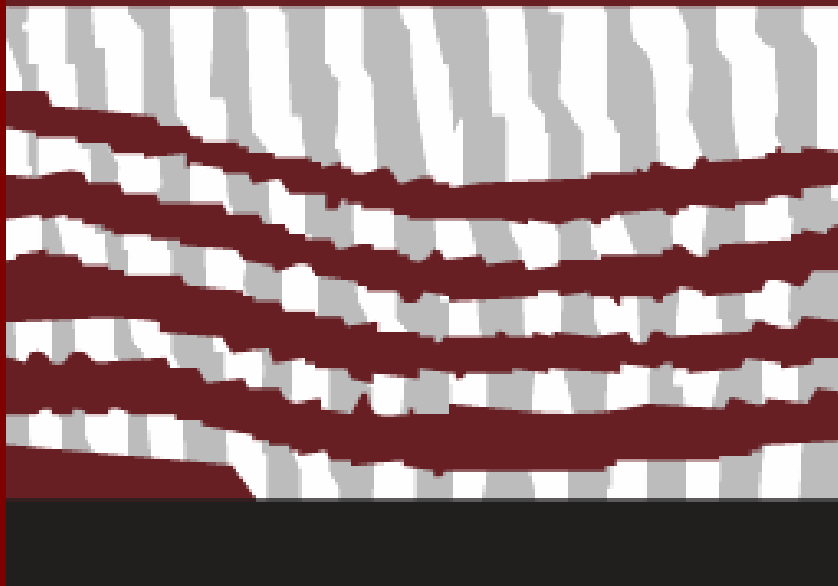


**AIATSIS
NTRB Knowledge Management
Pilot: Agreement Making**



INTERIM REPORT

October 2009 – April 2010



© Commonwealth of Australia 2010

This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to the Commonwealth Copyright Administration, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton ACT 2600 or posted at <http://www.ag.gov.au/cca>

Contents

ABBREVIATIONS	4
EXECUTIVE SUMMARY	5
1. INTRODUCTION.....	7
1.1 Overview	7
1.2 Rationale.....	7
1.3 Background.....	8
1.4 Definitions	8
2. PROJECT INITIATION, PLANNING AND DESIGN	9
2.1 Project initiation and pre-planning	9
2.2 Planning and design	11
2.3 Desktop research.....	13
2.4 Pro bono assistance	14
2.5 Risks, mitigation and lessons learned	14
3. INFORMATION GATHERING AND ANALYSIS	16
3.1 In-house work	16
3.2 Sanitisation and collation.....	16
3.3 Expansion: information gathering process	17
3.4 Risks, mitigation and lessons learned	17
4. IMPLEMENTATION	20
4.1 Information dissemination.....	20
4.2 Expansion: knowledge management system	20
4.3 Risks, mitigation and lessons learned	21
APPENDICES	24

Abbreviations

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
KM	Knowledge management
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NTPWG	Native Title Payments Working Group
NTRB	Native title representative body or service provider
PLO	Principal legal officer
PPD	Project partner deed

Executive Summary

I. Introduction

The NTRB Knowledge Management Pilot: Agreement Making ('the project') is investigating options for the development and implementation of a legal precedents database for NTRB use. The database will initially contain resource-related agreements of precedential value sourced from NTRBs, including mining, mineral and petroleum exploration, infrastructure and cultural heritage agreements. Access to the database will be limited to NTRBs only.

The primary objective of the project is to increase both efficiency and effectiveness in the future act agreement making process for NTRBs. An ancillary objective of the project is to test possibilities for increased communication and coordination among NTRBs. The project has been initiated in response to ongoing calls from NTRBs for the provision of such a resource, as well as related recommendations made by the Australian Government and others.

A Working Group of five NTRBs is providing strategic guidance on the development of the project and acting as primary information source during the pilot phase. A legal framework has been developed in consultation with the Working Group to protect the information gathered over the course of the project, and the legal interests of the participants. Information gathering is now under way alongside development of a web-hosted database to disseminate this information.

Should the pilot phase be successful it is envisaged that the scope of the project will be broadened to include other types of agreements. There is also the potential to develop other tools to augment the database itself, as part of a broader knowledge management system.

II. Key findings and analysis

The successful completion of the first round of information gathering has indicated that the participating NTRBs possess a good number of documents suitable for use as precedents. Experience so far has indicated that the agreements most usefully targeted during the pilot phase are those that are the most 'transferable' (commonly used or widely applicable – such as exploration agreements). Highly transferable precedents offer good scope to increase transaction efficiencies during the earlier stages of the project.

The success of the first round of information gathering has demonstrated a good level of NTRB support. It has also demonstrated the viability of the measures taken to address factors constraining the inter-organisational transfer of agreement making knowledge (primarily confidentiality, copyright, privacy and related legal obligations).

Developing the basic capacity to give effect to knowledge transfer within the relevant constraints requires a practical emphasis, which is well matched to the current focus on 'transferable' precedents. Scope exists to expand the knowledge management system in both form and content once this basic capacity has been implemented.

In-house visits have been of central importance to the success of the information gathering process. Working directly with the Working Group members and other project participants has facilitated the ongoing dialogue between the Project Manager and the participating NTRBs on which this project relies. It has also helped to ensure

that information is gathered efficiently and dealt with appropriately. Appropriate handling of sensitive information is a key objective at all stages of the project.

The sanitization and collation process has been straightforward in practice but more time consuming than anticipated. A balance needs to be struck when sanitizing a document to avoid inadvertently destroying its precedential value in the process of removing sensitive elements. Sanitization also requires technical issues to be addressed, including the need to remove potentially sensitive metadata residing in electronic documents.

In terms of collation, an average of around 30 parameters (searchable clauses or keywords) have been identified in each document, equating to approximately 1,500 substantive data entries for every 50 documents collated. This has workload implications in terms of project expansion.

The primary project output contemplated in the pilot phase is a prototype database facilitating the storage, collation and, primarily, dissemination of precedent agreements to NTRBs. The Working Group and other project participants have expressed a preference for a simple, customised database of agreement precedents from which information can be retrieved according to a number of specific parameters. These parameters include factors such as type of commodity, year, activity (mining/exploration etc) and specific categories of clause (e.g. employment clauses). The database is currently in development.

The project is operating within budget. Expenditure to date reflects the constrained scope of the work done within the first six months of the pilot phase, but is expected to increase significantly in step with project expansion.

Interest in the project has steadily increased since its inception six months ago. In terms of planning, two primary factors therefore need to be addressed: expansion of the content of the database and expansion in the number of participants. The most obvious option for expansion of the database is to broaden the scope to include other types of precedents in addition to resource-related agreement precedents. There is good potential here for the inclusion of framework agreements, regional agreements, project agreements and various other types of precedent. The proposal in terms of expansion in number of project participants is to require each NTRB joining the project to contribute relevant agreement making knowledge of its own in order to gain access to the database. This expansion should be carried out after completion of the pilot phase to allow a testing period for the database.

The overriding focus expressed by the Working Group is to maximize the number and quality of precedents available and to have a prototype database in operation as soon as possible. This will allow the fundamental objectives of the project to be reality tested and, if successful, will provide a platform to foster further interest from more NTRBs. The simplicity and practicality of this primary objective is central to the workability of this project.

1. INTRODUCTION

This report reviews the progress made in the first six months of the Native Title Representative Body (NTRB) Knowledge Management Pilot: Agreement Making ('the project') and the trends, risks and responses so far encountered or developed.

1.1 Overview

The Knowledge Management Pilot ultimately aims to develop and implement a knowledge management system for NTRB use, primarily in the form of a legal precedents database. Funded by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), the primary objectives of the project are to reduce duplication of effort by NTRBs and increase transactional efficiencies, while promoting best practice in both the form and content of agreements. In the process, the project will build on previous efforts to collate, analyse and disseminate information on agreement making in the native title sector while seeking to address the issues presented by confidentiality and related legal considerations. At one level this will test possibilities for increased communication and coordination among NTRBs, in that the database would facilitate the transfer of knowledge between these organisations. Access to the database will be limited to NTRBs; it is not intended to be an open resource. The final product is ultimately intended to be an independent and largely self-sustaining resource containing a range of precedents and related information.

A working group of five NTRBs are currently providing strategic guidance and contributing information to the project. Now six months into its pilot phase (concluding in October this year), the project is initially focusing on resource-related agreements, and the precedents gathered so far cover subject matter including mining, exploration, infrastructure and heritage. If the pilot phase is successful, the project scope will likely be expanded to cover a wider spectrum of agreement types, and the option will be open for all other NTRBs to participate. A 'project partner deed' (PPD) has been developed in collaboration with the Working Group to protect the legal interests of the project participants and to protect project information throughout the process. Each NTRB proposing to contribute information to, and access information from, the database will need to become a party to the PPD.

In terms of function, the database is intended to be a simple, web hosted resource from which documents can be retrieved according to a variety of search parameters. In addition, individual clauses engaging with specific issues will also be retrievable. The intention is to have a prototype version of this database in operation by September 2010.

1.2 Rationale

Agreement making is a priority for the native title sector and for the Australian Government. At the 2009 Native Title Ministers Meeting in Adelaide it was recognised that native title can provide opportunities and outcomes for Indigenous people through facilitation of broader settlement packages. The Guidelines for Best Practice devised by The Joint Working Group on Indigenous Land Settlements has similarly structured its directives based on this principle, recognising that practical and sustainable outcomes are desirable. In addition, the recent Australian Government discussion paper on optimising benefits from native title agreements

recognises that agreements arrived at within the native title framework 'now constitute a major form of engagement between Indigenous people, industry and governments'.¹

It is generally acknowledged, however, that significant challenges and opportunities remain in improving the effectiveness and efficiency of agreement making. Among other things, these challenges and opportunities engage with issues of capacity, transparency and confidentiality.

This project responds to calls for resources to address these issues.

1.3 Background

There is currently no central repository for legal precedents for NTRB use (noting that the Agreements, Treaties and Negotiated Settlements Database and several other online resources provide a partial exception to this – see Section 2.3). The development of a legal precedents database is thus a targeted means to address the project rationale.

The Australian Government, in its report arising from the Native Title Payments Working Group, recommended that 'agreements (or examples of best practice agreement provisions) should be able to be accessed from a central database or repository'.² Likewise, a 'Report into the professional development needs of Native Title Representative Body lawyers' by Richard Potok in 2005³ identified the need to provide access to a precedents database as a support structure to improve the work environment of NTRB lawyers.

NTRBs themselves have been requesting a resource of this nature for some time.

1.4 Definitions

It is important at this point to clarify the use of the term 'precedent'. In this report, 'precedent' refers to any document or clause which has been developed or refined over several instances and updated as required, has been useful in the past, and may be used again in future in the appropriate circumstances. A technical distinction can be drawn between a precedent and a 'template' (or 'standard form' agreement), in that, unlike a precedent, a template can be characterised as a 'fill-in-the-blanks' document which may not have been previously tested and may not cater for contextual variations. The focus in this project is on the collection and collation (and, eventually, maintenance) of precedents rather than templates, to the extent that the above distinction applies.

The term 'best practice' is also referred to at various points in this report. A definition is not attempted here, but Appendix 3 provides an overview of the commentary on so-called best practice in native title agreement making.

¹ Attorney-General's Department, Discussion Paper – Optimising Benefits from Native Title Agreements, at http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_DiscussionPaper-OptimisingbenefitsfromNativeTitleAgreements#submissions.

² Native Title Payments Working Group, Report, Recommendation 2, at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf).

³ Available at http://www.auroraproject.com.au/Links/2005_April_Report.pdf.

2. PROJECT INITIATION, PLANNING AND DESIGN

2.1 Project initiation and pre-planning

i) *Initial project endorsement, commencement and pre-planning*

The proposal to proceed with the project was initially floated at the Chief Executive Officers Forum in September 2009, and in-principle support was provided by the NTRB representatives attending.

FaHCSIA subsequently made funding available to AIATSIS to proceed with the pilot phase of the project. A financial report detailing project funding and an analysis of current and projected expenditure is attached at Appendix 1.

On 5 October 2009 the project formally commenced and the Project Manager, Joe Fardin, was appointed to the position of Research Fellow: Agreement Making at AIATSIS. At the same time a preliminary project proposal was developed in consultation with the project partners and project team. Among other things, this document set out the basic project rationale, described the method and deliverables, and provided a preliminary project timeline. This project proposal was finalised following consultation with the Working Group.

The project aims, as identified during the pre-planning phase, were to:

- investigate options for the development of a national knowledge management system; and
- in support of this objective, gather, collate, analyse and disseminate agreement-related information of precedential value for use by NTRBs, with a view to the development of a legal precedents database.

Project composition was determined as follows:

Project partners

- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)
- Aurora Project
- Department of Families, Housing, Community Services and Indigenous Affairs (funding partner)

Project team

- Dr Lisa Strelein, Director Research Programs, AIATSIS – Project Director
- Joe Fardin, AIATSIS Research Fellow: Agreement Making – Project Manager
- Richard Potok, Director, Aurora Project – Project Advisor
- Native Title Research Unit, AIATSIS – Project support

Project management

- Working Group of five NTRB representatives
- AIATSIS Native Title Advisory Committee, AIATSIS corporate infrastructure

ii) Working Group

The first task was to set up a working group of NTRB representatives who were keen to take on an integral role in the development of project. In an email sent out to all NTRB Principal Legal Officers, the Project Manager invited the nomination of 5-7 Working Group members who were in a position to support and guide the project. The stated function of the Working Group was to give direction on the first steps to be taken as the project got under way, to provide advice and content, test results, and champion the project within the NTRB sector. In other words, it was intended to be more than merely advisory in nature and was incorporated as part of the project team.

Establishment of the Working Group was formalised in November 2009, and NTRB principal legal officers (PLOs) notified of this development. Initial membership was comprised of:

- Malcolm O'Dell, Central Desert Native Title Services
- James Nugent, Central Land Council
- Marita Stinton, Cape York Land Council
- Paul Simmons, Native Title Services Victoria, and
- Stephen Hegedus, Yamatji Marlpa Aboriginal Corporation.

Stephen Hegedus was subsequently replaced on the Working Group by fellow Yamatji Marlpa Aboriginal Corporation lawyer Louahna Lloyd.

iii) Communication

With input from the Working Group, a communication strategy was developed to clarify communication processes. The communication strategy required that the Project Manager provide fortnightly email updates to the Working Group and convene a monthly teleconference. In addition it required the Project Manager to provide monthly email updates to all NTRB PLOs to advise of the progress of the project.

In terms of decision-making requiring Working Group input, the communication strategy provided for a consensus-based approach to be employed so far as practical. It was decided that, should a Working Group member not be available for comment on a particular proposal, this would not be a reason to delay the project provided a reasonable period for comment was given.

Liaison has also been carried out with various external parties in connection with the project on an ad hoc basis. The Project Manager and other members of the project team have liaised with or been approached by organisations including the National Native Title Tribunal, the Attorney-General's Department, the Minerals Council of Australia and the Agreements, Treaties and Negotiated Settlements project. Closer to the NTRB sphere, ongoing liaison is being carried out with the National Native Title Council, and a presentation on the project was given during the NTRB forum at the National Native Title Conference in June 2010. Given the nature of this project, network building outside the NTRB sphere was not identified as a primary objective.

iv) Legal framework

In addition to the above, the Project Manager initiated the development of a legal framework to circumscribe the project. Given the importance of this aspect, the law firm Norton Rose Australia was engaged to develop a so-called 'project partner deed' (PPD; attached at Appendix 4). At its most basic, the PPD formalises the process by which the 'project partners' (the participating NTRBs and AIATSIS) agree to co-operate to achieve the objectives of the project. In addition it establishes the legal framework governing information use and access between all project participants

during the course of the project, and ensures that information is not misused. This is especially important given the confidentiality, copyright and related concerns inherent in dealing with the type of information contemplated by this project. The PPD was developed with the intention that, on completion of the pilot phase and should the project continue, other NTRBs wishing to join the project would be required to execute a copy of it prior to accessing or contributing any information. In this way it is intended that the legal interests of all project participants will be provided for throughout the life of the project.

Once the terms of the PPD were settled with the Working Group, the information gathering phase commenced. During this phase, the participating NTRBs and AIATSIS executed copies of the PPD in counterpart as the Project Manager carried out in-house work at each.

The basic process for the collection, treatment and subsequent use of information, as set out in the PPD, is as follows:

- A. AIATSIS and the participating NTRB execute the PPD;
- B. AIATSIS and the relevant NTRB then identify documents for potential inclusion in the database;
- C. The Project Manager reviews these documents and modifies them as appropriate (which process may include sanitisation), before submitting them back to the relevant NTRB for formal 'approval';
- D. In the case of each document, the NTRB then approves or declines to approve its inclusion in the database;
- E. All project participants subsequently viewing any such documents are in turn required to be a party to the PPD, which releases all project partners (that is, parties to the PPD) and AIATSIS from all liability for losses and liabilities incurred in connection with the access to or use of any information on the database.

