



Agreements, Treaties and Negotiated Settlements Project

Working Paper Series

Transparency in Resource Agreements with Indigenous People in Australia

Miranda Stewart, Maureen Tehan and Emille Boulot

No. 4/2015

www.atns.net.au



Transparency in Resource Agreements with Indigenous People in Australia

Miranda Stewart, Maureen Tehan and Emille Boulot

ISSN 1839-2717

Published by the Agreements, Treaties and Negotiated Settlements Project in July 2015.

The views expressed in this publication are those of the author and do not necessarily represent those of the Agreements, Treaties and Negotiated Settlements Project, nor of the project's partner organisations.

Copyright © Agreements, Treaties and Negotiated Settlements Project

Apart from any fair dealing for the purpose of private study, research, criticism or review, as permitted under the Copyright Act 1968, no part of this publication may be reproduced without the written permission of the publisher.

The ATNS Working Paper Series

The Working Paper series is an occasional multi-disciplinary series of refereed research papers, published from time to time throughout the year. The series allows the ATNS Project to target emerging research issues in a size and format that is useful to a range of audiences, while maintaining a high academic quality guaranteed by submitting papers to a refereeing process.

The Working Paper Series is made available electronically via our website: www.atns.net.au. Enquiries should be addressed to: ATNS Research Team at atns-team@unimelb.edu.au

This Report was prepared for the Department of Industry and has not been independently refereed. The statement or opinions that are expressed in this paper reflect the views of the authors and do not represent the views of the Commonwealth of Australia.

Acknowledgements

The Agreements, Treaties and Negotiated Settlements Project is grateful for the support of its partners:



Australian Government
Department of the Prime Minister and Cabinet



AIATSIS
Australian Institute of Aboriginal
and Torres Strait Islander Studies



Australian Government
Australian Research Council

RioTinto



woodside

Santos



THE UNIVERSITY OF
MELBOURNE





TRANSPARENCY IN RESOURCE AGREEMENTS WITH INDIGENOUS PEOPLE IN AUSTRALIA

MIRANDA STEWART, MAUREEN TEHAN AND EMILLE BOULOT

Miranda Stewart is a Professor and Director of the Tax, Transfer Policy Institute at the Australian National University and is an affiliate Professor with the Melbourne University Law School. Miranda's research interests include tax law and policy including not-for-profits and tax, transparency and the legitimacy of tax law reform.

Maureen Tehan is an Associate Professor at the Melbourne University Law School and Associate Director of the Centre for Resources, Energy and Environmental Law. Maureen's major focus of research and academic research is Indigenous legal issues with a particular emphasis on native title, heritage protection and land access, use and management.

Emille Boulot is a Researcher with the Australian Research Council Linkage Project 'Poverty in the Midst of Plenty' and her research interests include Indigenous legal issues and environmental law.



Abstract

This working paper examines transparency requirements in agreement making with Indigenous People. In particular, this working paper examines resource payments provided to Indigenous entities or individuals, under a variety of types of agreements made by Indigenous peoples with resource companies, and/or governments. In general, these resource payments are made as part of obtaining a social licence to carry out resource activity on Indigenous lands, and in a process of a resource company gaining approval for exploration or production licenses. Benefits made under agreements can include monetary and non-monetary benefits such as training, education and employment benefits.

Payments or other benefits are provided by resource companies to Indigenous peoples in relation to investment in oil, gas, mining exploration or production in Australia under various legal regimes and in a range of forms. We call the many diverse payments and benefits that may be provided to Indigenous people under these regimes *resource payments* for ease of reference in this working paper. Resource payments may be provided to Indigenous entities or individuals, under a variety of types of agreement made by Indigenous peoples with resource companies, and/or governments. In general, these resource payments are made as part of obtaining a social licence to carry out resource activity on Indigenous lands, and in a process of a resource company gaining approval for exploration or production licenses.

Overall, there are minimal or no public disclosure requirements for most types of resource payments, in law and practice in Australia. There is also, in general, no legislative prohibition of disclosure or public reporting of resource payments. Most resource payments are made under contractual agreements between resource companies and Indigenous communities. Subject to normal contractual rules, the parties (resource companies and Indigenous communities) could agree to disclose or report resource payments. However, most do not.

Australian law does require some reporting of the existence of agreements under which resource payments are made and the parties to those agreements, and also requires some reporting by Indigenous entities of sources of income including resource payments that they receive. There is a spectrum of legal requirements for public disclosure and transparency of resource payments made to Indigenous people by governments and resource companies. Consequently, in this working paper, we organise the different entities and agreements under which resource payments are made, along a spectrum of transparency from those agreements or entities with the greatest amount of publicly available information, to those agreements which are least transparent.

Part 1 of this working paper examines the level of transparency in resource payments. Part 2 examines the range of potential benefits that an Indigenous party to an agreement may receive, the potential value of such benefits and the regulatory requirements in relation to received agreement benefits. Part 3 summarises reporting requirements for entities that receive resource payments and part 4 summarises reporting requirements for agreements under which resource payments are made.



Table of Contents

Glossary	6
Introduction: Transparency in resource payments.....	7
1.1 Low transparency?	8
1.2 Low levels of mandated disclosure.....	8
1.3 The private or commercial nature of agreements	9
1.4 The resource-intensive nature of formal agreement registration	10
1.5 A tendency to treat the totality of an agreement as ‘confidential’	10
1.6 Arguments made for increased transparency	11
2. Types of resource payment	13
2.1 Legal framework for resource payments	13
2.3 Estimated value of resource payments.....	14
2.4 Types of resource payment	14
2.5 Tax treatment of resource payments.....	15
3. Transparency and reporting requirements for entities.....	17
3.1 CATSI Corporations.....	17
3.2 Proprietary Limited company	17
3.3 Company limited by guarantee.....	18
3.4 Discretionary or fixed trusts.....	18
3.5 Incorporated associations	19
3.6 Registration as a charity.....	19
3.7 Victorian Traditional Owners Trust	20
3.8 Indigenous Community Development Corporation (ICDC).....	20
4. Transparency and reporting requirements for agreements	21
4.1 Native Title Agreements	22
4.2 State government settlements.....	29
4.3 Aboriginal Land Rights (NT) Act (ALRA) payments	32
4.4 Heritage agreements.....	35
4.6 Other agreements with governments.....	36
4.7 Relevant international law principles.....	36
References.....	38



Glossary

ABA	Aboriginals Benefit Account
ACNC	Australian Charities and Non-for-Profits Commission
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALGA	Australian Local Government Association
ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
ASIC	Australian Securities and Investment Commission
ATNS	Agreements, Treaties and Negotiated Settlements Project
CATSI	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)
CGOI	Consolidated Gross Operating Income
COAG	Council of Australian Governments
DGR	Deductible gift recipient
FaHCSIA	The former Department of Families, Housing, Community Services and Indigenous Affairs, now the Department of Social Services
ICCPR	International Covenant on Civil and Political Rights
ICDC	Indigenous Community Development Corporation
ILUA	Indigenous Land Use Agreement
MWT	Mining Withholding Tax
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i> (Cth)
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
TOSA	<i>Traditional Owner Settlement Act 2010</i> (Vic)
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples



Introduction: Transparency in resource payments

Payments are made to indigenous peoples and communities under various arrangements which provide access to land for a company, identification and protection of indigenous cultural heritage, a social licence to operate for the company and/or fulfil legislative requirements.

The term transparency is very broad and may range from full public disclosure to minimal disclosure between parties to agreements. Therefore in this working paper, depending on context, we use the term transparency in a general way to cover the full spectrum of transparency ranging from public disclosure to transparency between parties and beneficiaries under agreements. In assessing the relevant level of transparency it is helpful to ask for whom the transparency is sought and for what purpose as requirements for transparency may depend on matters such as whether projects, agreements and benefits are large or small scale and any in built transparency measures between parties.

Overall, there is a lack of public disclosure regarding resource payments to Indigenous people in Australia. The law does not require reporting for most kinds of resource payments. In particular, there are limited reporting obligations for payments made under native title agreements, which are the most common form of resource agreement with Indigenous people. While this may mean there is a lack of public transparency, the lack of public disclosure does not necessarily mean a lack of transparency between parties to or beneficiaries of agreements.

The law also does not prohibit transparency of resource payments in most cases. Most resource payments to Indigenous people are made under contractual agreements. Consequently, the resource companies and Indigenous communities who are party to agreements under which resource payments are made *could agree* to make the contents, types of payments and amounts public. In general, they do not do so.

While overall there is low transparency in the sense of public disclosure, the law does require reporting of some basic information about agreements under which resource payments are made, and requires reporting by some kinds of entity that receive resource payments. There is a spectrum of transparency requirements from more to less transparent produced by the patchwork of legal regimes for resource agreements and Indigenous entities. Consequently, in this working paper, we organise the different entities and agreements under which resource payments are made, along a spectrum of transparency from those agreements or entities with the greatest amount of publicly available information, to those agreements which are least transparent. Part 3 and Appendix B summarises reporting requirements for entities that receive resource payments. Part 4 and Appendix C summarises reporting requirements for agreements under which resource payments are made. Appendix E provides some examples of agreements and the quantum of payments made pursuant to them.

One form of native title agreement, the Indigenous Land Use Agreement (ILUA), must be registered with the National Native Title Tribunal (NNTT) and so the existence of ILUAs is accessible from one central public repository. However, apart from their existence and information about the parties and territory covered, the terms of ILUAs and payments made under ILUAs do not have to be publicly reported.

Much less information is available about other types of native title agreement. Specifically, Future Act Agreements under the native title right to negotiate regime are the least transparent of the agreements examined. Only the number of Future Act Agreements published and nothing is known as to their content unless parties make information available via press release or other means.



Agreements under the *Traditional Owner Settlement Act 2010* (TOSA) in Victoria are publicly available and the process is therefore quite transparent.

Aboriginal land rights mining related payments under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) are next in levels of transparency. Payments are required to be reported by the land council which receives the payments, in general terms. The statutory royalty equivalents must be paid to *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI) corporations and are therefore subject to the oversight of the Registrar of Indigenous Corporations (see 3.1 below). While the full text of agreements is generally not available and the information is more difficult to locate, the ALRA provides a mandated procedure and protocols around negotiation and reporting on benefits received.

1.1 Low transparency?

The relatively low level of transparency of resource payments with Indigenous people is primarily the result of legal regimes not requiring public reporting of these payments.

However, given that there is not usually a prohibition on publicity, parties could report agreements and resource payments if they chose. The relatively low transparency of resource payments in Australia can be attributed to a variety of factors, including:

- Low legal requirement for disclosure
- The viewing by some or all of the parties to agreements as well as regulators, as private or commercial contracts similar to agreements with private land-holders, especially where the State is not a party;
- The availability of (and preference for) more informal, more flexible and less resource-intensive (and hence less burdensome in terms of disclosure) types of agreements over more formal, and marginally more transparent, alternatives such as ILUAs; and
- A widespread tendency by parties to agreements to regard the entirety of agreements as ‘confidential’.

1.2 Low levels of mandated disclosure

The legal regime for most kinds of resource payments to Indigenous peoples does not require or encourage publicity of resource payments.

In a discussion paper titled *Leading Practice Agreements*, the Commonwealth government has suggested that broadening the requirements for the amount of information that must be made available for public inspection following the registration of an ILUA could improve the transparency of such agreements (2010a: 12–13). However, this discussion paper also highlighted concerns that would accompany any attempt to enhance transparency by mandating greater disclosure in statutory rules.

For instance, prescribing a broader range of information to be disclosed could lead to a greater ‘focus on form rather than substance’ in agreement-making parties’ decisions about which information to release to the public (Commonwealth of Australia 2010a: 13). Furthermore, if these broader disclosure requirements were applied to ILUAs only, they could make parties even more reluctant to register their arrangements in this form, increasing the existing



preference for less time-consuming, more informal arrangements (Commonwealth of Australia 2010a).

The introduction of mandatory requirements for full or more comprehensive disclosure of all agreement terms could remove some of the key attractions that agreement-making holds for agreement participants. These attractions include the confidential, flexible nature of agreements, the fact that they represent a far less time-consuming alternative to formal processes such as the running of a litigated native title claim, or the obtaining of a future act determination by the NNTT and the relationship building inherent in the agreement making process. The nature of these attractions also shows that while the low threshold of disclosure prescribed by the *NTA* with respect to ILUAs and Future Act Agreements has a role to play in their low transparency levels, other less formal factors are more determinative in the culture of confidentiality that has come to permeate agreement-making with Indigenous people.

1.3 The private or commercial nature of agreements

Many parties involved in negotiations over land access for mining, often including both corporations and Indigenous land owners, consider that the legal relationship is a private contractual relationship that should not be subject to public regulation and scrutiny beyond the normal accountability requirements for various entities.

There may be genuine reasons why parties to agreements may wish to prevent the disclosure of certain types of information. Indigenous people, for example, may need to protect traditional or ‘intensely personal’ information, especially when it relates to their stories, their individual and communal rights, and their responsibilities and connections to country and to observe cultural sensitivities about who has access to culturally significant knowledge (Bauman and Kingham 2005: 22). They take the view that the arrangements are confidential and private to the relevant group as is the case with any other private landholder related agreements. Companies for example may consider the information commercially sensitive. Amounts paid under agreements or other benefits (such as the provision employment, training or infrastructure programs pursuant agreements) may contain commercial in confidence aspects and other provisions which should not be disclosed to their competitors. Compensation packages may be characterised as setting a benchmark against which other future act agreements might be negotiated. On the other hand, governments and some Indigenous communities may consider these relationships and therefore the payments made to have a public character and that the agreements and payments should be subject to public assessment in terms of fairness, quantum of payments including the creation of benchmarks and the use made of payments.¹ The Law Council of Australia (2009:5) has suggested that this is information that might be most useful to native title parties engaged in subsequent negotiations. Some mining companies, in particular Rio Tinto, and some Indigenous organisations, in particular the Kimberley Land Council, have taken steps to make agreements public. However, these are the exception. There is a tension here between the private relationship of the parties and the attempts of governments to bring these payments into account when determining expenditure on indigenous communities (Langton and Mazel 2008; ATNS Submission to Native Title Working Group 2008).

¹ Although it is important to note that the quantum of payments and the accountability and internal governance arrangements for Indigenous entities may engage different considerations.



1.4 The resource-intensive nature of formal agreement registration

The number of registered ILUAs since the passing of the *NTA* is far outweighed by the number of (less formal) Future Act Agreements, which are not subject to the same notice and registration requirements. Government and private parties wishing to obtain consent to future acts clearly prefer to do this without going through the process of registering an ILUA.

The making of a binding ILUA may be a lengthy and resource-intensive process, involving a number of steps such as negotiation, lodging, notification and finally formal registration. There are significant transaction costs associated with preparation for, negotiating and completing an agreement, especially when a large project is at stake (FaHCSIA 2009: 3). As noted in submissions to the Commonwealth of Australia's discussion paper, *Leading Practice Agreements*, the notification periods for ILUAs may be excessively long (one month for body corporate ILUAs, and three months for area and alternative procedure ILUAs) (2010a: 12). There is also the risk of further delays as a result of what the discussion paper calls 'vexatious or frivolous objections to ILUA registration' (Commonwealth of Australia 2010a: 12).

On the other hand, some have suggested that the lack of transparency has contributed to the resource-intensive nature of the agreement-making process (FaHCSIA 2009: 9).

However, unless disclosure requirements are streamlined and made less burdensome and time-consuming for parties, such parties will always opt for the kinds of agreements that are accompanied by a low level of transparency — or will no longer see agreement-making as a less formal and costly alternative to the formal resolution of matters such as native title.

1.5 A tendency to treat the totality of an agreement as 'confidential'

The scarcity of information available about the contents of agreements on native title may be attributable to 'unnecessarily broad confidentiality provisions in agreements' as suggested by the FaHCSIA Native Title Payments Working Group in its recommendations to the Commonwealth government's discussion paper on *Optimising Benefits from Native Title Agreements* (FaHCSIA 2009: 2). This has been described by O'Faircheallaigh (2004: 6) as part of a culture of 'excessive secrecy' in agreement-making.

Broad confidentiality provisions in agreements stem from a preference among parties to regard a very broad range of agreement content as being confidential. They may also be the result of formal legal professional advice that adopts very broad confidentiality provisions as a matter of course or 'boilerplate' in agreements. In this state of affairs, potential benefits of greater disclosure such as the positive publicity that follows a strong policy of engagement with Indigenous communities by a resource company, are overshadowed by the perceived concerns associated with opening up 'private' arrangements to public scrutiny.

O'Faircheallaigh (2004: 2) suggests a fear of criticism of parties to agreements, including companies, governments and Indigenous groups, regarding the level and distribution of payments under agreements. The negotiation of agreements often requires Indigenous groups to make concessions about their native title rights and entitlements in exchange for certain benefits. Afterwards, they may not want the extent of concessions that they made to be known



to other groups, or to be characterised as having precedent value for subsequent negotiations with other groups (ALGA 2002: part 5.2). Companies may prefer that the amounts paid under the agreement or other benefits (such as the provision of employment, training or infrastructure programs) are not known to their competitors or characterised as setting a benchmark against which other native title agreements might be negotiated (Law Council of Australia 2009: 5).

This fear of criticism is compounded by the current process by which agreement outcomes are scrutinised, assessed and measured — a process that O’Faircheallaigh (2004: 3) describes as ‘inherently political’. However, as suggested in the FaHCSIA Native Title Working Group’s report (2009: 2), while there is a need for parties to be confident that ‘genuinely commercially or culturally sensitive information’ will be adequately protected it is likely that there is no need for confidentiality of the ‘totality’ of agreements.

1.6 Arguments made for increased transparency

The overall lack of public disclosure of resource payments to Indigenous peoples has been discussed in several government reviews of the agreement-making process. While it is widely accepted that agreements may generate significant benefits for Indigenous communities, there is also a consensus that we know little about the making, content and substantive outcomes of agreements for Indigenous communities (O’Faircheallaigh 2004: 1, 10; Langton and Mazel 2007: 24; Tehan 2003: 565; Bauman and Kingham 2005: 24). Various concerns have been expressed. These include that it is impossible at present to quantitatively and qualitatively assess their benefits and potential limitations and disadvantages for Indigenous people (Langton and Mazel 2007: 24, 40) or at least it is still too early to assess the long term sustainability of benefits to communities. For a range of views on agreement making see: Dodson 2006: 12-13; McCausland 2005; Howard-Wagner and Maguire 2010; O’Faircheallaigh 2004; Ritter 2009; Laurie 2007; NNTT 2007.

The main arguments for increased transparency are briefly discussed here.

- 1. To provide models and templates for parties to future agreements.*** There is a scarcity of ‘best practice’ models and templates for both large and small agreements including quantum of benefits. Greater transparency in agreement-making would benefit parties involved in negotiating new agreements by providing them with models or templates to follow (FaHCSIA 2009: 2). Parties involved in agreement-making incur unnecessarily high transaction costs due to the resource-intensive nature of drafting new agreements from scratch (Commonwealth of Australia 2008: 9). They also fail to take advantage of best practice principles that have already been established in previous agreements.
- 2. To enable more comprehensive analysis of the outcomes of agreement-making for Indigenous people.*** In particular, there are indications that the outcomes of many agreements especially Future Act Agreements are minimal, or inadequate (O’Faircheallaigh 2007; NNTT 2007: 27; Laurie 2007). The NNTT suggests in its publication *Getting the Most out of the Future Act Process* (2007: 28) that agreements are delivering benefits to Indigenous communities but also suggests that there are some valid concerns about whether or not agreement-making is actually delivering positive outcomes for all Indigenous communities.



3. ***To address complexities in power imbalances*** that might meet concerns that packages may not be appropriate for the scale of impact, exacerbated by the asymmetry of information and perceived or actual (in some instances) of power imbalances between companies and indigenous communities. This includes monitoring of activities of intermediaries or agents who may seek to negotiate on behalf of Indigenous communities.
4. ***To address the frustration of governments*** that may be aware of the full amount of monies flowing to specific indigenous communities or entities and their concern about contributions of those funds to critical infrastructure and service delivery and well as ensuring the proper treatment of such funds for taxation and income/welfare purposes.
5. ***To enable analysis of the equity of agreement-making processes involving Indigenous people.*** There is a need for adequate monitoring and evaluation to ensure, for example, that agreement negotiation and mediation processes demonstrate an adequate awareness of the cultural differences and discrepancies in terms of resources between Indigenous and non-Indigenous participants (Bauman and Kingham 2005: 17, 18, 24). There is also a need to ensure that the 'right' people are taking part in such processes on behalf of their communities, and that any mediation or negotiation of an agreement is aware and inclusive of those community members whose participation is vital to the success of any resulting agreement (Bauman and Kingham 2005: 17, 18).
6. ***To increase accountability in the implementation of agreements*** by requiring transparency and accountability for payments in the hands of the receiving entities.

A more fundamental reason given to open up much more of the agreements to public scrutiny is the general move towards a culture of transparency, accountability and corporate social responsibility in both governmental and industry contexts.



2. Types of resource payment

A range of type and value of resource payment is made to Indigenous peoples in Australia.

2.1 Legal framework for resource payments

Most resource payments are made under agreements with Indigenous people. The detailed reporting requirements for each type of resource agreement under which payments and benefits are provided under the native title, land rights and heritage legal frameworks is explained in Part 4. Different types of agreement include Indigenous Land Use Agreements (*ILUAs*), Future Act Agreements, usually referred to as Section 31 Agreements and ancillary agreements made in association with *ILUAs* or Section 31 Agreements, and other forms of agreement or determination under the native title regime; State native title settlement agreements such as those in Victoria and South Australia; agreements under land rights Acts; and heritage agreements.

There are three general situations where resource payments may be made (as suggested by Howard-Wagner and Maguire 2010: 74):

1. Resource payments made under agreements, where legislation requires an agreement before a resource project or certain acts can proceed. For example, the *ALRA* requires such agreements before mining projects can continue.
2. Resource payments made under agreement with Indigenous people even if this agreement is not required by law – that is, mining activity may proceed even if an agreement does not eventuate. For example, this may occur under the right to negotiate under the *NTA*.
3. Resource payments where there is no legal requirement to negotiate, but the resource company chooses to negotiate with Indigenous people voluntarily; this occurs generally in situations where the resource company held interests in the land prior to the native title regime (O’Faircheallaigh and Corbett 2005: 634-635). The Argyle Diamond agreement is an example (ATNS, 2005). These are often called ‘as if’ agreements as they are made as if the parties are bound by the relevant legal framework.

Resource payments may be received by a range of different legal entities created for the benefit of Indigenous people. There are various transparency and reporting requirements for each type of legal entity. The entities are CATSI Corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (*CATSI Act*), proprietary limited companies and companies limited by guarantee established under the *Corporations Act 2001* (Cth), trusts including discretionary or fixed trusts and charitable trusts, specific trust arrangements including the Victorian Traditional Owners Trust established under the *Traditional Owner Settlement Act 2010* (Vic) (*TOSA*), and the various statutory land rights entities established by the *ALRA*. There is also a recent proposal for a new legal status or entity, called an Indigenous Community Development Corporation (ICDC), however this has not yet been established.



2.3 Estimated value of resource payments

As there is no public reporting of resource payments to Indigenous people in Australia, there is no reliable independent estimate of the overall value of resource payments. The Minerals Council of Australia has provided an estimate of approximately \$3 billion as the total value of native title and land rights payments made by the mining industry for the 2011-2012 financial year (Taxation of Native Title and Traditional Owner Benefits and Governance Working Group 2013: 13). This estimate encompasses cash payments, native title land access payments, royalty equivalents under the *ALRA*, Indigenous and non-Indigenous heritage management, payments made under other land rights regimes and payments made under impact/benefit agreements. Future act agreements (that is agreements driven by the future act process of the *Native Title Act 1993* (Cth): see Part 4 below) provide the main source of native title income.

2.4 Types of resource payment

Resource companies may make a range of types of resource payment under the *ALRA* or *NTA* regimes including financial payments and non-monetary benefits. Agreements and payments made thereunder will vary markedly depending upon whether the payments are made in respect of exploration or mining as well as the scale of a project. The few publicly available agreements, and anecdotal evidence from both resource companies and Indigenous communities, indicates that a range of payments and benefits is common under native title agreements although quantum will vary. These different types of resource payment are illustrated in the Case Study example of a comprehensive agreement in Appendix A.

Monetary resource payments include:

- “lump sum”, once and for all payments, sometimes expressed to be for compensation or for access to or acquisition of an asset;
- Periodical payments, for example royalties or in the nature of royalties; linked to periodic use of an asset, such as a lease or licence payment, including *ALRA* royalties;
- Profit share payments, which may be made only when the specific project is profitable;
- Reimbursement of expenses associated with engaging in negotiation, concluding an agreement and operating an ongoing entity or management structure for receipt of funds;
- Lease or license payments;
- Investments in commercial businesses, low interest loans or equity contributions to Indigenous community organisations or businesses.

Non-monetary resource payments or benefits include:

- Real property such as freehold land or long term leases eg land owned by the resource company, or Crown land, or land purchased for the purpose;
- Equity, such as a shareholding, in a corporation;
- Funds to be expended for various social, employment or cultural benefits but remaining under control of the resource company (with obligations to disburse them for benefit of the Indigenous group);
- Employment targets and community development investment by the resource company;
- Education and training for members of the Indigenous community;



- Housing provision to members of the Indigenous community.

Other types of support or benefit include resource payments made to private individuals or related entities that are not representative of the traditional owner group as a whole, such as:

- Local business development and Indigenous contracting;
- Education and training including scholarships and bursaries;
- Payments for heritage services by individuals;
- Town maintenance and facilities;
- Accommodation and housing benefits;
- Health and wellbeing projects and initiatives;
- Recreation and culture projects and initiatives;
- Cooperative land management;
- Environmental and heritage initiatives and protocols.

Appendix A includes a Case Study that illustrates these payments made under a comprehensive agreement. Appendix E includes examples of agreements including quantum and types of payments.

2.5 Tax treatment of resource payments

Different types of resource payment have different tax treatment, but most are non-assessable on receipt by Indigenous groups or individuals. Resource payments may be reported to the Australian Taxation Office for tax purposes on entity or individual tax returns; however, these are confidential and not available to the public.

A Mining Withholding Tax (MWT) is imposed at a rate of 4.5 per cent on payments from mining companies to eligible distributing bodies for the benefit of Aboriginal people, under Division 11C of the *Income Tax Assessment Act 1936* and the *Income Tax (Mining Withholding Tax) Act 1979* (Cth). The MWT was established in 1979 and has operated primarily in the Northern Territory and in Queensland (for a detailed analysis see Martin 2010). It generally applies to resource payments under the *ALRA*. Where the MWT applies, then the payment to an Indigenous person or entity is treated as non-assessable for income tax (s 59-15 of *Income Tax Assessment Act 1997*).

New s 59-50 of the *Income Tax Assessment Act 1997* (Cth) has confirmed that most native title payments are non-assessable for income tax. Various Indigenous entities and individuals may be required to declare native title benefits in tax returns, generally to ensure that they attract the exemption which is intended to ‘clarify that amounts or benefits that may otherwise be assessable income for an Indigenous person or an Indigenous holding entity’ are treated as ‘non-assessable non-exempt’ income ‘if the amount or benefit is a native title benefit’.²

Section 59-50(5) defines a ‘native title benefit’ as:

² Explanatory Memorandum to Tax Laws Amendment (2012 Measures No. 6) Bill 2012, [1.17].



‘An amount, or *non-cash benefit, that

(a) arises under:

(i) an agreement made under an Act of the Commonwealth, a State or a Territory, or under an instrument made under such an Act; or

(ii) an ancillary agreement to such an agreement;

to the extent that the amount or benefit relates to an act that would extinguish *native title or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title; or

(b) is compensation determined in accordance with Division 5 of Part 2 of the *Native Title Act 1993*.

