i>: protects identified Aboriginal heritage sites. • <i>Aboriginal Affairs Planning Authority Act 1972 (AAPAA)</i>: establishes the Aboriginal Lands Trust, which holds reserves and other land for the benefit of Aboriginal people. The minerals and petroleum on or under Aboriginal Lands Trust are the property of the Crown - mining or 	<ul style="list-style-type: none"> • <i>Native Title (South Australia) Act 1994</i>: complements the Commonwealth NTA and validates certain past acts. • <i>Mining Act 1971</i>: sets out alternative State provisions governing the “right to negotiate” to operate in lieu of the Commonwealth NTA provisions (but does not apply to petroleum industry, which still comes under NTA). • <i>Land Acquisition (Native Title) Amendment Act 2001</i>: brings the Land Acquisition Act in line with the NTA regarding compulsory acquisitions of native title interests. • <i>Environment, Resources and Development Court Act 1993</i>: gives jurisdiction to the Supreme Court and ERD Court to deal with native title matters. • <i>Aboriginal Land Trusts Act 1966</i>: provides that vesting of land in the Trust does not extinguish or affect native title and that dealing’s by the Trust do not extinguish or affect native title. However, the Trust may, by agreement with the Minister and native title holders, deal with the land so as to extinguish or affect native title in the land. • <i>Aboriginal Lands Parliamentary</i>

	Queensland	Northern Territory	Western Australia	South Australia
	<ul style="list-style-type: none"> • <i>Land Act 1994</i>: provides for Deeds of Grant in Trust granted to Aboriginal and Torres Strait Islander Councils (former government reserves). • <i>Aboriginal Cultural Heritage Act 2003</i>: imposes duty of care to avoid harming cultural heritage and requires Cultural Heritage Management Plans for certain activities (large projects where an Environmental Impact Statement is required). • <i>Torres Strait Islander Cultural Heritage Act 2003</i>: as per above. • <i>State Development and Public Works Organisation Act 1971</i>: a project can be declared as a significant project, which triggers involvement of the Coordinator General to oversee an Environmental Impact Statement (EIS) process and coordination of development approval. 	<p>heritage protection.</p> <ul style="list-style-type: none"> • <i>Environmental Assessment Act (1994)</i>: Applies to development proposals that have a potential impact on the environment. Assessments required under the Act require consideration of social and cultural impacts. 	<p>exploration would be subject to the Mining Act. An administrative procedure enables royalty and rent equivalents for mining or exploration on trust land to be paid to the Trust.</p>	<p><i>Standing Committee Act 2003</i>: empower the Committee to oversee other State land rights legislation and inquire into matters affecting the interests of TOs and the manner in which lands are being managed, used and controlled under these pieces of legislation.</p> <ul style="list-style-type: none"> • <i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i>: vests title in the APY lands in an Aboriginal body corporate and includes provisions restricting entry to the lands for mining operations and strict controls on the issuing and negotiation of mining and petroleum tenements. • <i>Maralinga Tjaruta Land Rights Act 1984</i>: similar to the APY Act. • <i>Aboriginal Heritage Act 1988</i>: protects Aboriginal heritage sites, objects and remains, including through Aboriginal heritage agreements. A developer who discovers a heritage site etc. is obliged to notify the State and cannot disturb etc. without ministerial approval. Land holders may be directed to take preventative action.

	Queensland	Northern Territory	Western Australia	South Australia
Main types of Aboriginal land tenure (apart from native title)	<ul style="list-style-type: none"> • Freehold Aboriginal land held by Aboriginal Land Trusts (<i>Aboriginal Land Act 1991</i>). • Aboriginal Deed of Grant In Trust (DOGIT) held by Aboriginal Councils. • Special Leases held by Aurukun and Mornington Councils. • Pastoral properties owned by Indigenous councils or Indigenous corporations (e.g. purchased for their benefit by the Indigenous Land Corporation). 	<ul style="list-style-type: none"> • Freehold Aboriginal land held by Aboriginal Land Trusts under ALRA: comprises nearly 50% of NT land. • Excisions from a pastoral lease under the <i>Pastoral Land Act 1992</i>: known as Community Living Areas, with title held by an Aboriginal Corporation or association. Usually very small areas less than 25 sq. km. • Some larger areas of the NT are held by Aboriginal interests under NT Freehold where the existence of native title is contested. • National Parks on Aboriginal land leased back from Aboriginal land owners (e.g. Kakadu and Uluru-Kata Tjuta and more recently some NT National Parks). • There are some significant areas of vacant crown land which are subject to claims under the Aboriginal Land Rights Act such as in the Simpson Desert. 	<ul style="list-style-type: none"> • Land held in trust by the Aboriginal Lands Trust: covers approximately 27 million hectares or 11% of WA and comprises different tenures including reserves, leases and freehold properties. A significant proportion of this land comprises reserves that have Management Orders with the ALT (generally having the power to lease), with their purposes mostly being for "the use and benefit of Aboriginal inhabitants". 	<ul style="list-style-type: none"> • Maralinga Tjaruta lands: held by the Maralinga Tjaruta Council. • APY lands: held by the APY. • Land held by the Aboriginal Lands Trust: typically consists of former missions and reserves, Crown lands and properties purchased for Aboriginal benefit. Some lands are residential communities, while others are land held for the benefit of Aboriginal people generally. Land is inalienable title. Ministerial consent required for all dealings, such as leases.

	Queensland	Northern Territory	Western Australia	South Australia
Key Indigenous bodies	<ul style="list-style-type: none"> • Aboriginal Land Trusts under <i>Aboriginal Land Act 1991</i>. • Aboriginal Shire Councils holding DOGIT land or Special Leases. • Native Title Representative Bodies (NTRBs) funded by Commonwealth Government. • Miscellaneous Land Councils: some of which are NTRBs (e.g. Queensland South Native Title Services), while some are no longer NTRBs and are now just incorporated groups to represent certain interests (e.g. Gulang Land Council). • Aboriginal Corporations and associations: incorporated to represent/pursue interests of particular communities, Indigenous TO groups or individual families. 	<ul style="list-style-type: none"> • Aboriginal Land Trusts: hold land under the ALRA for the benefit of TOs. • Aboriginal Land Councils (Northern Land Council, Central Land Council, Tiwi Land Council, Anindilyakwa Land Council): play a formal statutory role liaising with land trusts to give effect to land rights under the ALRA. Also designated as the NTRBs for native title purposes. • Aboriginal Corporations and associations: incorporated to represent/pursue interests of particular communities, Indigenous TO groups or individual families. 	<ul style="list-style-type: none"> • Community Councils: generally incorporated under the <i>Commonwealth Aboriginal Councils and Associations Act 1976</i>. • Native Title Representative Bodies (NTRBs) funded by Commonwealth Government, including large organisations such as Kimberley Land Council, Goldfields Land and Sea Council and South West Aboriginal Land and Sea Council. • Aboriginal Corporations and associations: incorporated to represent/pursue interests of particular communities, Indigenous TO groups or individual families. 	<ul style="list-style-type: none"> • South Australian Native Title Services: the State-wide NTRB for SA (formerly part of the Aboriginal Legal Rights Movement). • Community Councils: managing Aboriginal lands held by the Aboriginal Lands Trust, which have been leased to the Councils to manage. • Anangu Pitjantjatjara Yankunytjatjara: under its constituting legislation, this authority is responsible for protecting the interests of the TOs in relation to the management and use of the APY lands and negotiating with persons desiring to use, occupy or gain access to any part of the lands. • Maralinga Tjarutja Council: as per APY above. • Aboriginal Corporations and associations: incorporated to represent/pursue interests of particular communities, Indigenous TO groups or individual families.

	Queensland	Northern Territory	Western Australia	South Australia
Other considerations	<ul style="list-style-type: none"> For small mining operations (less than 50 hectares), the Queensland Government actively facilitated a process of developing ILUA under its Small Miners ILUA Project 		<ul style="list-style-type: none"> WA cultural heritage legislation protects sites but does not require proactive negotiation of CHMPs as in the case of the Queensland legislation. However, in 2009, the WA Government published guidelines for preparing Aboriginal Cultural Heritage Management Plans to assist developers to manage cultural heritage. Transit Permits are required to pass through Aboriginal reserves subject to Part III of the AAPAA or to visit Aboriginal communities located on such reserves. Mining Access Permits are required for any exploration or production activities on any Aboriginal reserve. The Minister for Aboriginal Affairs issues Mining Access Permits, but is first required to seek the views of the ALT, which in turn consults with the resident Aboriginal community. 	<ul style="list-style-type: none"> SA has worked to establish a single State-wide native title resolution process involving the peak bodies from all the major stakeholder and industry groups. This process is known as the South Australia Native Title Resolution Process (formerly known as SA ILUA State-wide negotiations). Template ILUA has been negotiated between the State, the Chamber of Mines and Energy and the Aboriginal Legal Rights Movement to be used in mineral exploration activities. SA cultural heritage legislation protects sites but does not require proactive negotiation of CHMPs as in the case of the Queensland legislation. However, the legislation is currently under review and there has been strong support for introduction of a legislative requirement for Aboriginal Heritage Management Plans.

3.6. Emerging developments in legislation and policy

Over the past ten years, a series of Federal Government discussion papers have flagged the Government's interest in reforming the statutory framework for agreement-making between resource companies and Indigenous communities, especially in relation to three areas discussed in turn below.

3.6.1. Regulating and improving practices in agreement-making

In 2008, the Federal Government established a Native Title Payments Working Group to advise the Government on how to facilitate better use of payments from native title agreements. The Joint Working Group on Indigenous Land Settlements convened a workshop in April 2010 to consider what governments can do through native title settlement agreements to support Indigenous communities to achieve effective governance and sustainable economic outcomes.

In a discussion paper, the Australian Government (2010) indicated that it has an interest in reform of agreement-making because of its desire for native title to provide sustainable benefits to current and future generations. A key proposal is the establishment of a new independent body that would oversee agreement-making between resource companies and Indigenous groups. Possible functions would include to:

- Review and assess agreements against 'leading practice principles' (see below)
- Advise and assist parties
- Research, communicate and promote leading practice
- Report on trends and issues in an annual report
- Advise Ministers
- Assess eligibility of agreements for concessional tax treatment.

The Government's suggested 'leading practice principles' for sustainable agreements are the following:

- Regular, funded reviews of agreement performance, including mechanisms to respond to agreement review findings
- Financial provision for administration of the agreement
- Processes and funding for ongoing communication and decision-making regarding agreement matters amongst the native title group
- Dispute resolution provisions
- Appropriate agreement and benefits management structures
- Sustainable financial benefits package, both in workability and in providing benefits to future generations of native title holders. (2010, pp.9-10)

The Government also proposed new measures to encourage entities that receive native title payments to adopt measures to strengthen governance, such as:

- Incorporating under either the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (the CATSI Act) or the *Corporations Act 2001* (Corporations Act)
- Appointing one or two independent directors
- Adopting enhanced democratic controls, such as by encouraging transparency and accountability to beneficiaries, including measures that enable beneficiaries to hold

directors to account in discharging their functions, and by requiring directors to inform and explain to members details of payments received under native title agreements and disbursements of the resulting funds (these rights and obligations would not duplicate those already contained in the CATSI or Corporations Act).

After a series of consultation meetings from July to November 2010, submissions to the discussion paper closed on 30 November 2010. It is understood neither resource companies nor Indigenous groups were supportive of the establishment of a body to oversee agreement-making, nor mandatory measures around governance of native title payment recipient bodies. The Government is still considering the submissions on this discussion paper.

3.6.2. Resolving issues in the taxation of benefits from agreements

Concerns have been raised by resource companies and Indigenous groups that the treatment of agreement benefits in tax law has led to uncertainty and inconsistency and does not enable benefits to be used in a sustainable way or for economic empowerment of Indigenous people. For example, there are a number of limitations and shortcomings with charitable trusts, which are the most common legal structure for the management of agreement benefits.

In discussion papers since 2010, the Government has proposed a series of reforms that will create a better statutory framework for the management of agreement benefits. This issue is discussed in more detail in 6.3.

3.6.3. Improving the agreement-making provisions in the Native Title Act

The Government has also floated proposals to amend the agreement-making provisions of the Native Title Act, including:

- Streamlining the ILUA process to reduce the registration period, increase information on the register to make agreements more transparent and streamline processes for ILUA amendments after registration
- Amending the Native Title Act to clarify what is required to meet the obligation to negotiate in 'good faith'.

This issue is discussed further in Part 4.1.

PART 4 –

The process of agreement-making

4. The process of agreement-making

Key messages:

- There are accepted principles for conducting negotiations, including the requirement for 'good faith' (Part 4.1).
- Indigenous parties' fundamental aspiration from resource development is to create a better life, but they are involved in a complex balancing exercise between conservation and development, and competing individual and group interests and perspectives. The desire for respect and strengthening culture is an important motivation (Part 4.2).
- Guides and toolkits offer useful tips about the steps in agreement-making (Part 4.3).
- Key challenges in negotiation include the lack of capacity of some Indigenous parties, the need to resource Indigenous participation, accommodating Indigenous decision-making practices and managing conflict within Indigenous groups (Part 4.4).
- Regional differences between Indigenous groups in terms of culture, history and experience will be crucial in determining the approaches that will be successful in agreement-making. A thorough understanding of local context is necessary and it cannot be assumed that successful models can be transposed across different contexts (Part 4.4.2).
- Agreement-making processes are time-consuming and timeframes need to be realistic (Part 4.5).
- For a large project covering several Traditional Owner groups, there will be 'sustainable development' advantages in negotiating a single whole of project agreement, but a thorough risk assessment and realistic timeframes will be required and the respective advantages of multiple separate agreements also need to be considered (Part 4.6).
- The nature and extent of government involvement in agreement-making differs across Australian jurisdictions (Part 4.7).
- The capacity of Native Title Representative Bodies (e.g. Land Councils) to assist in negotiation of agreements differs widely across regions and jurisdictions (Part 4.8).

4.1. Principles for negotiation of agreements

Regardless of the legislative requirements, the starting point for any negotiation process should be a clear understanding of the principles that will underpin the process. Clarity about these principles will guide the way the process is structured and will provide the compass to find ways around stumbling blocks along the way.

Part 1.2.3 outlined some of the international instruments and conventions that set out high level principles for the rights of Indigenous people, including standards issued by international organisations and financial institutions to guide corporate dealings with Indigenous groups. The

ICMM's Position Statement on Mining and Indigenous Peoples sets out a statement of commitments that members make in relation to their engagement with Indigenous people. These commitments contain principles that will underpin an effective and respectful negotiation process.

The ICMM (2010, p.55) has indicated that the key features of successful agreements are that they are:

- Seen as the result of a fair and equitable process
- Not static legal documents but flexible instruments as a framework for a long term relationship
- Based on mutual obligations and benefits
- Open to change.

Box 8. Joint Working Group on Indigenous Land Settlements principles for negotiation

The Federal Government's Joint Working Group on Indigenous Land Settlements developed *Guidelines for Best Practice Flexible and Sustainable Agreement-Making* (August 2009), which are designed to assist Government parties in negotiating Indigenous land agreements. The guidelines state that government parties should act honestly and fairly, including:

- Not causing unnecessary delay
- Assessing potential liability/likelihood of success early and settling legitimate claims without litigation.
- Impartiality and consistency in handling claims
- Engaging in alternative dispute resolution where possible
- Not relying on technical defences unless it would result in prejudice
- Not taking advantage of a claimant who lacks resources, and
- Government leadership should influence the behaviour of other parties in this regard.

The guidelines further stipulate that to conduct good faith negotiations, the Government parties should:

- Conduct themselves with integrity, honesty, cooperation and courtesy during negotiations
- Comply with agreed negotiation procedures including attendance at meetings
- Make a genuine attempt to reach agreement
- Disclose relevant information as appropriate for the purposes of the negotiations
- Comply with agreed timeframes and ensure the timely production of relevant materials, and
- Effectively and efficiently participate in mediation through adequate preparation and a clear understanding of the issues.

It is widely accepted that negotiations should be conducted in 'good faith', but what that entails is often open to debate. The right to negotiate provisions of the native title legislation specifically require negotiations to be carried out in good faith. The Federal Government has recently proposed

a more specific definition of this requirement following a 2009 Federal Court decision that appeared to set a low standard for what is required for good faith negotiations (Australian Government 2010, p.14).

4.2. Indigenous aspirations about resource development

Understanding Indigenous parties' aspirations from resource development is a critical starting point for any resource company seeking to negotiate an agreement. As discussed in Part 2.2, Australian Indigenous people have diverse cultures, lifestyles and histories. However, there is a level at which they share common goals in relation to resource development. The common characteristics of Indigenous aspirations regarding resource development in Australia are:

- Indigenous groups are fundamentally seeking a better life through the material benefits of resource development on their land, for their old people (who have often had hard lives), for themselves, and for their children.
- A priority is economic opportunities (such as employment and business) for young people, partly as a way of avoiding social problems such as substance abuse, incarceration and youth suicide.
- Considerations of being able to enjoy being 'on country' are important (e.g. hunting, fishing, practising ceremony, painting and carving) re-establishing connection with traditional lands from which they have been excluded or removed.
- Indigenous groups want to feel that their country is being protected during exploration and development, with the sites protected and their culture respected.
- In the process of resource development, Indigenous people are sensitive to the need for the right people to be consulted and to share in the benefits, to ensure kin and social networks are not disrupted in a way that affects harmony and social wellbeing.
- Resource development is a balancing act for Indigenous people: between the material benefits of development and the need to look after country; between individual and group need and the desire to be inclusive and maintain harmony.
- Indigenous people cannot be assumed to be either standing in the way of development or selling off their heritage for profit. They are involved in a difficult balancing exercise within a highly politicised environment.

Example of Indigenous aspirations – Vision for the Western Cape Communities Trust

We maintain our culture by preserving, respecting, insuring and acknowledging our strong culture within the Western Cape Communities.

We provide the tools for our people of the Western Cape to empower them to manage and determine successful outcomes within our Communities.

We strive to ensure that our children have access to high quality and culturally appropriate education from Prep to Tertiary.

We support the creation of sustainable business opportunities, successful Capacity Building and best practice models.

We build on and utilise our strengths to expand our knowledge and experience base through training and employment for the benefit of all people within the Western Cape Region.

We determine our standard of health, by improving living conditions and lifestyle.

Source: O'Faircheallaigh 2006

Paradoxically, while resource development will inevitably mean sacrifice to the sanctity of traditional lands, an important motivation for Indigenous people in supporting resource development on their land is the opportunity that the material benefits might provide for strengthening culture and connections to land that have been eroded by the process of colonisation and dispossession. Thus, an important psychological aspect of agreements is the respect and recognition for Indigenous groups as the original owners of the land, and aspirations around material benefits may include funding for cultural awareness programs, cultural centres, language preservation, rangers and cultural heritage protection.

Indigenous groups have specific expectations about how negotiations will be undertaken and the principles that should be observed. Box 9 provides an example of principles for negotiation formulated by an Aboriginal representative organisation in South Australia.

Box 9. An Indigenous perspective on principles of negotiation

The Aboriginal Legal Rights Movement (ALRM) in South Australia sets out the following principles to guide agreement-making:

1. **Native Title is about people, not legal technicalities:** agreement-building must build relationships between people.
2. **Aboriginal claimants have standing as principals in the negotiations:** they are the people who hold native title rights and these are real property rights, as real as any other property rights.
3. **Non-extinguishment:** agreement-building should not require extinguishment of native title.
4. **Self-determination:** agreement-building involves the exercise of self-determination, rather than leading to self-determination.
5. **Fairness:** agreement-building should be fair. All participating groups should be better off and none should be worse off because of an agreement, including not only native title groups, but also other Indigenous groups and non-Indigenous interests.
6. **Inter-generational equity:** agreements should recognise the principle of inter-generational equity because they are likely to set important aspects of the conditions facing Indigenous people for several generations. They should not be short term deals.
7. **Sustainability:** negotiated outcomes should be sustainable for the Indigenous principals, for other interests and for natural and cultural resources.
8. **Meaningful benefits:** negotiated outcomes should be meaningful to the Indigenous principals. Agreement-building is only worthwhile if the Indigenous principals judge that it will produce outcomes they want.
9. **Benchmarks:** to be worthwhile, outcomes should not only be better than exist now, but should also be better than what can be achieved through other means (litigation or legislation) and must be reasonable against appropriate benchmarks (comparable international settings). Appropriate benchmarks should be reviewed and improved from time to time.
10. **An act of choice, not the only choice:** agreement-building should not lock Indigenous people into an “all-or-nothing” situation, where they rely on complete settlement to achieve any gains at all – Indigenous people should continue to negotiate only if they judge it to be producing worthwhile outcomes.

Source: Agius *et al.* (2004)

4.3. Guides and toolkits for agreement-making

There are now a number of guides, toolkits and reports that seek to identify good practice in agreement-making between resource companies and Indigenous groups. These guides have been developed over the last decade as the pace of agreement-making has escalated and are a response to concerns that the quality of agreements has been variable.

Some guides, such as the ICMM Good Practice Guide on *Indigenous Peoples and Mining*, provide advice for resource companies, while others, such as the IBA Community Toolkit on Negotiation and Implementation of Impact and Benefit Agreements, seek to equip Indigenous parties with the tools they require to successfully participate in negotiations.

The Federal Government has also recently proposed to develop a “leading practice toolkit” that would provide “a consolidated ‘one-stop-shop’ information resource and include checklists and guidance materials, taking into account jurisdiction specific processes” (Australian Government 2010, p.11).