One matter raised by the Working Group in relation to the legal aspects was the issue of intellectual property and its potential implications for this project. Specifically, the concern was that FaHCSIA has the right to rely on its intellectual property rights in relation to certain information held by NTRBs pursuant to clause 17 of the 'General terms and conditions relating to the Native Title Program Funding Agreements', and that this may be problematic where NTRBs want to share their intellectual property with one another in furtherance of developing a database. The Working Group proposed that FaHCSIA provide a 'letter of comfort' to the NTRBs involved in the project, indicating that FaHCSIA is not of the view that its intellectual property rights are being (or are likely to be) infringed by NTRBs through participation in the project, so long as the information resides in the NTRB system and remains there. FaHCSIA has provided in-principle support for this proposal, and the Working Group is proceeding on this basis.

2.2 Planning and design

To a degree, project scoping and information gathering were designed to be carried out in parallel.

As a first step in the planning phase, the Project Manager prepared a scoping proposal for comment by the Working Group. The intent behind this process was to

settle the basic parameters around information collation and analysis to ensure, so far as possible, that the project team shared a common vision in terms of intended outcomes and how to achieve them. Provision was made from the outset for the project scope to be expanded, should the pilot phase of the project be successful.

The scoping proposal sought to clarify both the type of information that would be initially targeted, and the process for dealing with that information (including identifying learnings around the negotiation of the documents, collation, and eventual presentation on a database).

Feedback from the Working Group in relation to the scoping proposal was instructive. Feedback centred on the following four issues:

i) Type of agreements targeted

The scoping proposal suggested a focus on 'mining-related agreements' during the pilot phase. This was defined to include documents relating to exploration, mining (both small and large scale) and cultural heritage. Working Group members agreed that a focus on mining-related agreements was appropriate, although not at the expense of the potential inclusion of other relevant information. This could include infrastructure agreements, negotiation protocols and memoranda of understanding, geothermal exploration agreements, petroleum exploration agreements and agreements pertaining to related downstream activities, as well as pipeline and infrastructure corridor agreements.

ii) Development and negotiation process

The scoping proposal also suggested that, in addition to agreements and agreement clauses themselves, information on the process around the development and negotiation of those documents could usefully be sought. This included identification of issues encountered during the development or negotiation process and learnings in relation to those issues, which could be annotated to clauses or agreements as relevant. Working Group feedback included the point that different classes of agreement in relation to one issue (for example, productive mining) may exist not only between NTRBs, but also within an individual NTRB. In these cases a threshold may be established to differentiate between small and large scale agreements. Another point was that procedural issues can be more time consuming to address than substantive issues, especially in the case of larger agreements. That is, while it may be relatively straightforward to reach agreement on terms, the lead-up to and subsequent formalisation of an agreement can consume significant resources.

In relation to a proposal that the project could also gather information on parties and issues (whether in-house lawyers, counsel or other consultants, areas of expertise, etc) in specific categories of matter, the Working Group was generally of the view that collecting information of this nature would be a time consuming and complicated exercise which could be more profitably pursued at a later stage in the project.

iii) Best practice

The scoping proposal suggested that while 'best practice' agreements should be targeted – so as to preclude the inclusion of poor quality documents in the information gathering phase – the term should be broadly defined to avoid taking an overly restrictive approach. The Working Group expressed broad agreement, commenting that 'best practice' can mean different things to different people. In addition, the point was made that the effect of the Global Financial Crisis should be taken into account when considering more recent agreements.

iv) Information collation and presentation

The final substantive issue dealt with in the scoping proposal was the collation and subsequent presentation of information. The scoping proposal suggested a number of 'parameters' or variables according to which documents would be able to be retrieved from the database. It also put forward a preliminary proposal for the user interface and presented options for the provision of 'current awareness' information (such as a newsletter) to augment general updates on the progress of the project.

The Working Group agreed in principle with the database design proposal (for further detail refer to Section 4), and put forward numerous suggestions for additional parameters to be incorporated. The Working Group did not favour the use of a newsletter in addition to existing communication processes and suggested the over-use of information products had the potential to lead to complications or bureaucratisation.

The project scope was subsequently amended to take into account the considerations raised by the Working Group. In terms of delineating project parameters this involved striking an appropriate balance between flexibility and responsiveness on the one hand, and clarity and specificity on the other. Appropriately managing this balance is an ongoing consideration; project planning during the pilot phase was designed to incorporate a level of responsiveness so that new developments or opportunities can be catered for, so far as practicable. This is expected to vary as the project advances.

2.3 Desktop research

Desktop research supporting the primary project objectives has been under way since the inception of the project. This research is designed to give a theoretical underpinning to the project's practical focus to inform project planning and design. Desktop research carried out to date has focused on three topics:

- i) 'Knowledge management', its application in the legal context, and its application in the native title agreement making context (Appendix 2);
- ii) The elements of 'best practice' in native title agreement making (Appendix 3); and
- iii) The current policy positions of Australia's state and Federal governments in relation to native title agreement making.

This work was carried out with the assistance of Aurora interns.

A survey was also carried out to identify existing resources having some relevance to the objectives of the project. The most relevant resources identified included:

- A report entitled 'Agreements between Mining Companies and Indigenous Communities: A Report to the Australian Minerals and Energy Environment Foundation', carried out in 2001 by Indigenous Support Services and ACIL Consulting;
- The 'Agreements, Treaties and Negotiated Settlements' database, available at <http://www.atns.net.au/>;
- The Native Title payments Working Group report and associated discussion paper, released by the Australian Government (Attorney-General's Department and FaHCSIA) in 2008;

- A database developed by the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, known as the Court interpretation of indigenous agreements: database, available at <http://www.dundee.ac.uk/cepmlp/mining/indigenous/>.
- The Canadian 'IBA Community Toolkit: Negotiation and implementation of impact and benefit agreements', available at www.ibacommunitytoolkit.ca.

These resources contain information of potential utility in the context of future act agreement making. In terms of function, however, these resources do not overlap with the objectives of the present project.

2.4 Pro bono assistance

The Law firms Allens Arthur Robinson and Freehills have provided pro bono assistance to the project, which was of particular value at the pre-planning stage. A Knowledge Management Lawyer at Allens Arthur Robinson met with members of the project team and provided support in the identification of relevant knowledge management principles and insight into relevant information collection and dissemination practices. The Knowledge Centre Manager at Freehills provided advice on the technological aspects of database development and the development of process guides, as well as on issues around appropriate use and re-use of documents.

The possibility remains open for further pro bono assistance to be provided.

2.5 Risks, mitigation and lessons learned

i) Risks and mitigation

A. NTRB participation/ability to participate

A measure of the success of this project is the level of 'buy-in' from NTRBs. Although the project is premised on a need identified within the NTRB sector, the resources and time of NTRB staff is limited and difficult to apply to external projects. In addition, legal constraints including confidentiality and copyright have significant implications in terms of the ability of NTRBs to contribute information.

The measure taken in relation to this risk was to target senior NTRB staff. PLOs/CEOs are best placed to ensure that adequate resources are made available should the decision be made to participate. The second measure was to carry out data collection *in situ* and meet face-to-face with NTRBs where possible. Adequate funding for travel was therefore incorporated into the project budget.

ii) Lessons learned

A. Target 'transferable' agreements

Experience so far indicates that the agreements most usefully targeted by the project are not the so-called 'headline agreements' nor even 'best practice' specifically. Instead, the documents identified as having the greatest precedential value are in fact those that are the most 'transferable' – that is, those which are the most common or generally applicable rather than those which are the most financially propitious or the largest in size. Variations in state level regulatory frameworks and policy

contexts, among other things, have a significant bearing on the outcomes of the future act agreement making processes the various NTRBs are involved in. In practice this means that many different approaches have been developed in relation to what could be characterised as the basic elements of future act agreement making, such as heritage and environmental protection, access, and benefits provisions.

Assuming they will be more frequently used, the more 'transferable' precedents are therefore valuable in terms of the transactional efficiencies they offer, and – as a category – are useful to test the workability of the database during the early stages of the project.

This need not be at odds with the view put forward in the NTPWG report that agreements providing "substantial benefits" should be available as model agreements. Rather, this reflects two complementary aims of knowledge management: improving efficiency (which relates to the transferability of precedents and therefore quantitative benefits) and raising standards (which relates to qualitative benefits). The outputs contemplated by this project have the potential to address both objectives.

B. Focus on practicality

Practicality has emerged as another focus of the project. The members of the Working Group and other NTRB lawyers consulted have so far expressed a general preference for the knowledge management tools developed by this project to have a focus on practicality or 'useability'. Such a focus reduces the risk of contributing to information overload and increases ease of use, while maintaining an emphasis on security. This approach fits well with the findings of the desktop research carried out in support of this project. The desktop research found that there is a high volume of extant information having some nexus with agreement making, but that this information is often theoretical in nature; some of it may in fact add to – rather than mitigate – the identified legal and policy complexities.

The question of practicality can also be linked to the 'lessons learned' in Section 4, in relation to arguments in favour of simplicity.

C. Obtaining 'buy-in'

Obtaining sufficient 'buy-in' was identified as a key risk factor for the project. In practice the level of NTRBs buy-in has been high from the outset, and the greatest issue has been the *availability*, rather than the *interest* of NTRB staff.

Constituting the Working Group provided the first concrete test of project buy-in, and no difficulties were encountered in this process. On the other hand, difficulties have been encountered getting all five members of the Working Group together at one time for teleconferences, for example. Reasons for this included the fact that Working Group members were often in the field, interstate, or otherwise subject to conflicting commitments. This issue is not peculiar to this project and has been addressed by various means, the primary such means being the conduct of in-house work. Face-to-face dialogue has proven to be a key factor in facilitating the two way flow of information on which this project relies.

3. INFORMATION GATHERING AND ANALYSIS

Information gathering is the core element of this project. The amount and nature of information gathered is the primary determinant of the utility of the project as a whole.

3.1 In-house work

The information gathering phase commenced on completion of the first round of planning and design work. This was given effect through in-house visits with the NTRBs on the Working Group, with the Project Manager spending 1-5 days at each (with the exception of one, for which the information gathering process is pending).

The process for the in-house visits was straightforward, and was designed with two objectives in mind:

- i) gathering relevant agreements and related documents at their source; and
- ii) gaining access to the lawyers involved in drafting or using the agreements to discuss content and process.

An underlying motivation for the in-house work was to minimise imposition on NTRB time and ensure information was handled appropriately. Meeting with lawyers in person and dealing directly with relevant documents both simplified and expedited the process of collaboratively identifying, gathering and collating relevant information.

In cases where in-house work is not feasible, the proposed alternative is discussion by phone with relevant staff and submission of documents by email. This approach may be used in future when working with NTRBs at which staff are geographically dispersed and/or where documents are held by external consultants.

3.2 Sanitisation and collation

All documents are to be sanitised before being approved by the source NTRB for use as precedents and uploaded on to the database. Sanitisation is carried out by the Project Manager or NTRB staff as appropriate.

The sanitised documents are then collated in such a way that both the documents and specific clauses within them can be retrieved from the database according to the specified parameters. This aspect of the information management process is being carried out in conjunction with the technical aspects of database design because data retrieval and user interface design are intrinsically linked with the IT solutions employed. This will be discussed further in Section 4.

At present, the quantity of documents requiring sanitisation and collation is at a level that can be carried out by the Project Manager independently. Should the project expand, however, additional assistance will be required.⁴

⁴ Note comments on the complexity of the sanitization and collation process at 3.4 *infra*, under 'Lessons learned'. Useful collation of information in this context is a significantly more involved process than simple data entry.

3.3 Expansion: information gathering process

The aim during the pilot phase is to carry out an initial round of information gathering at each of the five NTRBs represented on the project Working Group. If the project advances beyond the pilot phase, it is intended that the information gathering process will expand in two areas:

- i) type of information (i.e. expansion in scope beyond the resource-related agreements currently being targeted); and
- ii) source of information (i.e. an expansion in the number of NTRBs participating).

The information gathering aspect of the project is an iterative process which could be refined over time as the database is reality tested, a greater volume of information is processed, and more feedback is received. Ideally in-house work would continue to be the primary means of information gathering.

If other NTRBs are to join the project once the pilot phase is complete, the proposal is that as part of gaining access to the database, NTRBs also contribute precedents or other relevant information of their own.

3.4 Risks, mitigation and lessons learned

i) *Risks and mitigation*

A. Risk of confidentiality of agreements precluding inclusion in database

This risk is implicit in the project rationale. Of the different types of documents possessed by NTRBs, some are more amenable to dissemination as precedents than others. Generally speaking the more complicated and bespoke the agreement, the more sensitive it will be and the more restrictions will apply to its dissemination, whether in whole or in part. On the other hand, some NTRBs have developed future act agreement precedents for internal use, and these precedents are generally less sensitive. Targeting the least sensitive documents during the pilot phase is therefore one way to mitigate the risks associated with confidentiality. The sanitisation process applied to the documents gathered as part of this project also has a role to play in minimising confidentiality concerns.

The PPD also addresses this risk, in that it sets out the process for obtaining the relevant consents, sanitising documents, and the subsequent use of information relating to or developed as part of the project.

B. Risk of mismanagement of sensitive information

The potential mismanagement of sensitive information is another risk factor. It is assessed as low in likelihood (based on the precautions being taken) but high in potential negative consequences in the event that it did occur. The PPD again has a function in relation to this. Additional precautions are being taken at each step to ensure that information is not dealt with otherwise than as expressly desired by the source NTRB.

C. Risk that sanitisation process ineffective/too effective

There is an inherent tension in the sanitisation process: if a document has not been adequately sanitised then sensitive information could be inappropriately revealed; on the other hand, if a document has been 'over-sanitised' then its value as a precedent may be reduced or destroyed. This risk is being dealt with on a case-by-case basis in consultation with the relevant NTRBs.

D. Problems with coordination of knowledge management information

This project will, by its nature, test whether national coordination of agreement making and other knowledge management information among NTRBs is practicable and effective. The risk that such coordination is not practicable and effective is related to the risk of misapplication described in Section 4, but applies at the non-technical level and at the information gathering as well as the implementation phases.

To mitigate this risk the project will seek to work with diverse NTRBs, and will also source assistance from various other sources including law firms, IT professionals and others. The intention is to get advice on models and methods of knowledge management that may assist in developing an appropriate system to enable NTRBs to appropriately and effectively share agreement making information. This will be an ongoing element of the project, reflecting the iterative nature of the information gathering process driving the project.

ii) *Lessons learned*

A. Sanitisation and collation

The sanitisation process has been relatively straightforward in practice. It is, however, time consuming. Care needs to be taken when sanitizing a document to avoid inadvertently destroying its precedential value in the process of removing sensitive elements; this requires an understanding of both the context in which the document was drafted and the function of the document itself. Suitable expertise is therefore required for sanitization to be effective.

Another factor which has emerged during this process is the need to remove metadata from electronic documents. Both the Microsoft Word document format and Adobe (PDF) documents contain several layers of information which, in addition to text and graphics, includes metadata. While metadata is not part of the visible content of a document, it contains substantial hidden information about the visible content. Metadata can therefore survive in an electronic document which otherwise appears to have been sanitized and may allow ostensibly deleted parts of a document to be retrieved.

Other problematic aspects of the sanitization process include the following:

- Some categories of clause – for example financial benefits clauses – are often difficult to sanitise because of the extent of sensitive information they contain; removal of this information may render the clause meaningless;
- A similar problem is encountered where a document or clause engages with a complex legislative framework with localised applicability: removing the references to localized aspects can limit the overall utility of the document as a precedent; and
- Documents which are available only in hardcopy are especially time consuming to deal with as they must be manually converted to electronic format.

Collation is an equally time consuming process. An average of around 30 parameters (i.e. searchable clauses or keywords) have been identified in each precedent, which equates to approximately 1,500 substantive data entries for every 50 precedents collated. Importantly, these parameters may not be immediately obvious. An appreciation of the overall function and context of the document is therefore generally required to enable relevant parameters to be identified. For example, an employment condition may be couched within an environmental protection clause and not expressly identified as having an additional function.

Despite these factors, and in large part due to the level of support being provided by Working Group participants, these issues are not a barrier to progress.

B. NTRB 'buy-in' and the likely effect of mismanagement of information

The information gathering phase of the project is the most sensitive to risks relating to NTRB buy-in and related risks around confidentiality or other legal restrictions to dissemination. In practice, however, NTRB engagement has been very positive. There is significant interest among NTRBs in the promotion of transparency and the implementation of some level of national knowledge management coordination, and engagement with the Working Group and other NTRBs to date has therefore been positive and productive. The in-house work has been a particularly important aspect of this engagement. Early success with the prototype database, once implemented, would no doubt also have a positive bearing on buy-in.

Conversely, if for any reason sensitive information is mismanaged or misused to any degree during the course of the project, this would likely have a material negative impact on NTRB buy-in. Security and the appropriate management and use of information is being treated as a primary consideration in every element of the project.