The provision allows non-assessable native title benefits to be passed on to further eligible entities, or individuals, by the original recipient. Tracing of these payments will be required, and individuals must report (again confidentially) on tax returns.



3. Transparency and reporting requirements for entities

There is a range of entities that receive resource payments for the benefit of Indigenous people and these entities have a range of transparency and reporting obligations. To obtain a full picture of transparency and reporting obligations in relation to resource company payments to Indigenous people, it is necessary to identify the various entities that may receive such payments and their reporting obligations to various regulatory agencies. Some entities are required to publish detailed information about income, assets and agreements, while others must file minimal reports, if any. Entities may also enter into partnerships or joint ventures. Generally the reporting requirements will attach to the entities that are the partners or venturers. A summary of entity legal requirements is in Appendix B and the range of possible entities is illustrated in the case study in Appendix A.

The majority of income received by Indigenous groups and people, besides government grants, is related to land access or services. It is estimated that other categories of income comprise less than 10 per cent of the total income received by indigenous organisations (Taxation of Native Title and Traditional Owner Benefits and Governance Working Group 2013, 12).

Most Indigenous entities are required to file tax returns (unless they are charities that are tax exempt). Entities that receive native title payments may be required to declare these and set out the types of payment or benefit. This will generally be done in order to obtain tax exemption, for example for native title payments that are compensatory in nature, as explained in 2.5 above. In the normal course such tax filing will be confidential and may only be used by the Australian Tax Office in respect of its tax administration function.

3.1 CATSI Corporations

CATSI corporations are subject to stringent reporting obligations in respect of their management structure, income, expenses and activities. All information about each CATSI corporation and its annual reports are made public on the ORIC register.

Under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (*CATSI Act*) a CATSI corporation must report to the Registrar, the Office for Regulation of Indigenous Corporations (ORIC), each year about its finances and membership. It must include a report as to how well it has abided by the requirements of the *CATSI Act* and the corporation's own rules (constitution) (*CATSI Act* s 327-1).

Small corporations with a consolidated gross operating income (CGOI) of less than \$100 000 need to lodge a general report. Small/medium corporations with a CGOI of \$100 000 or more and less than \$5 million must lodge a general report and a financial or audit report. Large corporations and those in receipt of a CGOI of \$5 million or more must lodge a general report, financial report, audit report and directors' report. However, a CATSI corporation is not required to specify the source of income, or whether it has received resource payments.

3.2 Proprietary Limited company

A native title claim group may establish a proprietary company under the *Corporations Act 2001* (Cth), which is taxable. That company may operate businesses or investment activities. It must report to the Australian Securities and Investment Commission (ASIC) as do other



companies and file a tax return. Unless it is a small proprietary company (as defined in s 45A(2) of the *Corporations Act 2001* (Cth)) it must prepare a financial report (s 295), a directors report (s 298), have the financial report audited (ss 301, 307, 308), provide the reports to members (s 314) and lodge with ASIC (s 319). A small proprietary company does not need to prepare these reports unless directed to do so by ASIC or by at least 5 per cent of its members (s 292(2)). Companies are not required to specify the type or source of income in these reports.

3.3 Company limited by guarantee

It is common, especially for older indigenous organisations, that a company limited by guarantee is established. That company may operate businesses or investment activities. As for a proprietary limited company, a company limited by guarantee must report to ASIC and if in receipt of taxable income, it must file a tax return. Companies limited by guarantee are commonly used by organisations that seek and obtain charitable and deductible gift status for tax purposes.

Companies with an annual revenue less than \$250,000 which do not have deductible gift recipient status are exempt from preparing a financial report under the *Corporations Act 2001*, unless exceptions apply. Companies with either annual revenue of less than \$250,000 that are a deductible gift recipient, or have annual revenue of between \$250,000 and \$1 million, irrespective of whether the company is a deductible gift recipient, must prepare a reviewed financial report and a directors report (ss 292, 298, 300B). The financial report does not need to be audited unless the company is a Commonwealth company, or a subsidiary of a Commonwealth company or Commonwealth authority. Companies with annual revenue of \$1 million or more, irrespective of whether they are a deductible gift recipient, must prepare and lodge an audited financial report ss 292, 301 and a directors report (ss 298, 300B) and must give reports to any member who elects to receive them (s316A). Companies are not required to specify the source of income in these reports.

3.4 Discretionary or fixed trusts

Many Indigenous organisations establish one or more trusts to hold assets or income for the benefit of the native title claim group or members of the organization. Some trusts may be used for investment or business purposes as is common in Australia more generally.

Resource payments may be made to a discretionary trust in favour of a traditional owner clan, identified by named elders. This is illustrated in the case study in Appendix A. The discretionary trustee pays out sums directly to individual clan members as determined by the clan. In a fixed trust, the interests of the beneficiaries are fixed in relation to the income or the capital of the trust.

Trustees are subject to reporting and regulation under State Trustee Acts. In some circumstances, trustees carrying on investment or business activity must report to ASIC. Trustees are also required to lodge tax returns for the trust. A trust may have a corporate trustee which, as a company, will be subject to regular ASIC reporting requirements. However, there is no general requirement in law for trustees to specify the source of income, such as resource payments that may be made to trusts or the distribution of those payments.



3.5 Incorporated associations

Some Indigenous organisations may be established as incorporated associations under State Associations legislation. Generally, these organisations are required to be not for profit and they are subject to State reporting requirements which are generally minimal (see for example *Associations Incorporation Reform Act 2012* (Vic)). They may be registered as a charity. This legal entity form appears to be little used for receipt and management of resource payments by Indigenous groups.

3.6 Registration as a charity

A trust may be established for a charitable purpose (generally known as a charitable trust), and receive resource payments for Indigenous peoples. Other entities, such as a CATSI corporation or company limited by guarantee, may also be a charity at law.

For example a trust or company limited by guarantee may be established for the purpose of poverty relief and advancement of Indigenous people, which may comprise an Indigenous claim group and other Indigenous people who live in the community. A charitable trust may have a fund that provides education scholarships for members of the claim group and is utilised to receive payments. It may also invest resource payments for the life of the mine or other long period for future benefit of the group.

A charity, in whatever legal form, may choose to register with the Australian Charities and Not-for-profits Commission (ACNC).³ While voluntary, this registration is required if the charity is to be eligible for income tax exemption. Apart from this, a charitable trust is subject to any State based regulatory regime for Trustees while other entities that are charities are regulated under relevant entity regimes.

One of the main goals of ACNC registration is increased transparency. Charities are required to lodge annual tax returns and to lodge reports with the ACNC. As to the content of the reports to the ACNC, small charities need to submit an Annual Information Statement, which, from 1 January 2014, will include basic financial questions. Medium charities need to submit an Annual Information Statement and from 2014 must submit an Annual Information Statement and an annual financial report that is reviewed or audited. Large charities need to submit an Annual Information Statement and from 2014 must submit an Annual Information Statement and an annual financial report that is audited (ACNC Reporting). None of these require the charity to specify the source of income, such as resource payments.

To prevent duplication of regulation, the ACNC has entered into memoranda of understanding with various other government regulators. Currently, if a CATSI corporation is registered with the ACNC they do not need to send any reports to the ACNC. ORIC and the ACNC have signed a memorandum of understanding that confirms the ACNC will accept corporation reports lodged with the Registrar under the CATSI Act as meeting the ACNC's requirements.

³ The Abbott government proposes to abolish the ACNC however the Bill to remove the commission has been placed on hold. In the interim, all charities must report and information is on the ACNC Register.



A charitable trust may also have a corporate trustee, which will be subject to the relevant corporate reporting requirements.

3.7 Victorian Traditional Owners Trust

The Victorian Traditional Owners Trust manages lump sum funds resulting from native title settlements in Victoria, pursuant to agreements under TOSA (see Part 4.2.2 below). The Trust is registered as a charity and makes distributions to traditional owner groups for charitable purposes.

The Victorian Traditional Owners Trust and Trustee are audited by the Victorian Auditor-General's Office. The Trust produces public Annual Reports and Report Cards for each traditional owner group that has an account within that Trust (Victorian Traditional Owners Trust 2013).

At present, there is only one traditional owner group receiving payments under the Victorian Traditional owners Trust, the Gunai Kurnai (see 4.2.2 below); the Dja Dja Wurrung agreement has just been finalized and may lead to payments into the Trust in future.

3.8 Indigenous Community Development Corporation (ICDC).

A new ICDC entity or status was proposed by the Minerals Council of Australia and National Native Title Council as a not-for-profit, income tax exempt entity, with DGR status. The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report to Government (2013) adopted the proposal and considered that an ICDC would be established by an Indigenous community with the purpose of promoting sustainable community and socio-economic development. The ICDC structure could be used to manage land related payments and other income. The purpose of the ICDC would be wider than a charity and would therefore allow for a range of economic development activities and distributions, including for private profit, beyond what a charitable body is currently permitted to do.

The Working Group has stated that the ICDC would need to have safeguards to ensure Indigenous community funds are not misused and proposed that there should be minimum governance standards for ICDC entities, which ensure that the fiduciary obligation of responsible persons of the ICDC and appropriate standards of accountability, financial management and investment planning are met and that this is able to be supervised by an ICDC regulator.

The ICDC governance standards would apply to all entities that seek registration for the status of an ICDC which could include entities listed above such as CATSI corporations, companies limited by guarantee or trusts. It is unclear as to whether the ICDC will lead to greater transparency in resource payments made to Indigenous people.



4. Transparency and reporting requirements for agreements

Most resource payments are made under agreements with Indigenous people in both government policy and commercial practice in Australia. Resource payments were first made under legal regimes and agreements pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA)*. While this regime is still operative, the native title system established under the *Native Title Act 1993 (Cth) (NTA)* has become the dominant arena for agreement making with indigenous people in the last two decades. All of these types of agreement may provide Indigenous people with financial and infrastructural investment benefits, business opportunities, employment and community development opportunities and decision-making responsibilities, especially concerning the management and protection of environmental and cultural heritage (Commonwealth of Australia 2008).

In particular, the NTA and amendments to it in 1998 providing for Indigenous Land Use Agreements (ILUAs) brought about a significant increase in negotiated native title agreements in respect of diverse locations, parties and subject matters (Langton and Mazel 2007; Tehan and Godden 2012; O’Faircheallaigh 2004). As identified by the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, land access agreements and payments to Indigenous groups are increasing due to factors including increases in the indigenous estate (land rights or native title); new resource development projects moving into production; and greater indigenous participation in the formal economy (2013: 11).

Apart from direct government service grants, land-related payments comprise most of the income received by Indigenous organisations and people (ibid: 12). In addition, there may be commercial contracts between Indigenous peoples and private parties including resource companies made outside the land settlement legal regimes, and there are various regional and community agreements with governments (Llewellyn and Tehan 2005; Langton and Palmer 2007: 22; Langton and Mazel 2007: 17-22). As indicated above, agreement content will vary according to whether it covers exploration or mining or both as well as the scale and duration of the activity. Many agreements also cover matters unrelated to extractive industries, for example, pastoral lease access or conservation management.

Sources of data on agreements

The main sources of data about agreements that are publicly available and referenced in this working paper are:

- National Native Title Tribunal (NNTT) register and annual reports of statistics (www.nttt.gov.au).
- Agreements, Treaties and Negotiated Settlements (ATNS) database (www.atns.net.au), established in 2002.⁴ This regularly updated database is a publicly accessible repository of published information on agreements with Indigenous people. The database links together published information on ILUAs (such as media releases or academic articles) and the NNTT Register extracts of such agreements. It summarises the ILUA extracts, links them to a map of the agreement area and to relevant resources such as parties and any secondary commentary and provides background information on native title and other issues in the

⁴ Under ARC Linkage Projects generally known as *Agreements, Treaties and Negotiated Settlements Project*.



subject area. The database also includes publicly available information on non-ILUA agreements including Future Act Agreements and *ALRA* agreements.

- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a research institution that collects and collates information and research about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples. AIATSIS releases a monthly native title bulletin which includes information on native title agreement making.⁵

In addition to the transparency requirements under the various legal regimes, parties to a resource agreement may voluntarily release further information on the agreement, however in general this does not occur. See Appendix C for more detailed information on agreements and transparency requirements.

4.1 Native Title Agreements

4.1.1 Mabo (No 2) and the Native Title Act 1993

In 1992, indigenous rights in land based on pre-sovereignty law and custom were recognised at common law by the High Court in *Mabo (No 2)*. These rights were called ‘native title’. Following considerable national and parliamentary debate, the *NTA* was passed establishing a national scheme for the recognition and protection of native title (Tehan 2003).⁶ Since amendments establishing Indigenous Land Use Agreements (ILUAs) in 1998 (see part 4.1.3 for more information), there has been a proliferation of native title agreements between Indigenous people. Agreement making has become the preferred way of resolving most native title issues (Neate 2002; NNTT 2010).

Native title rights (as defined by the *NTA*) persist where they have not been abrogated by government actions, which have the legal effect of extinguishing native title. For an Indigenous group to claim a native title right, a continuing observance of a practice or tradition in relation to that right must be demonstrated (*Yorta Yorta* (2002) 214 CLR 422). Divisions 2, 2A and 2B of the *NTA* validate certain past and intermediate period acts by State and Federal governments in relation to native title and confirm extinguishment in certain circumstances. Division 3 deals with future acts and ILUAs, while Division 5 relates to the determination of compensation for acts that affect or have affected native title. An act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (*NTA* s 227).

The *NTA* recognises a right to compensation in relation to acts affecting native title and introduces mechanisms for determining compensation. This is achieved through a variety of specific provisions and the operation of the *NTA* as a whole. While the concept of compensation is central to the *NTA*, to date there have been no successful litigated (as opposed to consent) compensation claims. As at 30 June 2012, there were only 8 compensation claims in the National Native Title Tribunal (NNTT) compared to 441 native title claims (NNTT 2012: Table 2, 35).

Compensation may be provided where there has been validation of an existing mining right where the title is not extinguished (ie, the non-extinguishment principle applies). In this situation, native title rights are not extinguished but cannot be exercised for the duration of the

⁵ See <http://www.aiatsis.gov.au/ntru/whatsnew.html> accessed 13 March 2014.

⁶ For the definition of native title see s223 of the *NTA*.



grant (*NTA* s 238). Principles regarding the payment of just terms compensation are contained in ss 51, 51A and 53 of the *NTA*. Section 22L of the *NTA* also provides for compensation to native title holders as a result of validation of transfers under the *Aboriginal Land Rights Act 1983 (NSW)*. Mining is also treated under separate provisions in Part 2 Division 3 of the *NTA*.

4.1.2 Key elements of the native title regime

The two most prominent types of native title agreement today are ILUAs and Future Act Agreements, (in relation to extractive industries usually referred to as Section 31 Agreements), both of which are made under the future acts regime in Division 3 of the *NTA*.

Future acts include the grant of exploration and mining tenements and the future act regime authorises many other activities post the commencement of the *NTA* on 1 January 1994.⁷ Some future acts that come within a limited range of categories set out in the *NTA* are automatically characterised as ‘valid’, and can therefore be carried out in accordance with certain procedures that require but are not limited to the payment of compensation to the relevant native title holders (Part 2, Division 3, Subdivisions F–N *NTA*). Such procedures include notification or consultation obligations and compensation where native title is affected and include many non-extractive industry related agreements, but do not include a right to negotiate. However, they may result in agreements (including ILUAs) involving payments to native title holders. There are special provisions relating to opal mining that similarly do not attract the right to negotiate (*NTA* s26C). In respect of these types of mining, there is no legal requirement for any government or NNTT involvement and therefore no requirement for public reporting or scrutiny of agreements.

Future acts are activities and developments that have the capacity to extinguish native title rights and interests, or that are wholly or partly inconsistent with the continued existence, enjoyment or exercise of those rights and interests (defined in s 227 and s 233 of the *NTA*). Section 24AA(2) of the *NTA* provides that a future act is valid if covered by the provisions of the *NTA*, while s 24AA(3) provides that a future act is valid if dealt with by a registered ILUA.

The right to negotiate is the central feature of the future act provisions of *NTA* in relation to mining exploration or production. The right to negotiate arises when a State or Territory Minister intends to make a grant of a mining right (this may be for exploration or mining) in respect of land for which there is an existing native title determination or a registered native title claim (*NTA* s 26 and s 29). Where the Minister issues a notice under s 29, a process is triggered under which the parties have 6 months to negotiate in relation to the proposed grant. Negotiation must be in good faith and may cover a range of issues including the quantum of payments, which may be related to the value of the resource (*NTA* s 31).

At the expiration of the 6 month period, if no agreement has been reached or the parties have not agreed to extend the time for negotiations, either party may ask to have the matter arbitrated by the NNTT (*NTA* s 35(1)(a)). The NNTT may determine that the act be done, that the act be done on certain conditions or that the act not be done (*NTA* s38). The NNTT cannot have regard to the value of the resource in setting conditions or compensation (*NTA* s 39) and this can influence negotiations (O’Faircheallaigh 2007). In almost all arbitrations, the NNTT has found for the mining grantee party in that the act has been permitted (Corbett and O’Faircheallaigh 2006 suggest that forced arbitration has benefited mining companies; c.f. Sumner & Wright

⁷ Or after 1 July 1993 if the act constitutes an amendment or repeal of a legislative act under s 233 (1)(a)(i) of the *Native Title Act*. The complex definition of ‘future acts’ in the *NTA* means that some grants made post 1 January 1994 are not ‘future acts’.



2009). It is not uncommon for the parties to disregard the strict time limits and take some time to negotiate an agreement. However it is these provisions that provide the legal backdrop for negotiations that may either result in an ILUA, a Future Act Agreement or an arbitrated outcome. Payments may flow from each of these arrangements.

4.1.3 Indigenous Land Use Agreements (ILUAs)

ILUAs are voluntary agreements made under Division 3, Subdivisions B, C and D (ss 24BA, 24CA and 24DA) of the *NTA* between the claimants or holders of native title with respect to a particular area of land and waters, and others who either have or seek to gain an interest in that area.⁸ At 20 December 2013 there were 846 registered ILUAs.

An ILUA can cover any subject matter. Agreements in relation to exploration and mining including permissions and payments, as noted above, may also be made as ILUAs. An ILUA may be signed prior to a formal determination of native title by the Federal Court of Australia, or after native title has been determined. Often they are used to determine the way in which the parties' native title rights and interests, public laws and private rights will be managed at ground level (*ALGA* 2002: para 2.1). ILUAs remain binding on the parties even if native title is not ultimately made out. ILUAs now cover more than 18 percent of Australia's land mass and a substantial area of sea (below the high water mark); there are ILUAs in all states, but with a significant majority in Queensland (*NNTT* 2012, 37).⁹ See Appendix D for the *NNTT* map which indicates the extent of ILUA coverage.

The *NTA* provides for three types of ILUA:

- ILUAs made with bodies corporate – 'body corporate agreements' (*NTA* Part 2 Division 3 Subdivision B) of which there are 185 registered as at 20 January 2014;
- ILUAs made in relation to an area where there is not a body corporate – 'area agreements' (*NTA* Part 2 Division 3 Subdivision C) of which there are 670 registered as at 20 January 2014; and
- ILUAs made under 'alternative procedures' (*NTA* Part 2 Division 3 Subdivision D).

These subdivisions provide for the technicalities relating to parties, content, objections and registration of each type of agreement and provide lists of requirements for an agreement to satisfy the definition of an ILUA.

Disclosure and registration

The making of a valid ILUA involves a certain mandatory threshold of disclosure. An ILUA will only bind the parties when it is registered with the Registrar of the *NNTT* (*NNTT* 2008: 5).¹⁰ Once registered the ILUA operates as a contract between the parties but normal contract principles are varied in that the ILUA binds native title successors in title (*NTA* s24EA).

When the Registrar receives an application for the registration of an ILUA, he or she is required under ss24BH, 24CH or 24DI (depending on the type of ILUA) to issue a public notice containing basic information about the agreement. Following registration, an extract of the

⁸ ILUAs may cover activities unrelated to mining and therefore the total numbers represented here do not all relate to resource activities or payments.

⁹ Some registered ILUAs have expired and been removed from the register.

¹⁰ See *Registration of ILUAs* electronic document available at <<http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/Registration.aspx>> accessed 13 March 2014.



ILUA is made available to the public on the NNTT Register. This extract must contain the following information (*NTA* s 199B(1)):

- a description of the area covered by the ILUA;
- the name and contact address of each party to the ILUA; and
- the period during which the agreement will operate (if specified in the agreement).

The registered extract must also contain any of the following statements (which are mentioned in 24EB(1) or 24EBA(1) or (4)) if they are specified in the agreement:

- that the parties consent to the doing of the particular class or classes of future acts, with or without conditions; or
- that the right to negotiate does not apply to these particular acts; or
- that the native title rights and interests of the parties have been surrendered; or
- that the parties have agreed to change the effects of an intermediate period act on native title (in the case of body corporate or area agreements); or
- that the parties agree to the validation of a future act (other than an intermediate period act) that has already been performed invalidly; or
- that the non-extinguishment principle applies.

Although it registers ILUAs, the NNTT has no role in overseeing the content of ILUAs, for example in respect of whether it is a fair agreement, achieves industry benchmarks or contains particular types of payments or benefits. The registration regime is only concerned with ensuring that the ILUA meets the procedural requirements under the *NTA*. There is no on-going monitoring of the implementation of the agreement including whether and to whom payments are made or benefits provided.

Transparency requirements

Aside from the fairly limited level of disclosure mandated by s 199B(1), the publicly available extract of an ILUA is limited to information that the Registrar considers appropriate. The parties are not required by the *NTA* to disclose any additional details of their agreement (ss 199B, 199E). The release of information about the content of ILUAs is a matter for the parties to the ILUA. Publicly available information on most ILUAs is limited to the agreement extracts published on the Register, and these do not include the compulsory clauses mandated by s 199B(1).

Overwhelmingly, parties keep the content of ILUAs confidential. Out of a total of 846 ILUAs registered with the NNTT by 20 January 2014, there appear to be fewer than ten which have full-text copies of the agreement available to the public.¹¹ Any additional information is usually supplementary to the compulsory clauses which set out, for example, the exact kinds of future acts that may be performed or the kinds of native title rights that are retained by the parties. For example, additional information may note an Indigenous group's surrender of native title rights

¹¹ The authors have located the following full text agreements: Bundjalung of Byron Bay (Arakwal) Indigenous Land Use Agreement; the Argyle Diamond Mine Participation Agreement; the Eastern Kuku Yalanji, the State of Queensland and Douglas Shire Council Indigenous Land Use Agreement; the Yandruwandha/ Yawarrawarrka Petroleum Conjunctive Indigenous Land Use Agreement; the Murchison Radio-Astronomy Observatory Agreement; the Small Scale Regional Mining Indigenous Land Use Agreement; the Yawuru Prescribed Body Corporate Indigenous Land Use Agreement; and the Yawuru Area Agreement Indigenous Land Use Agreement. See the ATNS database for copies of the agreements www.atns.net.au.



or its consent to future acts, but almost never provides details in relation to the payments, community development programs and other benefits made by the private party or government.

It is difficult to identify any trends with respect to the relative transparency of various types of ILUAs. It is possible to conclude, however, that Body Corporate Agreements and Area Agreements concerning access to land covered by pastoral leases are the least transparent of all such agreements. The NNTT Register extracts of all of these agreements contain virtually no information at all, apart from the most basic agreement details such as the names of the parties, the date of registration, the type of ILUA and the location.

More information is available on agreements relating to matters such as the joint management of national parks, possibly because these are agreements with governments rather than third parties. However, this information tends to be found in news articles and media releases published by government and corporate agreement parties, rather than within the NNTT Register extracts of the agreements themselves. While the global quantum of payments and benefits may be published in media releases, detail is rarely available. For the full text of an example ILUA, refer to the Argyle Diamond Mine Participation Agreement – ILUA on the ATNS database (atns.net.au). Appendix E also contains a summary of the benefits received under the Argyle Agreement.

4.1.4 Section 31 Future Act Agreements

Apart from ILUAs, negotiation under the ‘right to negotiate’ provisions can have a number of possible outcomes, including the making of a Future Act Agreement under s 31(1)(b).¹² Future Act Agreements are far greater in number than ILUAs. Between 1 January 1994 and 30 June 2007, 1,442 Future Act Agreements were lodged with the NNTT as required under the *NTA*. Between 2008 and 2010 there were more than 9000 future act applications, many in Western Australia and Queensland (NNTT 2011b). Most applications are withdrawn, presumably being resolved by private agreement (but not resulting in an ILUA), although it is difficult to track these outcomes. The NNTT keeps a record of the number of Future Act Agreements but does not publish the figures on any central register, although they are mentioned among other statistics in the Tribunal’s annual reports.

As explained in 4.1.2, a Future Act Agreement deals with any act that affects native title in the future including exploration and development of minerals, petroleum and gas (but excluding some specific matters relating to renewals etc). The main purpose of a Future Act Agreement is to negotiate the manner in which an act will be undertaken and to provide payments and benefits for future impairment of title, even though the agreement itself may not extinguish or suspend title (*NTA* s 33). A Section 31 Agreement¹³ in relation to exploration or mining may take the form of a tripartite agreement between the native title holders or claim group, State or Commonwealth government and resource company or a bilateral agreement between the native title holders or claim group and resource company. The Section 31 Agreement confirms that the grant of a mining tenement can proceed (*NTA* ss 28 and 29). The Section 31 Agreement will usually be accompanied by further ancillary agreements (see part 4.1.5) detailing compensation payments, heritage protection and other benefits to be obtained by the native title parties (NNTT 2008: 5). The agreements can cover projects ranging from large resource extraction projects

¹² A negotiation might also ultimately result in an ILUA.

¹³ Section 31 agreements are often called ancillary agreements. This can create confusion as there are also ancillary agreements to ILUAs as well as Section 31 agreements themselves. This is explained further at 4.1.3 below.



with a life of 50 years or more to small short agreements covering part or all of an exploration program. The payments and benefits will vary accordingly.

The mandatory threshold of disclosure for Section 31 Agreements is very low. Unlike ILUAs, Future Act Agreements are not subject to any formal public notification or registration process whether legislative or administrative (confirmed in NNTT 2008: 8). The parties need only provide the NNTT with a copy of the agreement, and also advise the relevant minister of its making (*NTA* ss 28(1)(f) and 41A(1); NNTT 2008: 5). Due to confidentiality concerns, Section 31 Agreements provided to the NNTT rarely contain details about payments or other benefits that have been promised to Indigenous groups (NNTT 2006). Information is limited in general to basic facts such as the names of the parties and the date of the agreement. Even these minimal details are not available for public inspection (NNTT 2005: 26; NNTT 2008: 8). They may only be disclosed by the NNTT if the parties give their consent, or if an interested person seeks to obtain access to them through the Freedom of Information process (NNTT 2005: 26).

Because of these minimal disclosure requirements, there is no comprehensive public source providing information on Section 31 Agreements or Future Act Agreements generally.¹⁴ The ATNS database includes links to a small minority of agreements reached under the ‘right to negotiate’.¹⁵

It has been recommended by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (2013:17-18) that a process for the registration of s 31 native title Future Act Agreements be developed and that the federal government undertake the regulation of private agents (persons or firms other than NTRBs and Native Title Service Providers) involved in negotiating Section 31 Agreements in order to protect indigenous community benefits and prevent the exploitation of the process and payments.

4.1.5 ILUA and Section 31 Ancillary agreements

Ancillary agreements are a key feature of the agreement-making landscape. They are made in addition to formal ILUAs and Section 31 Agreements, especially for larger projects (and payments). They generally contain more information and key provisions than those contained in formal native title agreements. The parties to an ILUA or Section 31 Agreement have no obligation to lodge any ancillary agreements made by them with the NNTT. In this situation, most such agreements are confidential, including provisions that may be agreed between the parties for dispute resolution mechanisms, liaison committees, payments and benefits (NNTT 2008: 5). The case study in Appendix A provides an illustration.