Guides and toolkits are useful in providing a general roadmap for agreement-making processes and a checklist of issues that may need to be considered during the process. One of the reasons for the proliferation of these guides is that agreement-making with Indigenous groups is highly complicated, in terms of not only the legal and commercial processes, but just as importantly, the cultural and human dimensions. It is this diversity of people, cultures, geography and legal systems, however, that make it impossible to reduce the process of agreement-making down to a simple series of steps that will be applicable in any situation. Every agreement will be different because every project and every Indigenous group is different, and successful agreements depend on flexibility and creativity.

Leading practice:

The Argyle agreement is available in full at www.atns.net.au. As an example of leading practice, it is worth reading the many schedules that set out details of the entire agreement-making process, including the meetings held and the communication with Indigenous parties.

Table 7 summarises the recommended agreement-making process of some of the leading guides and toolkits now available.

Table 7. Recommended agreement-making processes in good practice guides and toolkits

ICMM Good Practice Guide, pp.37-60	IBA Community Toolkit (guide for Indigenous groups entering negotiations)	AMEEF Report, <i>Agreements between Mining Companies and Aboriginal Communities</i>	Cape York Model of Agreement-Making
<p>Laying the groundwork</p> <ul style="list-style-type: none"> • Determine Indigenous rights and interests • Understand the legal context • Ascertain customary land ownership and use (engagement and research et) • Deal with competing, overlapping or adjoining claims • Consider disconnected people elsewhere • Undertake baseline studies and SIAs, including: <ul style="list-style-type: none"> ○ Social mapping and social organisation studies (identify the parties) ○ Cultural heritage assessments ○ Impact assessments (including on women) ○ Conflict assessments <p>Agreement-making process</p> <ul style="list-style-type: none"> • Establish the overall aims so each party's objectives and needs are clear (see checklist for companies on p.57) • Build understanding and respect (see steps for good faith negotiating on p.58 such as an MOU about the negotiation process) • Build knowledge and capacity (create level playing field, assist Indigenous organisations with advice and 	<p>Planning to negotiate</p> <ul style="list-style-type: none"> • Understand legal and regulatory context • Define nature/extent of community involvement • Consider community character (ability to plan collectively and stay united; planning and managing politics and conflict) • Clarify community strategies / negotiating positions (need clarity re goals) • Decide community negotiating team composition, roles and legal position <p>Information collation and management</p> <ul style="list-style-type: none"> • Consider access and confidentiality • Define project nature • Develop community baseline • Identify potential impacts <p>Develop an informed budget</p> <ul style="list-style-type: none"> • Recognise project nature, communities, timeframes and legalities <p>Negotiating and reaching agreement</p> <ul style="list-style-type: none"> • Shaping agenda: consider locations, language, roles & rules; document meetings/consultations • Relationship building: respect & joint problem solving • Options highlighted and clearly articulated 	<ul style="list-style-type: none"> • Engage Native Title Representative Bodies early in the process. Seek their advice/ assistance in planning & undertaking negotiations. • Ensure that there is full company commitment up to CEO and Board level to the negotiations. • Negotiations should be aimed at finding common ground and mutually beneficial solutions to challenges in common. Win-lose approaches are not appropriate. • Ensure negotiations are being held with the right people. Seek advice to ensure this happens. • Provide clear information on the proposed development and its impact on Indigenous stakeholders to give them a clear idea of how their rights and interests might possibly be enhanced or diminished. • Consultation strategies should: <ul style="list-style-type: none"> ○ Be appropriate to the scale and geographical extent of the project ○ Open effective communication channels ○ Take into account social, cultural, economic and geographic circumstances of the Indigenous stakeholders 	<ul style="list-style-type: none"> • Initiation of the process • Create a framework for negotiations by developing: <ul style="list-style-type: none"> ○ Steering Committee ○ Land Council Negotiating team providing advice and technical support ○ MOU which defines roles and expectations to avoid future tensions by ensuring common rules and expectation's – differences recognised but united front maintained • Community consultation and information gathering • Establish a negotiating position - provides a benchmark for conduct of negotiations and the agreement • Conduct of negotiations and an agreement in principle developed • Endorsement and signature of final agreement • Implementation. The agreement should contain basic processes to ensure effective implementation of benefits, such as provisions unambiguous and clear, yet flexible; funding provided for implementation activities and initiatives; and structures such as joint Aboriginal

<p>resources)</p> <ul style="list-style-type: none"> • Manage internal disagreements within company and Indigenous groups • Involve other parties where appropriate (such as government, NGOs) • Limit the confidentiality of agreements 	<ul style="list-style-type: none"> • Agreement/consensus re what the community promises to do, or not, in return for benefits <p>Agreement needs to reflect community goals</p> <ul style="list-style-type: none"> • Transparency and opportunity for further input • Renegotiate if need be • Ratify agreement <p>Implementing agreements</p> <ul style="list-style-type: none"> • Establish clear goals • Strong management structures and systems –flexible for changing conditions • Ensure resources for implementation • Monitoring systems 	<ul style="list-style-type: none"> ○ Plan for and use timeframes that take into account the culture and needs of the Indigenous parties, rather than being driven solely by the project’s critical path. • Allocate adequate resources to negotiations, recognising that Indigenous parties will generally need company funding to participate fully and appropriately. • Use well-trained negotiators and maintain the same team until negotiations are completed. 	<p>community and mining company co-ordination committees established to ensure that implementation occurs as planned.</p>
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4.4. Negotiating Challenges

4.4.1. The capacity of Indigenous parties

In discussions about agreement-making between resource companies and Indigenous groups, the most frequently raised challenge is the capacity of Indigenous parties to effectively participate in the negotiation and implementation of agreements.

A fundamental principle for any negotiation is that there needs to be a *level playing field*. Yet, Indigenous groups are some of the most disadvantaged people in society, and face significant challenges in terms of:

- Education levels, which may affect ability to communicate effectively and comprehend the legal and technical details of mining projects and agreements
- Poor health, which can affect participation of key individuals (especially senior Traditional Owners) in negotiation processes
- Lack of ‘bridging’ social capital, characterised by the absence of social and economic networks with the broader community, reducing the opportunities to gain advice and support during negotiations
- Strong ‘bonding’ social capital, which is characterised by strong internal solidarity within Indigenous kin groups and communities, but often acts to limit individuals’ opportunities to ‘break the mould’ and pursue alternative life courses such as employment and other forms of engagement in the mainstream economy
- General lack of experience of engagement in the mainstream economy, leading to poor understanding of commerce and business.

The IBA Toolkit (2010, p.109) highlights the following challenges for Indigenous groups in approaching agreement-making:

- A community has to come up to speed on a tremendous amount of technical information in a very short time.
- People can feel excluded because they don’t understand the technical language that is used to describe the mining process and its potential impacts.
- People may not have the capacity to cover all the issues that need to be reviewed.
- The schedules that are created often force decisions on people, and they feel they have no power to change the timeframes for decision-making. There is commonly a difference between the timeframe that communities need to make informed decisions, and that of the developer and regulator.
- Often information is brought to people without allowing for informed decisions to be made, so that when a developer consults on a proposed development, they may negotiate the tonnage but not the principle of whether there ought to be a project or not.

Leading practice:

The Argyle agreement has simple English summaries throughout the detailed legal text of the agreement, making it easier to understand for non-lawyers. Read the agreement in full at www.atns.net.au.

Furthermore, the experience of colonisation has left many Indigenous groups dispersed from their traditional country and deeply fractured socially and politically. For Indigenous parties, the challenges in agreement-making may be as much about rebuilding group identity and repairing

fractured relationships with other Indigenous groups as they are about dealing with mining companies.

4.4.2. Regional differences and their implications for agreement-making

The challenges for Indigenous groups are not uniform across different contexts. Each group and each region has a particular history that will shape their unique mix of challenges. This means that an approach that has worked in one place with one group cannot be assumed to work in another place with another group. For example, across northern Australia it is possible to distinguish several different geographical and cultural contexts for agreement-making, as illustrated in Table 8.

The contextual differences regarding the Indigenous parties will lead to different challenges and the need for different approaches. For example, the large scale agreements achieved by Rio Tinto in relation to iron ore and diamond mining in the Kimberley and Pilbara regions in Western Australia are unlikely to be achievable in relation to coal seam gas developments in central or south west Queensland

Box 10 highlights, the particular challenges confronting a gas company seeking to negotiate with Indigenous groups in central or southern Queensland.

Box 10. Typical challenges confronting a gas company seeking to negotiate with Indigenous parties in central or southern Queensland

The particular challenges confronting a gas company seeking to develop a project in central or southern Queensland may include the following:

- The land councils (Native Title Representative Bodies) are unlikely to be of great assistance in negotiating with Indigenous parties because:
 - They do not have the same level of agreement-making experience, resources or capacity as land councils in other jurisdictions such as the Northern Territory
 - They may have poor relationships with many Indigenous groups.
- Rather than being located in one or two Indigenous communities, the Indigenous parties will be dispersed across a wide region, making travel and meeting costs greater.
- There will be few, if any, strong representative Indigenous governing structures for a resource company to engage with (in contrast to Indigenous populations in other parts of Australia that are represented by local councils).
- Some Indigenous traditional owner groups will have been dislocated to such an extent that they have no collective identity at all, so new groups or entities may have to be ‘artificially’ created specifically for the negotiation process.
- For some Indigenous groups, the process of negotiating an agreement, with meetings funded by the resource company, may well be the first time they have had the opportunity to meet together and try to forge a collective identity. The company cannot assume that individuals within the groups have a pre-existing relationship with each other and for the Indigenous parties, the process itself may be as much about identity formation and reasserting cultural status as it is about the negotiation. This is likely to make the process slower than in other parts of Australia.
- The Indigenous groups will also have little experience of working collaboratively together across the region.
- There will be a huge diversity within the Indigenous groups, with a corresponding diversity of experiences, perspectives, ideologies and aspirations. Members of the Indigenous groups will range from:
 - Socially and economically marginalised people living on the fringes of rural towns
 - People with private sector employment and small business experience
 - Well-educated public servants employed in regional centres.

Table 8. The implications of different geographical and cultural contexts for agreement-making

Location of proposed development	Northern Territory Aboriginal trust land	Kimberley or Pilbara region	Adjacent to discrete Queensland Aboriginal community	Central and Southern Queensland	Torres Strait
Location of Indigenous parties	Aboriginal parties reside in Aboriginal communities or outstations near traditional lands	Aboriginal parties reside in Aboriginal communities or outstations near traditional lands	Aboriginal parties reside within a former mission or government settlement, now an Aboriginal Shire Council area in most cases (e.g. Cherbourg, Woorabinda, Palm Island, Yarrabah, Wujal Wujal, Hope Vale, Lockhart River, Mapoon, Napranum, Pormpuraaw, Kowanyama, Aurukun, Doomadgee, Mornington Island, Northern Peninsula Area)	Aboriginal parties may be dispersed across: <ul style="list-style-type: none"> • Aboriginal Shire Council communities, some far distant from their traditional lands • regional towns and cities • small inland towns 	Torres Strait Islanders have continued to live on their traditional lands since before colonisation, with the exception of those moved to settlements in the Northern Peninsula Area Many members of Torres Strait communities now live in mainland cities and towns For Prince of Wales and Thursday Islands and surrounds, Aboriginal TOs are the Kaurareg people, now mostly resident on Moa Island and Horn Island
Connection to country of Indigenous parties	Living on or near country Close connection through hunting, fishing and perhaps ceremony	Living on or near country Usually close connection through hunting, fishing and perhaps ceremony	Cape York and Gulf – living on or near country with close connection through hunting and fishing Southern and Central Qld (i.e. Cherbourg, Woorabinda) – majority of Indigenous residents are not Traditional Owners (TOs) of local area, but have been relocated from other parts of State. Some TOs may live in the local community and some may be dispersed to other	May be dislocated from country with few opportunities to visit or maintain connections Widely dispersed across the region and the State Often socially dislocated and marginalised people whose cultural identity has suffered as a result of the process of dispossession and colonisation	Strong continuing connection with traditional lands for Torres Strait Islander communities (e.g. see <i>Mabo</i> High Court decision) Community members living on mainland maintain very strong connections to island homes Native title determinations have now been made for the majority of the Torres Strait Torres Strait Regional Sea

Location of proposed development	Northern Territory Aboriginal trust land	Kimberley or Pilbara region	Adjacent to discrete Queensland Aboriginal community	Central and Southern Queensland	Torres Strait
			parts of the State.		Claim successful in 2010
Characteristics of Indigenous parties	<p>Little experience of business</p> <p>Few individuals with mainstream employment experience</p> <p>Education levels generally poor, although some leaders attended boarding school</p> <p>English may be a second language</p> <p>Limited experience engaging with non-Indigenous people</p>	<p>Little experience of business</p> <p>Few individuals with mainstream employment experience</p> <p>Education levels generally poor, although some leaders attended boarding school</p> <p>English may be a second language</p> <p>Some experience engaging with non-Indigenous people</p>	<p>Little experience of business</p> <p>Few individuals with mainstream employment experience</p> <p>Education levels generally poor, although some leaders attended boarding school</p> <p>Some experience engaging with non-Indigenous people</p>	<p>May have some experience in running businesses, individually or through community orgs</p> <p>Individuals may have mainstream employment experience</p> <p>Education in mainstream schools may mean higher literacy and numeracy</p> <p>More experience engaging with non-Indigenous people</p> <p>Despite residing in mainstream communities, may be socially and economically marginalised</p>	<p>Less affected by the deleterious effects of colonisation than Aboriginal people (i.e. less dispossession, marginalisation etc.)</p> <p>Some experience of running businesses</p> <p>Longer history of employment in mainstream economy than many Aboriginal communities</p> <p>Education levels below mainstream averages, but exceed many mainstream Indigenous communities</p> <p>Torres Strait Kriol may be first language</p> <p>History of engagement with non-Indigenous people – often politically savvy, canny negotiators</p>
Governance capacity and representative bodies	<p>Local councils and community organisations have mandate to represent residents and some governance capacity</p> <p>Some smaller family based corporations with little capacity</p> <p>TOs may be represented by powerful and well-resourced</p>	<p>Local councils and community organisations have mandate to represent residents and some governance capacity</p> <p>Some smaller family based corporations with little capacity</p> <p>TOs may be represented by powerful and well-resourced</p>	<p>Aboriginal Councils have some governance capacity but do not speak for TOs</p> <p>Some smaller family-based corporations with little capacity</p> <p>Often contested relationships with land councils, who have little representative mandate</p>	<p>Some small-scale Indigenous corporations represent only single families and have limited governance experience</p> <p>Often contested relationships with land councils, who have little representative mandate and limited resources</p>	<p>Torres Strait Regional Authority (TSRA) is a strong, well-resourced regional representative body, which also serves as the Native Title Representative Body</p> <p>Torres Shire Council covers Thursday Island and surrounds</p>

Location of proposed development	Northern Territory Aboriginal trust land	Kimberley or Pilbara region	Adjacent to discrete Queensland Aboriginal community	Central and Southern Queensland	Torres Strait
	land councils (e.g. NLC and CLC)	land councils (e.g. KLC)	and limited resources		Torres Strait Islands Regional Council (TSIRC) is local government for outer islands Some smaller TSI corporations for community services
Experience of collaboration	History of collaboration between Aboriginal groups on a regional basis for ceremony and other purposes	History of collaboration between Aboriginal groups on a regional basis for ceremony and other purposes	History of co-location on reserves and missions has created some experience of collaboration, but many traditional divisions persist Limited regional collaboration	Little experience of collaboration with other Indigenous groups	Strong history of collaboration on a regional scale, through such organisations as TSRA and now TSIRC

4.4.3. Resourcing Indigenous participation in negotiations

The capacity deficit faced by Indigenous groups in some jurisdictions means that to create a level playing field for negotiations to take place, it falls to the company to provide resources for Indigenous groups to participate in negotiations. These resources typically include:

- Funding for Indigenous parties to obtain legal advice, and sometimes financial advice
- Funding for the costs of meetings, including travel and sitting fees (see Box 11).

The role of funding Indigenous participation in agreement-making carries ethical obligations for a

Box 11. Sitting fees

Traditional Owners are regularly called upon to provide input into the negotiation and then the implementation of Indigenous agreements. 'Sitting fees' are often paid to Indigenous representatives on negotiation teams, and after an agreement is finalised, to members of coordination committees established to implement the agreement. Sitting fees are remuneration for time, cultural expertise and contribution to the process. They can, however, be a contentious and complex element of negotiating and implementing agreements both in terms of what is covered as well as the amount to be paid. Practice varies considerably across States, companies and Indigenous organisations.

What is usually covered:

- Actual attendance at meetings for time and expertise
- Some organisations pay on 'good faith', while others require proof of attendance at a meeting or at a proportion of meetings (e.g. over 60 % of meetings per year) (NSWALC 2011)
- Public servants are typically not eligible for sitting fees (Hansard WA 2010).

Determining an amount for sitting fees:

- This is determined by the particular company or Aboriginal Corporation and can be based on the financial position of the company or corporation and the qualifications and experience of the attendees. Based on available literature, there does not appear to be any consistent method of determining sitting fees across the extractive industries
- Some State Government departments do not provide sitting fees, whereas other States follow public service standards (WAAAC 2010)
- Some Indigenous Councils and Boards have a standard regime to determine sitting fees and attempt to alleviate issues surrounding payment of fees, for example meeting costs such as meals, accommodation and refreshments will be paid directly to the service provider by some agencies where practicable (AALC 2011)
- NSW Aboriginal Land Council (NSWALC) pays up to \$1000 per year for a Chairperson of a LALC and up to \$750 per year for other Board members (NSWALC 2010).

Issues:

- Transparency: Some TOs sit across many meetings which have different rates for sitting fees. Some attendees consider lower fees patronising if they receive higher fees from another company
- Some meetings do not offer sitting fees, which can cause disquiet among the attendees. Unrest may be related to a lack of awareness of nature and context of the meeting and proposed outcomes (for example, whether the meeting is for a charitable Trust). Some TOs will only attend where there are sitting fees.
- Some Industry groups provide considerable fees to all attendees whether they are members of a specific group or not. This can cause friction between groups particularly those who consider that outsiders have been unjustifiably paid to attend. (LALC 2011)
- Tax implications: Sitting fees or remuneration payments may have tax implications for an organisation that pays the fees and personal income tax implications for recipients.

Ultimately, it is important for a company to have a clear and transparent policy on what payments can be made to meeting participants and how these will be delivered.

company. The company has to resist the temptation to use the funding of the negotiation process as leverage to expedite an agreement or exert pressure on Indigenous parties. There have been examples where companies have abused their role in resourcing negotiations (O’Faircheallaigh 2006, p.8).

4.4.4. Accommodating Indigenous processes of decision-making

For a negotiation process to be successful, it needs to satisfy Indigenous processes of decision-making. Understanding the local cultural attributes, protocols, histories and political relations of the Indigenous group concerned will be crucial. For this reason, an essential prerequisite for a resource company entering agreement-making is sourcing the expertise of an individual or organisation with a good understanding of the Indigenous parties to the negotiation.

Having obtained this expertise, the next important ingredient is to ensure that the negotiation process is designed in a way that is sensitive to the particular decision-making processes of the Indigenous parties. While every Indigenous group is different, for Australian Aboriginal groups there are some common attributes that the process will need to take into account:

- Aboriginal politics is characterised by a high degree of ‘localism’, with primary allegiance to local kin and family groups, with allegiance to a community or a broader region being of a lower order. Therefore, it cannot be assumed that an individual from a particular Aboriginal community who is appointed to a negotiating team will be able to represent the interests of all kin groups in that community, nor that the person will effectively communicate information back to all groups within the community. The individual is likely to have a much more family-centric perspective.
- Aboriginal politics also highly values the principle of individual and local group autonomy. For this reason, an Aboriginal person will be reluctant to speak on behalf of anyone but himself or herself, or in some instances, the person’s family group. It cannot be assumed therefore that an Aboriginal negotiating team structured on the basis of individuals representing communities or regions will have requisite authority or legitimacy.
- Local Aboriginal ‘representative’ organisations, such as community councils or service delivery organisations, may therefore have limited legitimacy or authority to speak on behalf of the traditional interests in land of residents of the community. While Aboriginal people may tolerate having broader community or regional representative structures for local government or service delivery purposes, representation in relation to land interests is solely the domain of local Traditional Owner groups and families.
- Due to the difficulties of representation alluded to in the last three points; there has been a tendency to rely on public meetings as the predominant process for negotiations. However, as anthropologist David Martin (2009) has explained, this too has limitations in facilitating Aboriginal decision-making processes:
 - Community meetings often become a forum for internal divisions within groups to be vocalised
 - Meetings in Aboriginal communities are prone to be dominated or disrupted by individuals using them for political ‘grandstanding’
 - Meetings do not allow for the typical Aboriginal processes of deliberation based on conferral with appropriate elders or senior people and extended periods of consideration and ‘caucusing’ prior to a consensus decision being made. A meeting should only be the forum for publicly ratifying a decision that has already been made ‘behind the scenes’

- Because meetings aggregate local and autonomous groups, they effectively disempower many people from participation.

Box 12. Features of an effective Indigenous decision-making process

An appropriate negotiation process that is sensitive to Indigenous decision-making processes therefore is likely to have the following features:

- Mechanisms for information flow directly to local groups, rather than reliance on ‘representatives’ within a representative body, community council or negotiating team
- Sufficient time for consideration and consensus formation between meetings
- Use of meetings only for dissemination of information and ratifying consensus decisions, and not as forums for decision-making processes to occur (e.g. by majority vote)
- Skilled meeting facilitation by experts who understand Indigenous decision-making processes which is able to manage and mediate conflict between groups.