4. IMPLEMENTATION

4.1 Information dissemination

The primary focus for the knowledge management system has been the development and implementation of a database, the purpose of which, as stated above, is to cater for the storage, collation and dissemination of precedents to NTRBs. Advice is currently being taken on the technological aspects of database development and design, and the aim is to have a functional prototype delivered before October 2010, containing the precedents collected during the first round of information gathering.

Feedback to date has evidenced a strong demand for a simple, clearly delineated database of legal precedents from which information can be retrieved via a number of specific parameters. The database will therefore need to be document-oriented to enable clauses and whole documents to be retrievable according to the various specified parameters, which include factors such as commodity, activity, year and size of undertaking.

The system will most likely be web hosted, to allow ease of maintenance in combination with access from geographically disparate locations, and for this reason and others security has been identified as an important design principle. Preliminary indications are that access to the database will be server-based, and the option exists to place additional security restrictions on documents within the database.

In terms of function, project participants have expressed a preference for clickable drop down tabs to enable topic selection. Ideally the topic parameters will be structured to enable the user to get to the specific topic or clause they want within three mouse clicks. A mock-up showing a preliminary representation of the user interface has been prepared and circulated to the Working Group and other NTRBs for comment.

Once the prototype has been tested by the Working Group, documents collected during subsequent information gathering rounds will be uploaded. Provision is being made for the addition of both more information and new categories of information or functionalities to be added to the system. The intent is therefore for the gathering and presentation of precedents and related information to be an ongoing process, which could in time be directly carried out by NTRBs. This raises the issue of ultimate ownership and control of the resource: if the pilot delivers a workable product capable of operating sustainably, project participants will need to decide whether oversight of the resource should be retained by AIATSIS or transferred to another organisation, and how it should be maintained. This is especially in relation to the issue of if, how many, and what type of full time positions should be made available for the maintenance of the database, and for that matter the general upkeep of the project more broadly.

4.2 Expansion: knowledge management system

While the primary output being contemplated during the pilot phase of the project is the precedents database, there is scope for other outputs to be developed in future as part of a broader knowledge management system. Other such components could include, for example, a database of cases or case analyses, relevant AIATSIS Native

Title Research Unit products or any other relevant resources identified by project participants.

Numerous other suggestions have been made during consultation with NTRBs and are being considered, including the possibility of allowing the precedents database to be duplicated so that it can be appropriated for internal use where an NTRB does not have an existing internal system.

4.3 Risks, mitigation and lessons learned

i) Risks and Mitigation

A. Risk of cost/time overrun, insufficient 'useability'

The primary risks relating to the database development process are twofold: excessive funds/time required to deliver the system; and unsuitability of the final product for its intended purpose.

The cost/time risks are assessed as low, in that the proposed system is relatively simple and small in scale. It is therefore expected to be inexpensive to develop and not overly time consuming to deliver. In-house expertise exists at AIATSIS to develop the system in the form currently proposed. The option to expand system capabilities in future has been contemplated in the design brief; the present focus on timeliness and simplicity should therefore not be a bar to future expansion, especially if modular or 'off-the-shelf' software is used.

The useability risk is more complex to address. This risk relates to the fact that, despite the fact that the system is being designed with a specific user group in mind – NTRB lawyers – this group will nonetheless have widely differing requirements of the system. Further, useability can only be fully assessed once the system is live. As with the cost/time risk, the focus on simplicity is likewise intended to be a mitigating factor in this context. In addition, the aim is to deliver a prototype version of the database as soon as possible (before October 2010) to allow the Working Group to begin testing it. If it transpires that any significant changes need to be made, they can be carried out as early as possible and before any further expansion is undertaken. Finally, user activity will be logged so that the most frequently used elements of the database can be identified and modified or improved as required.

B. Risk of misapplication of precedents

There is a risk – inherent in any system of precedents – that documents may be misapplied due to a lack of understanding of content, process, or context (that is, the context in which the document was intended to be used, and especially the legislative or policy context).⁵ This is especially so given the proposed database will be a national resource and therefore used in a number of different regulatory and policy frameworks. Two means to mitigate this risk have been identified.

The first and primary means is to annotate the precedents on the database to explain content and context where relevant – whether in relation to a specific clause or a whole document. This information was sourced during the first round of information gathering with this specific objective in mind, and is intended to be an ongoing focus.

⁵ The risk of misapplication has also been identified in the report of the Native Title Payments Working Group at p.13.

A secondary means to mitigate the risk of misapplication is to develop an agreement making guide or 'process guide' to be used in conjunction with the database. Such a guide would ideally identify the drafting process to be followed in specific scenarios, contain links to relevant precedents to be used in each scenario, and contain information clarifying the regulatory framework and policy context in each relevant area (i.e. state/territory at a minimum).

One of the benefits of a process guide is that it would assist the comparison of 'like with like'. This is an important factor when, for example, proposing to use a precedent in one state which was originally developed in another, given, inter alia, the interplay between the centralised native title legislation and the decentralised mining, heritage and environmental approvals processes. Addressing this complex issue would require suitable expertise. Developing a process guide of this nature would be a significant undertaking and is not included in the scope of the pilot phase of this project.

As an aside, another way to facilitate the comparison of 'like with like' would be to develop a geospatial system enabling the identification of commonalities in land use/ownership/tenure. Access to such information would form an important basis for extant agreement making knowledge to be applied in new areas. The Geospatial Services division at the NNTT has informally indicated that the development of such a system may be possible. Improved access to land tenure information was identified as a priority in the 2009 Native Title Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner (albeit in relation to claims rather than agreement making).⁶ Synergies also exist with the NNTT's 'National Information Management Framework – Land Tenure'.⁷

However, while these options represent possibilities for future investigation, they are at odds with the present, overriding focus on developing, implementing and testing basic database capacity (see point immediately following). In addition, some Working Group members have indicated that diversifying project objectives or seeking to bring in external expertise may impede progress or impair NTRB buy-in. As such these options will not be pursued as a priority.

ii) *Lessons learned*

A. Keep it simple

Knowledge management discourse is extensive. When combined with the multifaceted nature of native title agreement making, many options emerge for consideration in relation to this project. In terms of its evolution, therefore, this requires good strategic guidance. The Working Group has expressed a clear preference for the prototype database to be both the primary focus and output during the pilot phase of the project, with related objectives being to maximise the quality and range of precedents sourced and to deliver the prototype as promptly as possible. This guidance has been valuable and is an ongoing focus.

B. Comparing regulatory/policy contexts

It has become clear that there exists a significant opportunity to clarify the differences between the various regulatory and policy contexts around the country. This has been highlighted during the process of gathering information on the content and context of NTRBs' engagement with future act agreement making. Such clarification

⁶ Available at <http://www.hreoc.gov.au/social_justice/nt_report/ntreport09/pdf/ntr2009.pdf>.

⁷ Peter Bowen, NNTT, November 2009.

would offer significant practical benefits. From the NTRB perspective, there is currently no centralised approach to the 'doing' of future act agreements that can be likened to the centralised knowledge management systems employed by other participants in the future act agreement making process. This is an important issue to address, especially given the complexity and diversity of this area of the law and the significant and evolving workload generated by agreement making processes.

An underlying issue in this context appears to be the limited availability of practical resources and opportunities for lawyers to employ a comparative approach to future act agreement making, particularly in relation to the interaction between the various state and Commonwealth regulatory frameworks. This is compounded by unclear and changing policy positions as the various governments go through the electoral cycle. This has implications in terms of the opportunities for NTRB lawyers to employ a proactive approach based on comparative analysis. The precedents database currently in development engages directly with these issues.

APPENDICES

Appendix 1: Financial report

Appendix 2: Knowledge management in native title

Appendix 3: 'Best practice' in native title agreement making: An overview of current commentary

Appendix 4: Project partner deed

Appendix 1

Financial report

October 2009 – March 2010

	Budgeted 2009/10	YTD (Mar) 3/31/2010
Income		
Operational	\$150,909	\$150,909
TOTAL INCOME	\$150,909	\$150,909
Expenditure		
Operational		
Salaries		
Research Fellow EL1	\$97,190	\$43,634
Subtotal salaries	\$97,190	\$43,634
Services		
Consultants	\$25,000	\$7,637
Travel		
Fares	\$15,000	\$3,948
Corporate support - AIATSIS	\$13,719	\$6,860
TOTAL EXPENDITURE	\$150,909	\$62,080

Budget analysis

The project is currently operating within budget, reflecting the constrained scope of the work done during the first six months of the pilot phase. There are two primary factors which are expected to significantly increase project expenditure in the future.

The first factor is travel.¹ To date, one round of information gathering has been carried out at each of four participating NTRBs. Given the demonstrated demand for project expansion in terms of both participants and scope, travel costs are projected to rise markedly. Information gathering is, as discussed,² the primary driver of the project, and so far this has been given effect to solely through in-house work. For the project to expand, additional in-house work will therefore need to be carried out, at more NTRBs.

The second factor relates to database development.³ Costs for database development are not reflected in expenditure to date, in line with the fact that this aspect of the project hinged on the successful execution of the first round of information gathering. These costs will be reflected in the budget once the pilot phase is complete.

There are two other issues having potentially noteworthy implications for the budget: workload and legal advice. If the project expands it will be necessary to employ extra staff to assist with the sanitisation and collation process,⁴ as well as ongoing maintenance of the resource. In addition, legal fees may become a significant factor, depending on the nature and extent of advice sought on sanitisation and related issues. This process has so far been carried out wholly in-house.

¹ For expenditure to date see budget item: Travel.

² In relation to this refer to Part 3 of the substantive report.

³ For expenditure to date see budget item: Services.

⁴ In relation to this refer to section 3.2 of the substantive report.

Appendix 2

Knowledge Management, Law and Native Title*

Contents

1. What is knowledge management?	ii
1.1. Basic definitions.....	ii
1.2. The elements of knowledge management.....	iii
1.2.1 Two types of <i>knowledge</i>	iii
1.2.2 Two types of <i>knowledge management</i>	iv
1.2.3 Two types of <i>knowledge management strategy</i>	v
1.2.4 Four types of <i>knowledge management activity</i>	v
1.3. Evaluation of knowledge management.....	vi
1.3.1 Relevant circumstances.....	vi
1.3.2 Benefits of knowledge management.....	vi
1.3.3 Challenges of KM.....	vii
2. What does knowledge management mean in the legal context?	ix
2.1. The importance of KM for lawyers	ix
2.2. <i>Knowledge</i> in the legal context.....	x
2.3. <i>Knowledge management</i> in the legal context.....	xi
2.4. Benefits of KM in the legal context.....	xii
2.5. Challenges to good KM in the legal context.....	xiii
2.6. KM databases in law firms	xiv
3. Knowledge management and native title.....	xvi
3.1. Commentary linking KM with native title.....	xvi
3.2. KM in action in native title practice	xvi
3.2.1. The ATNS Project.....	xvi
3.2.2. NTRB projects	xvii
3.2.3. AIATSIIS	xvii
3.2.4. NNTT database	xviii
3.2.5. ACIL Consulting.....	xviii
4. Putting KM into practice in native title: a step-by-step guide.....	xix
Step one: draft the KM strategy	xix
Step two: target senior management.....	xxi
Step three: deploy the technology.....	xxi
Step four: implement the KM strategy.....	xxii

* The extensive assistance provided by Jack Brumpton in the preparation of this document is gratefully acknowledged.

1. What is knowledge management?

1.1. Basic definitions

There are many definitions for knowledge management (KM), of which the following provide a representative sample:

- “The process through which organisations generate value from their intellectual and knowledge-based assets... [it] involves codifying what employees, partners and customers know, and sharing that information among employees, departments and even other companies in an effort to devise best practices”;¹
- “A business activity... [that] encompasses identifying and mapping intellectual assets within the organisation, generating new knowledge for competitive advantage within the organisation, making vast amounts of corporate information accessible, sharing of best practices, and technology that enables all of the above”;²
- “Applications... which create, capture, organise, access and use the intellectual assets of the organisation”;³
- “A corporate knowledge store” and “organisational memory”;⁴
- “Making use of the knowledge and experiences of staff... [so that] one person’s knowledge becomes information for the next person to assimilate and add to his, or her, own repository of experiential learning”;⁵
- “Getting the right knowledge to the right people at the right time so they can make the best decision”;⁶
- “Systematic approaches to find, understand and use knowledge to create value”;⁷

¹ Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

² Barclay and Murray – www.media-access.com/whatis.html

³ Coakes, p. 581 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947>

⁴ Heath, in Coakes, p. 584 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947>

⁵ Coakes, p. 589 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947>

⁶ Petrash – http://books.google.com.au/books?id=34bu-X6YKAEC&printsec=frontcover&dq=knowledge+management&source=gsb_similarbooks_s&cad=1#v=onepage&q=&f=false

⁷ O’Dell – http://books.google.com.au/books?id=34bu-X6YKAEC&printsec=frontcover&dq=knowledge+management&source=gsb_similarbooks_s&cad=1#v=onepage&q=&f=false

These various definitions have some common threads. From them, a general, simplified definition of KM can be posited:

KM is:

1. *identification of existing knowledge of value; and*
2. *codification of that knowledge; and/or*
3. *sharing of that knowledge,*

in order to achieve increased results for both the business and the individual employee, and – where relevant – to encourage and generate new knowledge of value, creating a cycle which perpetuates itself.

Generating new knowledge of value is a central aspect of the KM process according to some interpretations, despite the fact that some (generally earlier) commentators do not acknowledge this aspect. Thus, while simple ‘identification, codification, and dissemination’ processes are a large part of KM, creating a space for experimentation and the development of innovative new processes is also important.⁸ KM may be as much about knowledge making as knowledge sharing.⁹

This evolution in KM theory has resulted in the identification during the late 1990s of so-called ‘second generation’ KM. First generation KM (or ‘supply-side KM’) is comprised of the basic knowledge sharing element. Second generation KM (or ‘demand-side’ KM) engages instead with the subsequent creation of new knowledge.¹⁰

1.2. The elements of knowledge management

1.2.1 Two types of *knowledge*

There are two types of knowledge with which KM is concerned.

The first is ‘explicit’ (or ‘represented’) knowledge. This is anything that can be documented, archived or codified,¹¹ and encompasses formal models, processes, rules and procedures which can be communicated externally.¹²

⁸ Christensen, p.16 – http://books.google.com.au/books?id=BxUU-23ESeUC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

⁹ McElroy, p. xxiii – <http://books.google.com/books?id=622olv3A9SEC&printsec=frontcover&dq=knowledge+management&cd=3#v=onepage&q=&f=false>

¹⁰ McElroy, p. xxiii to xxv – <http://books.google.com/books?id=622olv3A9SEC&printsec=frontcover&dq=knowledge+management&cd=3#v=onepage&q=&f=false>

¹¹ Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

¹² Nonaka & Takeuchi in Lomax – http://www.knowledgepoint.com.au/knowledge_management/Articles/KM_AL001.html

The second is ‘tacit’ (or ‘embodied’) knowledge – the “knowledge residing in people’s heads”¹³. This encompasses mental models, experiences, stories, rituals and skills residing in the individual and private mind.¹⁴

Tacit knowledge is valuable because it is unique to each person, and is responsible for innovation and real-time reactivity in decision-making. Tacit knowledge becomes more important in an environment of uncertainty, where an ability to ‘think on one’s feet’ becomes a priority. The downside is that tacit knowledge is easily lost,¹⁵ and its intangibility means that it is less diffusible.¹⁶

Explicit knowledge on the other hand is valuable in that it is not vulnerable to loss. It gives safety and security. It is definable, repeatable, auditable and simple to disseminate. Its main weakness is in its rigidity; it often offers only a basic solution to a given problem.¹⁷

While explicit and tacit knowledge are distinct, each can be used as an aid to acquire the other.¹⁸

1.2.2 Two types of knowledge *management*

Commentators identify two types of KM which roughly correlate with the two types of knowledge discussed above:¹⁹

1. Management of information; and
2. Management of people.

The ‘information management’ aspect of KM is generally concerned with the management of explicit knowledge. This aspect of KM is normally done using information technology.

The ‘people management’ aspect of KM is generally concerned with the management of tacit knowledge, and is harder to facilitate. Whilst information management may simply involve moving and indexing data, the second involves “surfacing” the knowledge contained in people’s heads and “leveraging it”, by

¹³ Coakes, p. 589 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947>

¹⁴ Nonaka & Takeuchi in Lomax –

http://www.knowledgepoint.com.au/knowledge_management/Articles/KM_AL001.html

¹⁵ Snowden, p. 56 –

http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

¹⁶ Senge, p.71 –

http://books.google.com.au/books?id=Ckb6GcUq31MC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

¹⁷ Snowden, p. 56 –

http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

¹⁸ Cook & Brown, p. 56 –

http://books.google.com.au/books?id=TIDDsMwW11gC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management&f=false

¹⁹ Svieby, in Barclay and Murray – www.media-access.com/whatis.html

“motivating people to share their experiences and learning”.²⁰ This can be done in a number of ways, including the ‘shadowing’ of an expert by a novice, joint problem-solving by an expert and novice, storytelling and trouble-shooting exercises.