Even where the NNTT has access to the information, ancillary agreements are never published by the NNTT in deference to the parties’ wish for confidentiality. In any case, ancillary agreements are almost never provided to the NNTT in their full form. See the Case Study in

¹⁴ There are a few exceptions. For example, the Burrup and Maitland Industrial Estates Agreement (2003), signed by the West Australian government and three Indigenous groups, is unusually transparent for a Future Act Agreement, as it has a full-text copy available on the West Australian government’s native title website. The Browse LNG Precinct Agreements (2011) signed by the West Australian government, the Goolarabooloo Jabirr Jabirr peoples and Woodside Energy Ltd was also made public in its entirety on the West Australian government’s Department of State Development website. There are also other future act agreements that are not available in their entirety, but that nonetheless well-publicised, with much of their content available online in summary form. One example of these is the Gulf Communities Agreement (1997), which was signed by MMG Century, the Queensland government and four native title groups: the Waanyi, Mingginda, Gkuthaarn and Kukatj.

¹⁵ The ATNS database contains information on 54 future act agreements including information on 16 template agreements.



Appendix A for an example of the material in ancillary agreements.

4.1.6 Expedited Procedure

A Future act in relation to explorations may be validated in the absence of negotiation with the native title holders or claim groups, if the relevant government asserts in a notice under s 29 of the *NTA* that the act is one to which the ‘expedited procedure’ in s 32 applies (ie exploration that is unlikely to involve disturbance or interference with sites or community *NTA* s237). Unless an objection to the expedited procedure is then lodged under s 32, the act can be done without further reference to the *NTA*. The majority of s 29 notices asserting the expedited procedure do not attract objections.¹⁶ However compliance with heritage legislation is still required and this may produce an agreement under which payments are made (see 4.4 below).

If an agreement is subsequently reached on such an act, there is no legal obligation for the parties to provide the agreement to the NNTT at all (in complete or extracted form), to publish it anywhere else or even to reveal whether the expedited procedure was actually used in the process of making the agreement.

4.1.7 Future Act Consent Determinations

The ‘right to negotiate’ process may also give rise to two other outcomes besides a Future Act Agreement. These two outcomes both afford a more influential role to the NNTT.

First, if the parties agree on the terms of a s 31(1)(b) Future Act Agreement, but cannot finalise it for some logistical reason, they may apply to the NNTT for a ‘consent determination’ that gives effect to their joint wishes (NNTT 2007: 22).

Second, if the parties to a future act negotiation do not succeed in reaching agreement at all, one or both parties may make an application to the NNTT (as the Arbitral body) for a future act determination that establishes whether or not the proposed act may go ahead and if so on what conditions (*NTA* s 35). Most such applications are resolved in a future act determination by consent.

In contrast to ILUAs and Section 31 Agreements, the full text of consent determinations must be published on the NNTT website. Consequently, there is a fuller record of agreements subject to consent determinations than there is of Future Act Agreements concluded without a determination. However, even agreements subject to consent determinations only have a minimal published content that is normally limited to recognising the existence of native title rights. It is usually the case that a more detailed record of the benefits, outcomes and management processes agreed is in an ancillary agreement between the parties. The ancillary agreement may sometimes be provided in extracted form to the NNTT for the purpose of making the determination.

4.1.8 Compensation Claim Consent Determinations

Compensation Claim Consent Determinations are applications made under *NTA* for compensation from government for validation and extinguishment. Specific provisions such as sections 17 and 19 and 22D and 22G of the *NTA* provide that for ‘past acts’ and ‘intermediate

¹⁶ As an example, between 1 January 1994 and 30 June 2007, 32,249 s 29 notices (80.5%) asserted the application of the expedited procedure (NNTT 2007: 11). However, 63 per cent of those notices did not attract any objection application (NNTT 2007: 11).



period acts' of extinguishment, the Commonwealth (or State as applicable) will be liable for compensation.

The Federal Court recently handed down the first award of compensation for the extinguishment of native title rights and interests under these provisions of the NTA (*De Rose v State of South Australia* [2013] FCA 988). The De Rose Hill Compensation Claim Group (the Nguraritja people) filed a compensation claim against the State of South Australia, under sections 50(2) and 61 of the NTA. The applicants and the South Australian government reached a compensation agreement, and the court made an order under s87 of the NTA (allowing the court to make a consent determination on compensation under an agreement of the parties) regarding compensation payable. However, the amount of compensation under the agreement and the method of calculation remained confidential and were not provided to the judge. Justice Mansfield accepted this confidentiality as, he stated, he did not wish to influence, or prejudice, other judges who may be required to make native title compensation decisions in future. Justice Mansfield was nevertheless satisfied that it was appropriate to make an order under s87 of the NTA, which requires consideration of a number of factors including whether the decision ought to be made.

4.2 State government settlements

Two State governments, South Australia and Victoria, have instituted State based settlement processes to resolve native title disputes and to provide for compensation. Some agreements have been made under these State settlement processes and it is expected that there will be more such agreements in future.

4.2.1 South Australian Settlement processes¹⁷

The South Australian Settlement Framework (see ATNS 2003 for more information) is not an alternative to the NTA, but rather focuses on two alternative paths to litigation under the NTA for resolving native title disputes –ILUAs and consent determinations (ATNS 2011c). The process for registration of ILUAs with the NNTT, (discussed at 4.1.3 above) applies to any ILUAs made under the South Australian Settlement Framework

The South Australian Native Title Resolution process operates in parallel to the ILUA process, bringing together the Congress of Native Title Management Committees, the South Australian Native Title Services, the SA Farmers Federation, the SA Chambers of Mines and Energy, Wildcatch Fisheries SA, the Local Government Association and the South Australian Government. The Resolution process can result in a Federal Court determination, a consent determination, or an agreement not to pursue. Compensation is determined either under a consent determination or an ILUA. The South Australian Resolution process does not specify particular heads of compensation.

Participants in the South Australian negotiation process have developed five template ILUAs that relate to the following areas (ATNS 2003):

¹⁷Determinations have been made to provide for procedures under *Land Acquisition Act 1969* (SA), *Mining Act 1971* (SA) and the *Opal Mining Act 1995* (SA).



- Fishing and aquaculture;
- Local government;
- Minerals exploration;
- Outback areas; and
- Pastoral.

These templates are available on the ATNS database. The minerals exploration ILUA template enables a mineral exploration company who holds an exploration tenement to sign up to the ILUA by completing and signing an acceptance document in the form attached to the registered framework ILUA. The company thereby enters into an agreement with the State, the native title claim group and the native title claim group's PBC on terms called the "exploration contract conditions". This contract is called an "accepted exploration contract".

The following types of mining tenements are authorised under the minerals exploration template ILUA:

- (a) tenements chosen by the explorer in the acceptance document;
- (b) any additional tenements notified by the explorer to the native title claim group during the term of the accepted exploration contract;
- (c) renewals, regrants and extensions of those exploration tenements; and
- (d) grants (and renewals, regrants and extensions) of exploration tenements of a different type within the area covered by the chosen or notified tenements (such as mineral claims, retention leases authorised for exploration only and miscellaneous purpose licences required for exploration).

As at 1 December 2013 four mining exploration ILUAs were in place for the Adnyamathanha Traditional Lands Association (Aboriginal Corporation) RNTBC, Gawler Ranges Native Title Group, Ularaka Arabunna Association Incorporated and Antakirinja Land Management Aboriginal Corporation.¹⁸

As at November 2012, Petroleum ILUAs in South Australia are in place for Yandruwandha/Yawarrawarrka Native Title Claim Group and the Wangkangurru/Yarluyandi Native Title Claim Group. The ILUA does not authorise mining (Parry et al 2005).

4.2.2 Victorian Settlement Process

Agreement-making in Victoria may occur under the Victorian Native Title Settlement Framework, as established by the *Traditional Owner Settlement Act 2010* (Vic) (*TOSA*), or arising out of applications for determinations of native title in the Federal Court. Both of these pathways are open to applicants and failure in one avenue does not necessitate failure in the other. For example, the Yorta Yorta people came to an arrangement under the Settlement Framework with the Victoria Government (prior to the Act passing), despite failing in their appeal to the High Court (*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002)

¹⁸ Electronic document available at http://www.minerals.dmitre.sa.gov.au/access_to_land/indigenous_land_use_agreements_iluas accessed 13 March 2014.



214 CLR 422; ATNS Database 2011b).¹⁹

The Victorian Settlement Framework seeks to pre-empt or render unnecessary Federal Court determinations on native title, minimizing costs and recognizing a wider range of traditional owner groups in Victoria. The Framework provides a mechanism for the government and private parties to conduct direct negotiations with traditional owner groups (Department of Justice 2013). Agreements under the Settlement Framework are called ‘non native title agreements’. They generally include a declaration that the group will cease native title applications in relation to the agreed land and promises not to commence any such action in the future. The State and the traditional owner group negotiate a settlement package that may include an alternative future act procedure under which payments might eventually be negotiated.

The Settlement Framework provides for substantive recognition of land title, payments and benefits of various kinds, and also contains measures for recognition and strengthening of culture. The overarching ‘Recognition and Settlement Agreement’ is designed to be equivalent to a native title settlement under the *NTA*. It may include four types of sub-agreement:

Land Agreements – including the grant of freehold over unreserved public land, with or without conditions; the grant of ‘aboriginal title’.

Land Use Activity Agreements - deal with the procedural rights of traditional owner groups in relation to certain activities on Crown land such as mining, leases, controlled burning and revegetation (*TOSA* s28). These agreements are intended to replace the future act regime set out in the *NTA* in coordinating native title claim groups, Crown use and third-party use, in four simplified categories: routine, advisory, negotiation or agreement activities. Under *TOSA* s 30 the relevant Minister, on behalf of the State, may enter into an agreement with a traditional owner group entity for the whole or any part of the land that is the subject of the recognition and settlement agreement as to the carrying out of land use activities on or in relation to that land. Section 31 of *TOSA* sets out the procedural requirements for a valid Land Use Activity Agreement and s75 of *TOSA* requires that all information on the Land Use Activity Register is publically available. For a template example of a Land Use Activity Agreement refer to Appendix G.

Funding Agreements - designed to provide a suitable funding base for traditional owner groups to perform their functions and meet their responsibilities under the Recognition and Settlement Agreement and may provide for money to be paid to the Victorian Traditional Owners Trust or to an Aboriginal Corporation (*TOSA* s78; see, eg, *Dja Dja Wurrung Clans Aboriginal Corporation and State of Victoria 2013: 9*).

Natural Resource Agreements - designed to recognise the rights of traditional owner groups to manage their non-commercial use of natural resources on lands and waters and may authorise participation rights for commercial use or activities for traditional purposes, such as hunting, camping, the harvesting of certain plants and the taking of fresh produce or water.

The ‘claims resolution’ aspect of the Settlement Framework accounts for the majority of

¹⁹ The Barmah National Park was created in April 2010 pursuant to the *Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009* (Vic) and is jointly managed by the Yorta Yorta people and the State of Victoria. Under s 25 of the *Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009* (Vic), the Government is empowered to enter into agreements with Traditional Owner Land Management Boards. The establishment of Traditional Owner Land Management Boards is governed by the *Traditional Owner Settlement Act 2010* (Vic).



compensation. Other rights such as participation in use of natural resources could provide more valuable benefits in the long run and may have a profound effect on economic development for the traditional owner group.

The Land Use Activity Regime provides procedures for future acts such as mining and large-impact land-use, providing for community benefits in that case. The ‘benefits’ will be targeted to assist economic, social and cultural development goals. *TOSA* s 67 specifically requires that a register of Land Use Activity Agreements is established and maintained.²⁰ The register must include details as to the area of land to which the agreement applies, the date of initial registration, a copy of the agreement as at the initial registration, the date of registration of any variation of the agreement and a copy of any registered variation (*TOSA* s 74). Section 75 of *TOSA* requires that all information in the land use activity agreements register is publicly available.

Settlement fund management

The independent Victorian Traditional Owners Trust manages the lump-sum funds from native title settlements in Victoria, pursuant to Agreements under *TOSA*. More detail about the Trust is in 3.7 above.

Dja Dja Wurrung Settlement

The Recognition and Settlement Agreement between the Victorian Government and the Dja Dja Wurrung traditional owner groups, is available online and includes the full text of the agreement.²¹ In addition to this agreement there is a Land Use Activity Agreement and an ILUA. Under the settlement the ILUA satisfies the future act provisions of the *NTA* by establishing an alternative future act regime under the Land Use Activity Agreement. It provides for the withdrawal of some native title determination applications and undertakes not to make future applications (Testro 2013). Dja Dja Wurrung funds will be managed by the Victorian Traditional Owners Trust (see 3.7 above).

4.3 Aboriginal Land Rights (NT) Act (ALRA) payments

The Australian Indigenous land rights movement began to achieve recognition in the 1970s. Indigenous people also began to extract an economic benefit from agreements with mining companies (Altman 1983; 1995). Agreements such as the Groote Eylandt (Manganese) agreement, the Gove (Bauxite) agreement and the 1975 Memorandum of Understanding for the Ranger Project negotiated royalties for indigenous people. These agreements did little to protect Indigenous peoples’ interests (Howard-Wagner and Maguire 2010) although their structure remains influential in contemporary agreements (Tehan and Godden 2012).

Although there had been since the 19th century a system of Aboriginal reserves (Altman 1983), the *ALRA* was the first significant recognition of Indigenous land rights in Australia and for the first time, gave Indigenous people a real opportunity to engage with and extract a benefit from

²⁰ See the online register available at <http://www.justice.vic.gov.au/home/your+rights/native+title/register+of+land+use+activity+agreements> accessed 13 March 2014.

²¹ Electronic document available at <http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+settlement#sthas.h.Qzj0hQxc.pdf> accessed online 13 March 2014.



mining companies over mining on their traditional lands and with government over leasing back aboriginal land (Howard-Wagner 2010).

In contrast to native title rights and interests recognized under the *NTA*, the *ALRA* created an inalienable freehold title, held communally, over former reserves and mission land in the Northern Territory and allowed for claims over un-alienated crown land by those Aboriginal peoples and communities who could prove traditional ownership as defined in the Statute. It also created a scheme for decision-making by traditional owners about developments on their land including a *veto power* over mineral resource development (*ALRA* ss 40, 41). Traditional owners have the legal right to refuse mining on their land. Mining on Aboriginal land in the Northern Territory accounts for more than 80 per cent of the value of minerals extracted in the Northern Territory and approximately 30 per cent of Aboriginal land is currently under exploration or negotiation for exploration (Northern Land Council). A large proportion of the mining exploration land comes under the *ALRA*.

Part IV of the *ALRA* sets out the procedure for resource companies to engage with the Traditional Owners. Exploration and Mining Agreements are made between the relevant Aboriginal Land Council such as the Northern Land Council [www.nlc.org.au] or Central Land Council [www.clc.org.au] and the exploration license applicant or prospective miners (*ALRA* ss40 and 46). These agreements require prior consultation with the traditional owners and contain the terms and conditions to which the grant of a license or a mining interest will be subject.

Payments made under the *ALRA* are much more regulated than native title payments. All payments received from mining companies and from governments for leasing purposes must be paid out to a corporation for the benefit of the traditional Aboriginal owners of the land generally within 6 months (*ALRA* s35). The corporation must be incorporated under the *CATSI Act*. The reporting obligations of CATSI corporations receiving payments under the *ALRA* are set out in 3.1 above.

It is a requirement that all money paid to Land Councils arising from mining agreements or other land uses, shall be paid to the traditional owners within six months of receiving the money in accordance with the agreement or to any Aboriginal and Torres Strait Islander corporation affected by the agreement (*ALRA* s35). If the Land Council fails to do so it must provide a written report to the Minister within one month (*ALRA* s35(5)). The Land Councils must report on any money received under mining agreements and the Aboriginal and Torres Strait Islander corporations which receive the money must report the names of people receiving payments, and the dates, amounts and purposes of payments to the Land Council (*ALRA* s35C). If a royalty association does not report to the Land Council, Land Council may suspend further payments to that royalty association (*ALRA* s35(6A)). The activities and operations of the Aboriginal and Torres Strait Islander corporations receiving certain payments under determinations may be audited by the Australian Government Office of Evaluation and Audit (Indigenous Programs).²²

Subsequent to the *ALRA*, various State and Territory land rights laws were passed. South Australia, for example, passed the *Pitjantjatjara Land Rights Act 1981* and the *Maralinga Tjarutja Act 1984*. Victoria passed the *Aboriginal Lands Act 1970*, which granted freehold title to people of Lake Tyers Aboriginal reserve and the Farlingham reserve. New South Wales passed the *Aboriginal Land Rights Act 1983* (NSW) which transferred some former reserves to

²² Established by section 193W of the *Aboriginal and Torres Strait Islander Act 2005*.



Aboriginal peoples and established a claims procedure over a small area of 'claimable crown land, as well as creating a land fund. Each has varying provisions for consultation and compensation in relation to extractive industry activity.

4.3.1 Entity reporting under the ALRA regime

Specific rules apply to entities reporting under the *ALRA* regime. A CATSI corporation in the Northern Territory that receives payments under the *ALRA* must provide the relevant Land Council with a copy of its financial statements each reporting year under s 35C of the *ALRA* and a written report setting out the purpose for which that amount was spent (including details of any relevant project) and each recipient of that amount and the amount paid. This information must also be provided to the traditional owners.

Northern Territory Land Councils are required to publish and submit to the Minister an annual report (section 9 of the Commonwealth *Authorities and Companies Act 1997*). The Land Council must report information received from CATSI corporations as to mining payments in its annual report (*ALRA* s 37). The Land Council must also include information as to any amounts held in trust, when it was paid and the mining operations concerned. The Annual Report will also include information as to consultancy fees and other money received by the Land Council. Under s 48D of the *ALRA*, mining agreements may also make provision for the distribution of any money paid to the Land Council under the agreement to or for the benefit of such groups of Aboriginals as are specified in the agreement.

4.3.2 Aboriginal Benefits Account

The *ALRA* also establishes the Aboriginals Benefit Account (ABA) where payments are made to the ABA by the Commonwealth or Northern Territory government ("royalty equivalent payments") based upon how much mining has been done on Aboriginal land. The ABA must receive and distribute monies generated from mining on Aboriginal land in the Northern Territory and use that money for the benefit of Aboriginal people living in the Northern Territory. A proportion of the ABA money funds operation of the Land Councils, 30 per cent goes to areas affected by mining and the balance is used for the benefit of all Aboriginal people living in the Northern Territory. The ABA advisory committee advises the Minister responsible regarding use of the balance (*ALRA* s64(4)).

The *ALRA* sets out the accounting and annual reporting of the ABA (Part VI, in particular s 64B of *ALRA*). The ABA directs funds to:

- initiatives of benefit to Aboriginal people living in the Northern Territory (beneficial payments) (*ALRA* s 64(4))
- distribution to traditional land owners (Royalty Associations) who are affected by mining operations on their land (*ALRA* s 64(3))
- support for the administration of the Northern Territory Land Councils (*ALRA* s 64(1) in accordance with s 34 (1))
- support for the acquisition and administration of land leases through the Office of Township Leasing (*ALRA* s 64(4A))
- support for the administration of the ABA (*ALRA* s 64(6))



The Annual Report of the ABA prepared by the department that administers the ABA must include the financial statements required by section 49 of the *Financial Management and Accountability Act 1997* (Cth) and an audit report on those statements under section 57 of the *Financial Management and Accountability Act 1997* (Cth). A copy of the report to the Minister must be tabled in each House of the Parliament as soon as practicable. The financial reports of the land councils include information on ABA appropriations.

4.4 Heritage agreements

Each State and Territory has a legislative regime that protects Aboriginal heritage as defined in the various statutes.²³ There is last resort Federal legislation if the State and Territory schemes fail to protect heritage.²⁴ Regardless of land status on which extractive industry projects occur, compliance with heritage legislation is required. These statutes create offences for various acts of interference with or destruction of heritage however defined. It is now commonplace for companies and Aboriginal land holders or custodians to enter into agreements for appropriate heritage protection processes. Under these agreements Aboriginal consultants will be paid for their time and expertise in clearing areas for work – either by identifying sites to be avoided or by clearing work areas in which the relevant exploration (or sometimes mining activity) may occur.

Agreements and methods will vary but templates of heritage agreements are provided by most governments or industry bodies. Western Australian examples are available at Land, Approvals and Native Title Unit, Government of Western Australia. Schedule 6 of the Proponent Standard Heritage Agreement indicates a daily rate of remuneration of \$500 maximum (indexed to CPI) plus a Regional Allowance in accordance with Public Service rates and food and accommodation allowance at cost.²⁵ These are direct payments for services provided and are not separately reported (see Appendix E for a summary of the template and Appendix F for the full text of the template).

4.5 Other agreements with Industry: ‘as if’ agreements

Companies and indigenous communities and groups will often enter into agreements under which payments will be made even though these agreements are not required by any legislation. These agreements will often be similar to those entered into under the various legal frameworks. There are many reasons for this practice including companies desire for a social licence to operate their activities. It is impossible to assess the number and scale of these agreements as they are not recorded publicly, although the Minerals Council of Australia assessment of the

²³ For example: *Aboriginal Heritage Act 1988* (SA); *Aboriginal Heritage Act 2006* (Vic); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Heritage Protection Act 2003* (Qld); *Aboriginal Heritage Act 1972* (WA); *National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996* (NSW); *Northern Territory Aboriginal Sacred Sites Act* (NT).

²⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

²⁵ Proponent Standard Heritage Agreement Schedule 6, electronic document available at <http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/PSHA%20Draft%207%20-%20203%20March%2014.pdf> accessed 21 March 2014.



total payments made to indigenous communities would include some of these payments (see 2.3 above).

4.6 Other agreements with governments

There is a range of other kinds of agreements made by governments with traditional owners. These agreements are instructive as they may include models for governance and receipt and distribution of payments and benefits. These include, for example, joint management agreements with respect to national parks; quasi-commercial arrangements involving Indigenous Business Australia, the Indigenous Land Corporation and industry representative bodies; health service or health framework agreements involving the Commonwealth and state governments; and commercial contracts involving Indigenous parties (Langton and Mazel 2007: 22).

In some cases, State governments may be parties to ILUAs or other agreements under which they assume obligations to make certain payments for services. A State government or the Commonwealth government may also take on obligations for both payments and institutional arrangements. The Browse agreements are an example of this, agreed with the Western Australian government (see <http://www.dsd.wa.gov.au/8617.aspx>).

The COAG *National Framework of Principles for Delivering Services to Indigenous Australians* provided for the mainstreaming of service delivery to Aboriginal and Torres Strait Islander people (Langton and Mazel 2007: 21). Two specific types of agreements were established: Regional Partnership Agreements (RPAs) and Shared Responsibility Agreements (SRAs). The general approach was continued under the Rudd/Gillard Labor governments but it is not clear to what extent these agreement models will be utilized under the Abbott government. By 2013, there were 18 RPAs and 284 SRAs on the ATNS database. However, while yet to be officially confirmed, it appears that SRAs may no longer be used in Commonwealth government agreement making with indigenous people.

A further example of agreements with government is the 99 year township leases entered into with Aboriginal communities under the *ALRA*. Trust land is leased to a government entity, which makes lease payments to the relevant land trust. These leases are agreements under which payments are made by governments to an Indigenous land holder (Office of Township Leasing 2013).

4.7 Relevant international law principles

There are overarching international law principles that may have varying (and contested) relevance and application in Australia. The four most relevant international instruments are [*Indigenous and Tribal Peoples Convention, 1989*](#) (ILO 169),²⁶ the United Nations [*Declaration on the Rights of Indigenous Peoples*](#) (UNDRIP)²⁷ and the [*International Covenant On Civil And*](#)

²⁶ Electronic document available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 accessed 21 March 2014.

²⁷ Electronic document available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf accessed 21 March 2014.



Political Rights (ICCPR).²⁸ Each of these instruments contains varying provisions concerning recognition of indigenous rights to land, to control resources, to be involved in decision-making about resources (commonly referred to as the requirement for free, prior and informed consent, although it is unclear whether actual consent is required) and to enjoy the benefits from resources on their land. Australia has not ratified ILO169. The UNDRIP was retrospectively endorsed in 2009²⁹ and is an aspirational document as ‘*it is non-binding and does not affect existing Australian law*’.³⁰

Although not binding on Australia it is often argued that some elements of each instrument may constitute customary international law and therefore may have some impact on the manner in which Australia conducts itself in relation to indigenous land and resource owners and extractive industries. The *International Convention on the Elimination of All Forms of Racial Discrimination*³¹ protects individuals from discrimination on the basis of race and has been ratified by Australia and introduced into Australian law through the *Racial Discrimination Act 1975* (Cth). The complaints procedure of this Convention has engaged the Australian government on occasions in relation to the operation of the *Native Title Act 1993* (Cth) (for example: Committee on the Elimination of Racial Discrimination 2010; Triggs 1999).

The former Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, has reported specifically on Australia (Anaya 2010) and more generally on Extractive Industries and Indigenous peoples (Anaya 2013). He has expressed concern that Indigenous rights might be ‘*inadvertently undermined because the terms of such agreements are kept secret*’ (Anaya 2010; para 27). His general report does not raise this issue (Anaya 2013) but rather focuses on the need for fully informed consent through appropriately resourced negotiations, opportunities for indigenous involvement in development of resources and an approach based on ‘*full respect, impact mitigation, equitable distribution of benefits ... within a framework of partnership*’ (Anaya 2013 20-21).

²⁸ Electronic document available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 21 March 2014.

²⁹ Electronic document available at https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf accessed 21 March 2014.

³⁰ Electronic document available at https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf accessed 21 March 2014.

³¹ Electronic document available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> accessed 21 March 2014.



References

- Agreements, Treaties and Negotiated Settlements (ATNS) Project (2003) *South Australian Statewide Framework Agreement*, viewed online 9 December 2013
<<http://www.atns.net.au/agreement.asp?EntityID=1539>>.
- (2005) *Argyle Diamonds Indigenous Land Use Agreement (ILUA)*, electronic document available at
<http://atns.net.au/agreement.asp?EntityID=2591&Search=http%3A%2F%2Fwww.atns.net.au%2Fsearchresults.asp%3Ftitle%3Dargyle%26keywords%3D%26category%3D%26subjectmatter%3D%26subcategory%3D%26location%3D%26country%3D%26fromyear%3D%26toyear%3D%26Order%3DName> accessed 16 January 2014.
- (2008) *Submission to discussion paper: Optimising benefits from native title agreements*, University of Melbourne & Department of Families, Housing, Community Services and Indigenous Affairs, 6 December 2008.
- (2011a) *Poverty in the midst of plenty: Economic empowerment, Wealth creation and institutional reform for sustainable Indigenous and local communities (LP0990125) Progress Report December 2010 – June 2011*.
- (2011b) *Yorta Yorta Traditional Owner Land Management Agreement*, electronic document available at <http://www.atns.net.au/agreement.asp?EntityID=5366> accessed 9 December 2013.
- (2011c) *Australian Indigenous Land Use Agreement (ILUA) Statewide Negotiations Strategic Plan 2006-2009*, electronic document available at
<http://www.atns.net.au/agreement.asp?EntityID=5268> accessed 9 December 2013.
- Altman, J. C. (1983) *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra.
- (1995) ‘Land Rights and Aboriginal Economic Development: Lessons from the Northern Territory’ *Agenda* vol. 2 no. 3, pp. 291-299.
- (1998) ‘Compensation for native title: Land rights lessons for an effective and fair regime’, *Land, Rights, Laws: Issues of Native Title*, no. 20, pp. 1–12.
- Anaya, J. (2010) A/HRC/15/ *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people: The Situation in Australia.
- Anaya, J. (2013) *Extractive industries and indigenous peoples: Report to the Human Rights Council A/HRC/24/41, 2013* electronic document available at
<<http://unsr.jamesanaya.org/study/report-a-hrc-24-41-extractive-industries-and-indigenous-peoples-report-of-the-special-rapporteur-on-the-rights-of-indigenous-peoples; 24 March 2014>> accessed 13 January 2014.
- Australian Human Rights Commission (AHRC) (2005) ‘Fact sheet 2’, *Social justice report 2005*, electronic document available at
<http://www.hreoc.gov.au/social_justice/sj_report/sjreport05/sjr_2005_factsheet2.html> accessed 9 December 2013.