4.4.5. Dealing with conflict within Indigenous groups

One of the most significant risk factors in any negotiation is the impact of divisions and internal conflict within Indigenous groups. While some might consider that this is not the concern of a resource company, the potential to derail a negotiation process means that companies must be willing to provide assistance to Indigenous groups to sensitively manage these issues. The IBA Community Toolkit offers the following advice:

Mining companies, for their part, need to understand the importance of resolving overlap issues or other sources of conflict. Companies do not need to become directly involved, but to create the conditions and allow the space and time for nation-to-nation agreements to emerge. Companies will benefit in the long term from the stability and certainty that will result from such agreements. (Gibson and O’Faircheallaigh 2010, p.54).

Conflicts over traditional ownership

Internal conflicts are most likely to arise over conflicting claims to customary ownership of areas. In practice, in Australia the future acts process under the native title system partially resolves these

Current practice – the ‘as if’ principle

To minimise disputation about traditional ownership claims, the current practice is, for the purposes of agreement-making, for resource companies to treat relevant Indigenous groups ‘as if’ their claims to traditional ownership of land were legally valid. This is also sometimes called the ‘no disadvantage’ principle.

issues by obliging companies to deal with all ‘registered native title claimants’ who have had their prima facie claims assessed against the registration test by the National Native Title Tribunal. In negotiating ILUAs, most companies tend to go further than this by applying the ‘as if’ principle, that is, as if their claims to traditional ownership of land were legally valid and the Land Use Conditions are hence enforceable as if they were a contract between the Explorer and the Native Title Signatories. However, this approach cannot be assumed to fully resolve competing or overlapping claims to land

by Indigenous groups. Some level of animosity or rivalry between Indigenous groups is likely to be a feature of the majority of agreement negotiation processes.

Different attitudes to development

Apart from competing claims to land, the other primary source of conflict within Indigenous groups is likely to be differences in various individuals’ or groups’ attitude towards development, particularly as it impacts on the environment or cultural heritage values. In these circumstances, a company should avoid the temptation to deal only with the groups that are pro-development, but

instead seek to fully engage those with concerns in order to ensure that they have all the information they need and the company can identify what measures might alleviate their concerns.

Political rivalry

Companies should be aware that a common feature of Australian Indigenous politics is that rival leaders within Indigenous groups will typically use public forums convened by outsiders (such as government or companies) to demonstrate their leadership credentials to their group. This may often mean that leaders or would-be leaders engage in 'grandstanding' that involves vehement criticism of outsiders and external agencies. This can often be a matter of performance for the benefit of fellow members of the group rather than reflect a deep-rooted opposition to the project being discussed or a genuine animosity towards the outsider. The complexity of Indigenous politics is such that the best advice for companies is to ensure that they are assisted in their negotiations by someone with a thorough understanding of the local Indigenous groups concerned.

While it is not a company's role to resolve internal disputes within Indigenous groups, the ICMM recommends that "where there are conflicts and disagreements between groups, companies should look for opportunities to assist groups to resolve their differences (e.g. by helping to identify a mediator, or perhaps offering to fund one) rather than leaving it to "the law" to run its course" (ICMM 2010, p.44).

Further information:

The IBA Toolkit has a discussion on how to manage the process of achieving internal agreement for Indigenous parties to authorise an agreement (2010, pp.169-170).

Authorisation of agreements

Achieving authorisation by the Indigenous native title parties is an important step in the process of finalising and registering an ILUA or concluding an s.31 agreement under the right to negotiate process. Due to the diversity of views and aspirations within many Indigenous groups and, in some cases, the internal divisions, this can be a very difficult part of the agreement-making process. In practice, in the Australian native title system there are procedural steps that can be taken in court to deal with the situation where one or two individuals are thwarting the aspirations of the entire claimant group. However, care would need to be taken to ensure that the resistant party really is an 'outlier' and does not reflect a broader level of dissatisfaction with the agreement terms.

4.4.6. Dealing with negative legacies from Indigenous groups' past experiences

Resource companies seeking to develop projects on Indigenous land need to be aware of the likely impact of history on an Indigenous groups' attitude towards resource companies and therefore its approach to a negotiation. An Indigenous group may have felt mistreated by a resource company or by government previously and regardless of the goodwill of a new resource company seeking to work with the group, these negative legacies will colour the Indigenous groups' perspective. Open and frequent communication will be required to re-establish trust.

Box 13. Steps that resource companies can take to overcome negative legacies

- Being careful to show respect for the culture and customs of local people
- Using a trusted intermediary, such as an Indigenous community organisation, a religious group, civil society or NGO to facilitate initial meetings and the exchange of information
- Providing people from the community with the opportunity to meet and interact with senior management, and the CEO in particular
- Acknowledging that the industry may have performed badly in the past (rather than attempting to defend poor practices)
- Seeking out opportunities to remedy any legacy of past socio-cultural and environmental damage (e.g. by restoring damaged cultural sites, filling in abandoned drill holes, revegetating disturbed areas)
- Being open and honest about the risks and benefits associated with the project
- Highlighting that the company has standards, processes and practices that make it accountable for its social and environmental performance and informing communities about how they may be involved in these processes
- Establishing what historical commitments may have been made (e.g. by an exploration company or joint venture partner) and, wherever practical, honouring those commitments.

Source: ICMM 2010, p.34

4.5. Timeframes for agreement-making

Negotiating an agreement for a resource development with affected Indigenous parties is likely to be a time-consuming process. The length of time required will depend on a number of factors including:

- The scale and complexity of the project (for example, a pipeline vs. a 30 year multi-stage resource development)
- The degree of readiness, organisation and negotiating capacity of the Indigenous parties
- The extent of the existing relationship and level of trust between the resource company and the Indigenous parties
- The resources available for facilitating the negotiation process
- The legislative timeframes. For example:
 - ILUAs: process includes a three month notification period and the National Native Title Tribunal recommends the entire process will take six months from lodgement to registration (see Figure 3)
 - Right to Negotiate agreements: agreements are made after the four month notification period following the State's issue of a s.29 notice that it intends to issue a mining or exploration tenement; a party cannot apply to the Tribunal to determine the matter until at least six months after then s.29 notice; and it can take up to a further six months for the Tribunal to decide the application.

The negotiation process for some larger scale Indigenous agreements such as the Argyle Agreement and the WCCCA has taken at least three years. The most time-consuming aspect of the process is likely to be the engagement with the Indigenous parties. At a minimum, it can be expected that this process will consist of series of meetings of the affected Indigenous parties, at least two months

apart, to provide information about the proposed development, discuss the possible terms of an agreement and finally, authorise the draft agreement. The National Native Title Tribunal advises that:

ILUAs take time to negotiate to ensure that adequate consultation takes place for informed consent by all people who hold or may hold native title. If the miners' planned dates are less than six months away, an ILUA will not serve their purposes. A further six months should be allowed as a minimum once an application to register the ILUA is made to the Tribunal. (Source: NNTT 2011)

4.6. Whole of project agreement vs separate agreements

Where a resource development project covers the traditional lands of several Indigenous groups, a key strategic choice in the negotiations will be whether to pursue a comprehensive whole of project agreement involving multiple native title parties or separate agreements with each native title party.

Table 9 summarises the advantages of each of these approaches from the perspective of resource companies and Indigenous parties.

Example – whole of project ILUA for gas pipeline

A gas pipeline from PNG was proposed in the early 2000s to traverse 800km along the length of Cape York through to Gladstone. Although the proponent dropped the project in 2007, a consulting company continued to work with Aboriginal traditional owners to finalise a single ILUA for the entire project.

This process was seen as a way of achieving parity amongst all Indigenous groups and improving overall bargaining position by working together

'Qld-PNG gas pipeline back on the cards', (ABC News, 1 Feb 2008).

Table 9. Advantages for resource companies and Indigenous parties a whole of project agreement compared with multiple separate agreements

	Resource companies' perspective	Indigenous parties' perspective
Advantages of a whole of project agreement	<p>Create certainty for any future development by providing for a broader range of pre-approved activities by the resource company over a broader area</p> <p>Create a larger total pool of benefits for Indigenous groups, leading to a substantial fund that could support significant community development activities on a regional basis. This could have reputational or public relations benefits for the company on a national or international level</p> <p>A greater opportunity for the company to be part of the governance and administration of the benefits, which enables the company to manage the reputational risk regarding what benefits are spent on</p> <p>Less transactional costs in managing the agreement because the company can work through a single implementation committee rather than multiple committees.</p>	<p>The potential for a larger amount of benefits to be negotiated because of the combined bargaining power of negotiating as a single unit (less scope for individual groups to be 'picked off')</p> <p>Greater economy of scale in the management of the benefits package, including sharing of administrative costs and the ability to fund larger community development projects as a result of the larger pool of funds</p> <p>A larger benefits package gives more scope for a portion of the funds to be invested for the benefit of future generations</p> <p>Creating parity between Indigenous groups, such that all groups are treated similarly, whatever the nature of their land interests (freehold, Aboriginal trust, native title determined, native title claimed only etc.)</p>
Advantages of separate agreements	<p>Less expense in bringing together large meetings of diverse Indigenous parties</p> <p>The opportunity to negotiate benefits packages that will collectively amount to a lower sum than a whole of project agreement with a broader scope</p> <p>Less likelihood of the process being disrupted by disputes between Indigenous groups</p>	<p>Greater autonomy in the negotiation process, because it avoids the need for collective bargaining with other Indigenous groups</p> <p>The group can negotiate relinquishment of a narrower parcel of rights and interests, rather than being bound by a larger agreement that covers a wide range of rights</p>

From the point of view of sustainable development outcomes for Indigenous parties, a single whole of project agreement is the optimal outcome and should be the aspiration for a resource company seeking to establish a new project. Pooling and scaling up the benefits package from a project creates significant opportunities to invest in strategies that will have sustainable long term benefits for Indigenous communities. However, because of the greater degree of difficulty and complexity, before embarking on a whole of project agreement-making process, it will be crucial to undertake a detailed risk assessment of this approach, ensuring that there is a robust fallback plan and that a realistic amount of time has been allocated to achieve this outcome. A whole of project agreement will not be possible in all circumstances.

It should also be noted that in practice it may be possible to combine both approaches as a pragmatic response to circumstances. For example, if a whole of project agreement is initially pursued and the majority, but not all, Indigenous parties are in favour of a proposed agreement, it is open to a company to enter a combined agreement with several Indigenous parties and then a separate agreement with any Indigenous group that does not wish to participate in the broader agreement.

4.7. The role of government in agreement-making

In Australia, the role of Australian State/Territory and Federal Governments in agreement-making has waxed and waned in recent decades.

4.7.1. Potential scope of government involvement in Australian jurisdictions

Depending on the circumstances, government involvement in agreement-making may include the following:

- Governments have created the legislative framework for agreement-making through legislation for land rights, native title, cultural heritage, resource development and major infrastructure coordination
- Government entities such as the National Native Title Tribunal, Coordinator-General's office and agencies administering cultural heritage have a role in registering native title agreements, approving Cultural Heritage Management Plans and Environmental Impact Studies
- In some jurisdictions, there is an imperative for the State/Territory Government to redirect a portion of royalties to Traditional Owner groups (e.g. Northern Territory ALRA and developments in Queensland on Aboriginal freehold held by land trusts)
- Where native title is to be extinguished by an agreement, the NTA requires that government be a party to the ILUA
- For very large projects of state significance, State Governments may become involved in facilitating agreements (e.g. Coordinator General's legislation in Queensland)
- Governments may have a funding, coordination and support role to play in working with resource companies and Indigenous groups on broader employment and training, and community development activities flowing out of agreements (e.g. the Gulf Communities Agreement in Queensland established an Employment and Training Committee that includes State representatives and oversees funding for training that includes State contributions).

4.7.2. Trends in government involvement in Australia

Different Australian jurisdictions have seen different degrees of government involvement. O'Faircheallaigh (2006, p.10) has observed that State Governments tend only to become involved in agreement-making where there is a specific political imperative arising from the non-Indigenous sphere, such as a desire to facilitate the growth of a particular industry. In the absence of such an imperative, State Governments are reluctant to become involved.

The pattern of various governments' involvement in agreement-making can be summarised as follows:

Queensland

- The Queensland Government was actively involved in the negotiation process for the Gulf Communities Agreement for the Century Mine in North West Queensland in 1997. The Government also participated in the Western Cape Communities Co-existence Agreement for Comalco's bauxite developments in 2001. In both cases, the Government contributed substantial resources to the package of benefits for Indigenous parties.
- However, in recent years, the Queensland Government has taken a minimal role in agreement-making processes, preferring to leave resource companies and Indigenous parties to negotiate agreements on commercial terms. The Queensland Government is supportive of negotiated outcomes, but it appears to take the view that there is sufficient

maturity and capacity on both sides of the process to reach fair and sustainable agreements without Government involvement.

- The Queensland Government has had little involvement in the negotiation of ILUAs by companies involved in coal seam gas development. The Government appears to have taken the view that there was little benefit to any party in the Government seeking to facilitate a larger scale native title agreement that would open up the broader region to the emerging coal seam gas industry. In fact, it was considered that there would be greater benefit to Indigenous parties by negotiating separate agreements with coal seam gas companies, given that some Indigenous groups have several companies seeking access to their lands.

Western Australia

- The Western Australian Government in the 1990s took a more hostile approach to Aboriginal interests in resource development, seeking to negate the Native Title Act and avoid negotiation with native title claimants over mining lease grants.
- However, over the past ten years, in its desire to boost economic development, the Western Australian Government has taken a more proactive role in agreement-making processes than the Queensland Government. For example, in the Western Australian Government facilitated the large scale ILUA to open up the Burrup Peninsula to industrial development, including the siting of LNG processing facilities.
- The Western Australian Government has been actively involved in the negotiations between Woodside and Traditional Owners in the Kimberley region for the establishment of a gas hub at James Price Point. It was reported in 2010 that the Government had expended \$16 million to fund negotiations.⁶ Following the failure of the parties to finalise an ILUA, the Government is considering stepping in and compulsorily acquiring the land to expedite the development.

South Australia

- The South Australian Government has worked with peak industry bodies, such as the Chamber of Minerals and Energy, and peak Indigenous organisations to bring about negotiated settlements for native title claims. This process is known as the South Australia Native Title Resolution Process (formerly known as SA ILUA State-wide negotiations).
- The South Australian Department for Primary Industry and Resources (PIRSA) has worked with the state wide representative body and the Chamber of Minerals and Energy to develop a template petroleum ILUA that is open for companies to utilise in certain areas.
- In Pitjantjatjara lands, PIRSA has facilitated exploration access through an ordered process of approving licences for negotiations. The recent agreement with AIVA suggests the Government is willing to facilitate agreements through provision of special arrangements for royalties.

Northern Territory

- The Northern Territory is generally not party to the negotiation of agreements with Aboriginal groups and resource companies. The Northern Territory Government, however, takes an active interest in the progress of negotiations and offers assistance through provision of information and assistance with understanding the relevant processes. The Government as the granter of the respective titles required for resource development is interested in the outcome and content of agreements.

⁶ 'Barnett to force gas land deal on Kimberley Land Council', *The Australian*, August 26, 2010.

Australian Government

- Apart from administering the native title system, the Federal Government has not had a direct role previously in agreement-making processes.
- However, as discussed in Part 3.6, a series of discussion papers in recent years have proposed new regulation in relation to ensuring good practices in sustainable agreement-making as well as reforms to the taxation treatment of agreement benefits.

4.8. The role of Native Title Representative Bodies

Native Title Representative Bodies (NTRBs) are Indigenous organisations (usually land councils) funded by the Federal Government to perform key functions under the native title system. The system of NTRBs has been reformed considerably in recent years, so that the network of small localised land councils prevalent in the late 1990s has now been centralised into a smaller number of large NTRBs. In Queensland, for example, a number of regional land councils were replaced as NTRB by Queensland South Native Title Services.

Further information:

For a current list of NTRBs, see:

<https://www.ntrb.net/PublicPages/NTRBmap.aspx>

NTRBs have a formal statutory function regarding certification of ILUAs. Certification requires the NTRB to ensure that all reasonable efforts have been made to identify all persons who hold or may hold native title for an area and that all the persons identified authorise the making of the ILUA.

Although this statutory function would appear to make NTRBs a key part of the agreement-making process, their actual role varies in different locations across Australia:

- The level of resourcing and capacity or expertise of NTRBs regarding agreement-making varies from place to place. Where the organisation's emphasis is on pursuing native title determinations, the diversion of resources into these processes is likely to diminish its responsiveness to future act negotiations or negotiations of ILUAs.
- NTRBs generally charge fees to companies for aspects of the certification process. In Queensland, many resource companies choose not to use the NTRBs to do the groundwork in identifying relevant native title holders and claimants because they do not consider the fees good value for money. Elsewhere, the cost to companies for NTRB services to assist in agreement-making has been reported to be as high as \$2 million. Companies have increasingly used other consultants or legal advisers to do the work and involve the NTRB only to provide certification at the end of the process prior to registration of the ILUA.
- Queensland NTRBs were subject to review and now consolidated in four major NTRBs. It is hoped that the stability brought by the scale of these bodies will result in improved performance.
- The situation in the Northern Territory is clearer as the major land councils created by virtue of the Land Rights Act in 1974 function as the representative bodies. The Northern Land Council is responsible for the northern part of the Northern Territory and the Central Land Council for the south. These are relatively well resourced organisations with in-house expertise developed over many years of dealing with the resources industry. The pace at which negotiations proceed tend to be a point of complaint amongst industry players, but perseverance is generally rewarded. Central Petroleum's control over the immense central Australian Amadeus Basin through a series of ILUAs and Land Rights agreements is evidence of this.

- During the native title era, Western Australian NTRBs have developed into well regarded organisations:
 - The Kimberley Land Council (KLC) in the far north west of the state began as a grass roots representative organisation which received recognition as an NTRB. It has been involved with many mineral resource activities with Argyle Diamond Mine agreement being a leading example. The negotiations over the James Point Gas Hub have brought the KLC's involvement into the spotlight. The difficulties here appear to be more related to the highly legalistic native title process whereby native title parties are named on applications and all must sign off on decisions related to the claim rather than any outstanding deficiencies with the KLC consultation process.
 - Yamatji [Marlpa](#) operates in the Pilbara and is taking a proactive role with agreement making in the Pilbara and areas around Geraldton.
 - The Goldfields Land Council and SW Land and Sea Council operate in the southern areas of the state are generally regarded as responsible organisations increasingly developing negotiation capacity and expertise in agreement making.
- The South Australian Aboriginal Legal Rights Movement (ALRM) is the single state wide NTRB in South Australia. The ALRM has a history of working collaboratively with the South Australian Government and the South Australian Chamber of Mines and Energy. Through this collaboration a state-wide ILUA for petroleum has been developed that is open to resource companies to use as a template for making ILUAs with the relevant native title group. South Australia also has substantial areas of the state held under freehold title by Aboriginal Traditional Owners. Anangu Pitjantjatjara (AP) is responsible for administering the Pitjantjatjara Land Rights Act which establishes a regime for accessing the AP lands in the north west of the state. The Maralinga lands are the other major area held under freehold title.

PART 5 –

Agreement benefits

5. Agreement benefits

Key messages:

- Benefits provided to Indigenous parties can be conceptualised as either or both *compensation* for impact on lands or the *sharing of the benefits* flowing from resource development. They should aim to leave people better off and should be focused on long term sustainability (Part 5.1).
- The quantum or value of financial benefits has increased in recent decades, but accurate data is not available due to confidentiality of agreements (Part 5.3).
- There are several models for calculating benefits (e.g. fixed payments, royalties based on output volume, output value or profits, equity in operation) which seek to balance various advantages and disadvantages for companies and Indigenous parties. Approaches vary across commodities and contexts (e.g. offshore vs onshore, gas field vs pipeline vs plant) (Part 5.3.2).
- Oil and gas projects offer considerable scope for the negotiation of benefits packages that can have sustainable long term development benefits for Indigenous communities due to the large scale of the projects, their long term nature and governments' interest in seeing the projects contribute to regional development (Part 5.4).
- Non-financial benefits vary widely, and there is an increased focus in agreements on more specific Indigenous employment and training benefits (including targets and specific training programs), Indigenous preference in business procurement and more detailed environmental management and cultural heritage protection provisions (Part 5.5).

5.1. The principles underpinning agreement benefits

The benefits provided to Indigenous parties in agreements will generally be directed at one or both of the following purposes:

- To compensate Indigenous parties for the impact of the resource development on their lands and livelihoods
- To enable Indigenous parties to share in the benefits flowing from the development of their lands.

For this reason, in Canada these agreements are known as Impact and Benefit Agreements, or IBAs. The ICMM notes that best practice compels a resource developer to include not only compensation for impacts, but to provide benefits that will leave Indigenous people better off:

A generally accepted principle is that full and proper compensation should be provided for all assets and livelihoods that are lost or irreparably damaged as a result of the impact of a project, with the aim of ensuring that, at a minimum, people are left no less well-off. Good practice is to try and enhance people's position and future so that they are left better off as a result of the mining project's presence. (ICMM 2010, p.67)

Differing aspirations:

A lawyer working with native title parties in Western Australia highlighted the widely varying aspirations of Indigenous groups. Some have the attitude that mining payments are purely compensatory, while some are much more entrepreneurial, seeing the payments as benefit-sharing and an opportunity for business development.