1.2.3 Two types of knowledge management *strategy*

In terms of the strategies required to give effect to KM, two distinct types can again be identified in line with the bifurcation identified above:

1. The ‘push strategy’; and
2. The ‘pull strategy’.

The push strategy involves an individual explicitly encoding their knowledge into a shared knowledge repository – such as a database – as well as retrieving knowledge they need that other individuals have provided to the repository. This strategy is associated with the ‘information management’ aspect of KM. One problem with this type of strategy is that it necessarily relies on persuasion or coercion to encourage participation in the system.²¹

The pull strategy requires an individual to request knowledge from experts associated with a particular subject on an ad hoc basis. This strategy is associated with the ‘people management’ aspect of KM. A problem with this second strategy is that individuals with genuine expertise often keep their heads down for fear of being overloaded with enquiries, while attention-seekers may capitalise on the opportunity for self-promotion.²²

1.2.4 Four types of knowledge management *activity*

Finally, commentators posit that there are four types of KM activity,²³ or rather, four modes of ‘knowledge conversion’:²⁴

- Moving explicit knowledge from individuals to the community (relates to the ‘push strategy’), also called ‘combination’;
- Moving tacit knowledge from individuals to the community (relates to the ‘pull strategy’), also called ‘socialisation’;
- Changing tacit knowledge to make it explicit, also called ‘externalisation’; and

²⁰ Coakes, p. 589 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=1572947>; see also ‘1.6 Challenges of KM’, below.

²¹ Richard Veryard – <http://rvsoapbox.blogspot.com/2010/01/intelligent-knowledge-management.html>; see also ‘1.6 Challenges of KM’, below.

²² Richard Veryard – <http://rvsoapbox.blogspot.com/2010/01/intelligent-knowledge-management.html>; see also ‘1.6 Challenges of KM’, below.

²³ Snowden, p. 54 –

http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

²⁴ Nonaka, Toyama and Konno, p.26 –

http://books.google.com.au/books?id=TIDDsMwW1gC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management&f=false

- Moving from use of explicit knowledge to use of tacit, also called 'internalisation'.

1.3. Evaluation of knowledge management

1.3.1 Relevant circumstances

Organisations may need a KM system where one or more of the following applies:²⁵

- Reductions in staff and/or high staff turnover create a need to replace informal knowledge with formal methods to stop loss of knowledge (knowledge as a 'depreciable asset'),²⁶
- The amount of time available to gain experience and acquire knowledge has diminished;
- Marketplaces are increasingly competitive in respect of their knowledge assets and the rate of innovation amongst competitors is rising;
- Competitive pressures reduce the size of the workforce that holds valuable business knowledge available to each employer;
- More and more work is becoming information-based and increasingly complex.

1.3.2 Benefits of knowledge management

A good KM system:

- Fosters innovation,²⁷ skills development and a collaborative business environment²⁸ (including quick integration of new employees)²⁹ by encouraging the free flow of ideas;
- At the same time, fosters conformity by disseminating 'best practice' and encouraging adherence to it,³⁰

²⁵ Macintosh, in Barclay and Murray – www.media-access.com/whatis.html

²⁶ Lomax – http://www.knowledgepoint.com.au/knowledge_management/Articles/KM_AL001.html

²⁷ Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

²⁸ Ardichvili, Page and Wentling, p. 65 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

²⁹ Ardichvili, Page and Wentling, p. 71 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁰ Mueller in Coakes, p. 580 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&contentId=157294>

- Improves client service by streamlining operations (i.e. minimising unnecessary processes and duplication of effort, thereby shortening response times);³¹
- Boosts business revenue by increasing client satisfaction through efficiency gains;³² and
- Enhances employee retention rates by recognising the value of individual employees' knowledge, thereby raising self-esteem and job satisfaction.³³

1.3.3 Challenges of KM

l) Challenges inherent in establishing any KM system may relate to the following:

- It can be difficult to get employees to *contribute* to the KM system. This can be due to a fear of criticism or of misleading colleagues through irrelevancy or inaccuracy, to a mentality focussing on 'knowledge as an individual's private asset and competitive advantage',³⁴ or simply mistrust (this is compounded when the contributor has never met other users of the KM system face-to-face);³⁵ and
- It can also be hard getting employees to *use* the KM system. This can arise from an unwillingness to change habits or an unfamiliarity with technology,³⁶ the existence of a tight-knit group which believes it already has all the required solutions,³⁷ the fact that some problems are 'process-oriented' and therefore difficult to duplicate electronically,³⁸ or again due to mistrust (and, again, this mistrust is only compounded when the user has never met the contributors to the KM system face-to-face);³⁹

³¹ Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

³² Levinson – http://www.cio.com/article/40343/Knowledge_Management_Definition_and_Solutions

³³ McLure and Faraj, in Ardichvili, Page and Wentling, p. 66 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁴ Ardichvili, Page and Wentling, pp. 64; 69 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁵ Ardichvili, Page and Wentling, p. 72 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁶ Ardichvili, Page and Wentling, p. 66 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁷ Ardichvili, Page and Wentling, p. 71 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁸ Ardichvili, Page and Wentling, p. 71 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

³⁹ Ardichvili, Page and Wentling, p. 72 –

<http://www.emeraldinsight.com/Insight/viewContentItem.do?contentType=Article&hdAction=lnkhtml&contentId=883796>

II) A KM system also:

- is costly and time-consuming to establish;
- requires ongoing maintenance;
- can result in 'information overload', or lack of high-value information;
- may conflict with corporate security restrictions, confidentiality requirements and similar concerns – often leading to questions being asked as to the neutrality of the facilitator of the KM system;⁴⁰
- can present difficulties in converting tacit knowledge to explicit knowledge (how can a system replicate the problem-solving process of an expert?);⁴¹ and
- can become another burden on time and resource poor employees.

In summary the challenges of constructing a good KM system exist on both practical and abstract levels.

In terms of practical challenges, those outlined above at II) are the most apparent. These challenges largely reflect the 'information management' aspect of KM.

The challenges described above at I) are more abstract. The problem of creating and maintaining trust in the KM system is an aspect of the 'people management' aspect of KM. The response to this challenge is to target and either develop or modify the 'corporate culture' amongst the KM system users.⁴² This may involve significant organisational change.

⁴⁰ Hase, Sankaran and Davies –

<http://www.actkm.org/userfiles/File/actKMjnl/2006/Overcoming%20barriers%20to%20Knowledge%20Management-%20Visiting%20the%20Dark%20Side%20of%20Organisations.pdf>

⁴¹ Berckman – http://www.cio.com.au/article/6262/when_bad_things_happen_good_ideas; see also Durrance, p. 31 –

http://books.google.com.au/books?id=2iRY4HLtjeIC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

⁴² Barclay and Murray – www.media-access.com/whatis.html

2. What does knowledge management mean in the legal context?

2.1. The importance of KM for lawyers

The practice of law is a 'knowledge businesses', which relies on both explicit knowledge (for example precedent documents) and tacit knowledge (in the form of their 'human capital' – lawyers) to a significant degree. KM is therefore an essential tool in the legal field.

Lawyers have struggled, at least until very recently, with the formal notion of KM. KM strategies and systems in this context have been haphazard, "rarely explicit, rarely documented, and rarely related to the hard issues of making money".⁴³ In the case of law firms specifically, reasons may include one or more of the following:

- A law firm generally bills by the hour, or in some cases, by the 6-minute block. If, as a result of KM processes, its lawyers become significantly more productive in that hour then the firm is forced to pass those savings on to its clients and hence lower its income. It has been remarked that "knowledge management may be good for individual productivity but bad for [legal] industry economics".⁴⁴ This has meant that KM has at times been resisted by partners heavily reliant on the so-called 'partner compensation model' that many firms run on. It is important to note, however, that in the case of NTRBs, where income is largely circumscribed, this argument does not apply or in fact could be reversed.
- A law firm could traditionally rely on long-standing relationships with its clients and, indeed, its employees.
- There were, in the past, fewer national (or for that matter international) law firms – each firm traditionally stayed within the boundaries of one city.
- There was less time pressure in the past deriving from instant communication tools, such as email, mobile telephony and facsimiles.⁴⁵

However, the law, like any other marketplace, has become more competitive, with firms now battling against local, national and international competition to provide the

⁴³ Parsons, p. 17 – <http://books.google.com/books?id=e3-aYFbxYiEC&printsec=frontcover&dq=knowledge+management+and+law&lr=&cd=2#v=onepage&q=&f=false>

⁴⁴ Davenport, in Parsons, p. 6 – <http://books.google.com/books?id=e3-aYFbxYiEC&printsec=frontcover&dq=knowledge+management+and+law&lr=&cd=2#v=onepage&q=&f=false>. This paradox is noted here, but will be discarded at this point as it is irrelevant to this larger project. For one thing, NTRBs are not so focussed on raising their income. But for another thing, this paradox is now largely outdated anyway, for the reasons outlined in 2.3.

⁴⁵ Rusanow, p. 9 – http://books.google.com/books?id=Ql2UVZdzVIoC&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

best services for a lower fee than their counterparts,⁴⁶ battling to retain staff, and struggling to keep abreast of new technology and the plethora of information deriving from it. KM has an important role to play in this context.⁴⁷

2.2. Knowledge in the legal context

It is worth highlighting that lawyers, like all 'knowledge workers', have two outputs: written outputs (documents – a form of explicit knowledge); and verbal outputs ('airtime' – a form of tacit knowledge).

Types of legal explicit knowledge include:⁴⁸

- legal texts;
- legislation;
- case law;
- commentary;
- letters of advice;
- legal briefs; and
- transactional documents (deeds and agreements).

Types of legal tacit knowledge include:

- knowledge about legal issues;
- knowledge about methodology and processes;
- knowledge about industry trends, opportunities and challenges;
- knowledge about existing and potential clients;
- knowledge about competitors; and
- knowledge about the firm and its staff.

The types of knowledge involved in the practice of law can further be categorised as:⁴⁹

⁴⁶ Rusanow, p. 9 –

http://books.google.com/books?id=Ql2UVZdzVl0C&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

⁴⁷ Eklof, Spieler & Tuh – <http://www.virtuallawjournal.net/?nodeid=31&lang=en>

⁴⁸ Rusanow, p. 71 –

http://books.google.com/books?id=Ql2UVZdzVl0C&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

- Administrative data – which includes all of the nuts and bolts information about firm operations, such as hourly billing rates for lawyers, client names and matters, staff payroll data, and client invoice data;
- Declarative knowledge – knowledge of the law, the legal principles contained in statutes, court opinions and other sources of primary legal authority;
- Procedural knowledge – which involves knowledge of the mechanics of complying with the law's requirements in a particular situation, for example what documents are necessary to transfer an asset from Company A to Company B, or what forms must be filed where to create a new corporation; and
- Analytical knowledge – which pertains to the conclusions reached about the course of action a particular client should follow in a particular situation. Analytical knowledge results, in essence, from analysing declarative knowledge (i.e. substantive law principles) as it applies to a particular fact setting.

Administrative data is most likely to be explicit, while the other categories are more likely to constitute tacit knowledge.

2.3 Knowledge *management* in the legal context

The following are KM strategies which have been used by law firms to accommodate that explicit knowledge ('push strategies'), and leverage the tacit knowledge ('pull strategies'):

'Push strategies' can involve the use of:

- precedent documents and forms;
- a 'best practice' library;
- wikis (i.e. collaborative blogs);
- project methodology documents; and
- practice group intranet sites ('portals').

'Pull strategies' include:

- meetings and conferences in which knowledge is shared;⁵⁰
- 'lessons learned' seminars and debriefings at the conclusion of a matter;

⁴⁹ Edwards and Mahling – <http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Edwards%20etal%201997%20Toward%20Knowledge%20Mgt%20Syss%20in%20%20Legal%20Domain.pdf>

⁵⁰ Kay & Bailey, p. 15 – http://members.optusnet.com.au/~briney001/LPM_1104_Conversations.pdf

- seminars from expert third parties (including regulators, judges, counsel, commentators, and consultants);
- skills and expertise locators (i.e. who knows what? Who has appeared before Justice X in jurisdiction Y? Who has worked with counsel Z?);
- professional development programs (or ‘continuing legal education’);
- mentoring programs (including ‘rotations’ through a series of practice groups) for junior lawyers;
- ‘communities of interest’ or ‘communities of practice’ (which may span different practice groups and locations);⁵¹
- casual conversation; and
- the physical design of offices to encourage knowledge sharing.⁵²

2.4 Benefits of KM in the legal context

In the legal context, a good KM strategy and associated system:

- reduces document drafting time;
- increases research capacity;
- helps the lawyer navigate through large amounts of information and locate the most relevant information;
- leads to better professional development for the lawyer;
- moves expertise out of the minds of a few and into the hands of the firm’s staff in general;⁵³
- encourages ‘pro-active/preventative lawyering’ and eliminates intra-firm competition by facilitating knowledge sharing amongst and across working groups;
- attracts better clients.

⁵¹ A ‘community of practice’ have been defined as “a group of people who are informally bound to one another by exposure to a common class of problem” – Manville, in Edwards and Mahling – <http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Edwards%20etal%201997%20Toward%20Knowledge%20Mgt%20Sys%20in%20t%20Legal%20Domain.pdf>

⁵² Rusanow, p. 28 – http://books.google.com/books?id=Ql2UVZdzVloC&printsec=frontcover&dq=knowledge+management+and+law&lr=&source=gbs_similarbooks_s&cad=1#v=onepage&q=knowledge%20management%20and%20law&f=false

⁵³ And especially because law is precedent driven, expertise can play an important role in the speed and quality of the outcome a new matter – Eklof, Spieler & Tukh – <http://www.virtuallawjournal.net/?nodeid=31&lang=en>

These benefits result in:

- increased client satisfaction and loyalty;
- increased job satisfaction;
- a better organisational culture; and
- increased revenue or decreased costs.

2.5 Challenges to good KM in the legal context⁵⁴

There are numerous challenges to good KM in the legal context, many of these relate to the issue of organisational culture:

- The problem of *individuality*. Lawyers rely on their own unique knowledge base and may be unwilling to share the fruits of their labour;
- The problem of *time pressure*. Time is money in a law firm; any time spent sharing knowledge and experience is time not spent billing.
- The problem of *success*. Success can be the enemy of innovation; many larger law firms have done very well in the past without any recourse to KM.
- The problem of *organisational structure*. KM requires 'horizontal integration' across practice groups, whereas law firms are traditionally integrated vertically, in practice group 'silos',⁵⁵
- The problem of *attitude*. Lawyers can be resistant to change. They are used to relying on precedents and past history, and the legal system is not focused on innovation. The rule of law requires any changes to happen slowly.⁵⁶
- The problem of *security, ethics and confidentiality*.
- The problem of *differing needs*. Lawyers' KM needs vary as they progress through their career and as they develop expertise in different areas of the law. A KM system needs to address these varied and specific needs.⁵⁷

⁵⁴ Edwards and Mahling – <http://www.bsos.umd.edu/gvpt/CITE-IT/Documents/Edwards%20etal%201997%20Toward%20Knowledge%20Mgt%20Sys%20in%20t%20Legal%20Domain.pdf>

⁵⁵ Gillies – http://www.kmworld.com/kmw05/Presentations/B203_Gillies.pdf

⁵⁶ Kabene – http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/kabene/kabene.pdf

⁵⁷ Interview with Sal Messina – <http://www.amplifi.com/KMcourse/Ind%20Interviews/Sal%20Messina.doc>. See also – <http://www.lexisnexis.com/presscenter/hottopics/kminfirms.pdf>

2.6 KM databases in law firms

The average law firm has numerous databases to facilitate its business processes – time management and financial systems, document repositories, and client relationship management platforms. However, at the typical firm, those databases:

- consist in a mixture of paper and electronic formats;
- are not ‘networked’ (i.e. do not work with each other);
- are physically or geographically dispersed;
- are rarely organised in such a way as to facilitate easy retrieval of knowledge (for example, by topic or keyword); and
- do not provide the context in which that knowledge is to be used (meaning, for example, junior lawyers can become confused when asked to work without guidance on templates).

Setting up a database using KM methods is the first step in fully implementing a KM strategy at a law firm. Such a database may contain all of the types of legal explicit knowledge (listed at 2.2 above), as well as:

- best practice precedents;
- information about methods, techniques, routines and processes;
- policy documents;
- strategy documents;
- white papers containing knowledge on the industry and its various actors;
- copies, transcripts and recordings of presentations and other ‘airtime’;
- library references; and
- curricula vitae for all lawyers.

A database is the best way to structure, categorise, filter and organise explicit knowledge and make it accessible for a given community. It is the best way to achieve ‘combination’ knowledge conversion (see 1.2 above), and thereby access the many benefits of KM (see 1.3.2 and 2.4, above).