- (2009) *Native title payments discussion paper: Optimising benefits from native title agreements*, submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner, 4 March 2009.
- Australian Institute of Aboriginal and Torres Strait Islander Studies (2008) *Native Title Payments & Benefits: Literature Review*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, Canberra.
- Australian Local Government Association (ALGA) (2002) 'Indigenous Land Use Agreements involving local government', *Native Title Issues Paper* no. 4.
- Bauman, T. & Kingham, F. (2005) *Native title mediation: Issues identified, lessons learnt: Proceedings and findings of IFaMP workshops with Native Title mediators February and March 2005*, Report no. 5, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, Canberra.
- Committee on the Elimination of Racial Discrimination Seventy-seventh session 2 –27 August (2010) *Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia* CERD/C/AUS/CO/15-17.
- Commonwealth of Australia (2006) *Implementation review of Shared Responsibility Agreements: Don't let's lose another good idea*, electronic resource available at <<http://www.dss.gov.au/our-responsibilities/indigenous-australians/publications-articles/evaluation-research/implementation-review-of-shared-responsibility-agreements-dont-lets-lose-another-good-idea>> accessed 9 December 2013.
- (2008) *Discussion paper: Optimising benefits from native title agreements*, Department of Families, Housing, Community Services and Indigenous Affairs, Canberra.
- (2009) 'SRAs and RPAs', Indigenous Portal, electronic document available at <<https://apps.indigenous.gov.au/sra.html>> accessed 9 December 2013.
- (2010a) *Discussion Paper: Leading practice agreements - Maximising outcomes from native title benefits Discussion Paper*, Attorney General's Department and Minister for Families, Housing, Community Services and Indigenous Affairs, Canberra.
- (2010b) *Consultation Paper: Native Title, Indigenous Economic Development and Tax*, Attorney General's Department, Canberra.
- Corbett, A. & O'Faircheallaigh, C. (2006) 'Unmasking Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions', *University of Western Australia Law Review*, vol. 33, no. 1, pp. 153-177.
- Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) (2007) *Secretaries' Group on Indigenous Affairs annual report 2006-2007*, electronic document available at <<http://www.dss.gov.au/our-responsibilities/indigenous-australians/publications-articles/annual-reports/secretaries-group-on-indigenous-affairs-annual-report-2006-2007>> accessed 11 December 2013.
- (2009) *Native Title Payments Working Group report*, electronic document available at <<http://www.dss.gov.au/our-responsibilities/indigenous-australians/publications-articles/land-native-title/native-title-payments-working-group-report>> accessed 11 December 2013.



- Department of Justice Victoria (2013) 'Traditional Owner Settlement Act' electronic document available at
<<http://www.justice.vic.gov.au/home/your+rights/native+title/traditional+owner+settlement+act>> accessed 11 December 2013.
- Department of State Development (WA) (2010) *Browse LNG Precinct: The native title agreements: Overview*, electronic document available at
<http://www.dsd.wa.gov.au/documents/Browse_Fact_Sheet_-_Native_Title-Overview.pdf> accessed 11 December 2013.
- Department of the Premier and Cabinet (WA) (2013) *Guide to Government Business under the Commonwealth Native Title Act 1993*, Western Australian Government, Perth.
- Dodson, M. (2006) 'A view from the ground: The true impact of policy change', speech delivered at the 5th Annual Conference of the International Quality and Productivity Centre, Brisbane Marriott Hotel, 27 June 2006.
- Howard-Wagner D. (2010) 'Scrutinising ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities' *Australian Indigenous Law Review*, vol. 14 no. 2 pp. 100 - 114.
- Howard-Wagner D. and Maguire A. (2010) 'The Holy Grail or the Good, the Bad and the Ugly?: A qualitative exploration of ILUAs Agreement-Making Process and the relationship between ILUAs and Native Title' *Australian Indigenous Law Review*, vol. 14 no. 1 pp. 71 - 85.
- Langton, M. & Mazel, O. (2007) 'Scoping paper on the potential uses and benefits of agreements with Indigenous people', paper in the author's possession, Ministerial Council for Aboriginal and Torres Strait Islander Affairs.
- Langton, M. & Mazel, O. (2008) 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' *Journal of Energy and Resources Law* vol 26(1) pp31-65.
- Langton, M. & Palmer, L. (2007) 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour Among Nations?* Melbourne University Press, Carlton.
- Laurie, V. (2007) 'Land use contracts fail to deliver', *The Australian*, 30 June.
- Law Council of Australia (2009) *Submission to Optimising Benefits from Native Title Agreements*, Attorney General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, 13 February 2009.
- Llewellyn D. and Tehan, M. (2005) 'Treaties', 'agreements', 'contracts' and 'commitments' - What's in a name? The legal force and meaning of different forms of agreement making' *Balayi - Culture, Law and Colonialism* vol. 7, pp.6-40.
- Martin, F. (2010) 'Native Title Payments and their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach?' *UNSW Law Journal* vol. 33 no.3, p. 685.
- McCausland, R. (2005) 'So just who is sharing the responsibility in Indigenous policy?', *New Matilda Magazine*, electronic document available at



- <<https://newmatilda.com/2005/03/09/so-just-who-sharing-responsibility-indigenous-policy>> accessed 11 December 2013.
- National Native Title Tribunal (2005) 'Procedures under the Right to Negotiate Scheme' electronic document available at <<http://www.nntt.gov.au/Future-Acts/Procedures-and-Guidelines/Documents/Procedures%20under%20the%20right%20to%20negotiate.pdf>> accessed 11 December 2013.
- (2006) 'Classes of agreement held by the National Native Title Tribunal'.
- (2007) 'Getting the most out of the future act process', presentation to the AIATSIS 2007 Native Title Conference, Cairns, 7 June 2007.
- (2008) 'ILUA or the right to negotiate process? A comparison for mineral tenement applications', electronic document available at <<http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Booklets/ILUA%20or%20the%20right%20to%20negotiate%20December%202008.pdf>>, accessed 11 December 2013.
- (2010) *Encouraging signs but significant challenges ahead*, Media Release, 6 April 2010, National Native Title Tribunal, electronic document available at <http://www.nntt.gov.au/news-and-communications/media-releases/pages/encouraging_signs_but_significant_challenges_ahead.aspx> accessed 11 December 2013.
- (2011a) *Milestone for native title agreements*, Media Release, 31 March 2011, National Native Title Tribunal, electronic document available at <<http://www.nntt.gov.au/News-and-Communications/Media-Releases>> accessed 11 December 2013.
- (2011b) Annual Report 2010-2011, electronic document available at <www.nntt.gov.au> accessed 9 December 2013.
- (2012) *National Report: Native Title* (30 June 2012) electronic document available at <www.nntt.gov.au> accessed 11 December 2013.
- (2013) Search Determinations, electronic document available at <<http://www.nntt.gov.au/Applications-And-Determinations/Search-Determinations/Pages/Search.aspx>> accessed 11 December 2013.
- Neate, G. (2002) 'Experience Proves Agreement Making the Preferred Way to Resolve Native Title', Media Release, 16 April 2002, National Native Title Tribunal, electronic document available at <http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Experience_proves_agreement_making_preferred.aspx> accessed 11 December 2013.
- Northern Land Council (2013) 'Mining' electronic document available at <<http://www.nlc.org.au/articles/info/the-mining-industry-and-the-nlc/>> accessed 11 December 2013.
- O'Faircheallaigh, C. (2004) 'Native title and agreement making in the mining industry: Focusing on outcomes for Indigenous peoples', *Land, Rights, Laws: Issues of Native Title*, vol. 2, no. 25, pp. 1–13.
- O'Faircheallaigh, C. (2007) 'Unreasonable and Extraordinary Constraints: Native Title, Markets and the Real Economy', *Australian Indigenous Law Review*, vol. 11, no. 3, pp. 18-42.



- O’Faircheallaigh C. and Corbett, T. (2005) ‘Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements’ *Environmental Politics* vol. 14 no. 5, pp. 629 - 647.
- Office of Township Leasing, electronic resource available at <<http://otl.gov.au/site>> accessed 11 December 2013.
- Ritter, D. (2009) *The Native Title Market*, University of Western Australia Press, Western Australia.
- Sumner, C. and Wright, L. (2009) The National Native Title Tribunal’s Application of the Native Title Act in Future Act Inquiries, *University of Western Australia Law Review*, vol 34., pp. 191-227.
- Stewart, M. (2011) ‘The income taxation of native title agreements’ *Federal Law Review*, vol. 39, No. 3, pp. 361-398.
- Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, (2013) *Report to Government 1 July 2013*, Commonwealth of Australia, Canberra.
- Tehan, M. (2003) ‘A hope disillusioned, an opportunity lost? Reflections on common law native title and ten years of the *Native Title Act*’, *Melbourne University Law Review*, vol. 27, no. 2, pp. 523–71.
- Tehan, M., and Godden L. (2012) in M. Langton and J. Longbottom (eds), *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom*, Routledge, Oxfordshire & New York.
- Testro, N. (2013) ‘Historic Dja Dja Wurrung native title settlement in Victoria’ *Native Title News*, vol. 11 No. 1/2 pp. 26-28.
- Triggs, G. (1999) ‘Australia’s Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1988 (Cth)’ *Melbourne University Law Review* vol. 23 no. 2, pp. 372.
- Victorian Traditional Owners Trust (2013) *Annual Report*.

Legislation

- Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).*
- Aboriginal Land Rights Act 1983 (NSW).*
- Aboriginal Land Rights Act (Vic).*
- Associations Incorporation Reform Act 2012 (Vic).*
- Authorities and Companies Act 1997 (Cth).*
- Commonwealth Authorities and Companies Act 1997 (Cth).*
- Corporations Act 2001 (Cth).*
- Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).*
- Income Tax Assessment Act 1997 (Cth).*
- Income Tax (Mining Withholding Tax) Act 1979 (Cth).*



Land Acquisition Act 1969 (SA).

Maralinga Tjarutja Act 1984 (SA).

Mining Act 1971 (SA).

Native Title Act 1993 (Cth).

Opal Mining Act 1995 (SA).

Pitjantjatjara Land Rights Act 1981 (SA).

Traditional Owner Settlement Act 2010 (Vic).

Cases

De Rose v State of South Australia [2013] FCA 988.

Mabo (No 2) (1992) 175 CLR 1.

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141.

Yorta Yorta (2002) 214 CLR 422.

International Instruments

[*Indigenous and Tribal Peoples Convention, 1989*](#) (ILO 169).

[*International Covenant on Civil and Political Rights*](#) (ICCPR).

[*International Convention on the Elimination of All Forms of Racial Discrimination.*](#)

United Nations [Declaration on the Rights of Indigenous Peoples](#) (UNDRIP).

Appendix A: Case Study

This Appendix sets out a case study of resource payments made under a comprehensive native title agreement involving Indigenous traditional owners, various entities, government and a mining company. This case study illustrates the different types of payments and benefits that may be provided, the types of agreements that may be made and the entities that may be involved or established. It is important to note that not all agreements will have these features.

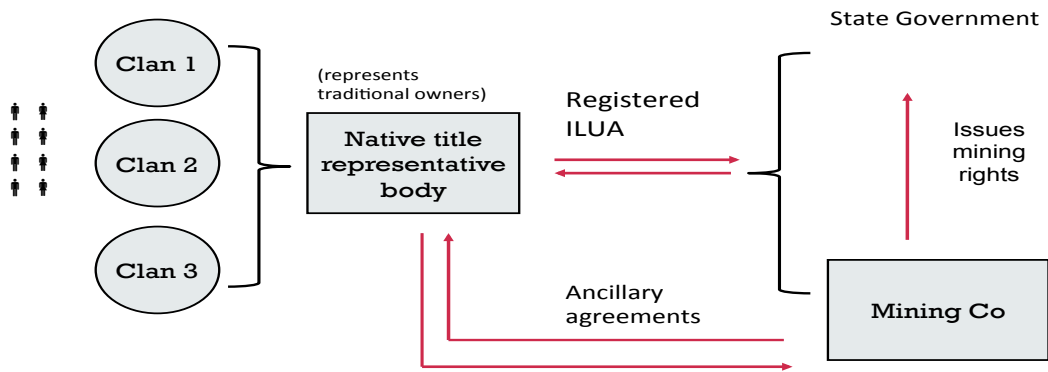


Figure 1: Negotiations under the NTA

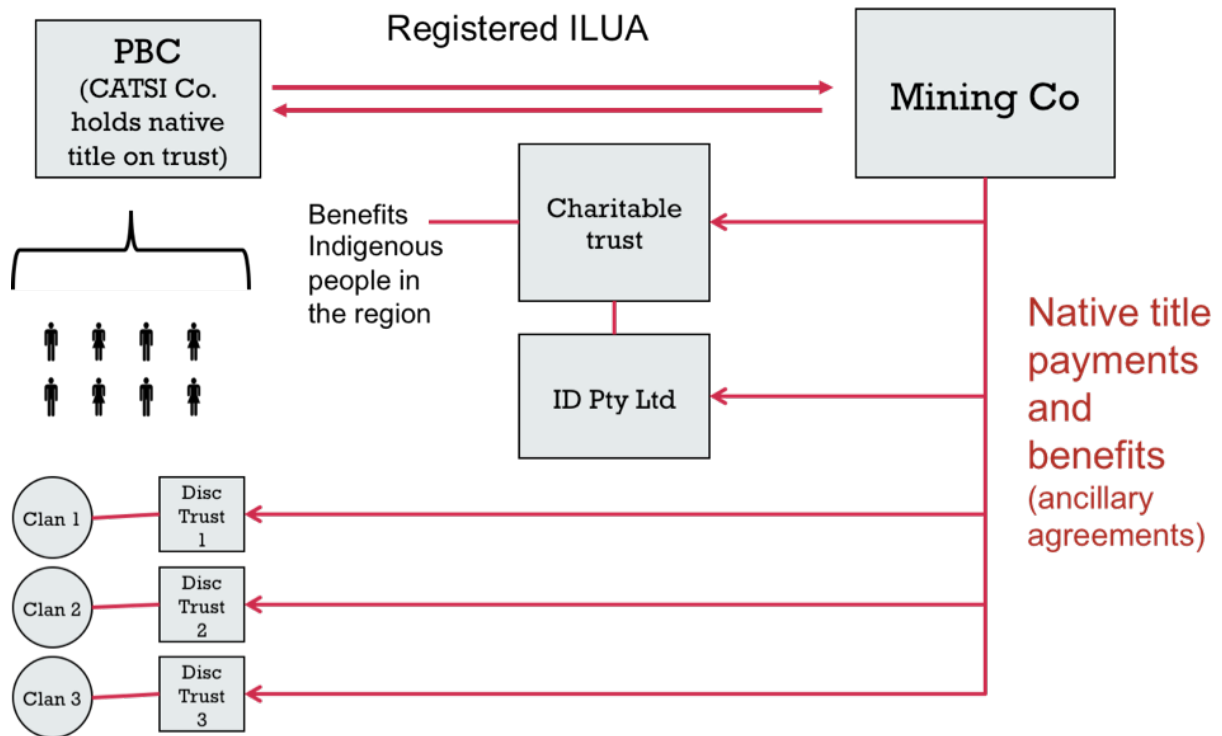


Figure 2: Entity structure post-agreement and native title claim determination Case Study¹

A mining company seeks to engage in a large scale and long-term mining project in respect of land subject to native title claims. An Indigenous claim group, comprising three clans led by individual elders, who are together represented by a Native Title Service Provider, enter into negotiations with the resource company and the State government in relation to the mining project. The mine life is expected to be 30 years.

The Indigenous claim group exercises its ‘right to negotiate’ under the NTA in respect of issue of mining rights by the State government (see 1.5). The group’s native title claims in the NNTT have not progressed beyond lodgement when negotiations commence.

During the course of negotiations, individuals who were part of the native title claim groups participated in heritage surveys including identification of sacred sites and analysis of potential mine impact. Their costs and expenses were paid by the mining company, and individuals sometimes received directly a per diem or fee, or was sometimes paid to the Native Title Representative Body as agent for the native title claim groups.

After lengthy negotiations, agreement is reached between the mining company, the State government and the Indigenous claim group. The main agreement is registered as an ILUA and states that it settles all ‘compensation’ issues with the mining company and the State government for past and future incursions on native title in respect of this mining project. A series of ‘ancillary’ agreements provide payments and benefits from the resource company in association with the ILUA.

¹ The Case Study is based in part on the Argyle Diamond agreement (ATNS, 2005), which is one of the few agreements to be publicly available. Some mining companies (in particular Rio Tinto) and some native title claim groups (in particular, those represented by the Kimberley Land Council) have made their full agreements public.

Later, some of the native title claims are upheld but not all of the native title claims are established for the project area.

The native title is held on trust by a Prescribed Body Corporate (PBC) established as a CATSI corporation (see 4.1), for the Indigenous claim group. The PBC does not receive any payments under the ancillary agreements (for a discussion on ancillary agreements see 5.1.3).

The substantive payments, benefits and negotiation and decision-making processes for the future are all set out in the ancillary agreements. A series of entities including discretionary trusts are established and the ancillary agreements explain how funds will be allocated on various trusts.

Payments and benefits

The ancillary agreement provides the following range of benefits:

1. A lump sum paid on signing the ILUA, to establish goodwill and capitalise the various legal entities established by the Indigenous claim group;
2. Annual cash payment, determined by value of output of the mine;
3. Annual profits-based cash payments, calculated as a fraction of profits of one mine. If the mine does not record a profit in a year, these payments are not made;
4. Provision of land owned by the resource company in the local township as freehold title (not subject to the native title claim);
5. A funded Employment and Training Budget for employment, training and youth education programs managed by the resource company.
6. A funded Cultural Awareness Fund, to be operated by the resource company, cultural heritage survey, site protection plans and ranger programs and a Cultural Awareness Course run by the traditional owners which all resource company staff must complete. For the heritage and ranger programs, this fund pays all costs of the individual Indigenous traditional owners who carry out the heritage survey for new work including a daily fee;
7. Support for Indigenous community development including construction of a recreation centre in the community by the resource company (on government land);
8. Preferential contracting for Indigenous business enterprises carried out by an Indigenous Development company ID Pty Ltd supplying to the mine and other operations.

Entity structure

The entity structure for this comprehensive agreement involves a range of entities.

PBC CATSI Corporation

The PBC must be established once native title is determined, to hold the native title on trust or as agent for the traditional owners. The PBC must be a CATSI corporation. The freehold land, and the cash payments received under the ILUA may be paid to the PBC, but are more likely to be distributed to other entities, as illustrated, in agreed proportions.

Discretionary trusts

Directly to a separate discretionary trust in favour of each traditional owner clan, identified by named elders. The discretionary trusts pay out sums directly to individual clan members as determined by the clan.

Charitable trust

A charitable trust for the purpose of poverty relief and advancement of Indigenous people in the region, comprising both the Indigenous claim group and other Indigenous people who live in the community. The charitable trust has a fund that provides education scholarships for members of the claim group and are utilised to receive payments. It has another fund called the Sustainability Fund, in which the cash payments are invested for the life of mine. The trustee may be a proprietary company, (often a company limited by guarantee or a CATSI corporation).

Development Company

A proprietary company called Indigenous Development Pty Ltd, which is taxable and in which all shares are owned by the charitable trust. ID Pty Ltd will operate businesses for the Indigenous claim group.

APPENDIX B: TYPES OF ENTITIES

Appendix B: Types of Entities

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose: <ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	Where is the material reported
CATSI corporation	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth).	<p>Each year a CATSI corporation must report to the Registrar each year about its finances, membership and include a report as to how well it has abided by the requirements of the <i>CATSI Act</i> and the corporation's own rules (constitution) (see PBCs below for more information).</p> <p>Small corporations with a consolidated gross operating income (CGOI) of less than \$100 000 need to lodge a general report. Small/medium corporations with a CGOI of \$100 000 or more and less than \$5 million must lodge a General report and financial or audit report. Large corporations and any corporation with a CGOI of \$5 million or more must lodge a general report, financial report, audit report and directors report.</p>	<p>Depending on the size of the CATSI corporation, various reporting requirements apply annually.</p> <p>The register includes the corporation name and Indigenous corporation number (ICN), date of registration, name and address of the contact person or secretary as well as key public documents, such as the corporation's rule book. <i>CATSI Act</i> s418-1 requires the Registrar to keep the Register of Aboriginal and Torres Strait Islander Corporations, the Register of Disqualified Officers and any other registers as considered necessary.</p> <p><i>CATSI Act</i> s 421-1 (1) states a person may inspect any document lodged with the Registrar except an exempt document as</p>	The Office of the Registrar of Indigenous Corporations www.oric.gov.au

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
			<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
Prescribed Body Corporate (PBC)	<p><i>Native Title Act 1993</i> (Cth); <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (Cth); <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth); <i>Corporations (Aboriginal and Torres Strait Islander) Regulations 2007</i> (Cth).</p>	<p>The <i>NTA</i> and the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (PBC Regulations) require corporations to register under the <i>CATSI Act</i> if they are determined by the Federal Court to hold and manage native title rights and interests. Once a PBC is entered on the National Native Title Register it becomes a registered native title body corporate (RNTBC).</p> <p>Under the <i>CATSI Act</i>, PBCs have the following obligations:</p> <p>327-1 An Aboriginal and Torres Strait Islander corporation must prepare and lodge with the Registrar a general report in relation to each financial year and any reports (which might include a financial report, or directors' report, for a financial year) that are required by the regulations and any reports that are</p>	<p>defined in the section. There are no requirements for CATSI corporations to disclose information regarding the terms of agreements that they may enter into with governments or resource companies, or to specifically identify any benefit they may have received from that agreement.</p> <p>Depending on the size of the PBC corporation, various reporting requirements apply annually. Each PBC must lodge a general report – see CATSI Corporations above for more transparency requirements. There are no requirements for CATSI corporations to disclose information regarding the terms of agreements that they may enter into with governments or resource companies, or to specifically identify any benefit they may have received from that agreement.</p>	<p>The Office of the Registrar of Indigenous Corporations (ORIC), www.oric.gov.au.</p>

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
		<p>required by the Registrar.</p> <p>Small corporations with a CGOI of less than \$100 000 need to lodge a general report. Small/medium corporations with a CGOI of \$100 000 or more and less than \$5 million must lodge a General report and financial or audit report. Large corporations and any corporation with a CGOI of \$5 million or more must lodge a general report, financial report, audit report and directors report.</p>	<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
Native Title Representative Bodies (NTRBs)	<i>Native Title Act 1993; Native Title (Representative Bodies – Audit of Financial Statements) Regulations 2005 (Cth).</i>	NTA Part 11 Division 5 specifies the accounting requirements of NTRBs. Audits may be made by Commonwealth appointed auditor (NTA s203DF). Some NTRBs are registered with ORIC and therefore have the same reporting requirements as CATSI corporations. Some NTRBs are registered as charities with the ACNC (see below).	Unless registered with ORIC, most information on NTRB accounting is not public. Annual reports are available online from most NTRB websites. The annual reports do not generally specify agreements made with governments or resource companies and do not specifically identify any benefit they may have received from agreements.	ORIC if applicable; NTRB websites contain annual reports. For details on NTRBs visit www.ntrb.net/ .
Native Title Service Providers (NTSPs)	<i>Native Title Act 1993 (Cth).</i>	NTSPs are funded to do the same work as NTRBs (NTA s 203FE). In an area where no NTRB is appointed, an NTSP may be funded by the Department of Social Services to provide the same functions as an NTRB. The funding period for NTSPs is determined by negotiation rather than the recognition process. NTSPs have legal responsibilities	The accounting requirements of NTSPs are not public. Annual reports are available online from most NTSP websites. The annual reports do not generally specify agreements made with governments or resource companies and do not specifically identify any benefit they may have received from agreements.	NTSP websites contain annual reports. For details on NTSPs visit www.ntrb.net/ .

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
		and functions under <i>NTA</i> s 203B and have the same accounting requirements as NTRBs.	<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
ASIC corporation (proprietary companies – Pty Ltd).	<i>Corporations Act 2001</i> (Cth).	Unless it is a small proprietary company (as defined in s 45A(2)) each company must prepare a financial report (s 295), a directors report (s298), have the financial report audited (ss 301, 307, 308), provide the reports to members (s 314) and lodge with ASIC (s 319). A small proprietary company does not need to unless directed to do so by ASIC or by at least 5% of members (s 292(2)).	The reports generally do not include information on agreements entered into with resource companies or governments and any benefits received. There is no requirement to state how income was received or from whom. Therefore it is difficult to determine the amount applicable to mining payments to traditional owners.	The ASIC Connect website allows for the user to search for documents lodged with ASIC. Fees are applicable < https://connectonline.asic.gov.au/ >
ASIC Corporation (public companies)	<i>Corporations Act 2001</i> (Cth).	Public Companies have the same reporting requirements as proprietary companies and in addition must lay the financial report, directors' report and auditor's report before AGM (s 317)	The reports generally do not include information on agreements entered into with resource companies or governments and any benefits received. There is no requirement to state how income was received or from whom. Therefore it is difficult to determine the amount applicable to mining payments to traditional owners.	The ASIC Connect website allows for the user to search for documents lodged with ASIC. Fees are applicable < https://connectonline.asic.gov.au/ >
ASIC –Company Limited by Guarantee	<i>Corporations Act 2001</i> (Cth).	Tier 1 companies (s45B annual revenue less than \$250,000 which do not have deductible gift recipient status under the <i>Income Tax Assessment Act 1997</i>) are exempt from preparing a financial report under the <i>Corporations Act</i> , unless directed to do so by	The reports generally do not include information on agreements entered into with resource companies or governments and any benefits received. There is no requirement as to state how income was received or from	The ASIC Connect website allows for the user to search for documents lodged with ASIC. Fees are

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
		<p>ASIC or by at least 5% of members (s 292(3)).</p> <p>Tier 2 companies are those with either annual revenue of less than \$250,000 that are a deductible gift recipient, or have annual revenue of between \$250,000 and \$1 million, irrespective of whether the company is a deductible gift recipient. Tier 2 companies must prepare a financial report and a directors report (ss 292, 298, 300B) but does not need to have financial report audited unless a Commonwealth company, or a subsidiary of a Commonwealth company or Commonwealth authority. If the company does not have financial report audited, it must have financial report reviewed (s301). Must give reports to any member who elects to receive them (s316A).</p> <p>Tier 3 companies, being those with annual revenue of \$1 million or more, irrespective of whether they are a deductible gift recipient, must prepare and lodge an audited financial report ss 292, 301 and a directors report (ss 298, 300B) and must give reports to any member who elects to receive them (s316A).</p>	<p>whom. Therefore it is difficult to determine the amount applicable to mining payments to traditional owners.</p> <ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	<p>applicable <https://connectonline.asic.gov.au/></p>
Statutory and state entities				
Northern Territory	<i>Aboriginal Land Rights</i>	Northern Territory Land Councils are required to	The financial reports do not list income or	Annual reports are

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
Land Councils	<i>Act 1976</i> (Cth); <i>Financial Management and Accountability Act 1997</i> (Cth); <i>Commonwealth Authorities and Companies Act 1997</i> (Cth).	publish and submit to the Minister an annual report (s 9 of the <i>Commonwealth Authorities and Companies Act 1997</i>). The Land Council must report information received from CATSI corporations as to mining payments in its annual report (<i>ALRA</i> s37). The Land Council must also include information as to any amounts held in trust, when it was paid and the mining operations concerned. The annual report will also include information as to consultancy fees and other money received by the Land Council (<i>ALRA</i> s37).	<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² <p>expenditure by tenement or by traditional owner group for income that may have been received from mining operations. The reports generally do not include comprehensive information on agreements made with Indigenous people and resource companies in the land council area.</p>	available from the Land Council websites: http://www.nlc.org.au/publications/cat/annual-reports http://www.clc.org.au/publications/cat/annual-reports/ http://www.anindilyakwa.com.au/periodicals-and-annual-reports http://www.tiwilandcouncil.com/publications/corporate-publications.htm
Aboriginal Benefit Account (ABA)	<i>Aboriginal Land Rights Act 1976</i> (Cth); <i>Financial Management and Accountability Act 1997</i> (Cth)	The ABA has reporting requirements under s64B of the <i>ALRA</i> . The Department that administers the ABA must prepare and give to the Minister a report relating to the operation of the ABA for the year which includes financial statements required by s 49 of the <i>Financial Management and Accountability Act 1997</i> (Cth), and an audit report on those statements	The reporting requirements do not require the ABA to list income by tenement or by indigenous group. Information as to any agreements made between Indigenous people and resource companies is very limited or not available.	For copies of the annual ABA financial statements contained in FaHCSIA annual reports visit www.dss.gov.au .