Compensation vs benefit-sharing

A lawyer working with Central Queensland native title groups noted that while companies often seemed to see the financial benefits in strict legal terms relating to compensation for the impact on land (and especially native title rights), Indigenous groups were more likely to see financial benefits as an opportunity to share in the benefits of development occurring on their traditional country. A possible reason for this is that Central Queensland native title claimants are more likely to have been dispossessed and relocated from their traditional lands, such that their opportunities to have direct contact with these lands (e.g. ceremonial, hunting etc.) has been diminished.

In Australia, benefits in agreements with Indigenous parties are generally directed to two beneficiary groups:

- Traditional Owners who are the recognised custodians of the land that will be directly impacted by the project
- Members of the broader Indigenous community who live in the vicinity of the project and may or may not also be Traditional Owners but are affected by the project.

In 2008, a Native Title Payments Working Group was formed by the Australian Government, comprising representatives from Indigenous organisations and land councils, native title lawyers, academia and the mining industry. In its report to the government, the Working Group agreed that sustainable agreements:

- Provide to the Traditional Owners financial benefits commensurate with the scale and impacts of the relevant mining or other operation the subject of the Traditional Owners' consent, and ensure that those financial benefits are applied, so far as possible, for their long term benefit
- Support Indigenous business and employment, rather than just provide an income stream
- Cover a range of areas including environmental protection, and cultural heritage as well as making provision for mine failure, assignment or failure of the parties to meet their obligations
- Have an acceptable balance between the nature of the effect or impact to the traditional owner group's land and waters and the nature and extent of the benefits to be received
- Have trust structures appropriately aligned with the purposes of the agreement
- Are culturally appropriate
- Involve regular review of the long term objectives (Native Title Payments Working Group 2008, p.7).

IFC Performance Standard 7

The IFC's Performance Standard 7 stipulates that a company is required to seek to identify "opportunities for culturally appropriate development benefits" that are commensurate with project impacts, with the aim of improving standard of living and livelihoods and fostering long term sustainability of the resource on which Indigenous peoples depend.

The above list would appear to reflect the current consensus about the principles that should underpin the benefits in resource agreements with Indigenous people in Australia.

5.2. The types of benefits included in agreements

Agreement benefits seek to provide a sustainable long term outcome for communities addressing a range of socio-economic dimensions. The types of benefits in agreements could include, but are not limited to:

- Financial benefits
- Land, assets or investments
- Opportunities for employment, education and training, which could include:

- Pre-employment training, traineeships and apprenticeships
- Indigenous employment targets/quotas or preferential employment policies
- Educational scholarships or cadetships
- Business development assistance, such as business start-up support or preferential contracting to Indigenous businesses
- Community development, including mentoring, career planning, leadership development and cultural strengthening programs
- Infrastructure development or delivery of social programs and services
- Programs for environmental protection and mine rehabilitation or guarantees for Indigenous participation in these activities
- Programs for cultural heritage protection or guarantees for Indigenous participation in these activities
- Licences to hunt, fish, camp or organise cultural events in the agreement area
- Ongoing commitment to collaborate on future projects
- Management assistance and governance support for Indigenous representative bodies.

5.3. Financial benefits

The financial arrangements are a key focus of agreement making with Indigenous people. The nature and quantum are a ready measure of the value of the agreement to Indigenous people. Establishing a payments regime that is commensurate with the impacts as perceived by Indigenous groups and that meets reasonable expectations to share in the benefit of resource extraction is critical for establishing the certainty the company needs for making large capital investments.

An overview of information that is available on petroleum agreements with Aboriginal people in Australia is provided in this section along with consideration of factors relevant to agreements over large scale gas projects.

Box 14. Rio Tinto's best practices regarding the management of financial benefits

Rio Tinto advised the Native Title Payments Working Group that the management of direct benefits under Rio Tinto agreements is characterised by:

- Aboriginal control of the funds
- Strong governance arrangements with multiple safety nets
- Significant emphasis on training and capacity building of Aboriginal managers of funds
- Payments to individuals absolutely minimised
- Payments focussed on community development purposes
- Intergenerational benefits are guaranteed
- Accumulation of capital funds structured to provide income stream post mine life equal to or greater than payments made during mine life, in perpetuity
- Allocation between charitable trust for tax effective accumulation and non-charitable trust for effective governance for funds for immediate distribution
- Allocation between community development purposes pre-determined, according to community plan'.

Source: Native Title Payments Working Group Report 2008, p.6

5.3.1. Quantum of financial benefits

There is no consistent basis and no formal benchmarks relating to the appropriate quantum or value of benefits underpinning agreements. This is because the nature of each resource project is unique and the legal, social and cultural setting varies between locations. Nevertheless, a broad survey of existing agreements gives an indication of the order of magnitude and provides examples of methods used in calculating payments in Australia.

Precise comparisons are difficult because agreements are negotiated in private and the parties generally choose to keep the terms, particularly financial terms, confidential. As such there are limited public examples to establish a body of precedent to be set about the appropriate level of benefits.⁷

A number of recent reports and government discussion papers have expressed concern about what is seen as unnecessary restrictiveness of confidentiality clauses, and the impact this has on inhibiting the progressive development of agreement-making practice (Native Title Payments Working Group 2008, p.2; Australian Government 2008, p.9). The Australian Government is considering amendments to require more information about ILUAs to be placed on the public register of ILUAs kept by the Native Title Tribunal (Australian Government 2010, p.13).

Example of benefits – Western Cape Communities Co-existence Agreement

The following annual contributions are paid into a Charitable Trust (of which 60% is set aside in long term investments):

- Resource company: \$2.5 million annually
- Government: \$1.5 million annually
- \$500,000 managed by the Company to run employment and training programs
- \$150,000 allocated to a cultural awareness fund

A company owned station (1325 sq. km) was also transferred to Traditional Owners

⁷ As a 2008 report noted, the most comprehensive database of agreements, the Agreements, Treaties and Negotiated Settlements (ATNS) Project website, contains information about 1062 Australian agreements, but full text documents are only available for 26 of these (AIATSIS 2008, p.9).

In the preparation of this resource document, CSRM has sought to obtain information from a variety of sources about the quantum of benefits contained in recent agreements. While some information is publicly available, such as the Rio Tinto agreement over the Argyle Diamond Mine and the Rio Tinto Western Cape Communities Cooperation Agreement over its Weipa bauxite and alumina operations, the focus here is on agreements in relation to petroleum in Australia.⁸ CSRM also had the opportunity to review the confidential database of agreements of one major resource company.

5.3.2. Methods for calculating financial benefits

A range of methods of calculating financial benefits are used in agreements with Indigenous people. These resemble closely the methods corporations use to negotiate with each other over such things as joint ventures and equity in projects, as well as resembling the type of royalty regimes governments apply to resource projects. The types of payments fall into the following categories:

- Fixed cash payments – either single upfront payments, milestone payments or fixed annual payments (for example, a percentage of capital expenditure); or fixed payment on the occurrence of particular events such as closure or financial events such as capital payback
- Royalties based on a unit of volume of resource extracted (e.g. \$ per tonne)
- Royalties based on the value of sales of the resource (*ad valorem* royalties)
- Payments based on profits – for example, after tax profit, or earnings before interest, tax, depreciation and amortization (EBITDA)
- Equity participation in the project either free-carried or purchased. Issuing shares in the resource corporation is another form of equity but rarely used.

Generally, resource companies seek to negotiate a payments regime that is sensitive to commercial fortunes of the project. Various forms of profit-based royalties tend to be favoured by proponents, which are interested in maximising the rate of return on capital invested.

In contrast, Indigenous parties are likely to prefer payments that are predictable, reasonably consistent year to year, and are calculated using a method that is easily understood. Transparency holds value in the Indigenous context because of the relatively low education levels and the issues of trust arising from the historical treatment of Indigenous interests by businesses and government in relation to money.

Profit-based calculations introduce a host of deductions related to the cost of production that are not easily verified nor necessarily well understood by external parties. Particularly where deductions from revenue for tax, remuneration and depreciation are introduced, an impression can easily be formed that there is some trickery involved.

The method of calculating payments to Indigenous groups is sometimes influenced by the methods that governments use to calculate statutory royalties for resource projects. A trend of late is for governments to seek profit-based royalty regimes, such as the Australian Government's Resource Rent Tax on petroleum and the controversial resource super profits tax proposed in 2010. The

Example – Risks with profit based payments:

The Argyle participation agreement provides for profit-based payments to a trust to be split between 21 traditional owner groups. During the boom years, these groups had become conditioned to a certain level of payments but when the Global Financial Crisis hit, these payments dried up. The company assisted the trust during the downturn by providing an advance of \$600,000 per year from future profit payments.

Source: Gelganyem and Kilkayi Trusts, *Annual Report 2008-09*

⁸ The Argyle Participation Agreement is analysed in detail in the BG Group report for the Bolivian Government.

Northern Territory has a profit-based mineral royalty regime, which the Australian Government will adopt for future uranium mines in the Northern Territory. Governments universally seek to stimulate economic development and the prevailing view of economists is that profit-based royalties promote the investment needed for discovery and development of mineral resources.

Extending that argument to suggest Indigenous groups should accept profit-based royalties from resource projects is fraught, because governments secure resource rents from many projects spread widely and involving multiple commodities. As such, there is a smoothing or flattening of income streams as the varying fortunes of respective projects tend to cancel each other out. For Indigenous groups, their interests will likely be in a single project and if unfavourable economic conditions prevail for a period then the financial compensation may not match the impacts of the operation, which continue regardless. This is potentially a source of aggravation for Indigenous parties.

The IBA Toolkit provides a good summary of the advantages and disadvantages to Indigenous groups of each of the payment models (see Table 10).

In practice, many agreements use a combination of the payment methods outlined above. As O’Faircheallaigh (2003) points out, the method of calculating benefits has become more sophisticated as resource companies have sought to balance the advantages and disadvantages of the various methods.

For example, one major mining company has moved from an approach up until the 1990s that was based on one-off payments supplemented by small indexed annual payments, to a package of benefits that includes:

- One-off payments
- Value of production payments (i.e. production volume X price)
- Indexed annual payments.

Using this approach, the Indigenous party will receive an up-front payment that can be used immediately, annual payments that will be predictable and can therefore assist with planning of long term programs, plus a payment that will reflect changes in the volume of production and value of the resource.

Examples of formulae used to calculate benefits

The review of a major mining company’s agreements found a variety of formulae are used to calculate the quantum of annual payments for Indigenous groups, such as:

- Benchmark price X mine cost factor (strip ratio) X tonnes of saleable ore
- Tonnage produced, weighted by LME average and CPI
- Free-on-board (FOB) value: gross value of shipped ore, less costs of shipping and export

Table 10. Advantages and disadvantages to Indigenous parties of different types of payments

	ADVANTAGE	DISADVANTAGE
Fixed payments	<ul style="list-style-type: none"> • Guaranteed payment amounts at agreed upon times • Easy to administer • Not dependent on profitability 	<ul style="list-style-type: none"> • As production amount and scale of disturbance increases, there is no increase in payments • As commodity price increases, no corresponding increases in payments • Community may feel the mining payment (royalty) is too low in hindsight and internal and community-corporate conflict may ensue
Royalty based on volume of outputs	<ul style="list-style-type: none"> • When company ramps up production, community gains benefits • As impact on environment changes with production increase, so do funds to mitigate harm • Reduced commodity price does not affect payments (provided company keeps up production level) • Not dependent on profitability 	<ul style="list-style-type: none"> • If price of commodity rises, there is no additional benefit to the community • If production costs decline during the life of the mine, the community does not benefit and may indeed lose jobs associated with downsizing and automation
Royalty based on volume of production	<ul style="list-style-type: none"> • Community shares in benefits whenever the commodity price increases or production levels rise • Not dependent on profitability • Payment is not dependent on operating, financing or capital costs • Simple definition and relatively easy to administer 	<ul style="list-style-type: none"> • If price of commodity falls, the payments decrease and often extremely quickly • If there is dependence on payments for services or programs, hardship may result when prices fall • Transportation and smelting costs (e.g. concentrate impurities) must be taken into consideration for some metals
Royalty based on profits	<ul style="list-style-type: none"> • Value can increase if mining costs are lowered through efficiencies • Value increases if price of commodity increases and costs are stable 	<ul style="list-style-type: none"> • Not all projects are profitable • Income changes with the price of commodity – if the price of commodity slumps during a recession, this can dramatically affect the payments made to a community • Operating costs can change yearly and not always for the better • Deductions before profits measured can be manipulated by the proponent • The agreement must be very clear, and it can be hard to administer because of need for accounting oversight • If payments are delayed until after capital costs are recouped, communities can wait a long time for any income

	ADVANTAGE	DISADVANTAGE
Equity	<ul style="list-style-type: none"> • Increases in value if the project is profitable • Can provide access to information and input to the senior management team and decision making • Potential to provide greater control over use of traditional lands and environment 	<ul style="list-style-type: none"> • May need to raise capital for investment • Project might not be profitable or have comparable value to other investments forgone • Subject to all the same risks that the company is subject to, like cost overruns or change of commodity price • May be required to share operating losses or capital expenditures • May have liabilities as part owner • Legal costs can be high • Funds may not flow early or readily back to the community – may not be short term upside

Source: IBA Toolkit 2010

5.3.3. Some examples of known quantum of benefits in Australian agreements

This section contains a broad survey of the payments contained in relevant agreements in Australia. As mentioned, the specifics and exact detail of payments is usually ‘commercial in confidence’. Furthermore, each arrangement arises out of the particular circumstances of the project, its location and the particular negotiations. As such, the data can only be used indicatively and is intended only to give insight into the order of magnitude and styles of agreements that exist.

The review of available information reveals that the method of calculating payments and the quantum of payments varies considerably across commodities (and to some extent, across jurisdictions). Inclusion of some form of payment based on the value of production appears to be becoming the norm in contemporary mining agreements for commodities such as iron ore and metals.

For these mining agreements, information available to CSRM suggests that the level of production-based payment appears to have ranged between well below 1% of the value of production (in the case of one national mining company) to up to 1-1.5% (in the case of a metalliferous project in north-west Queensland). Agreements by coal companies, on the other hand, do not use production-based payments and instead provided for one-off plus annual payments. The rationale behind these payments is about compensation for impact on land rather than sharing in the profits.

While production-based payments have been used in South Australia and Northern Territory for oil and gas projects (based on the government royalty formula), CSRM understands that the preference of Queensland oil and gas producers has been to calculate a payment based on the estimated impact on land rather than a production-based payment. Thus, the rationale for the calculation appears to be an attempt to determine the value of the native title that is being impacted on, which must by definition be less than the freehold value of the land. This compensatory payment is then supplemented by other payments, programs (e.g. training) or commitments (e.g. contracting) that are provided in recognition that the project will operate in the region for a lengthy period and has an ongoing obligation towards regional and community development in order to maintain its ‘social licence to operate’.

The following discussion provides some examples of the known quantity of payments in agreements for various commodities in various jurisdictions.

Northern Territory

As indicated in Part 2.4, some of the earliest agreements over petroleum in Australia are on Aboriginal land in central Australia. Agreements were reached in 1982 in a politically charged negotiation. The final agreement was reported in the Northern Territory media at the time to include a royalty of 1.5% on well-head⁹ plus a substantial lump sum although it was apparent that the Aboriginal negotiators wanted a substantially higher royalty. This was resolved in 2002 with the Central Land Council (CLC) concluding new agreements that almost doubled the royalty rate.

It also needs to be considered that on Aboriginal land, affected communities receive an equivalent 30% of the Northern Territory royalty take. The state takes 10% royalty on well-head, which means affected Aboriginal groups received an additional 3% of well-head, on top of the negotiated royalty. The CLC indicates that subsequent conjunctive agreements with current petroleum explorers contain well-head royalties in excess of the renegotiated agreements for Mereenie and Palm Valley.

In the northern part of the Northern Territory, the first petroleum agreement was concluded with the Northern Land Council by Sweetpea Corporation in 2004 for exploration permits covering 19,000 sq. km of land. It is significant as it is the first petroleum exploration agreement on native title land and includes agreed payments over any production, although the royalty rate is not disclosed. A major factor appears to be that senior Sweetpea staff had extensive experience working with the Native American tribes in New Mexico and Colorado and their approach has been always “to work in partnership with the tribes on their land”.

Subsequent agreements made by the NLC have built on this agreement. An agreement that was reached with a petroleum company several years ago is a good indication of expectations for quantum. The agreement was concluded but the permits were not taken up. The agreement includes a 3% royalty on well-head that steps up to 5% following a specifically defined capital payback point is reached. Additional increases can be triggered following payback based on the market price per unit of oil up to 10% of well head.

This compares with available information on the NLC’s approach to mineral exploration agreements between 1993-1995 which included production payments made up of an amount equal to 1% of construction costs, annual (non-statutory) royalty of about 2-3% levied as a percentage of the total value of minerals recovered, and annual rental payments of about \$100,000, depending on area of land involved (O’Faircheallaigh, 1995).

South Australia

The situation in South Australia has unfolded in a markedly different manner from the Northern Territory. South Australian native title groups are represented by the South Australian Aboriginal Legal Rights Movement, which signed the first Conjunctive Petroleum Indigenous Land Use Agreement in February 2007 with the South Australian Government and the South Australian Chamber of Mines and Energy (Government of South Australia 2007). The ILUA covers the Yandruwandha/Yawarrawarrka Native Title Claim area in the north-east corner of the state that covers a large portion of the Cooper Basin and includes the Moomba township. This is a proven field with significant exploration activity.

The ILUA provides the terms and conditions for a template agreement that exploration companies can enter into with the claimant group. Only minimal negotiation over such things as administration payments is required. Exploration compensation is settled in the overarching ILUA, as are production payments which are 1% of well-head, based on the definition used by the South Australian Government in the South Australian Petroleum Act. It would appear that native title parties have settled for a comparatively low royalty rate in exchange for a scheme that draws in companies as a matter of course.

⁹ As defined in the then Northern Territory Petroleum Act.

Similar ILUAs are being worked on with respect to other native title claims in an effort to get broad uniformity across the state. It may be that the native title parties are not totally satisfied with the royalty rate as a clause in the ILUA seeks to apply any higher rate that might be negotiated subsequently by another native title group. It will be worth monitoring developments in South Australia, as these arrangements appear to set the minimum in terms of available information on agreements over petroleum related resource development.

Other areas in South Australia are held under freehold title by Aboriginal groups such as the Pitjantjatjara lands and Maralinga lands. By way of comparison, a recently concluded conjunctive exploration petroleum agreement was made by the Pitjantjatjara representative body, Anangu Pitjantjatjara, with Indonesian petroleum company, Ahava Energy. It includes a conjunctive oil exploration land access agreement which, “comes with a commitment by the state government to pass on APY’s full one-third share of the 10% royalty received by the State on the first 5000 barrels per day production” (Anangu 2010). In other words, Aboriginal groups stand to receive in the case of production a 3.3% on well-head, paid by the government on the first 5000 barrels production per day.

Western Australia

There have been several large-scale Indigenous agreements by mining companies in WA over the past decade, but the quantum of payments for these agreements remains largely commercial-in-confidence. However, two agreements for which some information is available (probably because of the Western Australian Government’s involvement) are the Burrup and Maitland Industrial Estates Agreement and the Browse LNG Development at James Price Point.

Burrup and Maitland Industrial Estates Agreement

The Burrup Peninsula near Karratha in the Pilbara region of Western Australia is the focus of major industrial development, including petroleum. Woodside’s NW Gas Project onshore facilities are located here. With the advent of native title, the Western Australian Government has sought to secure additional land for further industrial development through agreements with native title claimants. In 2003 it entered into the Burrup and Maitland Industrial Estates Agreement with three Aboriginal Groups, the Ngarluma Yindjibarndi, Yaburara Mardudhunera and Won-goo-tt-oo people (Ripper 2003).

Through the agreement the state compulsorily acquired native title rights and interests in the Burrup Peninsula, and parcels of land in and around Karratha. The Agreement allows for major industrial development to proceed at the southern end of the Burrup Peninsula, light industrial and residential development to take place on land in and around Karratha. Onshore facilities for Woodside’s Pluto development are located in the Burrup Industrial Estate. The benefits under the agreement are said by the state government to be worth more than \$15 million (Ripper, 2003) and include:

Western Australian Government commitments

- \$1.5 million payment up front on signing of agreement
- \$2 million payment on acquisition of native title
- Title to more than 60% of the Burrup peninsula transferred to the native title claimants and leased back to the State to be jointly managed. The package included:
 - \$500,000 for the development of a management plan for the reserve
 - \$2.25 million over five years for the management of the reserve
 - \$8 million over five years for the construction of buildings and infrastructure, including a visitor centre and roads and tracks

- \$200,000 over three years for the establishment and running of an employment service provider to facilitate employment and training opportunities for the Roebourne Aboriginal Community
- \$75,000 over two years to the body corporate to provide education assistance to the Roebourne Aboriginal Community
- \$100,000 per annum for four years for running of native title body corporate
- Land to the value of 5% of Developed Lots created in the Karratha Land.

Proponent commitments

- Lump sum payments to native title parties from the following proponents in instalments on taking up the lease and then on commencing production
 - Methanex, \$500,000
 - Japan DME Ltd, \$650,000
 - Dampier Nitrogen Ply Ltd, \$650,000
 - Australian Methanol Company Pty Ltd, \$500,000.
- Annual lease payments of \$700 per hectare for current proponents and half the market rental rate for future proponents
- An obligation to employ Aboriginal people and utilise a service provider to facilitate Aboriginal training and employment opportunities.