Establishing a KM database at a law firm carries with it its own challenges:

- The issue of corporate culture, as addressed under 1.3.3. The availability of electronic knowledge exchange does not automatically induce a willingness to share information and build new intellectual capital. Major changes in incentives and culture may be required to stimulate use of a database.⁵⁸ It is

⁵⁸ Nahapiet & Ghoshal, in Gottshalkke – http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_3/gottschalk

therefore important to determine what types of knowledge intended database users need to share, and how to encourage them to share, before considering technological issues.⁵⁹

- Practical problems post-setup of the database. Incorrect use of the database can lead to duplicated documents, meaningless titles, incorrect selection of document type, and lack of contextual descriptions, among other things.⁶⁰
- There is also the problem of 'information overload'. Organisation members collectively acquire significant quantities of information on an ongoing basis. If all such information were to be transmitted to all parts of the organisation, its members would quickly be inundated.⁶¹
- Conflict with corporate security restrictions, confidentiality clauses and ethical concerns. 'Knowledge stealing' has been acknowledged as a factor to overcome with any KM database.⁶²

⁵⁹ Berckman – http://www.cio.com.au/article/6262/when_bad_things_happen_good_ideas. See also Feher, p.303 –

http://books.google.com/books?id=T6bbktGZvQQC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

⁶⁰ Kennedy & Friedmann – <http://www.abanet.org/lpm/lpt/articles/ftr06042.html>

⁶¹ Anand et al., in Gottshalke – http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1999_3/gottschalk

⁶² Feher, p.301 –

http://books.google.com/books?id=T6bbktGZvQQC&printsec=frontcover&dq=knowledge+management&source=gbs_similarbooks_s&cad=1#v=onepage&q=&f=false

3. Knowledge management and native title

3.1. Commentary linking KM with native title

There is very little literature on the topic of knowledge management in the native title context. Subject to the examples given below (see 3.2.1. to 3.2.3.), detailed consideration linking knowledge management and the practice of native title is essentially non-existent.

The primary exception to this is the 'Report into the professional development needs of Native Title Representative Body lawyers' published in 2005 (the Potok report).⁶³ The Potok report notes that:

"The professional development revolution that has taken place in law firms over the past decade has not yet been adopted comprehensively throughout the NTRB system. In recent years, law firms around the world have realised that the historical system of apprenticeship and on-the-job-training as the primary, and sometimes sole, form of developing lawyers' skills is no longer suitable. It may have been appropriate in the past (before fax machines, word processors and emails), but today legal practice moves too quickly. To complement mentor relationships, law firms now deliver training, capture knowledge in the form of precedent databases and make other professional development opportunities and tools available. This is to ensure that lawyers can 'hit the ground running' and satisfy the needs of their clients, their employers and the courts."

The Potok report goes on to examine these approaches and their associated benefits as they would apply to NTRBs. Among other things it specifically proposes the development of a precedents database for NTRB use.

3.2. KM in action in native title practice

3.2.1. The ATNS Project

The Agreements, Treaties and Negotiated Settlements (ATNS) project,⁶⁴ run out of the University of Melbourne, is a project "examining treaty and agreement-making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. The project also examines the process of implementation and the wider factors that promote long term sustainability of agreement outcomes." The ATNS project has a database "which links together current information, historical detail and published material relating to agreements made between Indigenous people and others in Australia and overseas."

⁶³ Available at http://www.auroraproject.com.au/Links/2005_April_Report_Exec_Summary.pdf.

⁶⁴ Available at <http://www.atns.net.au/>

3.2.2. NTRB projects

Various NTRBs have their own internal KM projects in operation.

Queensland South Native Title Services

Queensland South Native Title Services (QSNTS) embarked on a KM project in early 2009 to improve the retention of corporate memory and put in place mechanisms to facilitate succession for their NTRB.⁶⁵

QSNTS purchased an off-the-shelf Electronic Document and Records Management System called TRIM, and configured it to their specific needs with the assistance of an external consultant. This system was able to cater for the various departmental needs in its default format, but needed to be specially configured to allay concerns relating to conflicts of interest. The system was thus configured to store information in discrete 'containers', within which security is preset to enable or deny access to specific persons.

Implementation of the database was made difficult by the fact that few staff had any experience with a system such as TRIM before. One-on-one training sessions, as well as a one-day workshop, were carried out to address this. Additionally, there was initial resistance to the roll-out and uptake in the system took about 3-4 months to get to an acceptable level.

QSNTS now employs an internal administrator for the TRIM system on a full-time basis. Training in the system is included as part of the staff induction process and each staff member is provided with a user manual for the system.

Central Desert Native Title Services

Central Desert Native Title Services (CDNTS) has developed a set of 'Document Management and Filing Procedures'. The CDNTS document is a relatively simple and concise document setting out the procedures to be followed when a file or document is opened or closed (as well as for archiving, amending and naming). It also sets out the process for the organisation of internal, incoming, outgoing and precedent or template documents.

3.2.3. AIATSIS

Grace Koch, of the Native Title Research Unit at AIATSIS, published a report in 2008 entitled the 'Future of Connection Material'.⁶⁶ This report found that valuable and irreplaceable connection material was decaying and dispersed throughout the native title field. The solution to this, it was argued, was good KM system to organise and catalogue the nature and location of connection material.

The report found that the more established NTRBs such as the Northern Land Council, Central Land Council and the Kimberley Land Council have comprehensive cataloguing and internal management systems for their documents, as well as

⁶⁵ <http://ntru.aiatsis.gov.au/conf2009/papers/KatieHandford.pdf>.

⁶⁶ <http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/Future%20of%20connection%20material%20GK70408ed.pdf>

collection managers or librarians. Other NTRBs are in the process of digitising their holdings. Those NTRBs who have experience in collection management have valuable information to share with NTRBs newer to the field.

The report also found that:

- Documents for inclusion on the KM system should be assessed for duplication, uniqueness of material, and general value in relation to the rest of the collection.
- Full-time positions should be created for juniors to undertake the KM processes at NTRBs.
- A set of protocols should be drawn up to standardise basic principles and procedures as well as giving guidance to NTRBs regarding issues of confidentiality, access and use.
- Development of a comprehensive and workable database is crucial to the efficient operation of an organisation.⁶⁷

3.2.4. NNTT database

The NNTT has a database of ILUAs registered with it online.⁶⁸ This database does not contain a significant amount of detail about the ILUAS referred to within it.

3.2.5. ACIL Consulting

ACIL Consulting, in conjunction with Indigenous Support Services, in 2001 released a report on 'Agreements between mining companies and indigenous communities'. They compiled about 140 agreements in total for the purposes of the Report (of which only one was sanitised due to confidentiality concerns), and stated that following the release of the Report they intended to construct a database of agreements on their website. This seems never to have eventuated, however, and there is no sign of such a database, or mention of the Report itself, on their current website.⁶⁹

⁶⁷

<http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/Future%20of%20connection%20material%20GK70408ed.pdf>

⁶⁸ See <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx>

⁶⁹ See: <http://www.aciltasman.com.au/index.php>

4. Putting KM into practice in native title: a step-by-step guide

This section draws on the matters explored above to create a KM strategy for implementation with NTRBs.

A key part of this strategy involves the creation of a database, particularly in relation to agreement precedents.

Step one: draft the KM strategy

Consider the following when drafting the strategy:

1. Identify the broad aims and challenges specific to NTRBs, and outline how the KM system will support those aims and address those challenges.
2. Identify the scope of knowledge the KM system will manage. Identify the 'critical' knowledge which needs to be managed. Consider the types of legal explicit and tacit knowledge involved, and the other information which may be suitable for inclusion on a database, as discussed above.

It is likely that the knowledge the system will manage will be mainly 'transactional documents' – that is, agreement precedents. However, the system may also attempt to manage tacit knowledge, in the form of knowledge about methodologies and processes involved in negotiation of agreements.

3. Identify the barriers (within NTRBs and more broadly) that will need to be addressed by the KM system.

Barriers may include:

- time-poor employees;
- resource-poor NTRBs;
- relatively high turnover of staff;
- lack of junior staff to do low value-added work;
- resistance to change and or to link regional NTRB activities with broader and longer-term outcomes;
- poor communication of tacit knowledge;
- explicit knowledge in a mixture of paper and electronic formats which are not 'networked' and are in dispersed physical locations; may be poorly organised; and do not provide the context in which they are to be used;

- potential incompatibility of various electronic tools already in use (both within and between NTRBs);
 - offices in remote locations;
 - legal conflicts of interest (i.e. multiple overlapping claims at the one NTRB);
 - mixing of skill sets (i.e. anthropological vs legal staff);
 - prevalence of confidentiality concerns;
 - prevalence of sensitive information in agreements – such as cultural heritage and financial information; and
 - presence of many different classes of agreements – including agreements driven solely by compliance with the NTA versus agreements influenced by social impact policies of specific (larger) resource companies.
4. Draw up a protocol to standardise basic principles and procedures as well as giving guidance to NTRBs re confidentiality; sensitive material and conflicts of interest.
 5. Identify the approach to be taken with respect to KM.

These questions will need to be answered:

- Will knowledge be managed centrally, or decentralised to each NTRB, or a hybrid of both?
 - Will the KM facilitator be someone at AIATSIS, or someone within each NTRB, or both?
6. Create a structure that KM will take within each NTRB.

Identify who will lead KM at each NTRB, whether there will be any dedicated KM staff or whether it will become an additional role for existing employees. Identify what current functions of the NTRB will be rolled out under the banner of KM. Ideally, a full time position should be created at the junior level for a person to take charge of KM processes at an NTRB. If such a position is not viable, then secretaries or junior lawyers should at least gather what KM information they can as part of their routine duties in opening or closing files.
 7. Address how KM will fit into the larger NTRB network structure.
 - Who will the KM leader (if there is one) report to?
 - What will be the relationship between the KM and administrative functions?
 - What will KM look like between the anthropological and legal practice groups?
 8. Work out what the KM database will look like.
 - Do NTRBs already possess the relevant KM technological tools, or will tools need to be acquired? Many NTRBs already have internal KM systems in place, using software such as FileMakerPro and TRIM.

- Can improvements be made on existing tools?
9. Outline what the KM initiative will cost.
- How does this weigh up against the costs of not undertaking KM activities?

Step two: target senior management

Secure each NTRB's support for the strategy at the highest level.

Step three: deploy the technology

A database is the best technological method of initially implementing a KM strategy. Some initial tips for setting up a database include:

- Every item of information you can envisage adding to the system should fit comfortably into one category or sub-category;
- Every list of items within a subcategory should be mutually exclusive (i.e. no item on the list would fit equally well in another sub-category's list); and collectively exhaustive (i.e. the list is complete);
- The user should be able to navigate to any item of information with three or fewer mouse clicks, regardless of the starting point;
- The user should be able to navigate to any item on the list with little or no scrolling.
- Users should have access to the source of the knowledge or be able to identify the creator of the knowledge (to increase trust in the system);
- It must be easy to view the history of the item in the system: what date it was added; the date of any revisions; the frequency with which it has been used; and the situations in which it has been used (again to increase trust in the system);
- The software must be able to extract useful knowledge whilst retaining the confidentiality and security of relevant information. At least some parts of the system must support restricted access;
- All firm members should be able to share knowledge easily; the system should capture knowledge without the need for much additional effort from the creator;
- The system should be appropriate for use by persons with all variety of legal and technological skill;
- The system needs to support subject matter indexing;
- Any type of technology supporting the KM process should fit in seamlessly with the routine work of lawyers or risk rejection;

- An off-the shelf system will not work without some modification to allow for the specific outcomes you want out of it;
- Keep in mind that each NTRB may already have some database technology and internal management system in place.

Step four: implement the KM strategy

A. Short term implementation

1. Address the formal issues of KM structure and organisation. Amend position requirements and NTRB organisation to ensure that the KM system can start smoothly.
2. Educate the managers and lawyers in use of the system. Listen to their needs and concerns and consider amendment of the system if required. To encourage uptake of the system in the initial stages, consider a rewards system. Rewards may encompass the compensation system, the career progression system and budgeting. Having someone in an NTRB who is a real advocate for KM is also a help.
3. Begin the technological process. Capture and share the most critical of each NTRB's explicit knowledge on the database. Make sure that confidentiality, sensitive material and conflict of interest concerns have been addressed before documents are published.
4. Address the most basic barriers to KM within and outside the organisation.

B. Medium term implementation

1. Ensure that there is a consistent approach to KM across the various NTRBs.
2. Address the more complex (often cultural) barriers to KM within and outside the organisation.
3. Evaluate the strengths and weaknesses of the KM technological system. Ensure the knowledge on the database is valuable, is titled and contextualised appropriately, and is not duplicated. Beware also of information overload.
4. Consider broadening the focus to deal not only with explicit knowledge KM, but also tacit knowledge KM.

C. Long term implementation (3-5 years)

1. Focus on implementing initiatives to sustain the KM culture and practices built up to that point.
2. Review the database periodically to ensure currency and accuracy of knowledge.

Appendix 3

'Best practice' in native title agreement making: An overview of current commentary^{*}

Contents

1. The Elements	ii
1.1. Defining 'best practice'	ii
1.2. Analysing best practice	iv
1.3. What is best practice at the pre-negotiation/early negotiation stage?	iv
1.4. What is best practice at the substantive negotiation stage?	v
1.5. What is best practice at the post-negotiation/ implementation stage?.....	vii
1.6. What is best practice in terms of content of agreements?	viii
1.6.1. Financial terms	viii
1.6.2. Employment and contracting terms.....	ix
1.6.3. Environmental, social and cultural heritage terms	x
1.6.4. Social investment terms	x
1.6.5. Agreement management and relationship management terms	x
2. Problems with best practice	xiii
2.1. Problems with best practice in the first instance	xiii
2.2. Problems with implementation of best practice.....	xv
Attachment 1: Case studies	xvii
Attachment 2: Resources	xix
Attachment 3: Templates	xxii

* The extensive assistance provided by Jack Brumpton in the preparation of this document is gratefully acknowledged.

1. The Elements

1.1. Defining ‘best practice’

The term ‘best practice’ is not amenable to comprehensive definition, whether in relation to native title specifically, or agreement making more generally. A ‘one size fits all’ approach will find little support in any area of native title;¹ likewise, it is generally acknowledged that best practice requires local solutions.

Internationally, there is support for the notion that best practice should be “defined by decentralized and iterative processes, not by a fixed set of parameters that can be read out of a manual.”² Domestically, the National Native Title Tribunal (NNTT) has seconded this view, stating that attempts to define and propagate best practice through model clauses and processes are “of limited value.”³ According to the NNTT, each agreement will have its own nuances and peculiar focus that makes the use of “off the shelf” clauses and processes potentially problematic.

On the other hand, the countervailing factors in favour of the use of model clauses and processes in native title agreement making, and the resultant commentary on the elements of best practice, are the focus of this document.

Broadly speaking, there are a number of broad concepts that are generally associated with ‘best practice’. The embodiment of reciprocity or mutuality is one.⁴ Capacity building and related corporate governance objectives are another.⁵ A third is ‘sustainability’. The Native Title Payments Working Group has stated that sustainable agreements:⁶

- 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 the long-term benefit of the traditional owners concerned;
- Support Indigenous business and employment, rather than just provide an income stream;

¹ http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/No_one_size_fits_all_for_native_title.aspx ;
http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf - p.28

² <http://www.iied.org/pubs/pdfs/9084IIED.pdf> , pxxiii

³ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Mining%20Agreements%20Content%20Ideas.pdf>, p.9

⁴ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Mining%20Agreements%20Content%20Ideas.pdf>

⁵

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Discussion+paper+-+final+version.pdf/\\$file/Discussion+paper+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.pdf/$file/Discussion+paper+-+final+version.pdf) – p.11

⁶

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p7

- 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; and
- Involve regular review of the long-term objectives.

And the NNTT has described a 'sustainable agreement' as one that:⁷

- Does not provide perverse incentives;
- Has sufficient flexibility for diverse outcomes;
- Maximises the benefits to meet intergenerational needs; and
- Does not substitute for the responsibilities of government.

Finally, 'best practice' is often linked to human rights. The view exists that native title agreements (including mining agreements) should be aimed at and promote economic and social development, and to exhibit best practice should:

- Respond to the Indigenous group's goals for economic and social development;
- Provide for the development of the Indigenous group's capacity to set, implement and achieve their development goals;
- Utilise to the fullest extent possible the existing assets and capacities of the Indigenous group;
- Build relationships between stakeholders; and
- Integrate activities at various levels to achieve the development goals of the group.⁸

⁷

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p7

⁸ <http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2006/Speeches%20Sustainable%20agreement%20making%20Neate%20October%202006.pdf> – p 28

1.2. Analysing best practice

Commentary on best practice in native title agreement making tends to reflect the various stages of the agreement making process: pre-negotiation/early negotiation stage, substantive negotiation and the post-negotiation/implementation.

From a substantive (rather than procedural) viewpoint, another trend is to analyse best practice in terms of outcomes achieved. This approach is based on the link between the content of agreements and the results obtained.