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
		under s 57 of the <i>Financial Management and Accountability Act 1997</i> (Cth). These reports will then be tabled in each House of Parliament. The reports list the amount paid to land councils for administration. The financial reports of the land councils include information on ABA appropriations.	<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
Victorian Traditional Owners Trust	Established by deed between the Victorian Attorney-General and the Trustee. The Trustee for the Trust is Victorian Traditional Owners Funds Limited, a non-profit company limited by guarantee. The Victorian Traditional Owners Trust is a Charitable Trust (see below) and acts in accordance with <i>TOSA</i> and agreements made between Victorian Traditional Owners and the Victorian	The Victorian Traditional Owners Trust and the Trustee are audited by the Victorian Auditor-General's Office under the <i>Audit Act 1994</i> (Vic). The Trust is registered as a charity with the ACNC. Financial statements are made annually in accordance with the Australian Accounting Standards and include information on income, assets, liabilities and expenses. The Trust also produces Report Cards for each traditional owner group that has an account within the trust (Victorian Traditional Owners Trust 2013).	The trust deed and annual reports and report cards are available publically from the trust website. The report cards specify the amount that is being held on trust for each Indigenous group. The money is generally received through agreements made with the Victorian government.	Annual Reports and Report Cards are available from the Victorian Traditional Owners web site: < http://www.traditionalowners.org.au/index.php/reports >

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
	government.		<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
Anangu Pitjantjatjara Yankunytjatjara and Maralinga Tjarutja Act 1984	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)</i> <i>Maralinga Tjarutja Act 1984</i>	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)</i> recognized Anangu ownership of lands in SA and established the Anangu Pitjantjatjara Yankunytjatjara body corporate. Royalties obtained in respect of minerals recovered from APY lands are paid into separate funds maintained by the Minister of Mines and Energy with the royalties split between the Anangu Pitjantjatjara Yankunytjatjara, the General Revenue of the State and paid to the Minister to be applied to the health, welfare and advancement of the Aboriginal inhabitants of the State generally (<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 s22.</i>) The Executive Board of the body corporate must also prepare and submit to the Minister an annual report and audited financial reports (<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 ss 13 -13A</i>). The <i>Maralinga Tjarutja Act 1984</i> established the Maralinga Tjarutja Body Corporate. The body corporate is required to produce audited nancial accounts and lodge with Corporate Affairs Commission (<i>Maralinga Tjarutja Act 1984 s11</i>). Royalties obtained in respect of	Annual reports and audited financial reports can be obtained. The annual reports do not list income that may have been received from mining operations therefore the extent of any mining agreements in the APY Lands area or the Maralinga Tjarutja area cannot be determined.	APY annual reports are available from the APY website http://www.anangu.com.au/documents.html . Maralinga Tjarutja annual reports are available from the South Australian Government.

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
		minerals recovered from Maralinga lands are paid into a separate fund maintained by the Minister of Mines and Energy with the royalties split between the Maralinga Tjarutja, the General Revenue of the State and paid to the Minister to be applied to the health, welfare and advancement of the Aboriginal inhabitants of the State generally (<i>Maralinga Tjarutja Act 1984 s 24.</i>)	<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
Charities and Trusts				
Charity	From 1 January 2014 the ACNC will rely upon the <i>Charities Act 2013</i> (Cth) to determine whether a trust is charitable.	Charitable trusts or other charitable entities are generally not required to comprehensively report to any regulator. If registered with the ACNC, charities are required to lodge annual tax returns with the ACNC. Small charities are required to submit an Annual Information Statement which from 2014 will include basic financial questions and answers. Medium charities from 2014 must submit an Annual Information Statement and annual financial report that is reviewed or audited and large charities must submit an Annual Information Statement and an audited financial report. If a CATSI corporation is registered with the ACNC they do not need to send any reports any reports to the ACNC as the ACNC will accept corporation reports lodged with the Registrar	The ACNC Register includes information on charities registered with the ACNC and includes their Annual Information Statements, names of trustees, beneficiaries and purpose and trust deeds. Very limited information is publically available on agreement making and benefits.	ACNC – www.acnc.gov.au

APPENDIX B: TYPES OF ENTITIES

Type of entity	Legal Regime	Reporting Requirements	Relevance to the EITI. Do the entities disclose:	Where is the material reported
		under the <i>CATSI Act</i> as meeting the ACNC requirements.	<ul style="list-style-type: none"> • Terms of agreements that they enter into; • Names of the parties involved in agreements; • The value of the balancing benefit stream; • Resources pledged by the state to the entity under agreements; • Resources pledged by the resource company under agreements; • Can the materiality of these agreements relative to conventional contracts be determined.² 	
Trusts	Trustees are governed by the state trustee acts	Discretionary trusts or fixed trusts must lodge a tax return. If the trustee is a company, the corporate trustee has reporting obligations under the <i>Corporations Act 2001 (Cth)</i> . If the trust is a charity, it has reporting requirements to the ACNC – see above .	Very limited information is publically available, most of the information as to agreement making and benefits remains private and confidential. There are no requirements requiring trustees to release information about agreement making and to specify income streams from resource activities.	ASIC maintains a register of business names, which includes trusts if they are operating as a business (asic.gov.au).

Appendix C: Types of Agreements

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publically?*	Where is the material reported	Number of known Agreements
Indigenous Land Use Agreements (ILUAs)	<i>Native Title Act 1993</i>	<p>ILUAs must be registered with the National Native Title Tribunal (NNTT) before they bind the parties (<i>NTA</i> s24EA; NNTT 2008: 5). When the Registrar receives an application for the registration of an ILUA, they are required to issue a public notice containing some basic information about the agreement. Following registration, an extract of the ILUA is made available to the public on the NNTT Register of Indigenous Land Use Agreements. This extract must contain the following information (<i>NTA</i> s 199B(1)):</p> <ul style="list-style-type: none"> • a description of the area covered by the ILUA; • the name and contact address of each party to the ILUA; and • the period during which the agreement will operate (if specified in the agreement). <p>The registered extract must also contain any of the following statements (<i>NTA</i> ss 24EB(1) or</p>	<p>The terms of ILUAs (other than the period of the agreement and the description of the area) are not available publically. The names of the parties involved are recorded publically.</p> <p>Any information as to the amount of any benefit received from the State or resource company are not available publically.</p>	National Native Title Tribunal Register of ILUAs www.nntt.gov.au	<p>There are 881 registered ILUAs with the NNTT as at 5 June 2014.</p> <p>Mining: 141 Petroleum and gas: 25 Small Mining: 1</p> <p>TOTAL Mining Petroleum And Gas: 167</p> <p>Of the total 33 are Exploration ILUAs. 134 are non-exploration ILUAs:</p>

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
		<p>24EBA(1) or (4)) if they are specified in the agreement:</p> <ul style="list-style-type: none"> • that the parties consent to the doing of the particular class or classes of future acts, with or without conditions; or • that the right to negotiate does not apply to these particular acts; or • that the native title rights and interests of the parties have been surrendered; or • that the parties have agreed to change the effects of an intermediate period act on native title (in the case of body corporate or area agreements); or • that the parties agree to the validation of a future act (other than an intermediate period act) that has already been performed invalidly; or • that the non-extinguishment principle applies. <p>The extract of an ILUA is limited to information that the Registrar considers appropriate, and does not include any details that the parties intend to be kept confidential (NTA ss 199B, 199E).</p>	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
		Publicly available information on most ILUAs is limited to the agreement extracts and any additional information is usually supplementary to the compulsory clauses (for e.g. the exact kinds of future acts that may be performed in the agreement area, or the kinds of native title rights that are retained by the parties). Such information may note an Indigenous group's surrender of native title rights or its consent to future acts, but almost never provides details of payments, community development programs and other benefits that such a native title group may receive.	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		
Future Act Agreements (Subject to the right to negotiate)	<i>Native Title Act 1993</i> s31.	The mandatory threshold of disclosure for Future Act Agreements is very low. When a Future Act Agreement is negotiated in good faith under <i>NTA</i> s 31(1)(b), the parties must provide the Tribunal with a copy of the tripartite agreement, and also advise the relevant minister of its making (<i>NTA</i> s41A(1)). However, due to confidentiality concerns, the tripartite agreements provided to the NNTT rarely contain information about payments or other benefits that have been promised to Indigenous groups (NNTT 2006). They are largely limited to basic facts such as the names of the parties and the date of the	The names of the parties may be provided to the NNTT however are not available publicly.	The number of future act agreements subject to the right to negotiate are available from the NNTT and the number of Future Act Agreements that have been mediated by the NNTT under s 31 and s 150 of <i>NTA</i>	NA

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
		agreement. The minimally detailed Future Act Agreements that are submitted to the NNTT are not made available for public inspection (NNTT 2008). They may be disclosed by the Tribunal if the parties give their consent, or if an interested person seeks to obtain access to them through the Freedom of Information process (NNTT 2005). However, these options offer a very limited scope for any external scrutiny of such agreements.	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 	are available from NNTT annual reports. http://www.nntt.gov.au/News-and-Communications/Publications/Corporate-publications/Pages/Annual_reports.aspx	
Ancillary Agreements		Ancillary agreements to ILUAs or Future Act Agreements are never published by the NNTT in deference to the parties' wish for confidentiality, and in any case are almost never provided to the Tribunal in their full form. Ancillary agreements may contain details of payments, dispute resolution mechanisms, liaison committees and other substantive arrangements. The information on benefits exchanged and obtained by native title parties under ancillary agreements remains unavailable to the public.	Very little to no information is available publicly. Most agreements and the benefits under them are not made public unless released by the parties involved.	NA	NA
Acts subject to the expedited	<i>Native Title Act 1993 s 29.</i>	The number of objection applications to a section 29 notice are included in the Annual Reports of	Very little information is available publicly.	NNTT annual reports are	There have been 22919 objections

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
procedure		the NNTT.	<p>Unless an objection to the expedited procedure is lodged under s 32, such acts fall completely outside the NNTT regime. If an agreement is reached on these acts, there is no obligation to provide the agreement to the NNTT at all or even to reveal whether the expedited procedure was actually used in the process of making the agreement.</p> <p>The majority of s 29 notices asserting the expedited procedure do not attract objection applications. According to NNTT figures, between 1 January 1994 and 3 February 2014, there have been 50,157 s 29 notices. However, 66% of those notices did not attract any objection application at all.¹</p>	located: http://www.nntt.gov.au/News-and-Communications/Publications/Corporate-publications/Pages/Annual_reports.aspx	made, of which 9288 were withdrawn as an agreement was reached (at 3 February 2014).
Other Future Act Agreements: not subject to the right to negotiate	<i>Native Title Act 1993</i>	Acts that fall within the categories of 'valid' future acts set out in Subdivisions F to N of Part 2, Division 3 of the <i>NTA</i> are not subject to the 'right to negotiate' provisions in Subdivision P. Compensation must still be paid to the relevant native title holders before the proposed act can be carried out (<i>NTA</i> , Part 2, Division 3, Subdivisions F-N) and the native title holders also	The NNTT has no public record of the agreements for valid future acts under Subdivisions F to N of Part 2, Division 3 of the <i>NTA</i> which are not subject to the right to negotiate procedure under subdivision P.	NA	NA

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
		<p>retain some procedural rights such as the right to be notified on the proposed act, and the right to engage in consultation on its doing (<i>NTA</i> ss 24GB(9), 24JAA(11)-(14), 24KA(7)-(9)). However, there is no obligation to negotiate with these native title holders with a view to reaching agreement before the proposed act can be done.¹</p> <p>'Valid' future acts do not give rise to publicly available agreements, and the NNTT does not have access to records of compensation payments made with respect to such acts.</p>	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		
Consent determinations	<i>Native Title Act 1993</i>	<p>Consent determinations are published in full as a Federal Court judgment and are available from the NNTT website.</p> <p>Consent determinations generally have minimal content that is limited to recognising the existence of native title rights. A more detailed record of managing these rights is located in ancillary agreements between the parties, which may sometimes be provided in extracted form to the NNTT for the purpose of making the determination. The <i>NTA</i> s193 mandates that the Native Title Register must contain the following</p>	<p>Names of the parties involved and some of the terms are available on public record. Information as to compensation or funding is not included. The practicalities of managing the native title rights and interests are generally not included and are often located in ancillary agreements or ILUAs.</p>	<p>Available from austlii.edu.au and nntt.gov.au</p>	<p>203 consent determinations as of 3 February 2014.</p>

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publically?*	Where is the material reported	Number of known Agreements
		<p>information for approved determinations of native title:</p> <ul style="list-style-type: none"> - the name of the body that made the determination; - the date on which the determination was made; - the area of land or waters covered by the determination; - the matters determined, including whether or not native title exists in relation to the land or waters covered by the determination and if it exists—who the holders of the native title are and a description of the nature and extent of the native title rights and interests concerned; - in the case of an approved determination of native title by the Federal Court —the name and address of any prescribed body corporate that holds the native title on trust or is an agent for the native title holders - in the case of an approved determination of native title by a recognised State/Territory body, where the determination is that native title exists—the name and address of any body corporate that holds the native title 	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publically?*	Where is the material reported	Number of known Agreements
		<p>rights and interests concerned on trust or that is determined in relation to the native title under a provision of a law of the State or Territory concerned that corresponds to section 57.</p> <p>Under <i>NTA</i> 193(3) The Registrar may include in the Register such other details about the determination or decision as the Registrar thinks appropriate.</p>	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		
Recognition and Settlement Agreements	<i>Traditional Owner Settlement Act 2010</i> (Vic)	<p><i>TOSA</i> does not specifically require Recognition and Settlement Agreements to be made public. However the only agreement made to date between the Victorian Government and the Dja Dja Wurrung traditional owner groups is available online with the full text of the agreement. Any money paid to the Victorian Traditional Owner Charitable trust under a Funding Agreement (s78 of <i>TOSA</i>) will be audited yearly and information as to the account will be available publically.</p>	<p>While there is no requirement that the full text of Recognition and Settlement Agreements be available publically under <i>TOSA</i> (cf Land Use Activity Agreements) it appears that the agreements will be made public which includes the terms of the agreements, the names of the parties, the value of the balancing benefit stream, the resources pledged by the state, and the materiality of these agreements.</p>	<p>The Dja Dja Wurrung agreement is available online from the Victorian Justice website. http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+settlement#sthash.Qzj0hQxc.dpuf Victorian Traditional Owner</p>	<p>1 as at 3 February 2014.</p>

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publically?*	Where is the material reported	Number of known Agreements
			<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		
				trust: http://www.traditionalowners.org.au/	
Land Use Activity Agreements (LUAAs)	<i>Traditional Owner Settlement Act 2010 (Vic)</i>	<i>TOSA s 67</i> requires that a register of LUAAs is established and maintained. The register must include details as to the area of land to which the agreement applies, the date of initial registration of the agreement, a copy of the initial registered agreement as at the initial registration, the date of registration of any variation of the agreement and a copy of any registered variation of the agreement (<i>s74 of TOSA</i>). All information in the land use activity agreements register is publicly available (<i>TOSA s 75</i>).	The information includes the terms of the agreements, the names of the parties, the value of the balancing benefit stream, the resources pledged by the state, and the materiality of these agreements.	The Register is available online at: http://www.justice.vic.gov.au/home/your+rights/native+title/register+of+land+use+activity+agreements	1 as at 3 February 2014.
ALRA Mining Agreements	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>	Exploration and Mining Agreements are made between Aboriginal Land Councils and either exploration licence applicants or prospective miners (ss 40 and 46 respectively <i>ALRA</i>). They require prior consultation with traditional land owners, and contain the terms and conditions to which the grant of a licence or a mining interest will be subject. All payments received from mining companies and from governments for leasing purposes must	Mining and leasing agreements made under <i>ALRA</i> are not available publically.	Annual reports available from the Land Council's websites. Annual reports from the Prescribed Body Corporates are available from the Office of the Registrar of	NA

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
		<p>be paid out to an Aboriginal and Torres Strait Islander corporation for the benefit of the traditional Aboriginal owners of the land (ALRA s35). The corporations must be incorporated under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (CATSI Act) and therefore subject to the oversight of the Registrar of indigenous corporations. Under s37, information as to payments received and paid out must be included in the land council's annual report required by section 9 of the <i>Commonwealth Authorities and Companies Act 1997</i>. The Land Council must also include information as to any amounts held in trust, when it was paid and the mining operations concerned. The Annual Report will also include information as to consultants fees and other money received by the Land Council. Mining Agreements may also make provision for the distribution of any money paid to the Land Council under the agreement to or for the benefit of such groups of Aboriginals as are specified in the agreement (48D). ALRA s35C requires that body corporates receiving money from Land Council must give the</p>	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 	<p>Indigenous Corporations: http://www.oric.gov.au/</p>	

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
		<p>Land Council concerned a copy of the financial statements that the body is required, under the law under which it is incorporated, to give in respect of the reporting year; and a written report setting out the purpose for which that amount was spent (including details of any relevant project) and each recipient of that amount and the amount paid. The body corporates must also inform the Aboriginal traditional owners of the land as to the amount and purpose of the money spent.</p> <p>Under the <i>ALRA</i> s64B sets out the accounting and annual reporting of the Aboriginals Benefit Account. The Annual Report must include the financial statements required by s49 of the <i>Financial Management and Accountability Act 1997</i> and an audit report on those statements under section 57 of the <i>Financial Management and Accountability Act 1997</i>. A copy of the report Minister must be tabled in each House of the Parliament as soon as practicable.</p>	<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		
Regional Partnership Agreements (RPAs)	<i>Closing the Gap</i> policy on Indigenous affairs. Must	RPAs are not subject to any mandatory requirements in terms of disclosure however most are available to the public as full text documents.	Not all RPAs have been made public but many have. The full-text agreements which have been released include the terms of the agreements, the names of	All RPAs are listed on the ATNS database with links to full text	18 as at 3 February 2014.

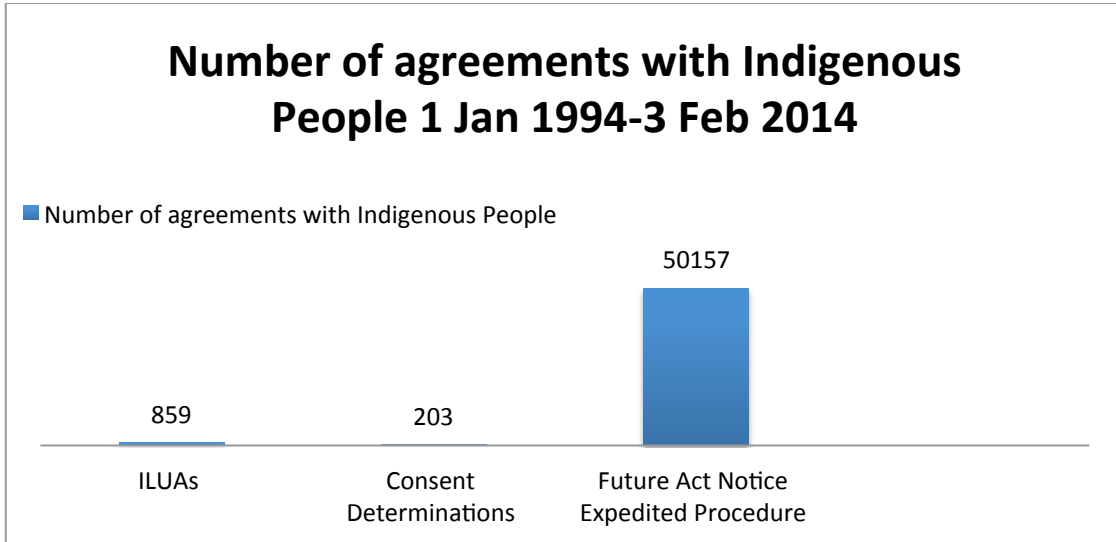
APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publicly?*	Where is the material reported	Number of known Agreements
	comply with Council of Australian Governments (COAG)'s <i>National Framework of Principles for Delivering Services to Indigenous Australians</i> (2004)		the parties, the value of the balancing benefit stream, the resources pledged by the state, and the materiality of these agreements.	agreements when available. There is also information and some RPAs available from the SRA and RPA web page https://apps.indigenous.gov.au/sra.html	
Shared Responsibility Agreements (SRAs)	<i>Closing the Gap</i> policy on Indigenous affairs. Must comply with Council of Australian Governments (COAG)'s <i>National Framework of Principles for</i>	SRAs are not subject to any official disclosure requirements, although they also tend to be highly publicised due to their close links with government policy. Access to the full text of the SRA is generally not provided, as the agreements are considered confidential (AHRC 2005).	The content of the agreement itself is not publically available. Summaries and media releases often indicate the extent of the agreement, the parties and the benefits provided however do not include the terms of the agreement. The names of the parties and certain terms will be available publically. In certain cases the resources pledged by the state will be available publically.	Summaries available online from the SRA and RPA web page: https://apps.indigenous.gov.au/sra.html and from the ATNS database.	284 as at 3 February 2014.

APPENDIX C: TYPES OF AGREEMENTS

Type of agreement	Legal regime	Reporting requirements (transparency)	Relevance to EITI - Is the following information available publically?*	Where is the material reported	Number of known Agreements
	<i>Delivering Services to Indigenous Australians (2004)</i>		<ul style="list-style-type: none"> • Terms of the agreements • Names of the parties • The value of the balancing benefit stream • Resources pledged by the state • Resources pledged by the resource company • Materiality of these agreements relative to conventional contracts¹ 		
99 year leases (Northern Territory)	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>	These leases are registered in the Northern Territory Land Registry and are therefore searchable and public. The Executive Director is a statutory office holder and reports on her/his activities to the Commonwealth Minister responsible for Indigenous Affairs.	The parties and the benefits under the agreements are available and information as to revenue is reported in the annual ABA financial statements (see Appendix B).	The Executive director's reports are available on the OTL website: http://www.otl.gov.au	6 township leases at 3 February 2014 – see http://www.otl.gov.au/site/current.asp

Appendix D: Quantity and Geographical Extent of Agreements



Graph 1: Quantity of Native Title Agreements

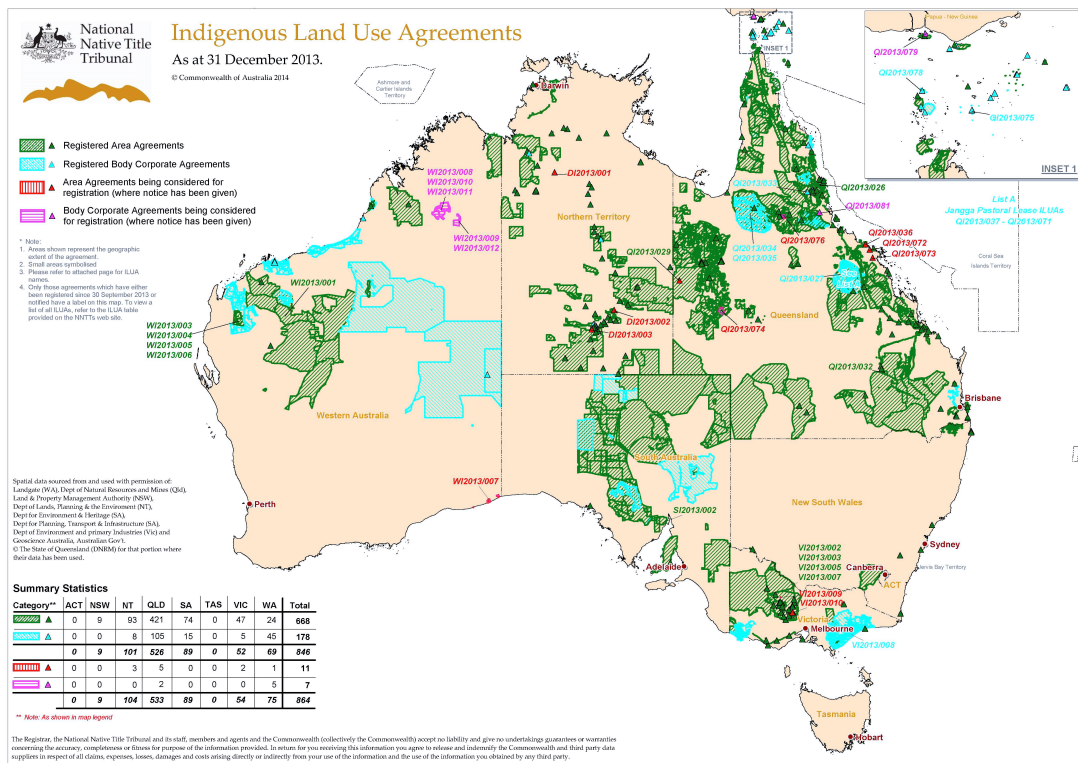


Figure 1: Geographical extent of Indigenous Land Use Agreements¹

¹ Courtesy of the NNTT: <http://www.nntt.gov.au/Mediation-and-agreement-making-services/Geospatial-services/Maps/Pages/National-Maps.aspx#determinations>