The Agreement also provides protection of Aboriginal heritage through an Additional Deed that provides further Aboriginal heritage protection by way of state government funded surveys and studies (Ripper 2003).

Browse LNG Development – James Price Point

As mentioned in Table 3, the total social and economic benefits package contained in the agreement over the Kimberley Gas Hub at James Price Point is said by the Western Australian Government to be worth \$1.5 billion to local Aboriginal communities over 30 years. It includes \$250 million contribution by the Western Australian Government.

The proponent, Woodside, claims “the package of employment, training and business development opportunities is one of the most substantial ever agreed between a major development and Indigenous people. It represents \$1 billion of benefits, including a significant investment in building the capacity and capability of Kimberley Indigenous people, for the long term”. Over the life of the project, Woodside says there will be \$150 million worth of contracts. Details include:

- A target of 300 Indigenous jobs during construction
- \$1.3m a year to support Indigenous education
- \$1.3m a year to support Indigenous training
- Publicly stated targets for how many Indigenous people will get jobs at the gas plant once it is completed
- Support for Indigenous businesses including a guarantee that the contractor engaged to build the permanent accommodation for the project will work with Indigenous businesses
- Once LNG production commences, a guaranteed minimum of \$5 million worth of contracts on the project every year will go to Indigenous businesses or joint ventures with Indigenous participation

- \$400,000 each year to support the administration arrangements with Traditional Owners and to support Indigenous business development
- In addition there are payments to native title holders including:
 - \$18m to native title holders as project milestones are met
 - \$3.6m per year to native title holders
 - \$4m per year to a regional Indigenous benefits fund
 - An additional \$4m per year to the regional Indigenous benefits fund for every LNG train above the base 12 million tonne project (Woodside 2011).

Queensland

In Central Queensland, agreements between coal companies and native title parties have tended to be based on a fixed upfront cash payment or fixed annual payments, rather than benefits based on production. Smaller companies, however, prefer a production-based payment as it does not require expenditure upfront and often they will have sold the operation by the time production starts.

For metalliferous mining, such as in the North West Minerals Province, a native title lawyer told CSRM that an ad valorem payment has been used for small agreements, such as 1% or 1.5% of gross metal value.

In the Queensland oil and gas sector, smaller agreements for domestic gas production have followed a similar approach to those in the Northern Territory and South Australia, with payments to Traditional Owners being calculated using the state's royalty formula regarding a percentage of well-head.

For the gas field elements of coal seam gas projects, however, the higher value of the LNG being produced for export seems to have led to a different approach to calculating payments. There has been a preference for calculating fixed payments based on a valuation of the impact on land, rather than an ongoing royalty based on production or profit. In reality, because the impact on land or on Indigenous parties' interests and rights are hard to value, the agreement comes down to a commercial negotiation regarding what a company is willing to pay for access to land.

For oil and gas pipelines, benefits are calculated based on kilometre of pipeline. A number of sources told CSRM that this rate has increased considerably over the past ten years. As recently as 2005, agreements included a rate of \$1000-2000 per kilometre and the negotiations for the PNG gas pipeline leading up to 2007 is understood to have been around a rate for \$2000-4000. By contrast, in 2011 the usual rate is between \$5000-8000 per kilometre, with some claimants seeking up to \$10,000. It was suggested by one lawyer who represents Indigenous parties that the race between the coal seam gas companies to get projects operational had created upward pressure on this rate. One consequence is that coal companies seeking to negotiate access for rail corridors are now faced with a much higher going rate than they had previously encountered.

5.3.4. Appropriate form of financial benefits

The question of the appropriate form of financial benefits to Indigenous parties under agreements has been a controversial issue. In particular, one of the most difficult questions is whether cash payments should be made directly to individuals or paid into trusts that will manage and apply the funds for more sustainable outcomes for current and future generations. Agreements such as the Argyle agreement contain a combination of these forms of payment, but the balance is a difficult one.

The Australian Government has expressed concern about direct cash payments and has urged arrangements that provide more sustainable benefits. A Government discussion paper made the following comments:

To harness these opportunities [from resource development], Indigenous people and organisations must be encouraged to apply income streams to optimal effect and to minimise cash payments to individuals in circumstances where such payments are unlikely to yield lasting benefits... The Government is concerned to maximise the opportunity to improve Indigenous people's economic status that arise from payments flowing to traditional owners and Indigenous communities. Upfront cash payments rarely achieve this outcome. Responsible companies are moving away from this practice in favour of structuring benefits in a more sustainable way. Nonetheless the practice continues as not all companies embrace industry best practice. The result is often conflict within Indigenous communities as direct payments to some and not others creates division and inequity. Rarely are such payments directed towards the benefit of the whole community or longer term investment strategies." (Australian Government 2008, p.7)

Rio Tinto's approach (outlined in Box 16) is to minimise cash payments to individuals and to support structures for long term benefit. This principle is implemented through the creation of charitable trusts to manage the majority of agreement benefits, as discussed in Part 6.3.

The difficulty of achieving the right balance, however, is illustrated by examples where communities and individuals with high levels of socioeconomic disadvantage have become frustrated by the fact that financial benefits have become locked up in future-focused trusts, leaving immediate needs unmet. For example, this criticism has been levelled at the Yandicoogina agreement (Box 17).

Further information:

The National Native Title Tribunal analysed several agreements and produced a guide entitled *Mining Agreements: Content Ideas* (2005). It includes a checklist of questions about the details of financial payments.

See: www.nntt.gov.au

In considering the extent of cash benefits that will be payable to individuals under an agreement, the following issues will also need to be taken into account:

- Potential difficulties in identifying the individuals who will be eligible
- The tax implications of payments to individuals
- Possible impacts on individuals' welfare entitlements as a result of receiving direct cash payments
- The possible social impact of cash windfalls for individuals, in terms of fuelling dysfunctional lifestyles involving alcohol abuse or gambling
- The potential to inflame divisions or jealousies in the community between those entitled to payments and those who are not.

Box 15. Case study example – Difficulty of balancing current use versus future benefit

Yandicoogina Land Use Agreement (YLUA) was to provide up to \$60 million to the Gumala Aboriginal Corporation over 20 years, with the possibility of more payments for a scaling up of production at Pilbara Iron's Yandi mine.

One of the concerns raised by Indigenous parties has been that the agreement tied up compensation payments in trusts that could not be accessed by the beneficiaries. A study reported that the local sentiment was that "We've got the richest trusts but the poorest people" (Altman, 2009, p.37 in Altman and Martin 2009).

Recent research with the beneficiaries of the YLUA included the following commentary:

"Cash payments to beneficiaries cannot be granted under the Trust structures. This is for some who are critical of this approach, as much a political and human rights issue, believing that they have a right to manage their own finances, cash payments or otherwise, like other Australians. Many of the Gumala members interviewed found the lack of choice patronising, and there was little understanding that the charitable status of the Trusts was a reason for not granting such payments. Gumala members were well aware that the neighbouring IBN (Innawonga, Banyjima, and Niapali) Agreement with BHP Billiton, also of comparative scope and majority overlapping membership, does provide limited annual cash payments to members. If membership of Gumala is viewed as part of a mosaic of ILUAs in the region, this feature of the IBN Agreement could be understood as assuaging, to some extent, the call by those individuals who are members of both." (Holcombe, S. 2009).

Although companies may prefer a model where payments are made to a trust in which the company has some management role, the company should be aware that Indigenous people are understandably sensitive about processes seen as 'paternalistic', due to the history of paternalistic laws and policies imposed by governments on Indigenous people.

To ensure that agreements do provide adequately for sustainable benefits into the future for Indigenous groups, the Australian Government is proposing a government review body to assess the content of agreements against leading practices (Australian Government 2010). This is discussed further in Parts 3.6 and 6.2.

5.4. Opportunities for the oil and gas sector

The analysis of available information on oil and gas agreements reveals the diverse outcomes of agreement-making across Australia. Differing outcomes are observed which reflect a range of variables that particularly affect the negotiation process:

- The nature of the project, including the scale and type of facilities, whether it is offshore or onshore, and requirements for onshore production pipelines
- The particular jurisdiction, land tenures and relevant legislation affecting the project
- The capacity and experience of Aboriginal stakeholders and extent to which competent representative Aboriginal organisations exist.

A trend towards securing a greater share of the financial benefit is observed in the Northern Territory, where land rights legislation provides Aboriginal groups with a strong negotiating position coupled with well-resourced and experienced representative bodies.

The large scale, mostly offshore, resource developments in Western Australia have seen even larger benefits packages, with the West Australian Government taking a prominent role in negotiations. The breadth and size of the benefits packages negotiated under these agreements actively seek to address the economic and educational factors that contribute to Aboriginal social disadvantage. Especially in regional Western Australia and the Northern Territory, where there are labour and skills

shortages, there are serious initiatives aimed at taking up employment and particularly contracting opportunities available from petroleum development. These include pre-employment and vocational training and increased efforts by petroleum companies to foster Aboriginal contracting businesses.

The South Australian approach is unique as it represents an industry-based collaboration with government that is focussing more on providing a framework aimed at getting petroleum exploration permits granted efficiently. Given the disparity between the level of payments contained in the template agreement and the payments achieved under agreements in other parts of the country, a question arises around how sustainable that approach will be in the longer term.

The Queensland experience also appears to be weighted towards the project approval function of agreement-making. The resultant agreements are piecemeal and tend to reinforce the disparate nature of the Aboriginal interests in land found in central and southern Queensland. The challenge of contributing to positive social outcomes is exacerbated by such an approach. This in turn could ultimately affect the degree to which agreements can deliver the level of certainty and security of investment desired by resource companies.

Based on this analysis, no single case emerges as an ideal example on which to model a future agreement-making process with Aboriginal people. Good practice, however, can be gleaned from drawing on the better parts of existing agreements. Within this context there is considerable room for a petroleum company to set the pace in terms of best practice in agreement-making in the petroleum industry.

Three major features distinguish the modern oil and gas industry and provide a solid framework to build an ongoing interaction with Aboriginal groups aimed at basis distinguishing the industry in agreement-making that has with lasting and positive social outcomes:

1. *Project scale.* The scale of the developments in terms of capital investment and operating revenues are extremely large. The capital value of current LNG developments is measured in tens of billions. Project cash flows are significant and because there are generally long term contracts with end users, there is continuity and consistency of revenues. As such, scaling benefits packages to the size of the projects results in significant funds that are potentially available to be applied to benefit packages contained in agreements, while not significantly affecting the rate of return from the project.

There is also value in predictability of payments under agreements as this assists in planning and funding initiatives and programs. Negotiations over quantum therefore need not focus so much on a project's capacity to pay but rather on how payments can be applied to achieve positive and lasting social and economic benefit to affected communities. Furthermore, there is a huge underlying incentive for companies to have certainty and security of investment achieved through a robust social licence to operate.

2. *Long term nature of projects.* Projects are designed and planned at the outset as long term investments. Projects may span 40 years which present opportunities for positive change in generational terms. Investment in initiatives that have long term outcomes, like regional infrastructure, education, technical skills development and business partnerships, are much more easily justified where the project can ultimately benefit from accessing services and labour locally. It becomes possible to conceive benefits to include building social capital and capacity in local Aboriginal communities where projects exist over such long time frames. Fundamentally, long project life gives ample time to build the relationships and trust to work with Aboriginal groups.
3. *Government interest.* The petroleum industry has the attention of government. The level of taxes and other revenue received by government engenders a 'can do' approach when it comes to seeing the project into fruition. Governments are also tending to link regional

development aspirations to major resource developments but are often criticised for not devoting the actual resources needed. Scope exists therefore for major projects to draw government into aspects of the initiation, design and resourcing of social programs for the benefit of stakeholder communities. Offsetting cost is not the major incentive here but rather encouraging appropriate public investment into regional infrastructure and institutions, as well as partnerships with regional communities that can persist and provide benefit beyond the life of the project.

5.5. Non-financial benefits

5.5.1. Provision of infrastructure, programs and services

Negotiations for a resource development can include provision for a non-financial benefit to the Indigenous party in the form of a commitment by the company to construct a facility or deliver a service. This may or may not be part of the terms of an actual agreement. It is common for companies to have a broader community development fund that supports various community programs or activities separate to the specific benefits provided to Indigenous parties as part of a formal agreement.

Funding programs or services that will benefit the broader Indigenous community rather than particular individuals may be appealing to companies from a social sustainability perspective. A risk for companies is that they may become responsible for funding infrastructure, programs and services that Indigenous residents should already be receiving from government as broader 'citizenship entitlements.'

Further information:

The IBA Toolkit sets out policy criteria for selecting the conditions under which it will be beneficial to apply mining payments to programs and services (2010, pp.142-3)

In Australia, companies have raised concern, particularly in remote Indigenous communities, that agreement benefits are being consumed on making up for deficits in government service provision to these communities. Companies need to be selective about the circumstances where it is appropriate to use agreement benefits for infrastructure, programs and services.

5.5.2. Employment and training

Commitments by resource developers to providing employment and training opportunities for Indigenous groups have become a pivotal aspect of agreements in the past decade because:

- Companies and Indigenous groups alike realise that a sustainable way for Indigenous groups to share in the benefits of a project is through training and jobs
- In circumstances of growing labour needs and a tightening labour market, there is a strong business case for companies to harness largely unemployed and underutilised local Indigenous populations by investing in the development of a reliable and stable local workforce.

In the past, many agreements with Indigenous people included clauses that the company would use its 'best endeavours' to maximise employment of local members of Indigenous groups. The poor employment outcomes achieved has led to criticism about these open-ended clauses, however:

- Such provisions have proved unenforceable and unmeasurable without clear implementation plans, funding or resources
- Employment targets have proven difficult to meet without additional programs for education, training and work readiness especially to overcome literacy and numeracy problems faced by many Indigenous people (AIATSIS 2008, p.14-15).

The current trend in agreement-making is that Indigenous groups expect companies to either make binding commitments regarding the number of Indigenous people to be employed in a project or, at least, set targets for Indigenous employment. For example, it is understood that an ILUA currently being negotiated between Rio Tinto Iron Ore and Traditional Owners in the Pilbara region of Western Australia will make the following commitments:

- Commitment to 13.9% of jobs being filled by Pilbara Indigenous people – this rate is based on the proportion of the Pilbara population that is Indigenous, according to census data
- Commitment to 20% of jobs being filled by Indigenous people generally (i.e. Pilbara and non-Pilbara Indigenous people) (Gawler, 2010).

In addition to targets, a growing trend in agreements in the past decade is to make commitments to:

- Give preference for local persons in recruitment
- Fund and deliver specific training programs for Indigenous people
- Review business processes to improve Indigenous training and employment

Further information:

The IBA Toolkit contains detailed information about the types of provisions for employment and training that might be included in agreements (2010, pp.144-153)

Box 16. Case study example – Santos Gladstone LNG (GLNG) Project

Santos has made employment and training a key feature of its negotiations with Indigenous groups for the GLNG project. While the company has negotiated several conventional project-specific agreements with Indigenous groups, the centrepiece of its negotiation process is a standalone \$4 million commitment for Indigenous training and employment with a target of 300 jobs for Indigenous workers. (Santos Media Release, 'Santos announces \$50 million apprenticeship and training plan', 29 October 2009). Santos is also looking to work with its contractors through its 'Santos Contractor Aboriginal Training and Employment Scheme' (SCATES).

- Align contractors with the resource company’s commitments regarding Indigenous training and employment (e.g. through including clauses in tenders requiring successful contractors to take certain steps to train or recruit local Indigenous people).

5.5.3. Business development

Like employment opportunities, business development opportunities for Indigenous groups are increasingly seen as a sustainable means for Indigenous people to share in the benefits of resource developments on their land. The various means for agreements to foster Indigenous business development include:

- Commitments to give preference to Indigenous owned business in the company’s contracting (e.g. the preference clauses in the Gulf Communities Agreement, which led to the creation of new Indigenous businesses such as Waanyi Mining Services and Northern Project Contracting). Preference might include:
 - A ‘right of first refusal’ being offered to Indigenous businesses before a contract is put out to tender
 - A weighting in the evaluation criteria applied to all tenders to favour Indigenous businesses.
- Targets for sourcing business from Indigenous contractors (e.g. the targets mentioned above in relation to Indigenous employment by Rio Tinto Iron Ore in the Pilbara will also be the targets for the proportion of contracts sourced from Indigenous businesses)
- Specific strategies, funding and support to establish Indigenous businesses, such as:
 - The Business Development Taskforce established under by Rio Tinto Argyle
 - The Aboriginal Development Benefits Trust (ADBT) established under the Gulf Communities Agreement, which has a role in encouraging the development of businesses through providing loans, grants, assistance in business skills training and start up funding and equity in ventures
 - Loan funds established by the company and accessible by Indigenous businesses.

As in the case of Indigenous employment, the experience of previous agreements has been that clauses mentioning “best endeavours” to engage Indigenous businesses have not led to significant outcomes. Given the difficulty of establishing and supporting standalone Indigenous businesses, an increasing trend is for resource companies to support the establishment of joint ventures between non-Indigenous contractors and local Indigenous groups.

For example, in 2009 Rio Tinto Iron Ore granted a \$200 million mining contract at Western Turner Syncline to a joint venture between the Eastern Guruma people and a mining contractor, NRW (NRW-Eastern Guruma 2009). The joint venture will commence with 25% Indigenous involvement, rising over the course of the contract to 50%. In Western Australia, Woodside has also been allocating funding (\$5 million in the case of one gas development) to develop local Indigenous business to joint venture with existing businesses to win supply chain contracts.

5.5.4. Land

Land is another non-financial benefit that has been included in some agreements between Indigenous groups and resource companies. Examples include:

- Under the Western Cape Communities Co-existence Agreement, Rio Tinto Alcan agreed to allocate a portion of its land holdings for Indigenous social and cultural interests in Weipa
- The Burrup and Maitland Industrial Estate Agreement provided for freehold land to be granted to native title parties (in exchange for extinguishment of native title)

- Several agreements have included the grant of grazing leases to Indigenous group:
 - Argyle agreed to hold a grazing lease on trust (Argyle Diamond Mine Land Trust) for the Traditional Owners and support them in pursuing a native title claim over the grazing area so long as they do not lodge claims over any other part of the mining lease area until after closure of the mine
 - Under the Gulf Communities Agreement for Century Mine, the company granted title to Indigenous Traditional Owners over two pastoral properties (the Lawn Hill Riversleigh Pastoral Holding Company and the Turn-Off Lagoon Pastoral Holding Company)
 - Under the Western Cape Communities Co-existence Agreement, the resource company agreed to transfer Studley Station (1325 sq. km) transferred to Traditional Owners.

5.5.5. Environmental management

Environmental protection and management is a key concern of Indigenous groups in negotiating new resource developments on their country. While environmental management did not feature in most agreements before the late 1990s, it is now common for agreements to include provisions for Indigenous people to participate in monitoring environmental management during a project. For example, the Gulf Communities Agreement provided for the establishment of the Century Environment Committee, comprising Traditional Owners, company staff and government representatives. The agreement provided for a budget of \$50,000 of discretionary funds per year for the committee to undertake independent environmental work.

A review by CSRM of one company's Indigenous agreements revealed that environmental management was not dealt with in pre-2001 agreements, but more recent agreements (apart from those for coal mines) contained provisions about creation of environmental committees, collaborative frameworks and some involvement of Traditional Owners in decision-making.

5.5.6. Cultural heritage management

The need to protect cultural heritage is a well-established international standard for doing business on Indigenous lands (e.g. IFC Performance Standard 8). In Australia, State laws provide at least some level of protection for pre-identified cultural heritage sites (e.g. ones that have been placed on a register), but only in some jurisdictions is there a legislative requirement for a development proponent to proactively negotiate a Cultural Heritage Management Plan (CHMP) to identify and provide clearance for activities that are likely to impact on as yet unidentified cultural heritage objects and sites.

For example, Queensland's *Aboriginal Cultural Heritage Act 2003* requires cultural heritage management to be either included as a schedule to an ILUA for a major resource development project or be provided for in a separate CHMP negotiated with Aboriginal parties in compliance with the requirements of the Act (see Part 3.4 for more information). Other jurisdictions such as South Australia are now considering amending their legislation to include similar requirements.

The trend in agreements has been towards more detailed and sophisticated cultural heritage provisions. For example, a review of a major company's agreements by CSRM revealed that, whereas prior to 2001, cultural heritage was dealt with in general agreement clauses containing commitments to 'consult' Traditional Owners and follow an agreed protocol on clearances, more recent agreements stipulate detailed processes, including grievance resolution processes.

PART 6 –

Implementation and governance of agreements

6. Implementation and governance of agreements

Key messages:

- Many agreements have not lived up to expectations and there is now a growing body of evidence about the importance of attention to the implementation and governance of agreements and the relevant success factors and principles (Parts 6.1 and 6.2).
- Robust governance structures for managing agreement benefits are a crucial aspect of implementation and attention to the appropriate and inclusive processes for the operation of these entities is as important as the design and representative structure (Part 6.3).
- Companies are paying increased attention to measures that will manage the reputational risk to the company from the operation of benefit management entities, such as insisting on independent directors (Part 6.3.4).
- Issues regarding tax status of benefits may affect governance arrangements, such as the use of charitable trusts. There are government proposals to reform this area to reduce complexity and enhance economic empowerment opportunities for Indigenous beneficiaries (Part 6.3.5).
- Lack of attention as to how benefit management structures will be resourced has been the downfall of some agreements (Part 6.3.5)
- There is a trend towards more sophisticated provisions about the overall governance of agreements, such as the establishment of robust and well-resourced coordinating committees with a role of oversight, communication, and monitoring and review. Internal company capacity to support implementation is a further success factor (Part 6.4).
- Experience has shown that the successful implementation of many agreements has floundered due to poor governance capacity and performance. Capacity-building and support is an often neglected aspect of Indigenous agreements and may lead to sensitivities about paternalism and interference, but there is a strong ‘sustainable development’ argument for companies to focus attention and resources in this area (Part 6.5).