Part 1 of this document will consider these four approaches to the characterisation of best practice in turn. The second part of this paper examines problems encountered in agreeing on and implementing of best practice

1.3. What is best practice at the pre-negotiation/early negotiation stage?

For the mining party, the best practice has been identified as:

- Gaining knowledge about the Indigenous party with whom agreement is sought;⁹
- Ensuring that the Indigenous party has given free, prior and informed consent to the process¹⁰, which includes providing clear information on the development and its impact;¹¹
- Engaging in widespread community consultation, inclusive of not just community leaders and bodies but also those who may be excluded from the decision-making process.¹²
- Identifying and completing necessary research, especially regarding tenure material;
- Ensuring that there is full company commitment up to CEO and Board level to the negotiations;¹³ and
- Taking account of the 'structural limitations' of Indigenous communities, including socio-economic status, education, welfare and health.¹⁴

For the Indigenous party, best practice is:

⁹ [http://www.ret.gov.au/resources/Documents/LPSDP/LPSDP-IndigenousCommunitiesHandbook.pdf - p34](http://www.ret.gov.au/resources/Documents/LPSDP/LPSDP-IndigenousCommunitiesHandbook.pdf-p34)

¹⁰ http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf

¹¹ ISS and ACIL Report to the AMEEF; hardcopy; p. vi

¹² <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

¹³ ISS and ACIL Report to the AMEEF; hardcopy; p. vi

¹⁴ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> , p.12

- Ensuring it is authorised to commence negotiations (and has the right to speak for country);
- Identifying and completing necessary research, especially regarding overlapping claims and connection evidence; and
- Seeking to resolve inter and intra-Indigenous group conflict concerning the project, where possible and appropriate;¹⁵

For both parties, best practice also encompasses:

- Addressing conflict of interest concerns;¹⁶
- Clarifying terms so that everyone has a common understanding of what is being proposed;¹⁷
- Mutually agreeing on a mechanism to resolve disputes or grievances which may crop up during the substantive negotiation stage;¹⁸
- Agreeing on the broad structure, timeframes, parameters and purpose of the negotiations. General goals may be established and agreed through the use of an 'agreement-in-principle' or memorandum of understanding in which parameters and/or processes are spelt out and agreed to;¹⁹
- Agreeing on the roles and responsibilities of the parties; and
- Act and engage proactively to enable timely and efficient outcomes.²⁰

1.4. What is best practice at the substantive negotiation stage?

For the mining party, best practice during substantive negotiation has been identified as:

- Exercising sensitivity in negotiation by providing an appropriate venue for negotiation, providing interpreters where necessary, allowing sufficient time

¹⁵

[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines for Best Practice in Flexible and Sustainable Agreement Making.pdf/\\$file/Guidelines for Best Practice in Flexible and Sustainable Agreement Making.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines%20for%20Best%20Practice%20in%20Flexible%20and%20Sustainable%20Agreement%20Making.pdf/$file/Guidelines%20for%20Best%20Practice%20in%20Flexible%20and%20Sustainable%20Agreement%20Making.pdf)

¹⁶ http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf

¹⁷ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> , p.12

¹⁸ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

¹⁹ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> – p. 18

²⁰

[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines for Best Practice in Flexible and Sustainable Agreement Making.pdf/\\$file/Guidelines for Best Practice in Flexible and Sustainable Agreement Making.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines%20for%20Best%20Practice%20in%20Flexible%20and%20Sustainable%20Agreement%20Making.pdf/$file/Guidelines%20for%20Best%20Practice%20in%20Flexible%20and%20Sustainable%20Agreement%20Making.pdf)

for Indigenous methods of decision-making, observing cultural rules about who can speak for what, and generally employing cultural awareness;

- Cultivating a relationship of trust, respect and understanding between parties by demonstrating a strong commitment to the settlement and delivery of benefits agreed to at the early negotiation stage;
- Balancing respect for the protection of confidentiality with the need to act transparently where appropriate; and
- Ensuring that benefits being negotiated for Indigenous parties are practical and sustainable (see above);

For both parties, best practice also encompasses:

- Employing a flexible, interest-based approach to negotiations.²¹ This means aiming to find common ground, rather than taking a 'win-lose' approach and avoiding technical or positional bargaining;
- Where the negotiations are being conducted through the NTA – adhering to model litigant principles and conducting negotiations in good faith. This includes:
 - complying with agreed negotiation procedures including attendance at meetings;
 - not causing unnecessary delay;
 - conducting themselves with integrity, honesty, cooperation and courtesy;
 - assessing potential liability/likelihood of success early and settling legitimate claims without litigation;
 - making a genuine attempt to reach agreement;
 - acting with impartiality and consistency in handling claims;
 - giving prompt disclosure;
 - engaging in alternative dispute resolution where possible;
 - not relying on technical defences unless it would result in prejudice; and
 - not taking advantage of a claimant who lacks resources.²²

²¹ ISS and ACIL Report to the AMEEF; hardcopy; p. vi

²² [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/\\$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf)

1.5. What is best practice at the post-negotiation/ implementation stage?

For the mining party, best practice at the post-negotiation/implementation stage has been identified as:

- Ensuring the agreement is drafted appropriately. It should be written in plain English, self contained and self evident and able to be used or understood by people who were not necessarily present or part of negotiations;
- Ensuring the whole of the community affected (and not just its leaders) ratify the agreement – a vote has been suggested;²³
- Allocating adequate resources to implement the agreement; and
- Assessing the capacity of Indigenous party to fulfil obligations under the agreement, and acting on that assessment. As the ACIL Consulting Report noted:
 - “Given that many Aboriginal people have not received a satisfactory level of education or employment, it is not realistic to expect that just because an agreement has been reached, Indigenous people will automatically become experts in trusts and handling large sums of money. This also applies in relation to their roles and responsibilities as company directors, members of corporate boards and their roles as trustees”,²⁴
 - Best practice then in this respect means acknowledging that sustainable benefits include the provision of relevant capacity building and governance frameworks. For example, it is common that Indigenous parties may aspire to owning businesses or utilising revenue streams from lump sum cash payments. Where this is the case it may be necessary to investigate appropriate corporate structures and have external expert financial advice, or to provide small business management training.

For both parties, best practice also encompasses regularly reviewing agreements to ensure that requirements are still being met.²⁵

²³ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

²⁴ ISS and ACIL Report to the AMEEF, hardcopy, p. vi

²⁵ [http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DEDAE36942A54D7D90\)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/\\$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf/$file/Guidelines_for_Best_Practice_in_Flexible_and_Sustainable_Agreement_Making.pdf)

1.6. What is best practice in terms of content of agreements?

Having considered best practice in the *process* of agreement making, this section will now examine best practice in the outcomes of that process – the *content* of agreements.

O’Faircheallaigh has identified eight ‘critical components’ of agreements that deal with resource development projects:

- i. Environmental management;
- ii. Cultural heritage protection;
- iii. Rights and interests and land;
- iv. Financial payments;
- v. Employment and training;
- vi. Business development;
- vii. Indigenous consent and support; and
- viii. Implementation measures.

To narrow this down, the content which is dealt with in agreements which exhibit best practice can be arranged into the following categories:

- Financial terms;
- Employment/contracting terms;
- Environmental, social and cultural heritage impact management terms;
- Social investment terms; and
- Agreement and relationship management terms.²⁶

1.6.1. Financial terms

Best practice financial terms include:

- Production/revenue based payments – that is, an annual payment for use of the resource or land, based on a percentage of production or profits;
- Equity – that is, a share of ownership in the project, and/or subsequent share of dividends paid to shareholders (the latter being less common²⁷),²⁸

²⁶ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

²⁷ For one example, see <http://www.smh.com.au/news/national/indigenous-mining-share-deal/2008/03/31/1206850812154.html>

²⁸ ISS and ACIL Report to the AMEEF, hardcopy, p.68.

- Fixed payments in certain circumstances, i.e. one-off payments for reaching agreed milestones, or fixed annual payments when a mine is not in production;
- Establishment of community development funds or foundations (including trusts) – see further under ‘Terms concerning implementation’, below;²⁹ and
- Provision for joint business ventures or microfinance.³⁰

Best practice financial terms may also take into account their potential impact on Centrelink and other social security payments as well as the taxation implications for individuals or communities.³¹

1.6.2. Employment and contracting terms

Best practice employment and contracting terms include:

- A general principle to preferentially employ, or contract, Indigenous people;
- Recruitment and procurement strategies focused on Indigenous Peoples;
- Time-bound targets for local employment, supported by clear definitions of what constitutes ‘local’;
- Skills development for Indigenous Peoples and Indigenous businesses to increase their opportunities to be recruited;
- Providing Indigenous apprenticeship and on-the-job training schemes;
- Partnering with an institution that is well positioned to leverage additional public funding, technical support, and attract external clients that can share the cost and achieve economies of scale;³² and
- Recognition that cultural commitments may require Indigenous employees to be absent from work for certain periods.³³

Best practice provisions for employment set specific and attainable goals. The abovementioned ISS/ACIL report found that a relatively large number of agreements featured employment provisions drafted along the following lines:

“The company will use its best endeavours to employ 25% of the workforce from the Indigenous community, provided they have the appropriate qualifications or expertise”.³⁴

²⁹ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

³⁰ ISS and ACIL Report to the AMEEF, hardcopy, p.69

³¹ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Mining%20Agreements%20Content%20Ideas.pdf>. The NTRU has extensively researched the latter:

<http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/Native%20Title%20Payments%20WEB%20FINAL.pdf>

³² <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

³³ ISS and ACIL Report to the AMEEF, hardcopy, p.65

Such a pre-requisite, in conjunction with a 'best endeavours' qualification, means that job opportunities will be limited for the average Indigenous person. Best practice employment provisions should link with training and skills development programs – not just in mine-related skills but, where relevant, wider objectives such as money management, making commitments, literacy and numeracy, health and hygiene.

1.6.3. Environmental, social and cultural heritage terms

Best practice environmental, social and cultural heritage terms are those that ensure the project manages the environment, land and cultural heritage to high standards in consultation with Indigenous groups and with adequate provision for performance monitoring.³⁵ These objectives should be aided social mapping, baseline studies, cultural heritage surveys and impact assessments.³⁶

1.6.4. Social investment terms

Best practice social investment terms may include support for:

- Social and cultural well-being;
- Counselling and support programs;
- Health and wellness programs;
- Education programs (including scholarships and programs encouraging attendance at schools);³⁷ and
- Local infrastructure programs.

The investment may take the form of a specified financial amount, or other in-kind support.³⁸

1.6.5. Agreement management and relationship management terms

Agreement management and related terms are cited as the most important in any mining agreement as the success of the entire process hinges on this aspect.

Best practice agreement management and relationship management terms should include:

- Terms concerning roles and responsibilities. Agreements should be drafted where appropriate with schedules of roles and responsibilities in relation to the provision of particular benefits;

³⁴ ISS and ACIL Report to the AMEEF, hardcopy, p.64

³⁵ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

³⁶ In hardcopy, and also at <http://www3.interscience.wiley.com/cgi-bin/fulltext/119389485/PDFSTART>

³⁷ ISS and ACIL Report to the AMEEF, hardcopy, p.67

³⁸ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

- Terms concerning Indigenous control of the project. These terms can include commitments relating to (in order of increasing influence of the Indigenous party):
 - Disclosure and public reporting of specific information;
 - Consultation with Indigenous groups on particular issues;
 - Consideration of traditional knowledge in decision-making;
 - Monitoring and auditing performance and impacts (financial, environmental, social), often with direct involvement of Indigenous peoples in the process;
 - Consent for development and further changes to the project by the Indigenous group;
 - Indigenous control on levels of project production and expansion;
 - Indigenous appointments to the board of directors; and even
 - Indigenous majority control of the company.
- Terms for managing grievances and resolving disputes between the parties. Dispute resolution mechanisms generally involve a series of escalating mechanisms to resolve issues, from informal amicable resolution, to more formal meetings between the two parties, to independent arbitration and finally to legal action as a last resort.³⁹
- Terms for review and amendment of the agreement. This may involve mandated reviews at regular time periods and splitting the agreement into components to allow for regular review of certain elements, while keeping separate those elements which should not/cannot be easily or regularly altered;
- Terms regarding mine closure and post-closure aspects. This may include arrangements for issues such as:
 - Environmental rehabilitation;
 - Agreements about land use, including transfer of ownership, post closure;
 - Arrangements for management of social investments funds beyond the life of the mine;
 - Training and retrenchment packages to include building transferable skills and support establishing businesses that are not dependent on the mine; and
 - Linking in with long-term government development plans for the area.
- Terms concerning implementation of the agreement. These may involve:

³⁹ <http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>.

- Establishing co-ordinating, monitoring and liaison structures tasked with ensuring that the objectives of the agreement are fulfilled and its provisions are enacted;⁴⁰
 - Committing adequate funds or other resources to these structures, either through direct funding of their activities by the industry party from beneficial trusts, or from government funding programs; and
 - Arrangements for the management of those beneficial trusts. Careful consideration needs to be given to the issues of identifying the rightful traditional owners who are entitled to payments or compensation, and also the means of payment – if a trust is to be used, then the trustees need to be representative of the community, and may need to receive capacity building in relation to their roles and responsibilities.⁴¹ Agreements also need to contain transparent accountability mechanisms in relation to payments made to trust funds.⁴²
- Terms setting out the process if the agreement is breached, that are proportional and appropriate in nature. ‘Best practice’ may encompass the inclusion of a penalty clause provision for breach of an agreement, in terms of failure to achieve goals in a set timeframe.⁴³

⁴⁰ Examples of such structures are given here – <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> p20; see also ISS and ACIL Report to the AMEEF, hardcopy, pp.70-73

⁴¹ ISS and ACIL Report to the AMEEF, hardcopy, p.67

⁴² ISS and ACIL Report to the AMEEF, hardcopy, p.68

⁴³ For more on agreement implementation and breach, see the next part, ‘Best practice in practice’.

2. Problems with best practice

There is general acknowledgment in the literature that there are not a great number of examples of best practice agreement making in practice. The Report from the Native Title Payments Working Group found that there exists “only around one dozen agreements that provide substantial benefits to Aboriginal people and Torres Strait Islanders and exhibit principles embodying best practice in agreement making.”⁴⁴

According to CAEPR researchers, the outcomes of agreements between mining companies and traditional owners are “frequently deficient”,⁴⁵ with potentially serious consequences.⁴⁶

This overview of the reasons cited for problems with best practice will be dealt with in two parts:

- Problems with best practice in the first instance; and
- Problems with implementation of best practice.

2.1. Problems with best practice in the first instance

There are a number of factors that can work individually or in concert to limit parties’ ability to engage in best practice in the pre-‘sign off’ phases of agreement making.

Lack of funding

Numerous sources, including the Native Title Payments Working Group and the NNTT, acknowledge that government funding in support of future act negotiations has historically and that such limitations are likely to continue.^{47,48}

Companies aiming for minimum compliance / Junior explorer issues

During mining booms new companies (mostly so called ‘junior’ companies) are often drawn in to the mining industry. Late entrants to the sector often accord less emphasis to reputational risk than established players, and may settle for a low level

44

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p2 – although this was disputed in at least one submission in response.

⁴⁵ http://epress.anu.edu.au/caepr_series/no_30/pdf/whole_book.pdf - p6

⁴⁶ http://epress.anu.edu.au/caepr_series/no_30/pdf/whole_book.pdf - p4

⁴⁷

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p2; see also

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Discussion+paper+-+final+version.pdf/\\$file/Discussion+paper+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.pdf/$file/Discussion+paper+-+final+version.pdf) – p6

⁴⁸ <http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2006/Speeches%20Sustainable%20agreement%20making%20Neate%20October%202006.pdf> – p19

of compliance in future act agreement making processes.⁴⁹ In addition, “junior explorers may be more project specific. They may not be able to meet the expectations of Aboriginal groups and may not be able to operate with the delays and complex processes to achieve the agreements reached by larger companies. Delays can impede access to capital, especially where investors are looking for relatively short term profit and will not wait while native title issues are resolved.”⁵⁰ Best practice is therefore sometimes seen as a ‘big company game’⁵¹

This is not to suggest that there is necessarily a positive correlation between outcomes and project scale. O’Faircheallaigh has commented that “while in absolute terms the highest figures for financial compensation have certainly been negotiated for large projects, in relation to the value of mineral output payments under agreements for some ‘small’ mines are among the highest we have found. Further, certain agreements for smaller projects have some of the strongest provisions in relation to cultural heritage and environmental protection.”⁵²

Confidentiality issues

Often examples of best practice from prior agreements are unable to be accessed due to issues of confidentiality. This means that there is a lack of examples of best practice provisions available to parties negotiating agreements. The Native Title Payments Working Group has argued that “while information that is genuinely commercially or culturally sensitive should be protected, much of the structural and technical content of agreements could be made public, assisting future drafters and enabling greater transparency and accountability.” The NTPWG further argued that “Agreements (or examples of best practice agreement provisions) should be able to be accessed from a central database or repository.”⁵³

Problems with mining company – Indigenous owner relationship

Traditional owners can best exercise their rights “by opposing mining initially, something that is structurally facilitated by the right to negotiate provisions of the relatively new native title statutory regime. Whether opposition is fundamental or strategic (or in some cases both), when beneficial agreements are signed and mining goes ahead, relations of conflict suddenly need to transform to relations of cooperation.”⁵⁴ This switch can be difficult to manage, and a hindrance to best practice in agreement making.