APPENDIX D: QUANTITY AND GEOGRAPHICAL EXTENT OF AGREEMENTS

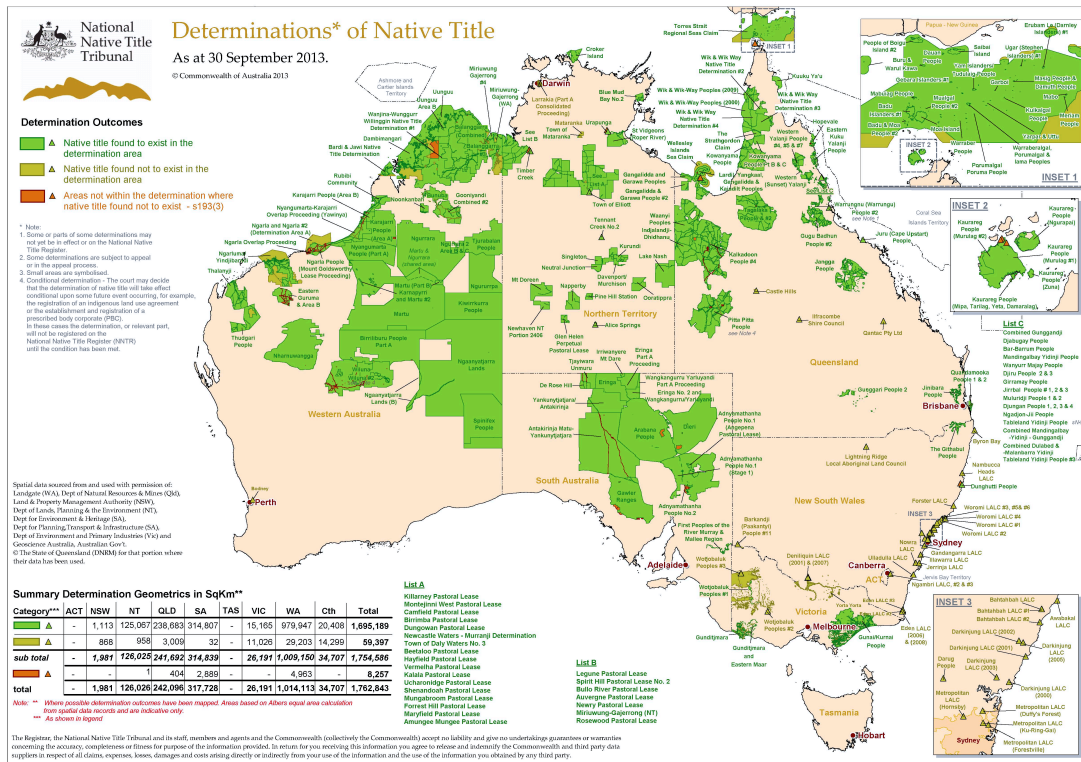


Figure 2: Geographical extent of Native Title Determinations⁴

⁴ Courtesy of the NNTT: <http://www.nntt.gov.au/Mediation-and-agreement-making-services/Geospatial-services/Maps/Pages/National-Maps.aspx#determinations>

Appendix E: Examples Of Agreement Content And Payments To Indigenous People

AGREEMENTS UNDER THE NATIVE TITLE ACT 1993

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
<p>The Argyle Diamonds Indigenous Land Use Agreement (ILUA)</p>	<p>The Argyle Diamonds Indigenous Land Use Agreement (ILUA) is unique in that the parties to the agreement have made the full-text of the agreement public.⁵ The agreement provides for Argyle to pay benefits into two trusts:</p> <ol style="list-style-type: none"> 1) A charitable trust that secures funds for future generations and provides funds for law and culture, education and training and community development partnerships; 2) A discretionary trust that provides benefits to the Traditional Owners for the ILUA area. <p>See Appendix F for a copy of the agreement.</p>	<p>Clause 5 of the agreement provides the following payments to the local communities:</p> <ul style="list-style-type: none"> - Mandangala Community receives \$309,300 per year; - Woolah Community receives \$116,610 per year; - Warmun Community receives \$295,726 per year; - Juwalinypany Community receives \$45,000 per year; and - Crocodile Hole Community receives \$25,000 per year. <p>All payments are indexed for CPI from 1 January 2004.</p> <p>Additional payments were also made to Traditional Owners directly under clause 6 before being made to the Special Purposes Discretionary Trust from 2005.</p>
<p>The Yandruwandha / Yawarrawarrka Petroleum Conjunctive Indigenous Land Use Agreement (ILUA)</p>	<p>The Yandruwandha / Yawarrawarrka Petroleum Conjunctive Indigenous Land Use Agreement (ILUA) illustrates potential benefits that may be provided under an ILUA to the Native Title Party. The full text of the agreement is available from the ATNS database.⁶ The parties to this ILUA consented to the grant of various 'Authorised Licences' under prescribed conditions. Authorised Licences include:</p>	<p>To obtain a Petroleum Exploration Licence, a Company must enter into an Executed Acceptance Contract. This contract provides for:</p> <ul style="list-style-type: none"> - the payment of \$60,000 upon the native title party authorising a Petroleum Exploration Licence; - the payment of administration fees (which vary depending on the term of the agreement); - the payment of 'further consideration' as a proportion of the substance successfully produced and sold as a consequence of the grant of the licences; - the company's agreement to consider the employment of members of the native title group; and

⁵ Agreements, Treaties and Negotiated Settlements (ATNS) Project Database, *Argyle Diamonds Indigenous Land Use Agreement (ILUA)*, viewed online 27 March 2014 <<http://atns.net.au/agreement.asp?EntityID=2591>>.

⁶ Agreements, Treaties and Negotiated Settlements (ATNS) Project Database, *Yandruwandha/Yawarrawarrka Petroleum Conjunctive Indigenous Land Use Agreement (ILUA)*, viewed online 27 March 2014 <<http://www.atns.net.au/agreement.asp?EntityID=5015>>.

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
	- Petroleum Exploration Licences and Petroleum Production Licences granted pursuant to the framework set out in the ILUA.	- the employment of 'scouting teams' to determine whether works may interfere with areas of significance.
The BHP Area C Agreement - Future Act Agreements	The BHP Area C Agreement is illustrative of a future act agreement. It is made up of three future act agreements between BHP and Innawonga Bunjima Niapaili native title claimants (executed 2001), the Martu Idja Banyjima native title claimants (executed 2000) and Nyiyaparli native title claimants.	The Agreements include benefits relating to employment and contract work, protection of Indigenous heritage and culture, and compensation payments to the Innawonga and Martu Peoples. These payments will average \$3 million each year for the life of the mine and will be paid for the benefit of claimants and to trusts to fund community programs. ⁷

JAMES PRICE POINT – BROWSE BASIN DEEDS

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
James Price Point – Browse Basin LNG Project Agreement⁸	The Project Agreement was agreed between the Western Australian Government, the Goolarabooloo Jabirr Jabirr, Woodside Energy Ltd, Broome Port Authority and LandCorp and is the primary native title agreement for the establishment of the Browse LNG Precinct. The agreement also provides for the establishment of a Precinct Management Committee involving the Goolarabooloo Jabirr Jabirr, the State and all precinct operators. The committee is to be involved in the establishment and operation of the precinct and oversight of	The benefits provided under the Project Agreement include <i>Upon execution:</i> - \$5 million for the Goolarabooloo Jabirr Jabirr Body Corporate establishment and operation; - A block of land in the Blue Haze estate to build the Goolarabooloo Jabirr Jabirr Body Corporate office; and - \$12.1 million Broome House and Land package. <i>Upon securing land for the Precinct:</i> - \$10 million for the Goolarabooloo Jabirr Jabirr Economic Development Fund; and - \$20 million for the Goolarabooloo Jabirr Jabirr Housing Fund. <i>Upon securing a Foundation Proponent:</i> - 2900 hectares of land (freehold or other tenure that Goolarabooloo Jabirr Jabirr chooses) in the Goolarabooloo Jabirr Jabirr claim area.

⁷ Indigenous Support Services, 2001, *Agreements between Mining Companies and Indigenous Communities; A Report to the Australian Minerals and Energy Environment Foundation*, viewed online 27 March, 2014 < <https://www.icmm.com/document/1131>>.

⁸ Government of Western Australia, *Browse LNG Precinct Project Agreement; Summary of Benefits*, viewed online 27 March 2014 <http://www.dsd.wa.gov.au/documents/Browse_Fact_Sheet_Project_Agreement_Summary.pdf>

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
	<p>cultural heritage management, environmental management, business development and contracting opportunities, cultural awareness training, land access and decommissioning of the precinct.</p>	<p><i>The benefits provided by Woodside Energy include:</i></p> <ul style="list-style-type: none"> - various milestone payments; - annual payments (\$3.6 million annually); - funding for an Administrative Body set up by the native title party (\$400,000); - funding for a Business Development Organisation established for the benefit of the native title party; - contracting opportunities for the native title party; and - various other opportunities for the native title party, including employment and training, business opportunities and a ranger program.
<p>James Price Point – Browse Basin LNG Regional Benefits Agreement⁹</p>	<p>The Browse LNG Precinct Regional Benefits Agreement was agreed between the Western Australian Government, Woodside Energy Ltd and the Kimberley Land Council (KLC) to provide benefits to Indigenous people of the Dampier Peninsula and broader Kimberley region. The Agreement lists the benefits the State Government, Woodside and additional proponents will provide to the Traditional Owners of the area and determines the priority for accessing regional benefits. The agreement also establishes a Regional Body Corporate to hold and distribute the benefits as well as committing the Western Australian Government to working with the KLC to resolve outstanding native title claims in the Kimberley and obtain additional funding from the Commonwealth Government for programs aimed at addressing impacts of the precinct and regional Indigenous issues in the Kimberley.</p>	<p>The West Australian Government will provide the following benefits:</p> <p><i>Upon securing a Foundation Proponent</i></p> <ul style="list-style-type: none"> - \$20 million for the regional Traditional Owner body (\$2 million annually for 10 years); - \$20 million for regional Economic Development Fund; - \$30 million for regional Indigenous Housing Fund (payment schedule); - \$20 million for regional Education Fund (\$1 million annually for 20 years); - \$8 million for Cultural Preservation Fund (\$500,000 annually for 16 years); - \$108 million for the Kimberley Enhancement Scheme; - \$15 million to create and jointly manage conservation reserves on the Dampier Peninsula with the Department of Environment and Conservation (\$1.5 million annually for 10 years); - 600 hectares of land for Kimberley Traditional Owners; - Reform of Indigenous land on the Dampier Peninsula so that it can be better used by Traditional Owners (includes a minimum of 600 hectares); and - Payments to be indexed to CPI. <p><i>From the Foundation Proponent – Woodside Energy:</i></p> <ul style="list-style-type: none"> - a milestone payment to the regional Education Fund; - payments to the Kimberley Enhancement

⁹ Government of Western Australia, *Browse LNG Precinct Regional Benefits Agreement; Summary of Benefits*, viewed online 27 March 2014, <<http://www.dsd.wa.gov.au/8617.aspx>>.

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
		Scheme; and - payments for any additional LNG trains (purification facilities) at the Precinct.
James Price Point – Browse Basin LNG Land Agreement¹⁰	The Browse (Land) Agreement was agreed between the Western Australian Government and the Kimberley Land Council on behalf of the Goolarabooloo Jabirr Jabirr.	The Browse (Land) Agreement: <ul style="list-style-type: none"> - Limits the use of the precinct to petroleum processing, storage, loading, transporting and associated activities; - Limits the life of the precinct to 100 years; - Provides a mechanism to close the precinct earlier if it is not being used; - Allows the port to operate as a general port after the precinct is closed; - Commits the State to remediate and rehabilitate the land and facilities after the precinct is closed; - Commits the State to the transfer of the land after the precinct is closed to the Goolarabooloo Jabirr Jabirr and allow for the Goolarabooloo Jabirr Jabirr to choose the tenure; and - Prevents further LNG development on the Kimberley coastline.

¹⁰ Government of Western Australia, *Browse LNG Precinct Land Agreement; Summary of Benefits*, viewed online 27 March 2014, <http://www.dsd.wa.gov.au/documents/Browse_Fact_Sheet_-_Land_Agreement-Provisions.pdf>.

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

ABORIGINAL LAND RIGHTS ACT AGREEMENTS

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
<p>Aboriginal Land Rights Act 1976 (ALRA) Mining Agreements</p>	<p>Agreements reached under the ALRA provide benefits for traditional Aboriginal owners including protecting their interests in land, compensation payments, employment, training, sacred site protection, environmental protection and cultural awareness.¹¹ For an example of numbers of agreements, at the end of the 2013 financial year the Central Land Council (CLC) held 63 current exploration agreements in respect of 210 exploration titles, including oil and gas permits. The CLC also had 11 mining agreements relating to a total of 13 mineral leases or production licences relating to operations at Tanami, the Granites, Areyonga and Tennant Creek, as well as Mereenie and Palm Valley.¹²</p>	<p>An example of the quantum of payments under the ALRA comes from the Nolan Bore Mine Traditional Owners who received \$720,000 exploration compensation money in the 2012 period.¹³</p>

¹¹ Central Land Council, 2013, *Annual Report 2012-2013*, viewed online 28 March 2014, <http://www.clc.org.au/files/pdf/388725_text_CLC_AR_final_reduced.pdf>, 51.

¹² Central Land Council, 2013, *Annual Report 2012-2013*, viewed online 28 March 2014, <http://www.clc.org.au/files/pdf/388725_text_CLC_AR_final_reduced.pdf>, 51.

¹³ Central Land Council, 2013, *Annual Report 2012-2013*, viewed online 28 March 2014, <http://www.clc.org.au/files/pdf/388725_text_CLC_AR_final_reduced.pdf>, 85. *Traditional owners for the proposed Nolan's Bore mine decided to direct half of their 2012 exploration compensation money to community benefit purposes. The CLC will now design and implement the Nolan's Bore Mine CD Project with \$360,000 that has been set aside by the group for development initiatives.*

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

OTHER AGREEMENTS

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
<p>Fortescue Metal service contracts with Morris Corporation (WA) & Karlka Facilities Management (Karntama Camp); Morris Corporation (WA) & Kariyarra Hospitality Services (Hamilton Motel); Morris Corporation (WA) & MIB Catering (Christmas Creek); Morris Corporation (WA) & Palyku Enterprises (Cloudbreak); Morris Corporation (WA) & Kariyarra Hospitality Services & Palyku Enterprises (Rail Camp); Morris Corporation (WA) & Eastern Guruma Pty Ltd (Kangi Camp).¹⁴</p>	<p>Fortescue Metal awarded service contracts to six Aboriginal joint ventures and Morris Corporation Pty Ltd for services. The contracts cover a range of services, including catering, cleaning, waste management and camp administration across Fortescue's mine, port and rail operations in the Pilbara.</p>	<p>Fortescue signed five – five year contracts worth approximately \$430 million with Morris Corporation and Native Title Groups representing Nyiyaparli, Kariyarra, Martu Idja Banyjima and Palyku people. The award also involved two Native Title Groups, Kariyarra and Palyku, forming a joint venture with Morris Corporation to manage the rail camps which are located on their traditional lands. The contracts include a key performance indicator (KPI) target of 20% Aboriginal employment and a requirement to do business with other Aboriginal businesses.</p>
<p>The Kokatha Macmahon Joint Venture Agreement.¹⁵</p>	<p>The Kokatha Macmahon Joint Venture will pursue work relating to resources sector expansion in the far north region of South Australia. Macmahon subsidiary Doorn-Djil Yoordaning formed the agreement with the Kokatha people to tender for new work on relevant projects in the Olympic Dam and Stuart Shelf mining areas.</p>	
<p>Rail Ore Car Maintenance Contract – agreed between Fortescue</p>	<p>Indigenous Construction Resource Group (ICRG) was established in 2010 and provides</p>	<p>The overall project value for the two year period is estimated at approximately \$2 million. The Indigenous engagement target for this project is</p>

¹⁴ Fortescue Metals Group, *Fortescue awards largest ever parcel of contracts to Traditional Owners*, Media Release, 6 August 2013, viewed online 28 March 2014 <http://www.fmgil.com.au/UserDir/News/en/MEDIA_RELEASE_-_Fortescue_awards_largest_ever_parcel_of_contracts_to_Traditional_Owners217.pdf>.

¹⁵ Macmahon, *Macmahon announces new Joint Venture with Kokatha people*, Media Release, 22 September 2011, viewed online 28 March 2014 <<http://www.macmahon.com.au/macmahon-announces-new-joint-venture-with-kokatha-people.html>>.

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
Metals Group and Indigenous Construction Resource Group (ICRG)¹⁶	civil maintenance and construction support to resource companies. The Rail Ore Car Maintenance Contract is a 2 year contract with ICRG and is responsible for providing a nominated 33% of the required skilled and non-skilled workforce needed to perform the ongoing FMG Rail rolling stock fleet maintenance activities.	50%.
Solomon Nanutarra – Munjina Road DCM Contract – agreed between Fortescue Metals Group and Indigenous Construction Resource Group (ICRG).¹⁷	ICRG was awarded a long term DCM Contract to modify and maintain a 120km section of road to enable travel access for the large, oversized and heavy construction modules for the FMG Solomon Construction Project.	The contract was expected to continue until the end of October 2013, with an estimated total value in excess of \$55M. An Indigenous engagement rate of 43% was achieved.

¹⁶ Indigenous Construction Resource Group, *FMG Rail Ore Car Maintenance Contract*, viewed online 28 March 2014 <http://www.icrg.com.au/icwp/wp-content/uploads/2013/07/FMG-Rail-Ore-Car-Maintenance-Contractbr_br_.pdf>.

¹⁷ Indigenous Construction Resource Group, *Solomon Nanutarra – Munjina Road DCM Contract*, viewed online 28 March 2014 <<http://www.icrg.com.au/icwp/wp-content/uploads/2013/07/FMG-Solomon-Nanutarra-Munjina-Road-DCM-Contract.pdf>>.

APPENDIX E: EXAMPLES OF AGREEMENT CONTENT AND PAYMENTS TO INDIGENOUS PEOPLE

TRADITIONAL OWNER SETTLEMENT ACT 2010 AGREEMENTS

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
The Dja Dja Wurrung Settlement Agreement - Traditional Owner Settlement Act 2010 (Vic) (TOSA)	The Dja Dja Wurrung Settlement Agreement agreed between the State of Victoria and the Dja Dja Wurrung people on 28 March 2013 formally recognised the Dja Dja Wurrung people as the traditional owners for part of Central Victoria.	The Dja Dja Wurrung settlement provided \$9.65 million from the State Government to enable the Dja Dja Wurrung Clans Aboriginal Corporation to meet its settlement obligations and advance the cultural and economic aspirations of the Dja Dja Wurrung. The package also included the transfer of land and co-management of six parks and reserves. ¹⁸

CULTURAL HERITAGE AGREEMENTS

NAME AND TYPE OF AGREEMENT	AGREEMENT BACKGROUND AND CONTENT	PECUNIARY AND NON-PECUNIARY BENEFITS PROVIDED UNDER THE AGREEMENT
Proponent Standard Heritage Agreement Template¹⁹	This is a template agreement provided by the Department of Premier and Cabinet in Western Australia for heritage clearance work on projects. Schedule 6 provides suggested pay rates for professional and aboriginal consultants engaged to conduct surveys for heritage clearance. See Appendix G for a copy of the template.	Payment to aboriginal consultants (up to six unless otherwise agreed) at the daily rate of remuneration of \$500 maximum (indexed to CPI) plus a Regional Allowance in accordance with Public Service rates and field (accommodation and food), travel and incidental expenses at cost.

¹⁸ Denis Napthine, Historic settlement of Dja Dja Wurrung native title claim, Media Release, 28 March 2013, viewed online 28 March, 2014, < <http://www.premier.vic.gov.au/media-centre/media-releases/6379-historic-settlement-of-dja-dja-wurrung-native-title-claim.html>>.

¹⁹ Department of Premier and Cabinet WA, 2014, *Draft Proponent Standard Heritage Agreement*, viewed online 28 March 2014 <<http://www.dpc.wa.gov.au/lantu/MediaPublications/Documents/PSHA%20Draft%207%20-%203%20March%2014.pdf>>, Schedule 6.

Appendix F: Western Australian Proponent Standard Heritage Agreement (PSHA) – Template

ANNEXURE 'B'

[XX - Insert year]

[XX - Insert name of PBC] Proponent Standard Heritage Agreement

[XX – Insert name of PBC]

[XX – Insert name of Proponent]

Table of Contents

1.	Definitions and interpretation	1
1.1	Definitions	1
1.2	Interpretation – general	10
1.3	Interpretation – liabilities and benefits	11
2.	No Application of the PSHA to Emergency Activities	11
2A.	Execution and effect of this PSHA	11
3.	Term and termination	12
3.1	Commencement	12
3.2	Termination	13
3.3	Termination or de-registration of ILUA does not affect PSHA	13
3.4	Survival of provisions and entitlements upon termination	13
4.	Area to which this PSHA applies	13
5.	Authority, representations and warranties	13
5.1	PBC’s role and functions	13
5.2	PBC representations and warranties	14
5.3	Proponent representations and warranties	14
5.4	Reliance on warranties	14
5.5	Acknowledgement regarding legal advice	15
6.	Time limits	15
6.1	Time for compliance and consequences of non-compliance	15
6.2	Justifiable delay	17
7.	Cooperation regarding Aboriginal Sites and proposed Activities	17
7.1	Exchange of information	17
7.2	No breach of Aboriginal Heritage Act	18
8.	The Activity Notice	18
8.1	Circumstances where no Activity Notice needs to be given	18
8.2	Giving the Activity Notice	18
8.3	Considering the Activity Notice and deciding whether a Survey is required	19
8.4	Disagreements following Activity Notice Response	20
9.	Survey agreement and planning	21
9.1	Operation of this clause 9	21
9.2	Whether a Survey is required	21
9.3	Agreements regarding Low Ground Disturbance Activity	22
9.4	Selection of Survey Methodology	23
9.5	Estimate of costs of Survey	23

9.6	Selection of Aboriginal Heritage Service Provider and Principal Aboriginal Heritage Consultant	23
9.7	Estimate of time for Survey commencement or completion	24
10.	Survey Team and commencement of Survey	24
10.1	Survey team	24
10.2	Commencement and conduct of Survey	25
11.	Payment for Surveys	27
12.	Survey Report	28
12.1	Timing of Preliminary Advice and Survey Report	28
12.2	Requests for reports	28
12.3	Preliminary Advice	28
12.4	Contents of Survey Report	29
12.5	Reliance on Survey Report	30
13.	Intellectual property	30
13.1	Intellectual property of the Native Title Group	30
13.2	Licence to use intellectual property	30
14.	Identification and Relocation of Ancestral Remains or Objects	29
14A.	Environmental Protection	30
15.	Proponent must consult about Aboriginal Heritage Act applications	31
15.1	Programme of Works Application	31
15.2	Proponent must consult about Aboriginal Heritage Act Applications	31
15.3	Justifiable delay	31
16.	Default and enforcement	33
16.1	Interpretation	33
16.2	Default	34
17.	Dispute resolution	35
17.1	No arbitration or court proceedings	35
17.2	Notification	35
17.3	Parties to resolve Dispute	35
17.4	Mediation	35
17.5	Arbitration	36
17.6	Breach of this clause	36
17.7	Obligations continue	36
17.8	Extension of time	36
18.	Confidentiality	37
18.1	Confidential information	37
18.2	Unrelated information obtained during Survey is confidential	37

18.3	Permitted disclosure	37
18.4	Disclosure requirements	39
18.5	Provision of Aboriginal Heritage Information to DAA	39
19.	Assignment	39
19.1	Generally	39
19.2	Assignment by Proponent	39
19.3	Assignment by PBC	40
19.4	Effect of Assignment	40
19.5	No encumbrance	41
20.	Notices	41
21.	GST	42
21.1	Interpretation	42
21.2	GST payable	42
22.	Costs and duties	42
23.	Force Majeure and Aboriginal Cultural Business	42
24.	General	43
24.1	Review and variation	43
24.2	Entire agreement	43
24.3	Governing law and jurisdiction	43
24.4	Severance	44
24.5	Waiver	44
24.6	No merger	44
24.7	Further action	44
	Schedule 1 – Party Details	45
	Schedule 2 – Determination and Aboriginal Heritage Details	46
	Schedule 3 – Aboriginal Heritage Area	48
	Schedule 4 – Tenure and Tenure Areas	49
	Schedule 5 – Contents of Activity Notice	50
	Schedule 6 – Costs for conduct of a Survey	53
	Schedule 7 – Contents of Survey Report	56
	Schedule 8 – DAA Survey Database Information	59
	Schedule 9 – Consent to the lodging of a programme of work	61
	Signing Pages	

Date

THIS AGREEMENT is made on [XX – Insert date]

Parties

[XX - Insert name of PBC] (**PBC**)

[XX - Insert name of Proponent] (**Proponent**)

Recitals

- A. The PBC represents the Native Title Group in relation to native title and Aboriginal Heritage matters in the Aboriginal Heritage Area.
- B. The PBC and the State are, together with others, parties to the ILUA.
- C. The Proponent is the registered holder of the Tenure.
- D. In accordance with the ILUA the Tenure has been granted subject to a condition requiring the Proponent to enter into an Aboriginal Heritage Agreement that applies to the Tenure and Activities within the Tenure Area carried out pursuant to that Tenure. This PSHA is one form of Aboriginal Heritage Agreement that the Proponent can enter into in order to comply with that condition.
- E. The Proponent has agreed to enter into this PSHA with the PBC to comply with the abovementioned condition imposed on the Tenure.

The Parties agree as follows:

Agreed Terms

1. Definitions and interpretation

1.1 Definitions

In this PSHA, unless the contrary intention appears:

Aboriginal Consultants means those members of, or persons appointed by or on behalf of the Native Title Group, through the PBC, who have authority to speak for the land and waters the subject of a Survey on behalf of the Native Title Group.

Aboriginal Cultural Business means a funeral, event or other ceremony that prevents the Native Title Group from attending to day to day business in accordance with traditional laws and customs.

Aboriginal Heritage means the cultural heritage value of an Aboriginal Site or of an Aboriginal Object.

Aboriginal Heritage Act means the *Aboriginal Heritage Act 1972* (WA).

Aboriginal Heritage Act Minister means the Minister in the Government of the State from time to time responsible for the administration of the Aboriginal Heritage Act.

Aboriginal Heritage Act Register means the register of Aboriginal Sites established and maintained under section 38 of the Aboriginal Heritage Act.

Aboriginal Heritage Act Registrar means the ‘Registrar of Aboriginal Sites’ appointed under section 37(1) of the Aboriginal Heritage Act.

Aboriginal Heritage Act Section 16 Application means an application to the Aboriginal Heritage Act Registrar for authorisation under section 16 of the Aboriginal Heritage Act to enter upon an Aboriginal Site and to excavate the site or to examine or remove anything on or under the site.

Aboriginal Heritage Act Section 18 Application means an application to the Aboriginal Heritage Act Minister for consent under section 18 of the Aboriginal Heritage Act to use land.

Aboriginal Heritage Agreement means an agreement with the Native Title Group or PBC concerning the management of Aboriginal Heritage and other matters under the Aboriginal Heritage Act with respect to areas in or near the Aboriginal Heritage Area. To avoid doubt, this PSHA is a form of Aboriginal Heritage Agreement, but not for the purposes of paragraph (a) of the condition set out in each of clauses 12.3 and 12.4 of the ILUA.

Aboriginal Heritage Area means the area to which this PSHA applies, being the land and waters described in Schedule 3.

Aboriginal Heritage Liaison Officer means the person appointed under clause 10.1(a)(ii).

Aboriginal Heritage Service Provider means the person or company engaged by or on behalf of the Native Title Group, through the PBC, to plan and carry out Surveys for that Native Title Group. The Aboriginal Heritage Service Provider may be the same as the Principal Aboriginal Heritage Consultant, or may be a separate entity.

Aboriginal Heritage Survey means a survey conducted to assess the potential impacts of Activities on Aboriginal Heritage, whether or not conducted under this PSHA. To avoid doubt, an **Aboriginal Heritage Survey** includes a Survey.

Aboriginal Object means an object to which the Aboriginal Heritage Act applies by operation of section 6 of the Aboriginal Heritage Act.

Aboriginal Site means a place to which the Aboriginal Heritage Act applies by operation of section 5 of the Aboriginal Heritage Act.

ACMC means the Aboriginal Cultural Material Committee established under section 28 of the Aboriginal Heritage Act.

Activity means any activity, including physical works or operations, involving entry onto the Aboriginal Heritage Area (whether on the surface of the land or waters, or under or over that surface).

Activity Notice means a notice issued by the Proponent to the PBC under clause 8.2.

Activity Notice Date has the meaning given in clause 8.2(g).

Activity Notice Response means notice given by the PBC to the Proponent under clause 8.3(a).