6.1. Factors in successful implementation

Experience has shown that the implementation of an agreement is as important as the content of the agreement, yet it is rarely given the attention and focus that it deserves. O’Faircheallaigh (2003, p.18) has noted that “the evidence suggests it is more difficult to implement an agreement than to negotiate it.”

For an agreement to be successfully implemented, the following ingredients should be in the agreement (Gibson and O’Faircheallaigh 2010, pp.179-186):

- *Clear goals:* Precision and clarity in the way that goals and intended outcomes are stated in the agreement will be critical in ensuring smooth implementation
- *Institutional structures for implementation:* Implementation cannot be expected to occur as an add-on role for the parties to the agreement. New structures such as committees specifically tasked with implementation will be necessary to drive the agreement forward (See Part 6.4).

- *Clear allocation of responsibilities:* The agreement needs to clearly state who is responsible for doing what, and make sure that the responsible person or organisation has the authority required.
- *Adequate resources:* Dedicated resources, whether funds or human resources, need to be allocated for the implementation of agreements. In a review of 40 agreements in Canada and Australia, it was discovered that less than 20% included dedicated resources for implementation, monitoring and review (O’Faircheallaigh 2003, p.15).
- *Penalties and incentives for compliance:* Some agreements have included clauses that require the company to spend more on Indigenous training and employment programs if agreed targets are not met.
- *Monitoring:* Provisions for monitoring might include a requirement for regular reporting of data and a list of performance indicators that will be used to track the progress under the agreement.
- *Review mechanisms:* Best practice agreements contain a requirement for periodic review of the agreement (e.g. after three years), as well as commitments to fund the review and a process for the findings to be considered and acted upon.
- *Capacity for amendment:* To ensure agreements remain relevant and can adapt to changing circumstances, the agreement should provide a process for amendment that is not too onerous. Companies may want ongoing certainty about the key commitments in an agreement and these can be made more difficult to amend, but provisions about implementation and governance need to be able to be amended as the need arises. In some agreements, the key commitments are in a strict legal agreement while the other provisions are in a separate agreed ‘management plan’ that can be amended more easily. ILUAs are registered with the National Native Title Tribunal and are difficult to review and change, so many companies have included only the core provisions in the registered ILUA and complemented these with separate management plans or ancillary agreements

Evidence has shown that successful implementation will also depend on the following factors external to the agreement:

- Whether the agreement implementation structures enable Indigenous parties to have a meaningful role in implementation
- The existence of ‘champions’ for the agreement within the company and Indigenous party
- Measures to ensure that knowledge about the terms of the agreement is carried forward as staff turnover, interest begins to wane (typically after five years), or the company changes ownership
- Whether government agencies maintain ongoing interest and support in the agreement

Implementation challenge – Following through on commitments:

A community relations manager from a Northern Territory mine reflected that the biggest challenge in agreement implementation was integrating the agreement commitments into the company’s systems, to ensure they are followed through.

A key consideration is whether the details about the structures and processes for implementation should be contained in the agreement itself. The poor implementation of many agreements may be the result of insufficient thought and attention being given to implementation during the agreement negotiations.

In many cases, the details about how an agreement will be implemented (such as the critical issue of how benefits will be managed and disbursed) are left until after the key terms of the agreement are

negotiated (namely, the quantum of benefits and the rights being relinquished by Indigenous parties).

Given the poor record of implementation of many agreements, there is a strong argument that the implementation arrangements should be negotiated *at the same time* or even *before* the other aspects of the agreement, and that these arrangements should be locked into the agreement. There are a range of considerations here:

- Some negotiators argue that it is difficult enough to get agreement about the central terms of the agreement, without also trying to deal with implementation structures and processes at this stage.
- There is a risk that the company will lose interest in the implementation issues if consideration of these issues is deferred until after the agreement is signed, because the key driver for the company is to settle the agreement and gain access to land.
- Indigenous representatives may argue that an implementation issue, such as how they disburse the benefits, is a matter purely for the Indigenous group and the company should not have a role in these discussions nor should the arrangements be locked into the agreement.
- On the other hand, the company does have a reputational risk arising from how the funds are disbursed. Also, there may be advantages for Indigenous parties in avoiding later disputes if they lock the disbursement arrangements into the agreement.

**Implementation challenge –
Company management commitment:**

A community relations manager from a Northern Territory mine lamented that a new General Manager for a mine tends to spend the first 12 months focusing on operations and then moves to community relations in the second 12 months.

6.2. Australian Government's proposed agreement principles

In a July 2010 discussion paper, the Australian Government (2010) has indicated that it has an interest in reform of agreement-making because of its desire for native title to provide sustainable benefits not only to current but also future generations. The Government has proposed that a body be established to review agreements against a set of leading practice principles that are aimed at ensuring sustainability of the agreement (see Part 3.6.1 for the principles).

There does not appear to have been an enthusiastic response to this proposal for Government intervention in agreement-making between resource companies and Indigenous groups. Nevertheless, these principles indicate current thinking about leading practices in sustainable agreements.

6.3. Governance structures for benefit management

An important trend over the last decade has been an increased focus on the governance arrangements for implementation of agreements. There are two important aspects to governance in this context:

- Governance structures for managing the benefits to Indigenous parties
- Governance structures for managing the agreement itself (i.e. to implement, monitor and review the agreement).

Governance structures for managing the agreement are discussed in the next section.

The governance surrounding benefits is a critical issue for both Indigenous parties and the resource company:

- For resource companies, there is a reputational risk if the funds that they provide to Indigenous parties are seen to have contributed little to the wellbeing of the Indigenous beneficiaries, or worse, are seen to have contributed to social dysfunction or conflict within the Indigenous community. Newspapers have reported numerous examples of nepotism and abuse of mining benefits in recent years (see example on this page).
- For Indigenous parties, there is a clear expectation that benefits will be managed in a way that is fair and equitable, and balances the various aspirations of Indigenous beneficiaries, such as the desire for funds to alleviate current poverty as well creating sustainable benefits for future generations (where the extent of the funds permits).

Example – reputational risk to companies regarding funds disbursement:

The media reported that \$8 million of benefits from an ILUA in Western Australia was being mismanaged because the trust structure had given complete control of the fund to a single person. It was alleged by one elder that: “A few Aboriginal families are getting very rich, while the rest of us struggle along, having to depend on government handouts.” The WA Government was reported to be assisting the indigenous groups to create new corporate entities to administer the funds, which suggests that this key aspect of implementation had not been well thought out at the implementation stage.

Source: *The Australian*, 8 February 2011.

6.3.1. Types of structures

There is currently no legal requirement as to the processes or structures by which benefits are given to Indigenous parties under native title agreements (Allens Arthur Robinson 2010). Some agreements are quite detailed with regard to establishing payment structures or mechanisms (e.g. setting up trust structures to receive benefits for subsequent distribution to the community), whereas other agreements simply leave this to the Indigenous recipients of funds to determine.

Examples of funds disbursement criteria:

Examples of funding guidelines for agreement trusts or community funds:

- Western Cape Communities Sub-Regional Trusts (Rio Tinto Alcan): <http://www.westerncape.com.au/>
- Clermont Aboriginal Community Development Fund (Rio Tinto Coal Australia): http://www.riotintocoalaustralia.com.au/documents/Clermont_Aboriginal_Community_Development_Fund_Guidelines_2008.pdf

There are a number of ways that benefits from agreements can be managed and a few of these are mentioned below:

- Joint management arrangements, such as:
 - A management committee to disburse funds, comprising government and Indigenous representatives (e.g. the Githabul ILUA (Githabul People 2007))
 - A business task force comprising company and Traditional Owner representation (e.g. Rio Tinto Argyle).
- Traditional Owner-controlled trusts that follow a set of disbursement criteria in managing long term capital and other funds to generate community and economic development opportunities for Aboriginal people in the area, such as:
 - The Gelganyem Trust and Kilkayi Trust (Rio Tinto Argyle agreement)
 - The Western Cape Communities Trust and three Sub-Regional Trusts (see for example, the Western Cape Communities Co-existence Agreement structures set out in Figure 4)
 - The Aboriginal Development Benefits Trust (Gulf Communities Agreement).
- Payment direct to Indigenous corporate entities (e.g. a community development association), with decisions about expenditure to be made by the association’s board or by an Annual General Meeting in accordance with the community’s strategic priorities. Examples of innovative approaches include:
 - A program from the areas proximate to Newmont’s Tanami gold mine whereby the Traditional Owners apply their own royalty and rent money to community development projects. In doing this, the community have also successfully leveraged complementary government funding or support for community projects
 - The Ngurratjuta/Pmara Ntjarra Aboriginal Corporation (NAC), a Northern Territory royalty association, has become a multi-dimensional financial organisation, which delivers a wide range of social, economic, cultural and political services (Altman and Jordan 2009).

Examples of trust expenditure:

The Gelganyem Trust, set up under the Argyle Agreement expended funds on the following:

- Renal health
- Programs for boys and girls
- Youth wellbeing
- Adult literacy
- Holiday programs
- Scholarships and bursaries
- Cultural curriculum
- Forward In Business
- Cultural services
- Gelganyem Pty Ltd
- Justice in Indigenous Communities
- Station skills project for young people
- Gelganyem Pastoral Company

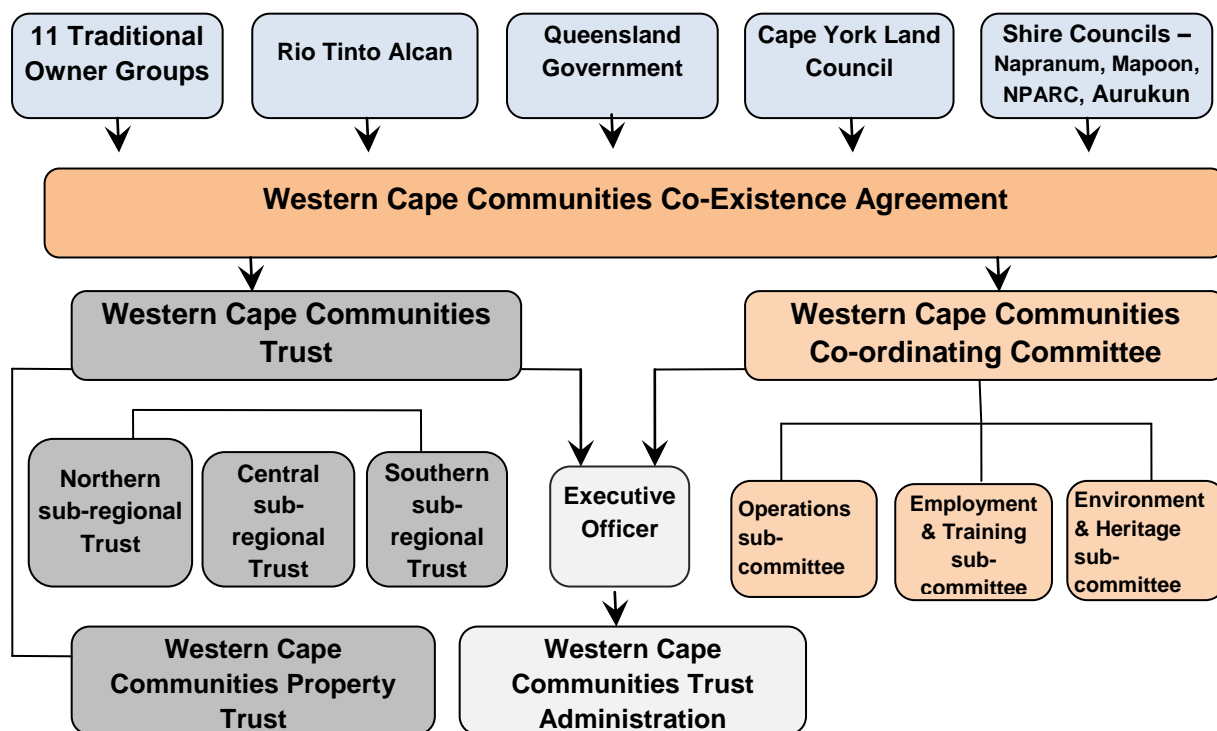
Rio Tinto advised the Native Title Payments Working Group (2008, pp.6-7) about its approach to the structuring of trusts to manage benefits in the following terms:

- The trust structure and purpose needs to be aligned with the objectives of the broader Traditional Owner group (i.e. structure follows purpose, not the other way around).

- Trust structure needs to have 'cultural fit', i.e., be representative of the broader group, with membership based around land connectedness, rather than non-Indigenous criteria or institutions.
- Independent trustees or directors are an effective way of bringing expertise into the trust management, as well as in-built mentoring and support for Traditional Owner trustees.
- The decisions of the trust need to be transparent to the entire Traditional Owner group.
- There needs to be a mechanism where the entire Traditional Owner group regularly revisits its longer term objectives, and that the trust(s) is seen as an agent of those objectives, rather than a purpose of its own.
- During the life of the operation, there needs to be some link between the operation and the trust (observer status/access to the trust papers and audits) as Rio Tinto's reputation is linked to the performance of the trusts.
- Regional development, inclusive of all local Aboriginal people, can be accommodated within agreements and benefit streams centred on Traditional Owners.

The case study of the Warlpiri Education and Training Trust (WETT) in Appendix 2 illustrates an innovative, community-driven model for the management of agreement benefits that satisfies many of these principles highlighted by Rio Tinto.

Figure 4. Example of a Traditional Owner controlled trust – Western Cape Communities Co-Existence Agreement (WCCCA) Governance Structures



Source: WCCCA 2009

6.3.2. The appropriate design of governance structures

Experience from previous agreements has shown that the governance structures put in place to manage benefits to Indigenous parties have not always functioned well, and poor design of the governance structures may be a contributing factor. The typical structure for an entity or trust to receive payments under an agreement is a board that has representation from all Traditional Owner groups that are beneficiaries. There may be equal representation or larger groups may have additional representation. This is often supplemented by independent board members.

The difficulty with this basic ‘representative’ governance model is that it is too often assumed that this body will perform the following key functions regarding Indigenous involvement:

- Ensure that all the Traditional Owner groups have access to information about decisions of the entity, with their board representative being a conduit for information, and
- Make decisions through a process that takes incorporates and responds to all the Traditional Owner groups’ interests and expectations (as represented through their board representative) and balances these through a representative decision-making process.

As was explained in Part 4.4.4, the concept of representative governance is problematic in terms of Aboriginal political culture in Australia. Equal representation will be important to provide legitimacy, but should not be relied upon to ensure smooth Indigenous decision-making processes. This concern has led to many attempts to develop elaborate structures that seek to incorporate elements of Indigenous political culture.

For example, under Rio Tinto’s standard structure outlined in Part 6.3.1, a broader representative council of Traditional Owners appoints and holds accountable a smaller executive board that is not chosen for representativeness but for ability to do the job. This is an improvement on the basic representative board model, but it should still not be assumed that Aboriginal decision-making processes can be codified into a Western governance model in this way.

An expert in the design of Indigenous governance structures in the native title context, David Martin (2009), argues that Aboriginal governance structures created for receiving resource agreement payments should not be designed as ‘culturally appropriate’ Aboriginal structures nor mainstream Western structures, but will need to be hybrid entities incorporating both Aboriginal processes and mainstream good governance principles. This is supported by evidence of research into effective Aboriginal governance structures in other contexts (Finlayson, 2007; Limerick 2009).

In a book on Native Title Corporations, Mantziaris and Martin (2000, pp.322-7) outline the following set of principles for organisational design of native title holding bodies:

- Legal certainty
- Legitimacy (capacity to attract the allegiance of the group)
- Sensitivity to Aboriginal values
- Sensitivity to motivational complexity
- Revocability
- Robustness
- Simplicity
- Transactional cost efficiency

Ultimately, as Martin notes, “[t]he objective fact is that representative structures can never truly reflect the nature of and relationship between the fluid and diverse groupings and alliances that characterise Aboriginal political systems” (Martin 2009, p.120). Instead of focusing on structure,

Martin urges more focus on process – in particular, ensuring that these entities have appropriate consultation, information sharing and permission mechanisms to build effective relationships with their Aboriginal constituents. In other words, to ensure that the diversity of Aboriginal interests is taken into account in the decision-making by a payments entity, effective processes will be more important than representative structures.

6.3.3. Appropriate processes for a governance body to build its relationship with beneficiaries

The previous discussion highlights that the successful implementation of an agreement is as much about the quality of the relationship between an Indigenous governance entity and its beneficiaries than it is about achieving an appropriate ‘representative’ design for the governance entity.

Martin (2009, p.125) has suggested the following guiding principles for this relationship:

- Including mechanisms for beneficiaries to actively participate at the individual and local group levels
- Replacing the reactive and passive relationships between most beneficiaries and agreement entities with relationships based on active participation and a sense of ownership
- Minimising opportunistic rent seeking by agreeing on structured processes in which beneficiaries will have a meaningful say in the operations of agreements, while still maintaining appropriate mechanisms for prudential control
- Providing mechanisms (such as regular participatory planning processes) by which beneficiaries can plan for their futures and how agreement resources can best be utilised
- Working with the beneficiaries to build their capacity to undertake this long term planning.

Box 17. Western Cape Communities Trust – Lessons learned during implementation of the trusts:

- There must be community engagement to identify strategic objectives
- There must be a strategic and planned approach to maximise social and economic initiatives funded by the Trusts
- The costs of administration must constantly be monitored so that demand on resources does not exceed demand on services
- Prior to funding a project, need to ensure good project management is in place
- Ensure that acquittal and reporting systems are in place to monitor progress
- The WCCT structure lacks flexibility to promote individual business development.

Source: Charger, 2008.

6.3.4. Managing reputational risk

Companies are increasingly conscious of managing the reputational risk involved in providing funds through native title agreements. A recent trend in agreements is for companies to insist on specific measures that will ensure good governance of the funds and provide safeguards against inequitable or fraudulent disbursement of agreement benefits.

An important feature of many new agreements is that companies insist that boards that manage trusts include independent directors. Independent directors are considered to have a number of advantages:

- They bring skills, expertise, experience, strategic vision and business networks that Indigenous community members may lack

- They provide a monitoring role that reduces the risk of fraud
- They are able to mentor and build the governance capacity of Indigenous board members.

Trusts have found that they are able to attract very high quality directors from mainstream business sector to these roles. They are, however, very challenging positions as they are required to work in a contested space involving both Indigenous and non-Indigenous law. Some independent directors have been subjected to bullying and intimidation.

As explained in Part 6.3.1, independent directors are a key element of Rio Tinto's industry-leading approach to the governance of funds. The two trusts created under the Argyle Agreement held over \$12 million in trust funds in 2009 (Gelganyem and Kilkayi Trusts, *Annual Report 2008-09*). On each of these trust boards, two independent directors sit with the Traditional Owners. One has expertise in commerce and one in community development. The Traditional Owner directors produce annual plans about spending the trust funds, which are submitted to the independent directors for approval. Spending is checked against the annual plans before further payments are made.

It is understood that Woodside has also insisted on independent directors for managing some of the trusts created for benefits from its Western Australian gas agreements, including the North West Shelf project.

For Indigenous parties, however, a company's insistence that decision-making bodies include independent directors may seem paternalistic and a diminution of the group's autonomy. A less prescriptive requirement proposed by a lawyer working with a native title group in Queensland is for the constitution of the Indigenous Corporation to provide for an advisory committee to be established, which can include independent experts and make recommendations to the board. If the board does not accept the advisory committee's recommendations, it must report the reasons for this to the corporation's Annual General Meeting.

The Australian Government's discussion paper in July 2010 (FaHCSIA, 2010 p. 6) proposed new measures to encourage entities that receive native title payment to strengthen their governance, including:

- 'incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* or the *Corporations Act 2001*
- appointing one or two independent directors
- adopting enhanced democratic controls and transparency (e.g. enabling beneficiaries to hold directors to account, requiring directors to provide details to members about payments and disbursements)'.

An option raised by the government is that only entities that met these governance requirements and the leading practice principles outlined in Part 6.2 would be eligible for status as a new type of tax-exempt native title beneficiary entity, which is discussed further below.

6.3.5. Charitable trusts vs other structures

In order to make native title payments tax-exempt, many agreements establish charitable trusts to manage some or all of the agreement benefits. Concerns have been raised in recent years, however, that charitable trusts are too limiting for the purposes of managing agreement funds for the sustainable benefit of Indigenous communities. The following issues have been raised:

- It can be difficult for an Indigenous group to obtain endorsement as a tax-exempt charity, given that a trust may be for the benefit of a particular Indigenous group, rather than the public as a whole. For example, it took Argyle Agreement's Gelganyem Trust two years of negotiations with the ATO before it was granted charitable status

- Funds in a charitable trust can only be disbursed for “charitable purposes”, which prevents the use of funds for economic development (such as establishing a business)
- There is no tax deductibility for expenditure by a company on capacity building for an Aboriginal trust
- The rule against perpetuities means that charitable trusts’ assets cannot be accumulated across generations, which limits the ability of Indigenous groups using charitable trusts to invest funds for future generations.