Systemic lack of government investment in core citizenship entitlements and normal government services in mining areas

49

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p4

⁵⁰ <http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2006/Speeches%20Sustainable%20agreement%20making%20Neate%20October%202006.pdf> – p26

⁵¹ <http://www.ied.org/pubs/pdfs/9084IIED.pdf> - p63

⁵² <http://ntru.aiatsis.gov.au/conf2003/papers/ciaran.pdf> -p8

⁵³

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf)

⁵⁴ http://epress.anu.edu.au/caepr_series/no_30/pdf/whole_book.pdf - p5

Benefits provisions in future act agreements often focus on basic benefits, such as adequate infrastructure and services, rather than outcomes which will help to ‘close the gap’ with mainstream Australia.⁵⁵ In areas with inadequate infrastructure and services, companies may have to address fundamental education and health objectives before other beneficial provisions such as employment clauses can be brought into effect.

2.2. Problems with implementation of best practice

After parties have formalised their agreement, problems may subsequently occur at the implementation phase. “Many agreements are wonderfully constructed documents that are the product of significant thought and effort—yet they have failed to work in practice.”⁵⁶ Reasons given for this include the following:

Inadequacy of implementation provisions

Few agreements contain effective implementation, monitoring and review provisions (such as those considered above at 1.6.5).⁵⁷ This has been attributed to the fact that much of the literature dealing with best practice focuses on reaching as an end in itself, at the expense of subsequent implementation and enforcement considerations.⁵⁸

As such, a “widespread failure ... to effectively monitor and implement agreements” has been observed, resulting in numerous cases of non-compliance including in relation to cultural heritage protection, employment and training.^{59,60}

There is also a direct link between implementation and enforceability. Very few agreements include penalty clauses for breaches of an agreement provision.⁶¹ This can be compounded by the use of non-specific or ambiguous wording in agreements, such as ‘best endeavours’ clauses which, in effect, make relevant provisions unenforceable.⁶²

Limitations on investment in Indigenous enterprises

Companies often look to provide funds in trust to traditional owners. However, tax concessions to encourage the accumulation of funds for the future of Aboriginal

⁵⁵

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p4

⁵⁶ <http://www.ret.gov.au/resources/Documents/LPSDP/LPSDP-IndigenousCommunitiesHandbook.pdf>

- p39

⁵⁷

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p4

⁵⁸ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf>

⁵⁹ <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf>

⁶⁰ <http://ntru.aiatsis.gov.au/conf2003/papers/ciaran.pdf> - p11; the ISS and ACIL Report to the AMEEF was similarly critical of implementation practices - see p.70 of that hardcopy.

⁶¹ <http://www.austlii.edu.au/au/journals/ILB/2002/60.html>

⁶² <http://www.austlii.edu.au/au/journals/ILB/2002/60.html>

communities are not available (in contrast with the tax concessions available, for example, for superannuation funds).⁶³

Indeed there are legislative disincentives to investment in Indigenous enterprises, such as s193X of the Aboriginal and Torres Strait Islander Act 2005, which allows the Office of Evaluation and Audit to investigate the activities of individuals or organisations who have derived benefit from Australian Government programs, either directly or indirectly.⁶⁴

In addition to all this, some argue there is a general reluctance of banks to finance Indigenous small business enterprises.⁶⁵

Understanding local social dynamics

Misunderstanding the social dynamics relating to a specific project can result in the failure of an otherwise excellent agreement. Agreements that seek to 'mark out' selected individuals and provide benefits to them to the exclusion of others risk collapse. Likewise, seeing the Indigenous community as a 'block' of interests and failing to understand its complexity can pose problems in agreement sustainability. Further, existing Indigenous organisations such as NTRBs, PBCs, and Community councils are part of the organisational landscape and need to be involved at some level in the agreement. This is regardless of matters such as perceived capacity, representativeness, legitimacy and standards of governance.⁶⁶

⁶³

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p4; 9

⁶⁴

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p5

⁶⁵

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p5

⁶⁶

<http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> , p.12

Attachment 1: Case studies

Burrup and Maitland Industrial Estates Agreements

- <http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf> – p.15; also Attachment 1.

The Mt Todd Agreement

- http://www.anu.edu.au/caepr/Publications/DP/1995_DP85.pdf - p.5.

The McArthur River Agreement

- http://www.anu.edu.au/caepr/Publications/DP/1995_DP85.pdf -p. 8.

The Cape Flattery-Hope Vale Agreement

- http://www.anu.edu.au/caepr/Publications/DP/1995_DP85.pdf – p.10.

The Mapoon-Skardon River Agreement

- http://www.anu.edu.au/caepr/Publications/DP/1995_DP85.pdf - p.12.

The Placer Pacific-Kalkadoon Tribal Council Agreement

- http://www.anu.edu.au/caepr/Publications/DP/1995_DP85.pdf – p.14.

The Cape York Model

- <http://www.aiatsis.gov.au/research/docs/dp/DP11.pdf>

The Yandicoogina Model

- <http://ntru.aiatsis.gov.au/ra/RAIP6.pdf>

The Argyle Diamond Mine Agreement (Rio – ‘best practice’ in terms of financial arrangements/payments and trusts)

- [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf) – p6.

Case studies by HREOC

- http://www.humanrights.gov.au/social_justice/publications/corporateresponsibility/HRECOMATRIX1.pdf

Working in Partnership Program case studies

- http://www.ret.gov.au/resources/resources_programs/working_in_partnership/case_studies/Pages/CaseStudies.aspx

Case studies done by CAEPR (ANU) - Ranger Uranium Mine (NT), the Yandicoogina Mine (WA) and the Century Mine (Qld).

- http://epress.anu.edu.au/caepr_series/no_30/pdf/whole_book.pdf -p34; 103; 133.

Canadian perspective – ‘best practice’ in theory and in practice in ‘IBAs’

- <http://s.cela.ca/files/uploads/IBAeng.pdf?q=files/uploads/IBAeng.pdf> - p8 onwards; recommendations for good agreement-making on p.22.
- Note that the same problems with implementation are described – p20.
- See also: <http://www.impactandbenefit.com/DIAND.IBA.CIRL.May399.pdf>

Various Australian case studies prior to 2001

- See ISS and ACIL Report to the AMEEF, p.25 onwards.

Various Queensland case studies

- http://www.qrc.org.au/_dbase_upl/QRC%20final%20report%20submitted%20060607%20updated%20data.pdf – p36.

Attachment 2: Resources

- 'Native Title Payments and Benefits: Literature Review', NTRU @ AIATSIS (2008).
<http://ntru.aiatsis.gov.au/publications/reports%20and%20other%20pdfs/Native%20Title%20Payments%20WEB%20FINAL.pdf>
- 'Indigenous and Local Peoples and Resource Development: International Comparisons of Law, Policy and Practice', Journal of Energy & Natural Resources Law, 2008
<http://www.atns.net.au/JERL%20main%20pages%20-%20March%202008.pdf>
- 'Guidelines for Best Practice – Flexible and Sustainable Agreement Making', Joint Working Group on Indigenous Land Settlements, Attorney-General's Department (2009) – for Governments, but principles apply equally to private entities.
[http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/\(3273BD3F76A7A5DED AE36942A54D7D90\)~Guidelines for Best Practice in Flexible and Sustainable Agreement Making.pdf/\\$file/Guidelines for Best Practice in Flexible and Sustainable Agreement Making.pdf](http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DED AE36942A54D7D90)~Guidelines%20for%20Best%20Practice%20in%20Flexible%20and%20Sustainable%20Agreement%20Making.pdf/$file/Guidelines%20for%20Best%20Practice%20in%20Flexible%20and%20Sustainable%20Agreement%20Making.pdf)
- 'Ten best practice principles' and 'Guidelines in Indigenous decision-making, agreement-making and dispute management processes', Toni Bauman, *AIATSIS Final Report of the Indigenous Facilitation and Mediation Project* (2006).
http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf - p28 - 36.
- 'Good practice guide: Indigenous peoples and mining', ICMM (Draft version, 2009).
<http://d.yimg.com/kq/groups/19218912/1639251/name/GPGIndigenousPeoples-Draft2.pdf>
- 'Mining Agreements: Content Ideas', NNTT (2005).
<http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Mining%20Agreements%20Content%20Ideas.pdf>
- 'Leading Practice SDP for the Mining Industry', DRET Handbook (2007) – p32.
<http://www.ret.gov.au/resources/Documents/LPSDP/LPSDP-IndigenousCommunitiesHandbook.pdf>
- 'Implementation and Resourcing of Native Title and Related Agreements', NNTT (2004).
<http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf>
- 'Partnerships for the pathways ahead: Negotiating native title agreements for a sustainable industry', Graeme Neate, Paper delivered to the Inaugural Global Sustainable Development Conference: 'Partnerships and Pathways to Implementation' (2004).

http://www.minerals.org.au/_data/assets/pdf_file/0011/5987/2B-2NeateGraeme.pdf

- 'Breaking new ground' – the report of the MMSD Project (2002).
<http://www.iied.org/pubs/pdfs/9084IIED.pdf>
- 'Finding common ground' – MMSD Project (2003).
<http://www.iied.org/pubs/pdfs/9267IIED.pdf>
- 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends', Langton and Palmer, *Australian Indigenous Law Reporter*, (2003).
<http://www.austlii.edu.au/au/journals/AILR/2003/1.html#fn130>
- 'Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia', Bradfield in Langton, Mazel, Palmer, Shain, Tehan (eds) *Settling with Indigenous People* (2006).
http://books.google.com.au/books?id=ykiyGUUJqWMC&pg=PA207&lpg=PA207&dq=%E2%80%98Settling+Native+Title:+Pursuing+a+Comprehensive+Regional+Agreement+in+South+West+Australia%E2%80%99&source=bl&ots=bmPBTKC0Sm&sig=P-MJfUaWoNlg4vYHm8WIWjBtdik&hl=en&ei=PxlqS8mpFs2OkQWIwby2DQ&sa=X&oi=book_result&ct=result&resnum=3&ved=0CAwQ6AEwAg#v=onepage&q=%E2%80%98Settling%20Native%20Title%3A%20Pursuing%20a%20Comprehensive%20Regional%20Agreement%20in%20South%20West%20Australia%E2%80%99&f=false – p222.
- 'Mineral Development Agreements Negotiated by Aboriginal communities in the 1990s', O'Faircheallaigh, CAEPR, ANU (1995).
www.anu.edu.au/caepr/Publications/DP/1995_DP85.pdf
- 'Negotiating Major Project Agreements: The 'Cape York Model'', O'Faircheallaigh, *AIATSIS Research Discussion Paper* (2000).
<http://www.aiatsis.gov.au/research/docs/dp/DP11.pdf>
- 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' O'Faircheallaigh, *Land, Rights, Laws: Issues of Native Title* (2004).
<http://ntru.aiatsis.gov.au/conf2003/papers/ciaran.pdf>
- 'Native Title and Mining Negotiations: A Seat at the Table, But No Guarantee of Success' O'Faircheallaigh, *Indigenous Law Bulletin* (2007).
<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/ILB/2007/21.html?query=native%20title%20agreements>
- 'Evaluating Agreements Between Indigenous People and Resource Developers', O'Faircheallaigh in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004).
<http://books.google.com.au/books?id=wBrVTJm6rCYC&pg=PA303&dq=Evaluating+Agreements+Between+Indigenous+People+and+Resource+Developers&cd=1#v=onepage&q=Evaluating%20Agreements%20Between%20Indigenous%20People%20and%20Resource%20Developers&f=false>

- 'The Yandicoogina Process: A Model for Negotiating Land Use Agreements', Senior, *Land, Rights, Laws: Issues of Native Title, Regional Agreements paper no. 6* (1998).
<http://ntru.aiatsis.gov.au/ra/RAIP6.pdf>
- 'Resource Development on Aboriginal Land; a Human Rights Approach' forum, Australian Human Rights Commission (2002)
http://www.humanrights.gov.au/social_justice/publications/corporateresponsibility/HRECOMATRIX1.pdf;
http://www.humanrights.gov.au/social_justice/publications/corporateresponsibility/OVERVIEW.pdf;
http://www.humanrights.gov.au/social_justice/publications/corporateresponsibility/development.html
- 'Australian Government Discussion Paper - Optimising Benefits from Native Title Agreements', Attorney-General's Department (2009).
[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Discussion+paper+-+final+version.pdf/\\$file/Discussion+paper+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.pdf/$file/Discussion+paper+-+final+version.pdf)
- 'Native Title Payments Working Group – Report', Attorney-General's Department (2009).
[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)~Working+Group+report+-+final+version.pdf/\\$file/Working+Group+report+-+final+version.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf)
- 'Implementation: The Forgotten Dimension of Agreement Making in Australia and Canada', O'Faircheallaigh, *Indigenous Law Bulletin* (2002).
<http://www.austlii.edu.au/au/journals/ILB/2002/60.html>
- *Power, Culture, Economy - Indigenous Australians and Mining*, Altman & Martin (eds.), ANU CAEPR (2009)
http://epress.anu.edu.au/caepr_series/no_30/pdf/whole_book.pdf
- 'Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada', Sosa & Keenan (2001)
<http://s.cela.ca/files/uploads/IBAeng.pdf?q=files/uploads/IBAeng.pdf>
- Website of the 'Working in Partnership Program' of the Fed. Dept. of Resources and Energy.
http://www.ret.gov.au/resources/resources_programs/working_in_partnership/Pages/WorkinginPartnership.aspx

Attachment 3: Templates

Agreement templates provide insight into the manifestation of 'best practice' at the context-specific level. Publicly available future act and related agreement templates have been developed in various contexts around Australia. These templates reflect the differences in regulatory frameworks and political imperatives around the country, among other factors. The evident divergence in approach has led one commentator to conclude that there has been a certain 'ad hocery' about process.⁶⁷

Relatively comprehensive agreement templates are available in some states (South Australia and Victoria), while others feature few (New South Wales). In Western Australia templates features templates dealing with cultural heritage but none on any other issue. Meanwhile the Territory has templates dealing with land use in parks and reserves – but none on any other issue. These differences are attributable largely to variations in the regulatory frameworks in place at the state level, but also to

Victoria

- In terms of agreements between Indigenous parties and mining/petroleum interests, the Victorian Government, NTSV and the Victorian Minerals and Energy Council has developed an ILUA template and other templates for use in their jurisdiction in relation to exploration, as well as a number of pro forma deeds and consent deeds:
<http://www.dpi.vic.gov.au/DPI/nrenmp.nsf/LinkView/771FC61DA38AADE74A256A72001EF70E617E72CCD1C18D264A256A800016C10F>
- The Victorian Justice Dept. has also developed a settlement framework under which 'framework agreements' can be made between the State and Indigenous parties.