Activity Program means all Activities described in an Activity Notice.

Business Day means a day that is not a Saturday, Sunday or public holiday in Perth, Western Australia.

Confidential Information has the meaning given in clause 18.1.

CPI means the Consumer Price Index, All Groups Index, number for Perth, Western Australia, published from time to time by the Australian Bureau of Statistics (catalogue number 6401.0). If that index ceases to be published by the Australian Bureau of Statistics then **CPI** shall mean such other index as represents the rise in the cost of living in Perth, Western Australia, as the State reasonably determines after consulting with the PBC.

CPI Calculation means:

$$A \times \frac{CPI_n}{CPI_{base}}$$

where:

A = the initial base payment under this PSHA as set out in Schedule 6.

CPI_n = the latest June quarterly CPI number as published each year by the Australian Bureau of Statistics;

CPI_{base} = the June 2014 quarterly CPI number (base quarter) as published by the Australian Bureau of Statistics in the second half of the 2014 calendar year.

DAA has the meaning given to **Department** in section 4 of the Aboriginal Heritage Act and as at the Effective Date is the State's Department of Aboriginal Affairs.

Determination means the approved determination of native title described in items 1 to 3 of Schedule 2.

Determination Area means the area in which native title was held to exist in the Determination. To avoid doubt, the **Determination Area** is the same as the Agreement Area as defined in the ILUA.

Due Diligence Guidelines means the Aboriginal heritage due diligence guidelines issued by the Department of the Premier and Cabinet and DAA dated [insert date of DDG version current as at date of execution of PSHA]

Effective Date means the date on which this PSHA comes into force and effect as an agreement between the Parties, as more particularly described in clause 3.1.

Event of Default means any of the events described in clause 16.1(b).

Force Majeure means an event that prevents a Party from performing its obligations, or receiving the benefit of the other Party's obligations, in whole or part, under this Agreement and which is unforeseeable and beyond the reasonable control of the affected Party including:

- (a) Acts of God;
- (b) explosion or fire;
- (c) storm or cyclone (of any category);
- (d) flood;
- (e) landslides;
- (f) earthquake or tsunami;
- (g) volcanic eruption;
- (h) impact of vehicles or aircraft;
- (i) failure of a public utility;

- (j) epidemic or pandemic;
- (k) civil unrest;
- (l) industrial action (other than industrial action limited to the affected Party);
- (m) war (including civil war);
- (n) acts of terrorism;
- (o) radioactive or biological contamination;
- (p) the effect of any law or authority exercised by government official by law (other than a State law or a State government official).

but does not include:

- (i) lack of or inability to use funds for any reason;
- (ii) any occurrence which results from the wrongful or negligent act or omission of the affected Party or the failure by the affected Party to act in a reasonable and prudent manner;
- (iii) an event or circumstance where the event or circumstance or its effects on the affected Party or the resulting inability of the affected Party to perform its obligations, or receive the benefit of the other Party's obligations, could have been prevented, overcome or remedied by the exercise by the affected Party of the standard of care and diligence consistent with that of a reasonable and prudent person;
- (iv) the failure by a third party to fulfil a contractual commitment with the affected Party other than as a result of any of items (a) to (o) above;
- (v) any act or omission of an agent or contractor of the affected Party.

GPS means a global positioning system device.

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and includes all associated legislation and regulations and any legislation or regulations substituting for or amending any of the foregoing.

Heritage Information Submission Form means the Form referred to, with website reference, in Schedule 8.

ILUA means the Indigenous land use agreement described in item 4 of Schedule 2.

ILUA Commencement Date has the meaning given to 'Commencement Date' in clause 1.2 of the ILUA.

ILUA Execution Date has the meaning given to ‘Execution Date’ in clause 1.2 of the ILUA.

Insolvency Event means where a Party:

- (a) commits an act of insolvency under and for the purposes of the *Corporations Act 2001* (Cth) or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
- (b) is placed under external administration under and for the purposes of Chapter 5 of the *Corporations Act 2001* (Cth); or
- (c) is placed under external administration under and for the purposes of Chapter 11 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth);
- (d) is unable to pay all its debts as and when they become due and payable.

Last Fieldwork Day has the meaning given in clause 12.1.

LEADR means the dispute resolution organisation of that name. If **LEADR** ceases to exist as an organisation, then **LEADR** shall be taken to mean any other dispute resolution organisation with similar objects agreed by a majority of the Parties to the relevant dispute or, if no majority agreement can be reached, decided by the Party that first notified the relevant dispute.

Low Ground Disturbance Activity means any Activity that does not involve major or significant ground disturbance, including the following:

- (a) field mapping, including cadastral surveys, not involving the permanent disturbance of soil and vegetation;
- (b) sampling, including removing soil, rock and flora samples using hand methods (including hand augering) from the natural surface;
- (c) remote sensing, biological, environmental or conservation surveys, including installing monitoring plots and marker posts;
- (d) establishing temporary camps for exploration, environment or conservation purposes, where the establishment of the temporary camp does not require the removal of trees or shrubs and does not require any earthworks;
- (e) reconnaissance and patrol in light vehicles;
- (f) drilling using hand held rig or rig mounted on 4 wheel vehicle, using existing access and without the construction of new roads and tracks (and where use of the existing roads or tracks involves no disturbance to plant roots);
- (g) digging pitfall traps and temporary trenches for small animals; baiting and installation of temporary fences and nest boxes;
- (h) collecting and removing loose rocks, firewood, flora or fauna;

- (i) fossicking for rocks and gemstones;
- (j) conducting tests for water, site contamination, or other scientific or conservation purposes;
- (k) maintaining and refurbishing existing facilities, including recreation and camping facilities, water points, signs and other structures;
- (l) maintaining existing roads, drains, culverts, bridges, trails, tracks, fence lines and firebreaks;
- (m) erecting signage and barriers using hand and mechanical augers;
- (n) revegetating of degraded areas, including fencing areas of vegetation;
- (o) rehabilitating previously disturbed areas, including ripping, scarifying, matting, brushing, seeding and planting;
- (p) carrying out species recovery programs;
- (q) erosion control activities around existing roads, infrastructure or facilities;
- (r) weed control using hand, mechanical and chemical methods of control;
- (s) conducting tourism operations that:
 - (i) are based in established facilities; or
 - (ii) require the establishment of new facilities that require no, or only minor, ground disturbance;
- (t) any other use of hand-held tools, not referred to in the preceding paragraphs;
- (u) activities connected with public events not exceeding 60 days in duration, such as car rallies and marathons, using existing roads, stock routes or pastoral lease tracks;
- (v) walking, driving or riding tours using existing roads, stock routes or pastoral lease tracks or official historical trails;
- (w) exercise of grazing rights permitted under Division 3, Subdivision G of the NT Act;
- (x) the laying of temporary water pipelines across the ground where no excavation is required; and
- (y) any other Activities agreed in writing by the Parties to be Low Ground Disturbance Activities.

Mining Act means the *Mining Act 1978* (WA).

Mining Act Department has the meaning given to **Department** in section 8 of the Mining Act which, at the Effective Date, is the State's Department of Mines and Petroleum.

Minister for Mines has the meaning given by the Mining Act.

Minor Impact Activity means any Activity that involves negligible or no ground disturbance and is not a Low Ground Disturbance Activity, including the following:

- (a) walking, photography, filming;
- (b) aerial surveying and magnetic surveys;
- (c) use of existing tracks and water courses;
- (d) environmental monitoring;
- (e) water sampling;
- (f) fossicking using hand held instruments;
- (g) spatial measurement;
- (h) scientific research, using hand held tools;
- (i) cultivation and grazing in previously cultivated/grazed areas;
- (j) maintenance of existing paths, walls, fences, roads, tracks, bridges, public infrastructure (e.g. electrical, water, sewage) and community utilities within the existing footprint and adjacent service areas;
- (k) feral animal eradication, weed, vermin and pest control, vegetation control and fire control; and
- (l) light vehicular access and camping.

Native Title Group means the common law holders of native title in the Determination Area who are described in the Determination. The Native Title Group is described in item 1(e) of Schedule 2 to the ILUA.

Notice of Application has the meaning given in clause 15.2.

Notice to Consult has the meaning given in clause 15.2

NT Act means the *Native Title Act 1993* (Cth).

Party means a party to this PSHA and **Parties** mean any 2 or more of them as the case requires.

PBC means the 'prescribed body corporate' (as that term is used in Division 6 of Part 2 of the NT Act) in respect of the Native Title Group for the Determination

Area. Details of the **PBC** (where this PSHA commences in accordance with clause 3.1(a)) are as listed in items 8 and 9 of Schedule 2.

PBC Regulations means the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth).

PGER Act means the *Petroleum and Geothermal Energy Resources Act 1967* (WA)

POW means a programme of work to be lodged with the Mining Act Department in compliance with the Mining Act or a condition imposed on Tenure under the Mining Act.

Preliminary Advice means advice, in writing, complying with clause 12.3(a).

Principal Aboriginal Heritage Consultant means the anthropologist, archaeologist or other appropriately qualified professional nominated and agreed under clauses 8.3(d)(v) or 9.6.

Proponent Acceptance Deed means a deed in the form contained in Schedule 10 to the ILUA which has been executed by the Proponent.

PSHA means this Proponent Standard Heritage Agreement.

RNTBC Orders means the orders of the Federal Court, under section 56 or section 57 of the NT Act in relation to the PBC and the Determination. Details of the RNTBC Orders as at the ILUA Execution Date are set out in item 12 of Schedule 2.

Sensitive Heritage Information means culturally restricted information about Aboriginal Sites or any other items of Aboriginal Heritage, provided by or on behalf of the Native Title Group during the course of or in relation to a Survey, including where such information is contained in any Survey Report.

Site Avoidance Model means a Survey methodology involving the identification of areas where Activity should not be undertaken because of the presence of an Aboriginal Site within that area.

Site Avoidance Survey means a Survey carried out using the Site Avoidance Model.

Site Identification Model means a Survey methodology involving the identification of Aboriginal Sites by an Aboriginal Consultant.

Site Identification Survey means a Survey carried out using the Site Identification Model.

Survey means an Aboriginal Heritage Survey conducted under this PSHA.

Survey Agreement Date has the meaning given in clauses 9.1(a) or 9.1(b).

Survey Agreement Period has the meaning given in clause 9.1(d).

Survey Area means the area of land or waters the subject of a Survey, or proposed to be the subject of a Survey.

Survey Methodology means either a Site Avoidance Model or a Site Identification Model.

Survey Report means a report of the results of a Survey, containing the information set out in clause 12.4 and Schedule 7.

Survey Team has the meaning given in clause 10.1.

Tenure means the tenures listed in part A of Schedule 4 (or by virtue of the Proponent Acceptance Deed deemed to be listed where this PSHA commences in the manner described in clause 3.1(b)) and, granted pursuant to the Mining Act, the PGER Act or section 91 of the *Land Administration Act 1997* (WA), including any renewal or extension of that tenure from time to time.

Tenure Area means in relation to each tenure listed, or deemed to be listed, in part A of Schedule 4, that part of such tenure which is located wholly or partially within the Aboriginal Heritage Area as described in part B of Schedule 4 (or by virtue of the Proponent Acceptance Deed deemed to be so described where this PSHA commences in the manner described in clause 3.1(b)).

1.2 Interpretation – general

In this PSHA, unless the contrary intention appears:

- (a) the headings and subheadings in this PSHA are inserted for guidance only and do not govern the meaning or construction of any provision of this PSHA;
- (b) words expressed in the singular include the plural and vice versa;
- (c) a reference to a clause, schedule or annexure is a reference to a clause, schedule or annexure to this PSHA and a reference to this PSHA includes any recital, schedule or annexure;
- (d) a reference to a document, agreement (including this PSHA) or instrument is to that document, agreement or instrument as varied, amended, supplemented, or replaced;
- (e) a ‘person’ includes a company, partnership, firm, joint venture, association, authority, corporation or other body corporate, trust, public body or Government Party;

- (f) a reference to a 'person' (including a Party to this PSHA) includes a reference to the person's executors, administrators, successors and permitted assigns, transferees or substitutes (including persons taking by permitted novation);
- (g) a reference to a person, statutory authority or government body (corporate or unincorporate) established under any statute, ordinance, code, legislation or other law includes a reference to any person (corporate or unincorporate) established or continuing to perform the same or substantially similar function;
- (h) a reference to conduct includes, without limitation, an omission, statement or undertaking, whether or not it is in writing;
- (i) 'including' means 'including but not limited to';
- (j) a reference to a statute, ordinance, code, legislation or other law includes regulations and other instruments under it and amendments, re-enactments, consolidations or replacements of any of them;
- (k) a reference to dollars or \$ is a reference to the currency of Australia;
- (l) a reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
- (m) a reference to a month is to be interpreted as the period of time commencing at the start of any day in one of the calendar months and ending immediately before the start of the corresponding day of the next calendar month or if there is no such day, at the end of the next calendar month;
- (n) references to time are to local time in Perth, Western Australia;
- (o) where time is to be reckoned from a day or event, that day or the day of that event is excluded;
- (p) if the day on or by which a person must do something under this PSHA is not a Business Day, the person must do it on or by the next Business Day; and
- (q) if any conflict arises between the terms and conditions contained in the clauses of this PSHA and any recitals, schedules or annexures to this PSHA, the terms and conditions of the clauses of this PSHA shall prevail.

1.3 Interpretation – liabilities and benefits

In this PSHA, unless the contrary intention appears:

- (a) any agreement, representation, warranty or indemnity set out in this PSHA which is in favour of the Native Title Group and the PBC is for the benefit of them jointly and severally;

- (b) any agreement, representation, warranty or indemnity in favour of the Proponent, where the Proponent comprises more than one entity, is for the benefit of them jointly and severally; and
- (c) any agreement, representation, warranty or indemnity which is given by the Proponent, where the Proponent comprises more than one entity, binds them jointly and severally.

2. No Application of this PSHA to Emergency Activities

This Agreement does not apply to Activities which are urgently required to secure life, health or property, or to prevent or address an imminent hazard to the life, health or property of any person.

2A. Execution and effect of this PSHA

- (a) Execution of this PSHA may take place by the PBC and the Proponent executing any number of counterparts of this PSHA, with all counterparts together constituting the one instrument.
- (b) If this PSHA is to be executed in counterparts, the Parties must execute sufficient numbers for each of them to retain one instrument (constituted by the counterparts).
- (c) Notwithstanding the prior provisions of this clause 2A, the Parties acknowledge that, in order to avoid possible confusion, it is their intention that all Parties shall execute one instrument (in sufficient copies for each Party to retain an executed copy).
- (d) The provisions of this PSHA will only apply to the Tenure held by the Proponent, and any Activities undertaken within the Tenure Areas by the Proponent pursuant to that Tenure, on and from the Effective Date until the termination of this PSHA as referred to in clause 3.2.
- (e) Where this PSHA commences in the manner described in clause 3.1:
 - (i) the Proponent binds itself including, where applicable, each entity comprising the Proponent; and
 - (ii) to the extent permissible by law, the PBC binds itself and all members of the Native Title Group.

3. Term and termination

3.1 Commencement

This PSHA comes into force and effect as between the Proponent and the PBC:

- (a) where this PSHA has been executed by the Parties, on the date that the last of those Parties executes this PSHA; or
- (b) where the Proponent has executed a Proponent Acceptance Deed, on the date that all of the conditions precedent set out in clause 3 of the Proponent Acceptance Deed have been satisfied.

3.2 Termination

This PSHA shall terminate on the occurrence of whichever of the following events is first to occur:

- (a) all Parties agree in writing to end this PSHA;
- (b) all Tenure held by the Proponent that is located wholly or partially within the Aboriginal Heritage Area has terminated or expired or been surrendered or cancelled;
- (c) as referred to in clause 16.2(c)(ii), a court order is made to wind up the Proponent as the result of an Event of Default.

3.3 Termination or de-registration of ILUA does not affect PSHA

Notwithstanding the termination or de-registration of the ILUA, this PSHA shall continue to apply to the Parties with full force and effect, to the extent that this PSHA has commenced under clause 3.1.

3.4 Survival of provisions and entitlements upon termination

This PSHA ceases to have any force or effect on and from the date of termination, save that:

- (a) any entitlements, obligations or causes of action which accrued under this PSHA prior to termination survive termination;
- (b) clauses 1, 3.4, 5, 12.5, 13, 17, 18, 20, 21, 24.2, 24.3, 24.4 and 24.6 survive termination.

4. Area to which this PSHA applies

This PSHA applies to the Aboriginal Heritage Area.

5. Authority, representations and warranties

5.1 PBC's role and functions

- (a) The PBC enters into this PSHA, on behalf of the Native Title Group, in the PBC's capacity as holder of the relevant native title rights and interests on behalf of the Native Title Group, and in performance of the functions given to

a trustee prescribed body corporate under the NT Act and the PBC Regulations.

- (b) To the extent permitted by law, the PBC binds itself and all members of the Native Title Group by entering into this PSHA.

5.2 PBC representations and warranties

The PBC represents and warrants, for the benefit of the Proponent, that:

- (a) it is a 'prescribed body corporate' within the meaning of section 59 of the NT Act and regulation 4 of the PBC Regulations and it is the 'registered native title body corporate' (as defined in section 253 of the NT Act) for the Determination Area;
- (b) under regulation 6 of the PBC Regulations, it enters into this PSHA on behalf of the Native Title Group;
- (c) it has full power and authority to enter into this PSHA and represent the Native Title Group in respect of all matters arising in respect of this PSHA;
- (d) all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary authorisations) in order to enable it lawfully to enter into, exercise its rights and perform its obligations under, this PSHA have been fulfilled or done;
- (e) it has received independent legal advice about the effects of this PSHA; and
- (f) it knows of no impediment to it performing its obligations under this PSHA.

5.3 Proponent representations and warranties

The Proponent represents and warrants, for the benefit of the PBC and the Native Title Group, that:

- (a) it is authorised to enter into this PSHA; and
- (b) all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary authorisations) in order to enable the Proponent lawfully to enter into, exercise its rights and perform its obligations under, this PSHA have been fulfilled or done; and
- (c) it knows of no impediment to the Proponent performing its obligations under this PSHA.

5.4 Reliance on warranties

Each Party acknowledges that the other Parties have relied on the warranties provided in clauses 5.2 or 5.3 (as the case may be) to enter into this PSHA.

5.5 Acknowledgement regarding legal advice

Each Party acknowledges that it has:

- (a) had the benefit of legal advice in respect of all matters in this PSHA and the effect of the rights, obligations and liabilities of each of the Parties to it; and
- (b) been provided with an opportunity to consider that advice and all of the provisions of this PSHA before entering into it.

5.6 Ministers may act through authorised officers

Where in this Agreement including any Schedule reference is made to a Minister of the State, and the relevant Minister may, or is required to, give any notice or do any other act or thing, that notice may be given and that other act or other thing may be done by a duly authorised officer of the relevant Department in the name of and on behalf of the relevant Minister.

6. Time limits

6.1 Time for compliance and consequences of non-compliance

- (a) The Parties must each meet the time limits imposed under the following provisions of this PSHA:
 - (i) the receipt by the Proponent of an Activity Notice Response (clause 8.3(a));
 - (ii) the reaching of the Survey Agreement Date within the Survey Agreement Period (clause 9.1(d));
 - (iii) the commencement of fieldwork for a Survey (clause 10.2(a)) and the agreed date (if any) for completion of the fieldwork for a Survey (clauses 8.3(d)(iii) or 9.7);
 - (iv) the receipt by the Proponent of the Preliminary Advice following completion of a Survey (clause 12.1(a)); and
 - (v) the receipt by the Proponent of the final Survey Report (clause 12.1(c)).
- (b) The time limits on the steps referred to in clause 6.1(a) may be extended by agreement in writing between the Parties. Any such agreed extension will apply only to a single Activity Program, unless expressly agreed otherwise in the written agreement under this clause.

- (c) To avoid doubt, any failure to comply with the time limits for the steps described in clause 6.1(a) does not give the Proponent a right to terminate this PSHA, but failure to comply with those time limits has the consequences described in the following provisions of this clause 6.1.
- (d) If the PBC fails to comply, or to ensure that the Aboriginal Heritage Service Provider complies, with any of the time limits on the steps listed in clause 6.1(a), then the Proponent may provide a written notice to the PBC, with such a notice to nominate a date by which the non-compliance must be rectified. The date nominated by the Proponent must allow a reasonable period, in all the circumstances, for rectification of the non-compliance, and in any event the date must not be less than 10 Business Days after the date of receipt of the notice of non-compliance.
- (e) If the PBC is unable to comply with, or to ensure that the Aboriginal Heritage Service Provider complies with, the time limits imposed by the provisions referred to in 6.1(a)(ii) because they are (or either of them as the case may be, is) unable to engage an external consultant anthropologist at the rate set out in Schedule 6, the PBC must advise the Proponent that this is the case and provide 3 written competitive quotes from external consultant anthropologists and reasons why the higher rates quoted are justified in the circumstances. If the Proponent is aware of an alternative external consultant anthropologist who will undertake the work for the rate set out in Schedule 6, then the Proponent may notify the PBC in accordance with clause 6.1(f)(iii) and 6.1(g) that alternative arrangements will be made for the Aboriginal Heritage Surveys.
- (f) If the PBC fails to comply with a notice sent by the Proponent under clause 6.1(d), then the Proponent may notify the PBC that the Proponent is no longer bound by clauses 9 to 12 inclusive of this PSHA in respect of the relevant Activity Program with effect from the date on which the PBC receives the latter notice. The Proponent may then at its election:
 - (i) decide not to proceed with the relevant Activity Program;
 - (ii) conduct the relevant Activity Program at its own risk; or
 - (iii) make alternative arrangements for the carrying out of Aboriginal Heritage Surveys, including appointing an independent anthropologist or archaeologist, or other appropriately qualified professional, to conduct such Surveys.
- (g) In the circumstances described in clause 6.1(f)(iii), where the Proponent makes arrangements for an Aboriginal Heritage Survey to be conducted by an independent anthropologist, archaeologist or other professional, then:
 - (i) the Proponent shall inform the PBC of the alternative arrangements made; and

- (ii) neither the PBC nor the Aboriginal Heritage Service Provider shall have any claim against the Proponent arising from the making of those alternative arrangements.
- (h) To avoid doubt:
 - (i) the effect of this clause 6.1 is not limited by any dispute resolution processes under clause 17 of this PSHA, and in particular the time limits on the steps referred to in clause 6.1 continue to apply where a dispute resolution process is commenced; and
 - (ii) the dispute resolution provisions in clause 17 of this PSHA do not apply to any decision by the Proponent to issue a notice of non-compliance under clause 6.1(d), and the provisions of this clause 6.1 apply instead. However, the Proponent may elect, by notice in writing to the PBC, to allow use of the dispute resolution provisions in clause 17.
- (i) The Proponent must act reasonably in asserting its rights under this clause 6.1.

6.2 Justifiable delay

- (a) Delay caused by any event of Force Majeure or Aboriginal Cultural Business notified under clause 23 will be excluded from the time limits referred to in clause 6.1.
- (b) A Party asserting the existence of a delay to which clause 6.2(a) applies must advise the other Party of that delay and take reasonable steps to mitigate that delay.

7. Cooperation regarding Aboriginal Sites and proposed Activities

7.1 Exchange of information

The Parties acknowledge the importance of a regular flow of information between the Proponent and the PBC, to ensure that members of the Native Title Group and the PBC know what Activities within the Tenure Areas are proposed by the Proponent, to avoid misunderstandings, to enable informed decisions to be made and in order that the desired outcomes are achieved. In accordance with this objective:

- (a) if requested by the PBC, the Proponent will provide an outline of the nature, location and timing of any Activity to be undertaken in each Tenure Area in the next field season or next field operations program, to the extent that such information is known to the Proponent; and
- (b) where, as a result of receiving the above information the PBC becomes aware of any particular cultural heritage concern arising from a proposal to conduct

an Activity in a Tenure Area, the PBC will use its reasonable endeavours to raise those concerns with the Proponent.

7.2 Obligation to comply with Aboriginal Heritage Act

- (a) Nothing in this PSHA purports to authorise any act or omission that would be in breach of the Aboriginal Heritage Act.
- (b) If the Proponent carries out any Activities through contractors, then the Proponent will ensure that such contractors are made aware of all relevant obligations of the Proponent pursuant to the Aboriginal Heritage Act and this PSHA, including by providing the internet web address through which copies of the Aboriginal Heritage Act and this PSHA are available to the contractors.

8. The Activity Notice

8.1 Circumstances where no Activity Notice needs to be given

- (a) The Proponent may elect not to give an Activity Notice in respect of any proposed Activity where:
 - (i) The Activity proposed to be conducted consists entirely of
 - (A) Minor Impact Activity;
 - (B) Low Ground Disturbance Activity of a class that the PBC has notified in writing to the Proponent need not be the subject of an Activity Notice; or
 - (ii) The Proponent has reasonable grounds to form the opinion that no Survey is required (taking into account the Due Diligence Guidelines).
- (b) In the event that the Proponent, acting reasonably, is unsure as to whether or not clause 8.1(a) operates to exempt the Proponent from giving an Activity Notice, then the Proponent should give the Activity Notice in any event.

8.2 Giving the Activity Notice

- (a) Except where clause 8.1 applies, if the Proponent intends to undertake an Activity in a Tenure Area, it must issue a notice in writing to the PBC in accordance with this clause 8.2 (**Activity Notice**). An Activity Notice may be given in respect of more than one Tenure Area.
- (b) The main purposes of an Activity Notice are:
 - (i) to determine whether a Survey is required and if so, what kind; and

- (ii) if a Survey is required, to provide information relevant to the conduct of that Survey.
- (c) The Activity Notice shall contain:
 - (i) the basic information specified in part 1.1 of Schedule 5;
 - (ii) the key statements and nominations specified in part 1.2 of Schedule 5 or if clause 8.2 (e) applies, the default provisions of part 3 of Schedule 5; and
 - (iii) the additional information specified in part 2 of Schedule 5.
- (d) The PBC acknowledges that the inclusion in an Activity Notice of the matters described in parts 1.2(c) to (f) of Schedule 5 does not prejudice any statement by the Proponent that it considers that no Survey is required.
- (e) If the Proponent omits to specify or nominate, in an Activity Notice, any of the particular items referred to in part 1.2 of Schedule 5, then the default provisions provided in part 3 of Schedule 5 apply.
- (f) To avoid doubt, the Proponent may modify any aspect of the Activity Notice up to the time of receiving the Activity Notice Response. Proposed modifications to the Activity Notice after receipt of the Activity Notice Response shall be discussed between the Parties but, provided that the PBC acts reasonably, the PBC shall have the right to request a fresh Activity Notice instead of dealing with the proposed modified Activity Notice. The Proponent may also request any of the items referred to in part 1.2(f) of Schedule 5 at any later time, in accordance with clause 12.2.
- (g) The date of receipt by the PBC of the Activity Notice (or fresh Activity Notice if requested under clause 8.2(f)) is the **Activity Notice Date**.