Box 18. An example of a standardised governance structure for benefit management

A law firm working with major resource companies in Western Australia has developed a standardised model for a Business Management Structure that is now used for managing payments under any new agreements with native title parties. The structure involves two trusts:

- Charitable trust, which can disburse funds for community benefit purposes
- Direct benefits trust, which follows certain criteria in making payments to individuals

The two trusts are managed by a single trustee body which includes between three and six Traditional Owners and one or two independent directors. The Indigenous directors are supported in this role with Australian Institute of Company Director’s board director training. The objective is to form a small board that has a high level of competence, rather than try to achieve a board structure that is representative of all Indigenous family groups. The trustee board is required under the trust document to consult with and seek the consent of a broader Traditional Owner council that is representative of the Traditional Owners. The trust is self-funding, with part of the payments being set aside for administration.

The trust is a discretionary trust that can decide the way distributions are made. The distribution does not have to be equal but it must be done fairly. For the charitable trusts, the use of funds must benefit the broader community rather than individuals. Some direct benefits trusts are also able to get a ruling from the Australian Taxation Office that they are charitable organisations.

Because the company’s reputation is at stake in the way the funds are managed, the agreement has certain governance safeguards and checks and balances built in. The independent director requirement is one such safeguard, and these directors have a power of veto. Another safeguard is that the trustees must prepare an expenditure plan. The trust constitution also limits changes to the constitution without the consent of the company and the broader Traditional Owner group. The Traditional Owner council that oversees the trustee board can appoint or remove directors. Most agreements have also included a requirement for a review of the business management structure after three or five years, which will be funded by the company.

Lawyers involved in these trusts report that directors of the trusts still struggle with good governance. It is a challenge to separate individual from whole group interests. The independent directors help dramatically in these matters. The first two years of establishing a trust are very intensive, as the trust puts in place its policies and funding criteria and sets up a future fund as part of the charitable trust. It is a significant challenge ensuring Traditional Owner directors are able to ‘come up to speed’ during this time.

While this Business Management Structure model is broadly standardised, the legal team will work with Traditional Owners over a period of time to tailor the model to the particular needs and circumstances of the group. This process takes some time to ensure the Traditional Owners have a full understanding of the agreement and the structures, as there must be informed consent to the arrangements. The legal costs for establishing a trust are estimated to be about \$100,000.

Charitable trusts appear to be more common with larger agreements. For smaller ILUAs, the agreement may only stipulate that the funds be paid to a corporate entity that represents the

Indigenous group that is not for profit. That organisation can then seek to obtain charitable status, but this will depend on the Australian Taxation Office's assessment.

The limitations of the charitable trust model has prompted companies such as Rio Tinto and peak bodies such as the Minerals Council of Australia to lobby government to legislate for a new type of tax-exempt entity specifically for Indigenous communities to manage agreement benefits (Nish, 2008). A July 2010 Australian Government discussion paper sought comments on a proposal to create a new type of tax-exempt Indigenous Community Fund (Macklin and McClelland 2010).

6.3.6. Resourcing implementation

As mentioned in Part 6.1, dedicated resources for implementation is a key factor in successful implementation of an agreement, but it is not yet commonplace for this to be provided for in agreements. Examples of allocations specifically set out in agreements are:

- Western Cape Communities Coexistence Agreement (WCCCA) – 5% of the annual payments were dedicated to administration of the Western Cape Communities Trust
- Argyle Agreement – about \$300,000 per year was allocated for administration of the two trusts. The mine pays a progressively reducing proportion of this cost over five years until the Traditional Owners assume the full cost, to be met through their benefits payments. (In the first year, Argyle pays 100% of this cost and this proportion reduces by 15% every year until it is meeting 40% in the fifth year, but this reduces to 0% from the sixth year onwards)
- Gulf Communities Agreement (GCA) – \$50,000 per year (indexed) was allocated by the company to pay for the administration of the Gulf Aboriginal Development Corporation. This was increased by another \$50,000 per year after the “sit-in” protest by Traditional Owners in 2002.

The consequence of inadequate resourcing for implementation is illustrated by the example in Box 19.

Box 19. Gulf Communities Agreement: consequences of inadequate resourcing of governance structures

The Gulf Communities Agreement (GCA) has been cited as an example of an agreement that failed to pay adequate regard to the resources needed for implementation (Martin 2009, p.106).

The \$50,000 annually allocated under the agreement for administration of the Gulf Aboriginal Development Corporations (GADC), which was the key governance body to distribute funds to the individual native title groups' corporations, was inadequate to engage even one properly qualified staff member.

The company argued that the native title groups should allocate a portion of their benefit monies received by their beneficiary corporations to the administration of GADC, but the native title groups argued that these monies were compensation for the damage done to their country.

As a result of the impasse, GADC was basically non-functional in the early years of the GCA. Furthermore, the lack of governance support for the native title groups' corporations led to compliance failures such that within two years of the signing of the agreement, four of the six corporations were ineligible to receive the funds. As a consequence, by 2002 a substantial amount of money had accrued but could not be distributed to some of the native title groups, especially the Waanyi, on whose land the mine was actually located.

This problem was one of the key reasons for the 2002 sit-in at the mine's canteen by the Waanyi people, which exposed the mine to serious financial risk as well as reputational damage. Martin argues that this might have been avoided if the GADC had been properly resourced for not only its own operations, but to assist the native title corporations to maintain regulatory compliance.

6.4. Governance structures for managing agreements

6.4.1. Coordinating committees

The implementation success factors cited in Part 6.1 highlighted the importance of:

- A dedicated institutional structure focused on the implementation of the agreement
- A clear allocation of responsibilities to persons or entities with the requisite authority
- Adequate resources to support implementation
- Monitoring function
- Review arrangements.

Trend towards more sophisticated governance provisions

CSRM's review of a major company's Indigenous agreements revealed that prior to 2001, agreements provided only for a consultative/oversight committee for the purposes of monitoring and liaison, with little detail about how the committee would function. By contrast, following 2001, the agreements spelt out detailed governance arrangements, including subcommittees for particular topics, funding for Executive Officers and other purposes and a requirement for periodic review.

The practice in most agreements is to provide for the establishment of some form of coordinating committee to oversee the implementation of the agreement. The usual features of these coordinating committees are:

- Joint representation involving the company and Indigenous parties (and sometimes government representatives for larger agreements containing government commitments)
- Established separately from any trusts or Indigenous entities created under the agreement, but usually oversees or receives reports from these entities
- Role is to oversee implementation and may extend to monitoring (such as receipt of regular reports from the resource company or benefits trusts) and periodic review.

Growing recognition of the importance of robust governance structures for agreements has led to a trend towards more sophisticated provisions about governance. Examples of coordinating committees are set out in Table 11.

Table 11. Examples of coordinating committees for implementation of agreements

	WCCCA: Coordinating Committee	Argyle Agreement: Relationships Committee	Gulf Communities Agreement: Century Liaison and Advisory Committee	Recent Central Queensland coal mine agreement
Structure of Committee	<ul style="list-style-type: none"> • 2 reps from each of 11 Traditional Owner groups • 1 rep from each of 4 local Aboriginal communities • 1 resource company • 1 Qld Government • 1 Cape York Land Council • 1 Weipa Town Authority (observer) • Executive officer from WCC Trust (observer) <p>Three subcommittees: Environment and Heritage; Employment and Training; Operations.</p>	<ul style="list-style-type: none"> • 26 Traditional Owner reps • 4 resource company reps 	<ul style="list-style-type: none"> • Traditional Owner reps • resource company reps 	<ul style="list-style-type: none"> • 3 reps from company • 3 reps from native title group
Functions	<ul style="list-style-type: none"> • To monitor, implement and review the agreement • To ensure all parties to the agreement carry out their obligations and responsibilities 	<ul style="list-style-type: none"> • Meets quarterly • Receives reports from the company on how they are implementing the 8 management plans, covering: Aboriginal site protection; Training and employment; Cross cultural training; Land access; Land management; Decommissioning plan; Business development and contracting; Devil Devil Springs. • Receives reports from the trusts 	<ul style="list-style-type: none"> • “To see that the project is conducted efficiently and with the adequate regard to the aspirations and welfare of the Native Title Groups” 	<ul style="list-style-type: none"> • Meets at least twice annually • To oversee implementation of the agreement • To review and distribute benefits

	WCCCA: Coordinating Committee	Argyle Agreement: Relationships Committee	Gulf Communities Agreement: Century Liaison and Advisory Committee	Recent Central Queensland coal mine agreement
Comments	<ul style="list-style-type: none"> • In the early years, it took some time to get systems in place for the committee to operate effectively and it was under-resourced • Appears to have become more effective over time • In recent years, reviewed the governance of the agreement and put in place new strategic plan to improve governance of the committee and the trusts 	<ul style="list-style-type: none"> • Has met regularly since the beginning of the agreement • Effectively coordinates issues such as Work Program Clearances • Has overseen initiatives such as establishment of a Business Development Taskforce 	<ul style="list-style-type: none"> • 2008 review concluded: "This organisation has virtually not operated in the last 10 years. We have no reason to believe it will work in the next 5 year period unless there is a clear and accepted driver. From its inception, it has obviously not been the correct vehicle for governance of the Agreement." 	<ul style="list-style-type: none"> • Decisions are to be made by consensus, with assistance of independent mediator where necessary • Secretarial support provided by the company

6.4.2. Resourcing coordinating committees

As in the case of the governance structures for benefit management, experience has shown the importance of allocating sufficient resources for the body that oversees implementation of agreements. Generally, the obligation is on companies to provide resources for coordinating committees, although unlike trusts and Indigenous entities, the level of resources is not typically set out in agreements. In the absence of a clear commitment or driver from the company, this leaves these committees vulnerable to non-performance.

The Century Liaison and Advisory Committee is a good example of a coordinating committee that never functioned. The 2008 review of the Gulf Communities Agreement recommended disbanding the committee and creating a new GCA Management Board comprised of representatives of Indigenous groups, the trust structures, the company and the Queensland Government. The board was to meet regularly, provide quarterly progress reports to the public and prepare annual performance cards. This board has since been established and is now fully functional.

6.4.3. Internal company structures for implementation

Experience from previous agreements has shown that the effectiveness of companies themselves in implementing their commitments under agreements has been variable. The following lessons have been highlighted in analyses of previous agreements and discussions with company personnel:

- Ensuring the company has the right people to be able to build and maintain a relationship with the Indigenous parties is an essential prerequisite for successful implementation. For Indigenous groups, the agreement represents a commitment to a relationship and to ongoing respect as much as it is about benefits. Continuous engagement and information flow (e.g. newsletters, meetings) is critical.
- The company needs to try to foster a sense of shared responsibility for the implementation of the agreement. A paternalistic provider-recipient relationship is not conducive to proactive implementation of the agreement and does not build Indigenous capacity for self-management. This is a challenge because of the history of passive dependency for many Indigenous groups, but companies need to understand that agreements and the benefits they bring are a transformative opportunity for Indigenous people to gain new skills and build a new future.
- Maintaining high level support from management is crucial for continued focus on agreement implementation (there needs to be a champion within the company).
- Implementation activities need to be incorporated within the company's systems so that they are not seen as an optional extra.
- Clear roles and responsibilities for company staff and organisations need to be mapped to ensure a systems approach to implementation and to prevent uncoordinated engagement or over engagement.
- The systems for implementation should be embedded across the whole of the organisation, rather than left to the Community Relations area.
- The focus for the company should not just be the agreement, but also broader voluntary activities by the company to assist and build relationships with Indigenous groups. A gas company in Western Australia told CSRSM that over half of its activities involving Indigenous groups were in the voluntary sphere rather than under its agreements.

- Quality assurance systems, and performance management and planning tools will be crucial for the company to monitor its performance in implementing its obligations under agreements.
- Reporting to the Indigenous groups (in appropriate formats) on progress in implementing the agreement is essential to maintaining good faith and preventing circulation of inaccurate information that can lead to community unrest.

6.5. Governance capacity and performance

6.5.1. Experience from previous agreements

A common theme in reviews of the implementation of previous Australian agreements between resource companies and Indigenous parties has been the poor governance performance of many of the structures created under agreements to disburse benefits and implement the agreement. Although much of the available evidence about implementation is drawn from the experience of some of the larger agreements between mining companies and Indigenous groups (such as the Gulf Communities Agreement, the Argyle Agreement and the WCCCA), they provide pointers to the pitfalls and challenges that are likely to be relevant in implementation of any agreement.

For example, the 2008 independent review of the Gulf Communities Agreement was blunt in its assessment:

“The unfortunate fact about this Agreement is that weak organisational structures, and the lack of capacity and/or will of the respective signatories (Government, Zinifex and the Native Title representatives themselves) has resulted in the GCA Agreement being the ‘Forgotten Agreement’. We do not say this lightly. Our discussions and findings show that there are inappropriately designed and/or under-resourced organisations; many members of them do not have the capacity to contribute meaningfully; and there is a lack of will to redress the situation.”
(The Right Mind 2008, p.6).

Following the signing of the Western Cape Communities Coexistence Agreement in 2001, governance issues amongst the governing structures created by the agreement also emerged in the following years. The Western Cape Communities Coordinating Committee was established with little thought to resources or capacity-building. The committee commenced with no plans, rules of operation, office systems, and knowledge of trusts or clear understanding of its role.

In the initial stages, the company tried to be proactive in managing the committee and pushing outcomes through quickly, but this was not effective. The committee’s operation was affected by some individuals seeking to use it as a forum to push personal agendas rather than focusing on the interests and aspirations of the Indigenous groups. There was also a tendency to rely on the Executive Officer to achieve outcomes for the community rather than working together with the Executive Officer. Over time, the committee developed its own systems and tried to incorporate aspects of traditional governance, such as consensus decision-making.

To deal with the ongoing governance problems, in 2008 the Coordinating Committee commenced a legal, tax and governance review, calling in Clayton Utz and Deloitte to investigate and address risks that were arising from the previous administration of the trusts (such as non-compliance with charitable trust guidelines). As a result of the review, a new strategic plan for 2009-2012 was established for the trusts and coordinating committee and detailed, transparent funding guidelines were developed by each of the subregional trusts. The Committee is now operating with a clearer sense of direction and purpose.

6.5.2. The role of the company in capacity-building

There is a difficult balance to be achieved by companies, because while they might wish to respect the strong preference for Indigenous entities to manage their own affairs, they would be aware of a history of poor governance performance by many Indigenous organisations. Whilst the governance of Indigenous entities might seem like none of the company's business, there is a strong case for the company to be involved in providing governance support and capacity-building for Indigenous parties to an agreement. There is significant reputational risk to the company as a result of poor performance or even fraudulent behaviour within these organisations. Again, the experience of the GCA is salient:

"The governance bodies established as part of this agreement have largely demonstrated high levels of nepotism and poor management (companies with mixed white/black directors excepted). This is not a nice thing to say, but the lack of progress in up-skilling members is more disconcerting." (The Right Mind, 2008, p.42).

The 2008 independent review of the GCA was highly critical of the mining company and government for "sitting on their hands" and not providing support or assistance, despite clear evidence of nepotism and fraudulent activities.

There are a variety of types of support that can be provided to members of governance bodies:

- Board governance training (for example: directors training delivered by the Australian Institute of Company Directors; governance training delivered by the Office of the Registrar of Indigenous Corporations; Indigenous governance training offered by the Queensland Resources Council)
- Support for directors to visit other locations to learn from successful approaches elsewhere
- Support for consultation and engagement activities with Indigenous community members (e.g. funding for community barbeques, consultation visits etc.)
- Provision of mentors (either external or through independent directors)
- Funding for workshops and strategic planning exercises
- Leadership development programs, including youth programs
- Independent advice such as investment advice, legal advice, accounting services and trustee management services.

Governance capacity-building should be seen as an ongoing, evolutionary exercise, such that Indigenous groups take on greater responsibility for management and administration over time. For example, it has been common for administrative assistance for new governance structures under agreements to be provided by external organisations, but this can be seen as a transitional measure. The trusts under the Argyle agreement were administered by a local project management company, Rosewood Project Management, from signing of the agreement in 2005. By 2008, however, the trusts wanted their own autonomous administration and there was a staged handover to an executive officer employed directly by the board.

The ongoing control of governance by external services does little to build Indigenous capacity for self-management. For example, the review of the GCA found that the only beneficiaries from the administration of one of the key governance bodies under the GCA were the executive officer and the legal and accounting service providers, and certainly not the native title group members (p.11).

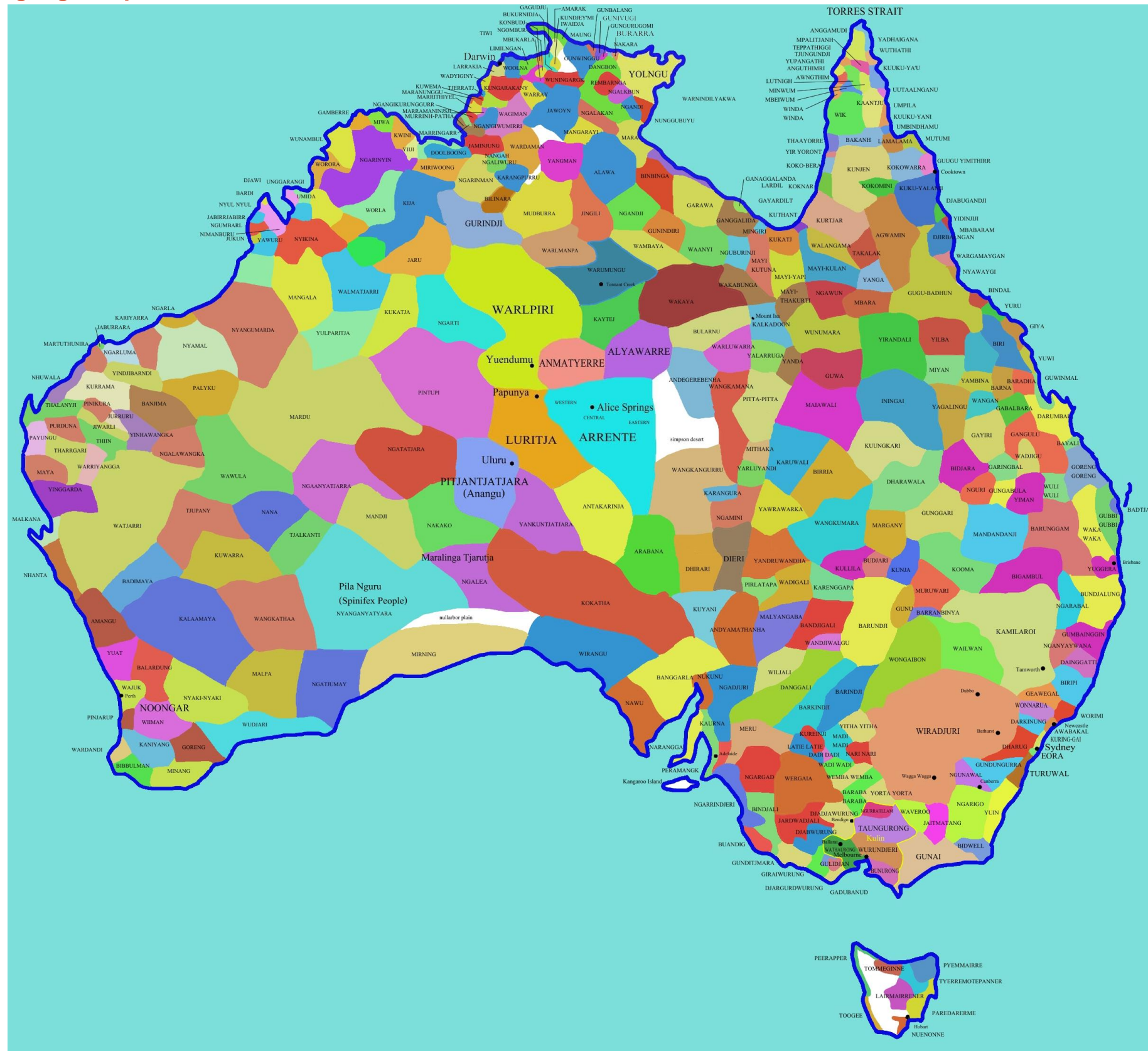
Although the level of capacity building and support for the Western Cape Communities Coordinating Committee was evidently inadequate in the early years of the agreement, a greater focus on the committee in recent years has yielded benefits. Funding guidelines and strategic plans are now in

place, along with measures to better monitor progress and compliance. There is also a process for mentoring younger people to step up into leadership roles.

Capacity-building for Indigenous groups in terms of governance, leadership and administration has been a largely neglected aspect of agreement negotiations between resource companies and Indigenous groups. Yet this is an area in which a resource company can leave its most significant legacy, because it is the critical determinant in whether an Indigenous group will be able to use the benefits of an agreement to build a prosperous future for its members.

APPENDICES

Appendix 1: Indigenous language map of Australia



Source: <http://www.yolngu.net/>

Appendix 2: Case study on governance of agreement benefits: *Warlpiri Education and Training Trust (WETT)*

Background

WETT is an example of an innovative approach to managing funds derived from payments under mining agreements with Aboriginal people in Australia. The trust was established in 2005 following renegotiation of terms, including financial terms, of a mining agreement in the Northern Territory (NT) between Newmont and the Warlpiri traditional owners represented by the Central Land Council (CLC).