See the Report recommending the establishment of the framework here:

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/e/b96a40a0048253/FINAL%20SC%20Report%2013May09.pdf>

And this is the framework website:

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/>

See also the ATNS run-down of the Framework:

<http://www.atns.net.au/agreement.asp?EntityID=4883>

South Australia

- A number of stakeholders in SA have come together a produced ILUAs for various industries:

<http://www.iluasa.com/default.asp>

The Mineral Exploration ILUA template for use in SA is here:

⁶⁷ <http://ntru.aiatsis.gov.au/ntpapers/ipv2n26.pdf> -p10

http://www.iluasa.com/dl/ILUA_Minerals_Exploration_Template.pdf

Western Australia

- Regional Standard Heritage Agreement (RSHA) templates have been produced by the government. For those, and further details of the Government's approach to Native Title, see: <http://www.dmp.wa.gov.au/4327.aspx#4919>
- An Issues paper discussing the potential development of ILUA templates in Western Australia can was produced but has not been acted on: <http://www.ont.dotag.wa.gov.au/Files/Issues%20paper.pdf>
- The WA Govt in 2001 signed a *Statement of Commitment to a New and Just Relationship* with ATSIC, to agree on a set of principles for the parties to negotiate a state-wide framework that can facilitate negotiated agreements at local and regional levels: <http://www.dia.wa.gov.au/Documents/Policies/StatementOfCommitment.pdf>

Northern Territory

- An ILUA template has been developed for parks and reserves in the Territory, pursuant to the [Parks and Reserves \(Framework for the Future\) Act 2003 \(NT\)](#): http://ntru.aiatsis.gov.au/major_projects/nt_land&water_pdfs/Joint%20management/NT%20ILUA%20Template.pdf
- The *Native Title Petroleum Agreement between the Northern Land Council and Sweetpea Corporation* is seen as a template for that type of agreement. See: <http://www.atns.net.au/agreement.asp?EntityID=2945>

Queensland

- A sample ILUA is provided in the following document provided by the Qld. Dept. of Energy, Resources and Mines (p.16): http://www.derm.qld.gov.au/nativetitle/pdf/land_use_agreement1.pdf
- A model ILUA was developed and made available in 2000.⁶⁸ It has been widely used around the state: http://www.derm.qld.gov.au/nativetitle/pdf/mining/iluas_map.pdf
- There some regional agreements and heads of agreement which have been signed and are available, complete with explanations of their framework: http://www.wettropics.gov.au/rah/rah_pdf/regional_agreement.pdf
<http://www.atns.net.au/agreement.asp?EntityID=472>
- THE QMC and the QIWG signed a MoU in 2005 in which it was stated that both parties "may investigate the possible development of model generic arrangements, in relation to aspects of native title and cultural heritage." It does not appear that any such collaborative development ever occurred. See: http://www.qrc.org.au/dbase_upl/QIWGMoU.pdf

⁶⁸ <http://www.atns.net.au/agreement.asp?EntityID=1640>

New South Wales

- Although not a template specifically, the Natural Resources Advisory Council (NSW) has developed an 'Aboriginal Natural Resource Agreements Kit'. See: http://www.nrac.nsw.gov.au/projects/pdf/ANRA_kit_web.pdf

Appendix 4
Project Partner Deed

Dated

Native Title Representative Bodies Knowledge Management Pilot: Agreement Making

Project Partner Deed

Parties

Australian Institute of Aboriginal and Torres Strait Islander Studies
ABN 62 020 533 641

And

Central Desert Native Title Services
ABN 53 124 921 811

Cape York Land Council
ABN 22 965 382 705

Yamatji Marlpa Aboriginal Corporation
ABN 14 011 921 883

Central Land Council
ABN 71 979 619 393

Native Title Services Victoria
ABN 27 105 885 149

Deed dated

Parties

Australian Institute of Aboriginal and Torres Strait Islander Studies ABN 62 020 533 641, a body corporate established under section 4 of the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989* (Cth) and having its principal place of business at Lawson Crescent, Acton in the Australian Capital Territory
(AIATSIS)

and

Central Desert Native Title Services ABN 53 124 921 811 of Lower Ground Floor, 170 Wellington Street, East Perth WA 6004

and

Cape York Land Council ABN 22 965 382 705 of 32 Florence Street, Cairns QLD 4870

and

Yamatji Marlpa Aboriginal Corporation ABN 14 011 921 883 of 5th Floor, 256 Adelaide Terrace, Perth WA 6000

and

Central Land Council ABN 71 979 619 393 of 27 Stuart Highway, Alice Springs NT 0870

and

Native Title Services Victoria ABN 27 105 885 149 of Level 2, 642 Queensberry Street, North Melbourne VIC 3051

(collectively the "**Project Partners**")

Introduction

- A.** AIATSIS is launching the Native Title Representative Body Knowledge Management Pilot: Agreement Making (**the Project**) with the objective of developing and disseminating information of precedential value for use by Native Title Representative Bodies and service providers (**NTRBs**).
- B.** The Project will involve the submission by Project Partners, and collation by AIATSIS, of legal documents including advices, contracts and court materials as well as other information to form a central knowledge management database (**the Project Database**) for use by NTRBs.
- C.** The Project Partners are NTRBs who intend to contribute to the Project and to utilise the Information included in the Project Database.
- D.** The Parties agree to co-operate in accordance with the principles set out in this Deed to achieve the objectives of the Project as summarised in Recitals A and B.

- E. AIATSIS will lead the Project Partners and be responsible for coordinating the Project.

It is witnessed

1. Definitions and interpretation

1.1 Definitions

In this Deed:

- (1) **Applicable Laws** means the relevant laws, regulations, codes, rules and standards that may govern the conduct of the Parties under this Deed;
- (2) **Confidential Information** means information which is subject to an obligation of confidence (express or implied);
- (3) **Deed** means this document, including any schedule or annexure to it; and
- (4) **Information** includes deeds, agreements, advices, practice notes, court documents, historical data and any other information which may be of value to Project Partners and has been approved under clause 4.5 for inclusion in the Project Database;
- (5) **Intellectual Property or Intellectual Property Rights** includes any:
 - (a) copyright;
 - (b) design, patent, trademark, semiconductor, circuit layout or plant breeder rights (whether registered, unregistered or applied for);
 - (c) trade, business, company or domain name; and
 - (d) know-how, inventions, processes, confidential information (whether in writing or recorded in any form);

and any other proprietary, licence or personal rights arising from intellectual activity in the business, industrial, scientific or artistic fields and any application or right to apply for registration of any of those rights;
- (6) **Legal Professional Privilege** includes privilege recognised at common law and under the Commonwealth, State and Territory Evidence Acts.;
- (7) **Project Partners** refers to NTRBs that have executed a Project Partner Deed and who will be contributing to or otherwise partaking in the Project and includes NTRBs that execute a Project Partner Deed after the commencement of this Deed;
- (8) **Parties** means the parties to this Deed, being AIATSIS and the Project Partners;
- (9) **Preliminary Content** includes deeds, agreements, advices, practice notes, court documents, historical data and any other information which may be of value to the Project Partners as "Information" but has not been authorised by a Project Partner under clause 4.5 for inclusion in the Project as Information;

- (10) **Privacy Legislation** means the *Privacy Act 1988* (Cth) and any State and Territory acts dealing with privacy and the protection of personal information and any associated regulations or subordinate legislation;
- (11) **Personal Information** means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion;
- (12) **Use** includes reproduce, modify and adapt but does not include publication or communication to the public at large.

1.2 Interpretation

- (1) Reference to:
 - (a) one gender includes the others;
 - (b) the singular includes the plural and the plural includes the singular;
 - (c) a person includes a body corporate;
 - (d) a Party includes the Party's executors, administrators, successors and permitted assigns;
 - (e) a thing includes the whole and each part of it separately;
 - (f) a statute, regulation, code or other law or a provision of any of them includes:
 - (i) any amendment or replacement of it; and
 - (ii) another regulation or other statutory instrument made under it, or made under it as amended or replaced; and
 - (g) dollars means Australian dollars unless otherwise stated.
- (2) "Including" and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings and any table of contents or index are for convenience only and do not form part of this Deed or affect its interpretation.
- (5) A provision of this Deed must not be construed to the disadvantage of a Party merely because that Party was responsible for the preparation of the Deed or the inclusion of the provision in the Deed.

1.3 Parties

- (1) If a Party consists of more than 1 person, this Deed binds each of them separately and any 2 or more of them jointly.
- (2) An obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly.
- (3) A Party which is a trustee is bound both personally and in its capacity as a trustee.

2. Duration

- 2.1 Each individual Project Partner commences to be bound by this Deed on the earlier of the date:
- (1) the Deed is signed by that Project Partner;
 - (2) the Project Partner approves Preliminary Information for inclusion in the Project;
 - (3) the Project Partner accesses Information contributed to or stored in the Project Database or
 - (4) the Project Partner otherwise commences participating in the Project,
- and will terminate on the earlier of the effective date of:
- (5) the Project Partner's notice under clause 9 of its intention to withdraw from the Project; or
 - (6) AIATSIS's notice under clause 10 of its intention to terminate the Project.

3. Governing Principles of the Project

- 3.1 The Parties acknowledge that the purpose of the Project and this Deed is to facilitate the sharing of knowledge amongst NTRBs.
- 3.2 Each Party agrees to:
- (1) cooperate fully with all other Parties to ensure the long term success of the Project;
 - (2) conduct all negotiations between the Parties in absolute good faith;
 - (3) pay its own costs and outlays connected with the Project and the negotiation and execution of this Deed;
- 3.3 The Project Partners acknowledge that AIATSIS will direct and lead the coordination and development of the Project.

4. Review of Preliminary Content

- 4.1 AIATSIS (through its authorised representative) will attend each Project Partner to assist in the identification and preparation of Preliminary Content for submission in the Project. This process may include the modification of Preliminary Content for standardisation purposes and for the purpose of removing content which, if submitted by the Project Partner, may be in breach of the Project Partner's warranty under clause 5.1.
- 4.2 Upon completion of AIATSIS's review of a Project Partner's Preliminary Content, the AIATSIS authorised representative will present to that Project Partner the Preliminary Content (as modified by AIATSIS as the case may be) which AIATSIS would like to include in the Project.
- 4.3 AIATSIS makes no warranties or representations that the Preliminary Content identified and prepared by AIATSIS and provided to a Project Partner under clause 4.2 is suitable for inclusion in the Project as Information.

4.4 A Project Partner must review the Preliminary Information as provided by AIATSIS under clause 4.2 and notify AIATSIS within 21 days of receiving the Preliminary Information (subject to an extension granted by AIATSIS under clause 4.6) if any of the Preliminary Content:

- (1) contains any Personal Information;
- (2) contains any Confidential Information;
- (3) is subject to Legal Professional Privilege;
- (4) contains Intellectual Property Rights, including moral rights, of any person; and
- (5) is otherwise not suitable for the inclusion in the Project.

Any Preliminary Information subject to notification under this clause 4.4 shall not be included in the Project Database as Information.

4.5 If a Project Partner does not notify AIATSIS under clause 4.4, the Preliminary Content will be deemed approved by the Project Partner for submission and inclusion in the Project Database as Information.

4.6 A Project Partner may seek an extension to the 21 day review period under clause 4.4 by providing a written request to AIATSIS no later than 5 days before the expiry of the review period.

5. Inclusion of Information in the Project Database

5.1 A Project Partner, in approving Information under clause 4.5, warrants that:

- (1) the Information does not contain any Personal Information or, if the Information does contain Personal Information, the Project Partner has obtained the prior express consent of the individual to whom that Personal Information belongs to permit the inclusion of the Information in the Project Database and the dissemination amongst and Use of the Personal Information by the Parties;
- (2) the Information does not contain any Confidential Information;
- (3) the Information is not subject to Legal Professional Privilege;
- (4) the inclusion of the Information in the Project Database and the Use of the Information (in whole or in part) by the Parties will not infringe the Intellectual Property Rights, including moral rights, of any person; and
- (5) the inclusion of the Information in the Project and any use of or access to the Information by the Parties in accordance with this Deed will not breach any Applicable Laws.

5.2 The Project Partner grants to AIATSIS and all other Project Partners a non-exclusive, royalty-free, perpetual, sub-licensable licence to Use the Information for the purposes of the Project.

5.3 If a Project Partner becomes aware or reasonably suspects that the Information or any Use of the Information by the Parties:

- (1) breaches an obligation of confidence,

- (2) infringes the Intellectual Property Rights of any person;
- (3) breaches the Privacy Legislation;
- (4) constitutes a waiver of Legal Professional Privilege; or
- (5) otherwise breaches any Applicable Laws,

the Project Partner must immediately notify AIATSIS.

- 5.4 AIATSIS must, within seven days of receiving notice from a Project Partner under clause 5.3, remove the offending Information from the Project Database. The Project Partners acknowledge that any removal of Information from the Database may not prevent other Project Partners from Using or storing that Information if accessed by Project Partners prior to the Information's removal from the Database.

6. Use of Information by Project Partners

- 6.1 Each Project Partner may, upon completion of the Project Database, access and Use Information provided by other Project Partners.
- 6.2 Each Project Partner acknowledges that the Parties make the Information available on an 'as is' basis and the Parties make no warranties as to the accuracy, currency or completeness of the Information.
- 6.3 The Project Partners acknowledge that the Information is not intended to constitute legal advice and each Project Partner must make its own enquiries and seek professional legal advice before relying upon the Information.
- 6.4 A Project Partner must not assert ownership over any Intellectual Property Rights subsisting in the Project or the Information (except to the extent that Intellectual Property Rights subsist in Information contributed to the Project by that Project Partner).
- 6.5 A Project Partner must not publish or otherwise communicate to the world at large any Information obtained through the Project without seeking the prior consent of AIATSIS. For the avoidance of doubt, this clause 6.5 does not prevent the disclosure of Information to clients by Project Partners in the course of providing legal advice and services to clients.
- 6.6 The Project Partners must comply with any reasonable directions given by AIATSIS in relation to the Use and return of Information.

7. Release and Indemnity

- 7.1 Each Project Partner ("the releasing Project Partner") releases the other Project Partners and AIATSIS from all liability for losses (direct and indirect, consequential and special losses) and liabilities incurred, including all costs actually payable to legal representatives (whether or not under a costs agreement) and other expenses incurred in connection with a demand, action, arbitration or other proceeding (including mediation, compromise, out of court settlement or appeal) incurred by a Project Partner arising from or in connection with:
- (1) the releasing Project Partner's involvement in the Project;
 - (2) the releasing Project Partner's access to or Use of any Information; and
 - (3) any access to or Use of Information originating from the releasing Project Partner by AIATSIS or other Project Partners.

8. Publicity

- 8.1 The Project Partners acknowledge the right for AIATSIS to use each Project Partner's name, trade marks or logos and to make public statements about the Project and the Project Partners' involvement in the Project.

9. Withdrawal from the Project

- 9.1 A Project Partner may withdraw from the Project at any time by giving 14 days' written notice to AIATSIS.
- 9.2 The Project Partners acknowledge that withdrawal from the Project does not require AIATSIS to return any or all of the Information originating from the withdrawing Project Partner.

10. Termination of the Project

- 10.1 AIATSIS may in its absolute discretion discontinue the Project by giving written notice to the Project Partners.
- 10.2 The Project Partners acknowledge that termination of the Project does not require AIATSIS to return any or all of the Information originating from the Project Partners.
- 10.3 The Parties acknowledge that on the termination of this Deed under clauses 9 or 10 the Parties continue to be bound by the obligations relating to the objective of the Project, Use of Information, warranties and exclusions of warranties in relation to Information and Preliminary Content, releases and indemnities, return of Information by AIATSIS and waivers and any other obligations which by their nature are intended to survive this Deed.

11. Relationship of the Parties

The Parties agree that:

- (1) nothing contained in this Deed constitutes any of them as agent, partner or trustee of any other of them, or creates any agency, partnership or trust for any purpose whatsoever; and
- (2) except as otherwise specifically provided in this Deed, a Party does not have any authority or power to act for, or to create or assume any responsibility or obligation on behalf of, any other Party.

12. Entire understanding

This Deed:

- (1) is the entire agreement and understanding between the Parties on everything connected with the subject matter of this Deed; and
- (2) supersedes any prior agreement or understanding on anything connected with that subject matter.

13. Variation

An amendment or variation to this Deed is not effective unless it is in writing and signed by the Parties.

14. Waiver

- 14.1 A Party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- 14.2 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.
- 14.3 A waiver is not effective unless it is in writing.
- 14.4 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

15. Notices

- 15.1 A notice or other communication connected with this Deed (**Notice**) has no legal effect unless it is in writing.
- 15.2 In addition to any other method of service provided by law, the Notice may be:
- (1) sent by prepaid post to; or
 - (2) delivered at;
- the address of the addressee set out in this Deed or subsequently notified.
- 15.3 If the Notice is sent or delivered in a manner provided by clause 15.2, it must be treated as given to and received by the Party to which it is addressed:
- (1) if sent by post, on the 2nd business day (at the address to which it is posted) after posting; or
 - (2) if otherwise delivered before 5pm on a business day at the place of delivery, upon delivery, and otherwise on the next business day at the place of delivery.

16. Governing law and jurisdiction

- 16.1 The law of the Australian Capital Territory governs this Deed.
- 16.2 The Parties submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory and of the Commonwealth of Australia.

Executed as a Deed.

Signed sealed and delivered for and on behalf of **AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES** ABN 62 020 533 641 by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness
(BLOCK LETTERS)

Name of authorised representative
(BLOCK LETTERS)

Address of witness

Signed sealed and delivered for and on behalf of **NATIVE TITLE SERVICES VICTORIA** ABN: 27 105 885 149 by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness
(BLOCK LETTERS)

Name of authorised representative
(BLOCK LETTERS)

Address of witness

Signed sealed and delivered for and on behalf of **CAPE YORK LAND COUNCIL**
ABN: 22 965 382 705 by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness
(BLOCK LETTERS)

Name of authorised representative
(BLOCK LETTERS)

Address of witness

Signed sealed and delivered for and on behalf of **CENTRAL DESERT NATIVE TITLE SERVICES** ABN: 53 124 921 811 by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness
(BLOCK LETTERS)

Name of authorised representative
(BLOCK LETTERS)

Address of witness

Signed sealed and delivered for and on behalf of **YAMATJI MARLPA ACORIGNAL CORPORATION** by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness
(BLOCK LETTERS)

Name of authorised representative
(BLOCK LETTERS)

Address of witness

Signed sealed and delivered for and on behalf of **CENTRAL LAND COUNCIL** by its authorised representative in the presence of:

Signature of witness

Signature of authorised representative

Name of witness
(BLOCK LETTERS)

Name of authorised representative
(BLOCK LETTERS)

Address of witness