Mining commenced in 1986 following an agreement under the NT Aboriginal Land Rights Act being reached that included a royalty stream for the benefit of the Aboriginal traditional owners. After many years of receiving payments, Warlpiri people, mainly women, approached the CLC seeking new ways to ensure lasting benefit to the communities from mining money. In cooperation with Newmont, the Warlpiri Education and Training Trust (WETT) was established to receive a portion of the mining agreement payments and use the funds within a Community Development framework.

The Trust

The objects and rules of WETT are exclusively aimed at improving the educational and training opportunities for affected (mostly Warlpiri) Aboriginal communities. The existing royalty receiving landowner association (Kurra) is the trustee and approves decisions made by WETT, which in turn has an advisory committee made up of a majority of Aboriginal community members and key stakeholders including the CLC, Newmont, Northern Territory Government and Commonwealth Government. The committee seeks advice and input from experts in the field of community development and makes recommendations to the trustee. Community consultation and engagement is fundamental in the approach taken to developing programs. The CLC established a Community Development Unit with qualified officers to administer and manage the programs.

Expenditure of benefits

WETT receives in the order of \$1.2 million a year and as at June 2009 had approved some \$7 million over five key program areas:

1. *Warlpiri Language and Culture Support* – is driven by strong Aboriginal aspirations for maintaining Warlpiri language and culture and aims to enhance two-way education in schools in each of the four main Warlpiri communities as well as a boarding school in Alice Springs. Small grants are available to schools for the conduct of country visits which include payments to traditional elders and field costs of conducting visits. An initial outlay was made for each of the schools to purchase a vehicle appropriate for undertaking visits. Small grants are available for producing Warlpiri language literacy resources.
2. *Warlpiri Early Childhood Care and Development Program* – a key area that community and experts agree is fundamental to long term health and community development. This is a significant program in terms of resources and expenditure and is built on an innovative partnership with an international aid agency. World Vision is the program manager and is allocated funds from WETT as well as it contributing its own funds. The

Australian Government also contributes to the program by funding a World Vision worker. This is a multi-faceted program aimed at creating a healthy, safe and learning environment for preschool-age children from 0-5 years including such things as childcare and playgroups, nutrition programs, play grounds, family support, men's positive parenting and training of childcare workers.

3. *Warlpiri Youth and Media Program* – a partnership with community based media organisations which provide diversionary activities for young people with an emphasis on media training. The program funds a coordinator based in the main Warlpiri community of Yuendumu who provides support to youth workers in the other communities, also funded out of the program. Working with youth is the focus with special programs for video, photography and music workshops. The program has attracted further in-kind support from the mining company and some equipment from the Australian Government. Three young men have progressed from the media training into jobs in the local community based media organisation.
4. *Warlpiri Secondary Student Support Program* – a smaller program that assists Warlpiri students attending high school. No community high schools exist so students must board away from home. Assistance is provided to give additional support such as to enable visits from family and travel for cultural reasons.
5. *Warlpiri Learning Community Centre Program* – funds have been provided for infrastructure in two communities which have no learning facilities other than the school. The centres provide library and computer resources and access to the internet as well as a space for learning activities such as workshops or training sessions. Funds are also available for Aboriginal project officers to assist in managing the centres.

Success factors

While delivery of each of the programs is not necessarily straightforward or without particular issues, the success of WETT to date can be attributed to a number of features:

- Strong community based support and involvement through the governance structure. In this case WETT Advisory Committee has built upon an existing community based education lobby, Warlpiri-parlu-kurlangu Jaru, which has met regularly for many years to discuss and promote Warlpiri education initiatives in schools. Capacity has developed in this group to plan strategically and think in the long term. The members, all Aboriginal women who have experience in the education area, have the skills to agree on a vision of the future and furthermore articulate such within the community and garner support for programs.
- External and expert advice is sourced from scholars and practitioners in the field of community development. Review and on-going input is sought to enhance programs based on experience from other places.
- There is a strong emphasis on consultation and engagement with Aboriginal community members on the ground in the design and implementation of the actual programs.
- Delivery of programs through partnerships with appropriate community based organisations with resources provided to ensure capacity within these organisations. Where appropriate organisations are absent, partnering with international community development organisations with experience with program delivery in developing nations such as World Vision.
- Careful design of programs that not only avoid the issue of substituting government responsibility but actually present as attractive opportunities for government to become involved and contribute additional funds and resources.

Appendix 3: Comparative case study: Negotiated agreements between resource industry and Indigenous peoples in Canada

Indigenous Peoples in Canada

The Canadian constitution recognises three groups of Aboriginal people: Indians (commonly referred to as First Nations), Métis (descent of mixed European and First Nations parentage) and Inuit (who mainly inhabit the Arctic regions of Canada¹⁰). These are three distinct peoples with unique histories, languages, cultural practices and spiritual beliefs.

More than one million people in Canada, or 3.8% of the national population, identify themselves as an Aboriginal person, according to the 2006 Census.¹¹

First Nations and Inuits are organised politically from bands of a few people (typically, but not always, composed of a single community), to Tribal councils made up of several bands, to multi-nation confederacies. The largest multi-nation organisation is the Assembly of First Nations¹², which represents the chiefs of over 600 First Nation bands throughout Canada. The national organisation of the Inuit is the Inuit Tapirisat of Canada¹³. The Métis National Council is the representative organisation of the Métis people¹⁴. All three organisations' headquarters are in Ottawa.

Aboriginal communities are located in urban, rural and remote locations across Canada. They include:

- First Nations or Indian Bands, generally located on lands called Reserves;
- Inuit communities located in Nunavut, NWT, Northern Quebec (Nunavik) and Labrador;
- Métis communities; and
- Mixed communities of Aboriginal people (including Métis, Non-Status Indians, Inuit and First Nation individuals) in cities or towns which are not part of reserves or traditional territories.

Government relations and structures

Historically, the relationship between Aboriginal people in Canada and the British Crown and Canadian Government was defined by the signing of various treaties. From the early 18th century, treaties were signed to define, among other things, the respective rights of Aboriginal people and governments to use and enjoy lands that Aboriginal people traditionally occupied. Treaties include historic treaties made between 1701 and 1923 and modern-day treaties known as comprehensive land claim settlements.

Since confederation, the Canadian government's policy towards Canada's Aboriginal people has been embodied to a certain extent in the Indian Act, first enacted in 1876 by the Parliament of Canada and amended several times since. The Act defines who is officially recognised as "Indian", defines certain legal rights for registered Indians, and defines how Reserves and Bands can operate. Overall, from the 19th century onwards, the Canadian governments' policies towards Canada's Aboriginal people had the overall aim to assimilate Aboriginal people into Canadian wider society.

¹⁰ Inuit are the Aboriginal people of Arctic Canada. About 45,000 Inuit live in 53 communities in: Nunatsiavut (Labrador); Nunavik (Quebec); Nunavut; and the Inuvialuit Settlement Region of the Northwest Territories. Each of these four Inuit groups has settled land claims. These Inuit regions cover one-third of Canada's land mass.

¹¹ This total comprises 698,025 people of First Nations descent, 389,785 Métis, and 50,485 Inuit.

¹² Website: <http://www.afn.ca/index.php/en>.

¹³ Website: <http://www.itk.ca>.

¹⁴ Website: <http://www.metisnation.ca>.

However, from the 1960s onwards, with an increasingly prominent Aboriginal rights movement, federal government policy has gradually changed with increased political and legal recognition of the rights of Canada's Aboriginal peoples. The Constitution Act of 1982 recognizes and affirms the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada". This affirmation has paved the way for court challenges on the nature of the relationship between the Crown and Aboriginal peoples, and the possibility of modern land claim agreements. These court challenges have begun to establish the expectations of the Crown on the duty to consult and accommodate¹⁵ Aboriginal people in instances where their rights might be impacted.

Indian and Northern Affairs Canada (AINC) is the department of the federal government of Canada with responsibility for policies relating to Aboriginal peoples in Canada. The department is overseen by the Minister of Indian Affairs and Northern Development.

Indigenous traditional lands and their rights

As early as the 18th century, Britain recognised that Aboriginal people had claims to the land. As a result, as the settlements moved west across Canada, the Crown negotiated and signed major treaties with various First Nations from the 18th century onwards. Canadian treaties can be divided into:

- **Historic Treaties** (Pre-Confederation & Numbered Treaties after Confederation): After the British Royal Proclamation of 1763, which prohibited the purchase of First Nation lands by any party other than the Crown, the Crown signed several treaties with Aboriginal groups. These include the Upper Canada Treaties (1764 to 1862) in Ontario and the Vancouver Island Treaties (1850 to 1854) in British Columbia. After Confederation, between 1871 and 1921, the Crown entered into more treaties with various First Nations that enabled the Canadian government to actively pursue agriculture, settlement and resource development of the Canadian West and the North. Because they are numbered 1 to 11, the treaties are often referred to as the "Numbered Treaties." The Numbered Treaties cover Northern Ontario, Manitoba, Saskatchewan, Alberta, and parts of the Yukon, the Northwest Territories and British Columbia. Under these historic treaties, the First Nations surrendered interests in their lands in exchange for certain other benefits that could include reserves, annual payments or other types of payment and certain rights to hunt and fish.
- **Modern treaties – Comprehensive land claim settlements:** These deal with areas of Canada where Aboriginal people's claims to Aboriginal rights had not been addressed by treaties, or other legal means. The first of these modern-day treaties was the James Bay and Northern Quebec Agreement, signed in 1975. To date, the federal government has settled 24 modern treaties with Aboriginal people in Canada. These treaties are agreements, which establish an Aboriginal group's rights with respect to a defined area of land and routinely cover resource management issues, including mineral rights.

However, not all Aboriginal traditional lands have been legally recognised and today there are still areas in Canada claimed by Aboriginal people where treaties have not been signed and Aboriginal claims are not resolved. Furthermore, there is a lot of debate with regards to the historic treaties and the interpretation of the rights surrendered, and the content and legality of these agreements is often contested by First Nations.

In 1982, the Canadian Constitution was amended to affirm already existing Treaty rights and recognise Aboriginal rights. Aboriginal rights are based on Aboriginal peoples' occupation and use of the land prior to the arrival in Canada of Europeans. Aboriginal rights encompass a range of rights,

¹⁵ The duty to accommodate, which is defined as "seeking compromise in an attempt to harmonize conflicting interests", is enacted in instances of a high degree of severity of impact from a proposed project (Gibson and O'Faircheallaigh, 2010).

including Aboriginal title to land. Aboriginal title is a right that is held communally and affords exclusive use and occupation rights to the land to an Aboriginal group, for a variety of purposes. Aboriginal title is being defined through the courts, and although Canadian courts have begun to define the specific nature and content of Aboriginal rights, there persists significant ambiguity regarding their extent. With regards to mineral rights, the Canadian federal and provincial governments own the vast majority of the country's mineral resources. However, there are instances where Aboriginal groups hold tenure to mineral resources through modern land claim agreements or Aboriginal title.

Other types of land areas inhabited by First Nations in Canada are Indian Reserves (also referred to as Native reserve or First Nations reserve). These areas have been allocated and defined by the Indian Act as a tract of land, which is owned by the Crown and is set apart for the sole use and benefit of a band (though some reserves are occupied by several bands). In all, there are over 600 occupied reserves in Canada, most of them quite small in area. The development of mineral resources on Indian reserve land is overseen by the Indian Minerals Unit within Indian and Northern Affairs Canada (AINC).

Indigenous lands (i.e. lands used, occupied and/or claimed by indigenous peoples) in Canada are therefore the following:

- Lands included in the Historic Treaties;
- Lands included in modern land claim settlements;
- Aboriginal traditional areas subject to unresolved land claims; and
- Reserve lands.

Each type of land confers different types of rights.

In Canada the Crown holds the ultimate duty towards respecting Aboriginal rights and title (as laid out in the Canadian Constitution), but the obligations and manner in which this is carried out is vague and ill defined. What this means is that while the Crown is responsible to consult and accommodate Aboriginal peoples, industry can't be sure the Crown will fulfil this responsibility, and sometimes the Canadian federal or provincial governments will expect companies to fulfil that duty.

Negotiated agreements

As Aboriginal rights have gained judicial and political recognition, and as more First Nations have settled land claims in recent decades, negotiated agreements between Aboriginal groups and resource companies have become common practice in Canada when mineral development is located within, or adjacent to, traditional Aboriginal or Treaty lands.

Although not always legally compulsory, resource companies and representative Aboriginal organisations are increasingly negotiating different types of agreements, which acknowledge Aboriginal peoples' rights and interests in the land. In most cases, the main aim of these agreements has been to establish formal relationships between resource companies and Aboriginal groups and to secure economic benefits for the affected Aboriginal communities. These agreements can range from comprehensive life of project agreements known as Impact and Benefit Agreements (IBA) to smaller MoUs during exploration phases (agreements are also sometimes referred to as Participation Agreements or Benefit Agreements). The agreements, which are usually confidential, can include a range of measures such as:

- **Financial provisions** such as royalties, equity shares and/or fixed cash amounts;
- **Provisions regarding the employment of Aboriginal people in the project**, such as a hiring policy that gives preference to Aboriginal people, strategies to maximise Aboriginal participation in employment, training and apprenticeship programmes, quotas, etc.;

- **Economic development and business opportunities** that promote the establishment and development of aboriginal businesses that can supply the company with necessary goods and services;
- **Environmental and social impact management** involving affected Aboriginal people in monitoring;
- **Institutional and decision-making arrangements** for managing the agreement and Aboriginal engagement with the project.

There is no single legislative or policy framework that drives the negotiation of agreements in Canada. Agreements therefore have come about as a result of different drivers:

- **The Crown duty to consult and/or accommodate:** The Crown can delegate procedural aspects of consultation to corporations, and in practice, much of the obligation to consult falls to the industrial proponents.
- **Order from the federal or provincial government** (such as the BHP Billiton Ekati Diamond mine being ordered by then Indian and Northern Affairs Minister, Ron Irwin to sign negotiated agreements with local Aboriginal communities).
- **Aboriginal land rights & title:**
 - *Historic Treaties' areas:* Within the areas covered by historic treaties, the Crown has a duty to consult and/or accommodate affected First Nation groups. Furthermore, there may be contestation between the government and First Nations as to the nature of the rights over the land.
 - *Modern Land Claim Agreements and settlements:* Where land claims have been settled, the Aboriginal group may own surface and subsurface rights to some areas within the land claim area settlement area, as well as hold some rights, such as notification and consultation rights regarding the use of the land in areas legally owned by the Crown. These rights confer Aboriginal groups with varying degrees of control over access to the land, which in many cases have translated into negotiated agreements between companies seeking access and the Aboriginal rights holders. Furthermore, most modern land claim agreements are explicit in their support for negotiated agreements and include the need for agreements in relation to extractive projects. Some land claim agreements such as the Nunavut Final Agreement explicitly require that an IBA be negotiated before a "major development project" can take place on aboriginal land and even set specific guidelines about agreement contents.
 - *Areas included in outstanding land claims or land claim negotiations:* Though these claims have not been settled, the fact that there is a claim may serve as sufficient incentive for a company to enter into negotiations with First Nations (e.g. the Raglan mine in Northern Quebec). In many cases, First Nations may exercise some rights regarding land use decisions for these areas.
 - *Indian Reserves:* Companies wishing to develop oil and gas operations on Indian reserves must negotiate a surface agreement with the affected First Nations. Oil and gas on First Nation reserve lands is regulated and managed by the federal government department Indian Oil and Gas Canada (IOGC). IOGC assists the First Nation in the negotiation of subsurface agreements and ensures fair returns. All revenues collected by IOGC on behalf of First Nations throughout the agreement life cycle are placed in regional trust fund accounts. This includes all bonuses, rents, considerations and royalties. First Nations can apply to Indian and Northern Affairs Canada to access their moneys for community projects and other uses. IOGC is

responsible for receiving, depositing and transferring the moneys into these accounts.

- **Environment Impact Assessment process¹⁶:** The EIA process allows for public participation and consultation. EIA in Canada in relation to mineral development focuses overwhelmingly on assessment of, and possible approval for, the commercial development of mineral deposits that have already completed advanced exploration work. EIAs can provide key information for designing IBAs and in many cases are appended to agreements.
- **Provincial regulation governing mineral (mining, oil & gas) development:** Some provinces require that extensive consultation be carried out with Aboriginal communities before any mineral development, or that employment and training plans be developed.
- **Companies' own social performance and risk management processes.**

¹⁶ EIA under federal jurisdiction in Canada is governed by the 1995 Canadian Environmental Assessment Act (CEAA), and is administered by the Canadian Environmental Assessment Agency. However, because the Constitution Act of 1867 did not specifically assign the environment to any one jurisdiction (federal or territorial) there is no exclusive authority to enact legislation over the environment. As a result, environmental assessment legislation falls under the jurisdiction of the federal, provincial and territorial governments.

Appendix 4: International human rights instruments and international agency policies relevant to agreement-making with Indigenous people

International human rights instruments

The following human rights instruments identified by the ICMM (2010, p.8) contain provisions relevant to agreement-making with Indigenous people:

- The 2007 United Nations Declaration on the Rights of Indigenous Peoples:
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples:
<http://www.ilo.org/public/english/region/ampro/mdtsanjose/indigenous/derecho.htm>
- The Office of the United Nation's High Commissioner for Human Rights International Covenant on Economic, Social and Cultural Rights (1976):
<http://www2.ohchr.org/english/law/cescr.htm>
- The International Covenant on Civil and Political Rights:
<http://www2.ohchr.org/english/law/ccpr.htm>
- The International Convention on the Elimination of All Forms of Racial Discrimination:
<http://www2.ohchr.org/english/law/cerd.htm>
- The Convention on Biological Diversity Akwé: Kon Guidelines:
www.cbd.int
- UN Guidelines on the Protection of the Cultural Heritage of Indigenous Peoples:
<http://www2.ohchr.org/english/issues/indigenou/s/docs/guidelines.pdf>
- The American Convention on Human Rights:
www.oas.org/juridico/English/treaties/b-32.html
- Inter-American Court on Human Rights:
www.worldlii.org/int/cases/IACHR

Further information:

- The IBA Toolkit, pp. 24-27, has a good discussion of international instruments that are relevant to agreement-making with Indigenous groups

International Council on Mining & Metals (ICMM)

The International Council on Mining & Metals (ICMM) has a membership comprising 18 mining and metals companies and 30 national and regional mining associations and global commodity associations. The ICMM aims to address the core sustainable development challenges faced by the industry and has been active in developing policies and tools to assist members in their dealings with Indigenous peoples, including:

- *ICMM Sustainable Development Framework*

This framework is applicable to all ICMM Members and includes 10 principles of sustainability. Those principles of relevance to the relationship between resource companies and Indigenous people include:

Principle 3: Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities

Principle 6: Seek continual improvement of our environmental performance

Principle 9: Contribute to the social, economic and institutional development of the communities in which we operate (ICMM 2008).

- *ICMM Position Statement on Mining and Indigenous Peoples*

This Position Statement was released in May 2008 and contains 6 recognition statements regarding Indigenous rights and 9 commitments by members. The full text can be found at the ICMM website: <http://www.icmm.com/page/208/indigenous-peoples>.

International Financial Institutions

For companies that borrow money from international financial institutions, there may be applicable international standards promulgated by the lending agencies. These standards may mandate certain behaviours by companies that go beyond their legal obligations imposed by national legislation regarding Indigenous people and resource development. Many resource companies have incorporated some of these international standards into their own social sustainability policies.

Important standards enforced by international financial institutions include the following:

- *International Finance Corporation (IFC) Performance Standard 7 on Indigenous Peoples (PS7), April 2006*

This performance standard aims to foster respect for Indigenous rights and aspirations, avoid or minimise adverse impacts on Indigenous groups, encourage good relationships, foster good faith negotiation and informed participation of Indigenous peoples in projects and respect and preserve their culture, knowledge and practices (IFC 2006). It is intended to be applied during the social and environmental assessment process for a project. The standard sets out:

- general requirements about avoiding adverse impacts and ensuring information disclosure, consultation and informed consultation
- a requirement to identify “culturally appropriate development benefits”
- special requirements in the case of impacts on traditional or customary lands under use, the relocation of Indigenous peoples from traditional or customary lands and the use of cultural resources or knowledge for commercial purposes

Recent changes proposed to this Performance Standard would stipulate the following requirement for resource companies:

“the client will obtain the FPIC [Free, Prior and Informed Consent] of the Affected Communities of Indigenous Peoples on project design, implementation, and expected outcomes. This process builds on and expands the process of informed consultation and participation described above, and will be established through good faith negotiation between the client and culturally appropriate institutions representing communities of Indigenous Peoples. The client will document (i) the mutually accepted process between the client and Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. This requires agreement by the culturally appropriate decision-making body within the affected community of Indigenous Peoples, representing and communicating an agreement seen as legitimate by the majority. Consent does not necessarily require unanimity and may be achieved even when individuals or sub-groups explicitly disagree.”

- *World Bank Operational Policy (OP) 4.10 – Indigenous Peoples, July 2005*

This policy “contributes to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples.” For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation (World Bank 2005). Projects financed by the bank include measures to

- (a) avoid potentially adverse effects on the Indigenous Peoples’ communities; or
- (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects.

Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and inter-generationally inclusive (World Bank 2005).

- *European Bank for Reconstruction and Development (EBRD) Environmental and Social Policy, November 2008*

This policy provides that for projects where Indigenous people may be affected, the client is required to carry out an impact assessment. The project client is expected to avoid adverse effects and if this is not feasible, they must prepare an Indigenous Peoples’ Development Plan to minimise and/or mitigate any potential adverse impacts and identify benefits. This process must be carried out through an informed consultation and participation process with the affected Indigenous communities.

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