8.3 Considering the Activity Notice and deciding whether a Survey is required

- (a) The PBC will promptly consider the Activity Notice and shall, within 15 Business Days after receipt of such Activity Notice or modified Activity Notice, notify the Proponent in writing as to whether the PBC considers that a Survey is required (**Activity Notice Response**). In coming to its decision the PBC shall take into account:
 - (i) the extent to which the Activity Program described in the Activity Notice consists of Low Ground Disturbance Activities and in that regard taking into account the provisions of clause 8.3(e);
 - (ii) the extent to which the land and waters the subject of the Activity Notice have been the subject of a previous Aboriginal Heritage Survey. In

considering this factor, the PBC will consider whether it is reasonably clear from the reported results of the previous Aboriginal Heritage Survey that the Activities disclosed in the Activity Notice can be carried out without breaching the Aboriginal Heritage Act;

- (iii) any relevant previous decisions by the PBC under clause 8.3(b); and
 - (iv) any other matter the PBC reasonably considers relevant.
- (b) The Proponent shall be free to carry out any Activity in a Tenure Area without conducting a Survey of the land and waters within that Tenure Area where:
- (i) the PBC so agrees in writing; or
 - (ii) the PBC waives its right under clause 6.1(f) of this PSHA to require a Survey of the proposed Activity,
- after considering an Activity Notice or at any other time.
- (c) Either Party may request additional information from the other at any time to enable discussion and proper consideration of the Activity Notice.
- (d) If in its Activity Notice Response the PBC indicates that it considers that a Survey is required, then the Activity Notice Response shall set out the following additional information:
- (i) if different to the opinion given by the Proponent in the Activity Notice in accordance with part 1.2(a) of Schedule 5, a statement of the extent to which the Activity Program consists of Low Ground Disturbance Activity, in the PBC's opinion;
 - (ii) if different to the nomination by the Proponent in the Activity Notice in accordance with part 1.2(c) of Schedule 5, a nomination of the PBC's proposed Survey Methodology, subject however to clause 9.4;
 - (iii) if different to the date or dates nominated by the Proponent in the Activity Notice in accordance with part 1.2(e) of Schedule 5, a nomination of a proposed Survey start date or finish date;
 - (iv) subject to clause 9.5(a), an estimate of costs to conduct the Survey; and
 - (v) a nomination of the Native Title Group's proposed Aboriginal Heritage Service Provider and (if different to the Aboriginal Heritage Service Provider) Principal Aboriginal Heritage Consultant.
- (e) The PBC acknowledges that only in highly unusual circumstances would the PBC provide notice (under clause 8.3(a)) of its opinion that a Survey is required in respect of proposed Low Ground Disturbance Activity.

8.4 Disagreements following Activity Notice Response

If, following receipt by the Proponent of the Activity Notice Response, the Parties are in disagreement on any matter about the conduct of a proposed Survey, then the Parties shall endeavour to agree on all outstanding matters by following the provisions of clause 9. To avoid doubt, until the Parties have consulted under clause 9 during the period of 20 Business Days referred to in clause 9.1(d), no Party is entitled to invoke the dispute resolution provisions of clause 17 in respect of any matter the subject of this clause 8 or clause 9.

9. Survey agreement and planning

9.1 Operation of this clause 9 – Survey Agreement Date

- (a) Subject to clause 9.1(b), the date on which agreement is reached on all matters referred to in clauses 9.2 to 9.7 (inclusive) is the **Survey Agreement Date**.
- (b) If after receipt by the Proponent of the Activity Notice Response under clause 8.3(a) the Parties are in agreement about all matters regarding a proposed Survey, then the date of receipt of the Activity Notice Response shall be deemed to be the Survey Agreement Date otherwise referred to in clause 9.1(a).
- (c) The Parties' discussions under this clause 9 shall be conducted reasonably and in good faith.
- (d) The Parties shall ensure that the Survey Agreement Date occurs within 20 Business Days after the date of receipt by the Proponent of the Activity Notice Response (**Survey Agreement Period**).
- (e) If any of the matters referred to in clauses 9.2 to 9.7 (inclusive) cannot be agreed during the Survey Agreement Period, then the Proponent may, by notice in writing to the PBC, agree that the Survey Agreement Date has been reached notwithstanding the lack of agreement on that matter or matters. In such a case, the Parties will continue to discuss the non-agreed matters with a view to resolving them as quickly as practicable. To avoid doubt, a notice under this clause has effect to waive the right of the Proponent to rely on clause 6.1(a)(i), but does not otherwise affect the rights of the Proponent under clause 6.

9.2 Whether a Survey is required

- (a) The Parties' discussions regarding whether a Survey is required will be guided by the matters in clauses 8.3(a), 8.3(e) and 9.2(b).
- (b) The following provisions shall apply to the Parties' discussions about whether a Survey is required.

- (i) Where no previous Aboriginal Heritage Survey (whether under this PSHA or otherwise) has been undertaken in relation to the area of land and waters the subject of the Activity Notice, there is a non-binding presumption that a Survey is required unless otherwise agreed or waived in accordance with clause 8.3(b).
- (ii) Where this PSHA does not deal with the particular circumstance as to whether a Survey is required, there is a non-binding presumption that a Survey is required.
- (iii) Where a previous Aboriginal Heritage Survey (whether conducted under this PSHA or otherwise) has, or if this is not clear, reasonably appears to have, covered the area the subject of the Activity Notice, there is no presumption either way as to whether a Survey is required. Subject to confidentiality provisions, the Proponent must (if it is in their possession or control) provide by way of notice a copy of the written report of the previous Aboriginal Heritage Survey to the PBC (if such copy has not already been provided with the Activity Notice).
- (iv) Subject to the presumptions in clauses 9.2(b)(i) and 9.2(b)(ii), and the matters described in clause 9.2(b)(iii), in determining whether a Survey is required, the Parties will have regard to the following matters:
 - (A) the nature of the Activities outlined in the Activity Notice;
 - (B) whether there has been any previous Aboriginal Heritage Survey and the age, methodology, participants, standard and results of that Survey;
 - (C) the extent to which the land has been affected by previous ground disturbing activities;
 - (D) whether the Aboriginal Heritage Act Register discloses any Aboriginal Sites on the land the subject of the Activity Notice;
 - (E) any relevant matters relating to the Native Title Group's practices, laws and customs; and
 - (F) any other relevant matters raised by any of the Parties.

9.3 Agreements regarding Low Ground Disturbance Activity

- (a) The Parties' discussions to confirm the extent of Low Ground Disturbance Activity, and whether a Survey is required of such Activity, will be guided by:
 - (i) the definition of Low Ground Disturbance Activity in this PSHA; and
 - (ii) the provisions of clause 8.3(e).
- (b) If the PBC considers that a Survey of any Low Ground Disturbance Activity is required, then the PBC and the Proponent will each use their reasonable

endeavours to address the concerns of the PBC, by modifying the proposed Low Ground Disturbance Activity to the extent necessary to remove the need to conduct a Survey.

9.4 Selection of Survey Methodology

The discussions between the PBC and the Proponent about Survey Methodology shall be conducted with a view to reaching agreement on a Survey Methodology that is fit for purpose, having regard to the PBC's concerns for the Survey Area and the Activities proposed by the Proponent.

9.5 Estimate of costs of Survey

- (a) The Parties acknowledge that it may not always be possible for the PBC or the Native Title Group's nominated Aboriginal Heritage Service Provider to provide an accurate Survey cost estimate at the time of providing an Activity Notice Response, and that a cost estimate in many cases may need to be provided, or revised, following resolution of all other matters under this clause 9.
- (b) If an estimate of Survey costs has not been provided earlier, then the PBC must ensure that during the Survey Agreement Period, the Aboriginal Heritage Service Provider submits a written and itemised estimate of Survey costs to the Proponent for approval by the Proponent.
- (c) The PBC must ensure that in the estimate of Survey costs the Aboriginal Heritage Service Provider clearly indicates those items that the Proponent will be asked to pay in advance under clause 11(b).
- (d) During the Survey Agreement Period, the PBC and the Proponent shall agree on a budget for the proposed Survey (such agreement not to be unreasonably withheld or delayed by either Party).

9.6 Selection of Aboriginal Heritage Service Provider and Principal Aboriginal Heritage Consultant

- (a) If the PBC's Activity Notice Response does not identify the Native Title Group's nominated Aboriginal Heritage Service Provider and (if different to the Aboriginal Heritage Service Provider) Principal Aboriginal Heritage Consultant, then the PBC will advise the Proponent of these nominations during the Survey Agreement Period.
- (b) Subject to clause 9.6(c), the Parties acknowledge that the Proponent will not usually have any role in nominating an Aboriginal Heritage Service Provider or

Principal Aboriginal Heritage Consultant, subject however to the rights of the Proponent under clause 6.1(f)(iii) in the event of delays.

- (c) If the Proponent has reasonable concerns about the competence or impartiality of the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) nominated by the Native Title Group, it may request the PBC to request that the Native Title Group consider another anthropologist, archaeologist or appropriately qualified professional to act as Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be).
- (d) If the Parties cannot reach agreement on the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) within the Survey Agreement Period, then in addition to and without limiting its general rights under clause 6.1(f)(ii), the Proponent may nominate a proposed Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) and the PBC shall promptly respond to any such nomination and shall ensure that the Native Title Group does not unreasonably withhold its approval to appointing such nominee as the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be).

9.7 Estimate of time for Survey commencement or completion

If following the Activity Notice Response the Parties are not in agreement about the date of commencement of fieldwork for the Survey or the date of completion of fieldwork for the Survey (as the case may be), then during the Survey Agreement Period, the Parties shall agree on such date or dates.

10. Survey Team and commencement of Survey

10.1 Survey team

- (a) As soon as possible after the Survey Agreement Date, the PBC or the Native Title Group's nominated Aboriginal Heritage Service Provider, in conjunction with the Principal Aboriginal Heritage Consultant (if appointed), will organise a Survey Team, which shall consist of:
 - (i) up to 6 Aboriginal Consultants, with appropriate experience and authority, as are necessary, in the opinion of the PBC in consultation with the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be), to examine the Survey Area and assist in the Survey;
 - (ii) if considered necessary by the PBC and supported by the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant

(as the case may be) and agreed to by the Parties, an Aboriginal Heritage Liaison Officer, who will be responsible for Survey logistics and on-ground operations;

- (iii) where considered necessary by the PBC and supported by the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be), and agreed to by the Parties, another anthropologist of a specific gender; and
 - (iv) where the Survey being conducted is a Site Identification Survey, or where considered necessary by the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) and agreed to by the Parties, including during the course of the Survey, an archaeologist.
- (b) Where considered necessary by the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) and agreed to by the Parties, more than one archaeologist may be appointed to the Survey Team.
 - (c) The number of paid Aboriginal Consultants to be appointed to the Survey Team will not be more than the number specified in clause 10.1(a)(i). Additional members of the Native Title Group may accompany the Survey Team but the Proponent will not be liable for additional costs.
 - (d) The Proponent may send one or two nominees with relevant qualifications and authority on the Survey to assist the Survey Team conducting the Survey with information and direction where required

10.2 Commencement and conduct of Survey

- (a) Subject to clause 11(c), the PBC will use its, and must ensure that the Aboriginal Heritage Service Provider and the Principal Aboriginal Heritage Consultant (if different to the Aboriginal Heritage Service Provider) each uses its best endeavours to commence the Survey within the time agreed by the Parties, or in the absence of such agreement, within 30 Business Days after the Survey Agreement Date.
- (b) The Proponent will provide to the members of the Survey Team (and any other attending members of the Native Title Group) before the Survey commences:
 - (i) details and explanation of any safety and other procedures and policies implemented from time to time by the Proponent over the Survey Area; and
 - (ii) protective clothing and equipment if reasonably necessary in all the circumstances.

- (c) The Parties acknowledge that the Proponent is not required to have insurance in place for the protection of Survey Team members.
- (d) The Survey Team will as appropriate in the circumstances:
 - (i) visit the Survey Area;
 - (ii) identify any Aboriginal Sites in the Survey Area or, in the case of a Site Avoidance Survey, determine the area to be avoided due to the presence of an Aboriginal Site; and
 - (iii) provide sufficient information to the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be), or any other heritage consultant accompanying the Survey Team, to enable them to:
 - (A) record the external boundaries of all Aboriginal Sites or, in the case of a Site Avoidance Survey, the area to be avoided due to the presence of an Aboriginal Site, using a GPS;
 - (B) record relevant Aboriginal Site information or, in the case of a Site Avoidance Survey, the area to be avoided, on a Heritage Information Submission Form;
 - (C) mark the external boundaries of identified Aboriginal Sites or, in the case of a Site Avoidance Survey, the external boundaries of the area to be avoided due to the presence of an Aboriginal Site, on a map;
 - (D) make recommendations for the protection and management of any Aboriginal Site identified by the Survey Team;
 - (E) when an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application is to be lodged, record sufficient information to address DAA's requirements for such an application; and
 - (F) generally, prepare a Survey Report that complies with the requirements of clause 12.
- (e) When in the field, and in response to Aboriginal Heritage concerns raised by the Aboriginal Consultants, the representatives of the Proponent nominated under clause 10.1(d):
 - (i) shall withdraw from discussion and inspections in order to ensure the confidentiality of Sensitive Heritage Information or other information pertaining to Aboriginal Sites; and
 - (ii) may make modifications to the Activity Program and the Survey Team will then proceed to assess the Aboriginal Heritage significance of the

modified Activity Program in accordance with the applicable Survey Methodology.

11. Payment for Surveys

- (a) The Proponent shall pay the costs and expenses of the Survey at the rates set out in Schedule 6.
- (b) The Proponent agrees to pay, in advance of the commencement of the Survey, the following components of the approved estimated costs:
 - (i) 50% of the estimated administration fee; and
 - (ii) any disbursements that are to be paid by the Aboriginal Heritage Service Provider prior to the fieldwork component of the Survey being completed.
- (c) If the Proponent does not pay that component of the costs referred to in clause 11(b)(i) above within the period of 20 Business Days after the Survey Agreement Date (or by such earlier date agreed for the commencement of the Survey as may be applicable), the PBC may, at its discretion, advise the Proponent by notice in writing that:
 - (i) the Survey cannot commence until payment has been made; and
 - (ii) notwithstanding any other provisions of this PSHA:
 - (A) the date on which that payment is made will be deemed to be the new Survey Agreement Date;
 - (B) the date for commencement of the Survey will be 30 Business Days after the new Survey Agreement Date, unless otherwise agreed between the Parties; and
 - (C) if dates have been agreed for the completion of the fieldwork for a Survey or the Survey Report, such dates are to be altered to reflect the delayed date for commencement of the Survey arising from the operation of this clause, unless otherwise agreed between the Parties,

provided that if the Proponent fails to make payment within 14 Business Days after receipt of the notice under this clause, the default provisions of clause 16 will apply.

- (d) If the Survey is cancelled by the Proponent before it is completed, the part of the administration fee that has been advanced and any of the disbursements that have been paid and cannot be recovered will be forfeited and the balance will be refunded to the Proponent.

- (e) The balance of the Survey costs will be paid within 21 days after receipt of the Survey Report by the Proponent. The PBC must provide a tax invoice of the Survey costs that reconciles the costs estimated, and any costs advanced under clause 11(b), with the costs incurred. This tax invoice must be accompanied by all relevant receipts and invoices, and any other relevant supporting documentation, and must be certified as correct by the chief executive officer of the PBC.

12. Survey Report

12.1 Timing of Preliminary Advice and Survey Report

After the last day of fieldwork for a Survey (**Last Fieldwork Day**) the PBC will ensure that the Aboriginal Heritage Service Provider or the Principal Aboriginal Heritage Consultant (as the case may be) provides the Parties with:

- (a) Preliminary Advice (if requested by the Proponent in the Activity Notice or at any other time under clause 12.2), as soon as reasonably practicable, and in any event within 7 Business Days after the Last Fieldwork Day;
- (b) a draft Survey Report (if requested by the Proponent in the Activity Notice or at any other time under clause 12.2), as soon as reasonably practicable, and in any event within 20 Business Days after the Last Fieldwork Day, to enable the Parties to comment on it; and
- (c) a final Survey Report as soon as reasonably practicable, and in any event within 35 Business Days after the Last Fieldwork Day.

12.2 Requests for reports

- (a) Notwithstanding the relevant nominations by the Proponent in the Activity Notice under part 1.2(f) of Schedule 5, the Proponent may by notice in writing request the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) to provide a Preliminary Advice or draft Survey Report, at any time, subject to this clause. The Proponent shall provide a copy of any notice under this clause to the PBC at the same time as notifying the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be).
- (b) The Proponent acknowledges that a notification under clause 12.2(a) may impact on the times and costs for the Survey, and the PBC shall ensure that any revised times and costs are notified promptly to the Proponent.

12.3 Preliminary Advice

- (a) A Preliminary Advice shall record at least the information referred to in clause 12.4(c)(i).
- (b) Upon receipt by the Proponent of the Preliminary Advice, and subject to any reasonable recommendations in the Preliminary Advice, the Proponent may commence the Activities described in the relevant Activity Program (except any Activities indicated in the Preliminary Advice as potentially resulting in a breach of the Aboriginal Heritage Act).

12.4 Contents of Survey Report

- (a) The Survey Report will record sufficient information to enable the Proponent to:
 - (i) plan and, subject to the law and this PSHA, undertake the things that are the subject of the Activity Notice; and
 - (ii) lodge an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application supported by all necessary information, where the Parties have been made aware of the proposed application.
- (b) The Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) will, in consultation with the Survey Team, be responsible for preparing a Survey Report:
 - (i) as per the guidelines in part 1 and part 2 of Schedule 7, where the Survey being conducted is a Site Avoidance Survey; or
 - (ii) as per the guidelines in part 1 and part 3 of Schedule 7, where the Survey is a Site Identification Survey.
- (c) In addition to the matters described in Schedule 7, the Survey Report will:
 - (i) describe which aspects (if any) of the Activity Program described in an Activity Notice, if carried out, may result in a breach of the Aboriginal Heritage Act;
 - (ii) record sufficient information to enable the Proponent to plan and, subject to the law and this PSHA, undertake the things that are the subject of the Activity Notice.
- (d) The intellectual property rights in the Survey Report are governed by the provisions of clause 13.

12.5 Reliance on Survey Report

The Parties each acknowledge that they may rely upon the contents of a Survey Report.

13. Intellectual property

13.1 Intellectual property of the Native Title Group

All intellectual property rights in the Survey Report vest absolutely and irrevocably in the Native Title Group.

13.2 Licence to use intellectual property

Subject to clause 18, the PBC on behalf of the Native Title Group grants to the Proponent an irrevocable, transferable, non-exclusive, unrestricted, royalty-free licence to utilise:

- (a) any Survey Report for the purposes of the Proponent:
 - (i) conducting its Activities; and
 - (ii) seeking any necessary or desirable statutory approvals or pursuing any rights under law, including under the Aboriginal Heritage Act; and
 - (iii) enforcing its rights, and complying with its obligations, under this PSHA.

14. Identification and Relocation of Ancestral Remains or Objects

- (a) Where, as a result of an Activity, the Proponent uncovers skeletal remains or identifies an area or object which it reasonably suspects of being an Aboriginal Site or Aboriginal Object, the Proponent will:
 - (i) cease all such operations and activities in the immediate vicinity of such remains, area or object;
 - (ii) immediately notify the DAA and other relevant authorities in accordance with the Aboriginal Heritage Act and other applicable statutory law; and
 - (iii) notify the DAA of the findings and, subject to other statutory requirements, meet on site where the Parties will discuss in good faith a culturally appropriate method of managing the discovery and how to deal with it in accordance with the provisions of the Aboriginal Heritage Act or other applicable statutory law.

- (b) For the avoidance of doubt, and subject to other statutory requirements, the Activity may continue in areas which are not in the immediate vicinity of the suspected skeletal remains or suspected Aboriginal Site or Object.

14A. Environmental Protection

- (a) In co-operation with the PBC the Proponent agrees to rehabilitate the Aboriginal Heritage Area as a result of its Activities as required by law.
- (b) The Proponent shall respond to any complaint or concern raised by the PBC regarding failure to rehabilitate the Aboriginal Heritage Area as required by law.

15. Programme of work under the Mining Act and Aboriginal Heritage Act applications

15.1 Programme of work (POW)

- (a) The Proponent must not lodge a POW with the Mining Act Department, in respect of works proposed to be carried out within the boundaries of an Aboriginal Site recorded on the Aboriginal Heritage Act Register and located within the Aboriginal Heritage Area unless:
 - (i) the Proponent:
 - (A) has obtained the written consent of the PBC to both the lodging of the POW and to the works proposed in the POW in respect of that Aboriginal Site, such consent to be in the form or substantially in the form set out in Schedule 9 to this PSHA; and
 - (B) if required by the Mining Act Department, has provided to the Mining Act Department written advice from the DAA that, based on the then current and available information, the works proposed to be carried out within the boundaries of that Aboriginal Site will avoid all relevant areas within that Aboriginal Site that are required to be avoided to ensure that such works do not impact on the Aboriginal Heritage of that Aboriginal Site or
 - (ii) the Proponent has obtained an authorisation pursuant to an Aboriginal Heritage Act Section 16 Application or a consent pursuant to an Aboriginal Heritage Act Section 18 Application in relation to that Aboriginal Site.

- (b) The Parties acknowledge and agree that the PBC's consent does not imply:
 - (i) any release of the Proponent from any requirements or obligations under the Aboriginal Heritage Act, including any obligations in relation to Aboriginal Sites recorded on the Aboriginal Heritage Act Register; or
 - (ii) any assumption by the PBC of any responsibility or liability in respect of a POW lodged with, and approved by, the Mining Act Department.
- (c) Subject to compliance with clauses 15.1(a)(i) and (ii), nothing in his PSHA prevents the Proponent from lodging a POW Application.

15.2 Proponent must consult about Aboriginal Heritage Act applications

- (a) Subject to the provisions of this clause 15.2, each Party acknowledges the benefit of the PBC being consulted about a proposal by a Proponent to lodge an Aboriginal Heritage Act Section 16 Application or Aboriginal Heritage Act Section 18 Application in respect of any area within the Aboriginal Heritage Area.
- (b) Unless otherwise agreed between the Parties, the Proponent shall not lodge an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application without first giving the PBC prior written notice of its intention to do so (**Notice of Application**) and the opportunity for consultation.
- (c) If the Proponent gives the PBC a Notice of Application under clause 15.2(b):
 - (i) the PBC must, if it wishes to proceed to consultation under clause 15.2(d), within 15 Business Days of receiving the **Notice of Application**, give to the Proponent a written notice stating that the PBC would like to proceed to consultation (Notice to Consult); or
 - (ii) if the PBC does not give a Notice to Consult to the Proponent within the time period specified in clause 15.2(c)(i), the Proponent may lodge the Aboriginal Heritage Act Section 16 Application or Aboriginal Heritage Act Section 18 Application (as the case may be) the subject of the **Notice of Application** without further consultation with the PBC under this clause 15.2.
- (d) If the Proponent receives a Notice to Consult within the period specified in clause 15.2(c)(i), the Proponent must consult with the PBC for a minimum of 30 Business Days immediately after receipt of such Notice to Consult, including by making reasonable efforts to meet with the PBC, about the proposal which is the subject of the **Notice of Application**, with a view to agreeing:

- (i) where appropriate, that the proposal is not likely to impact Aboriginal Sites or Aboriginal Objects; or
 - (ii) ways to avoid the need to lodge the Aboriginal Heritage Act Section 16 Application or the Aboriginal Heritage Act Section 18 Application (as the case may be); or
 - (iii) where the Proponent considers that agreement under clause 15.2(d)(ii) above is not likely, ways to minimise and mitigate the impact of an authorisation under section 16 of the Aboriginal Heritage Act or consent under section 18 of the Aboriginal Heritage Act, as the case may be (including through salvage or relocation of Aboriginal Sites or Aboriginal Objects).
- (e) If the Parties do not agree in respect of any matter arising from the consultation under clause 15.2(d), then such matter may be determined, at the election of either Party, as a dispute pursuant to the provisions of clause 17 subject to the following:
- (i) the requirements to give a dispute notice pursuant to clause 17.2 and to endeavour to resolve the dispute pursuant to clause 17.3 are satisfied, respectively, by the giving of the Notice to Consult and consultation by the Parties pursuant to this clause 15.2; and
 - (ii) the arbitration provisions of clause 17 will not apply in respect of such dispute.
- (f) Subject to compliance with clauses 15.2(b) to (e), nothing in this PSHA prevents the Proponent lodging an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application.

15.3 Justifiable delay

- (a) A delay caused by an event of Force Majeure or Aboriginal Cultural Business notified under clause 23 will be excluded from the time limits referred to in clause 15.2.
- (b) A Party asserting the existence of a delay to which clause 15.3(a) applies must advise the other Party of that delay and take reasonable steps to mitigate (to the extent applicable) that delay.

16. Default and enforcement

16.1 Interpretation

- (a) In this clause 16 a reference to a Party means a party to the default or dispute.
- (b) An **Event of Default** occurs where a Party:
 - (i) breaches an obligation under this PSHA; or
 - (ii) commits an Insolvency Event.

16.2 Default

- (a) If a Party (the **Defaulting Party**) commits an Event of Default, the other Party (the **Non-defaulting Party**) may serve a notice (**Default Notice**) on the Defaulting Party specifying the Event of Default and, on receiving the Default Notice, the Defaulting Party must remedy the Event of Default within 5 Business Days after receiving the Default Notice.
- (b) If the Event of Default is of the kind described in clause 16.1(b)(ii) and applies to the PBC, then the PBC shall as soon as possible notify the Proponent:
 - (i) that the Event of Default has occurred;
 - (ii) of the appointment of any administrator, receiver or manager to manage the affairs of the PBC; and
 - (iii) when the relevant Event of Default ceases to exist.
- (c) If the Event of Default is of the kind described in clause 16.1(b)(ii) and applies to the Proponent, then:
 - (i) the Proponent shall as soon as possible notify the PBC:
 - (A) that the Event of Default has occurred;
 - (B) of the appointment of any administrator, receiver or manager to manage the affairs of the Proponent; and
 - (C) when the relevant Event of Default ceases to exist;
 - (ii) where the Event of Default results in a court order to wind up the Proponent, this PSHA shall by force of this clause terminate with effect from the date of the court order.
- (d) The Non-defaulting Party may, by notice in writing to the Defaulting Party, suspend the performance of its obligations and the Defaulting Party's rights under this PSHA until either clause 16.2(a) is complied with or the Event of Default no longer exists, as applicable.
- (e) Any remedy exercised under this clause 16 is without prejudice to any other rights a Party may have under this PSHA or otherwise at law (including the right to seek interlocutory relief and specific performance).

17. Dispute resolution

17.1 No arbitration or court proceedings

- (a) Subject to clause 17.1(b), if a dispute arises under this PSHA including a dispute in respect of this clause 17.1 (**Dispute**), a Party must comply with clauses 17.2 to 17.4 before commencing arbitration or court proceedings (except proceedings for urgent interlocutory relief).
- (b) The provisions of this clause 17 are subject to clause 8.4.

17.2 Notification

A Party claiming a Dispute has arisen must give the other Parties to the Dispute notice setting out details of the Dispute.

17.3 Parties to resolve Dispute

During the 20 Business Days after a notice is given under clause 17.2 (or longer period if the Parties to the Dispute agree in writing), each Party to the Dispute must use its reasonable endeavours to resolve the Dispute. If the Parties cannot resolve the Dispute within that period, any Party to the Dispute may request that the Dispute be referred to a mediator and, if a Party so requests, the Dispute must be referred to mediation in accordance with clause 17.4.

17.4 Mediation

- (a) If the Parties to the Dispute cannot agree on a mediator within 10 Business Days after a request under clause 17.3, the chairman of LEADR will appoint a mediator at the request of either Party.
- (b) The role of the mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a Party to the Dispute except if the Party agrees in advance in writing.
- (c) Any information or documents disclosed by a Party under this clause 17:
 - (i) must be kept confidential; and
 - (ii) may only be used to attempt to resolve the Dispute.
- (d) Each Party to a Dispute must pay its own costs of complying with this clause 17.4. The Parties to the Dispute must equally pay the costs of any mediator.
- (e) The Parties will engage in the mediation process in good faith and with the aim of reaching a resolution of the Dispute. If the Parties fail to achieve a resolution of the Dispute by mediation within 20 Business Days of the

appointment of a mediator and the commencement of mediation under this clause, or such further time as is agreed by the Parties, any Party may take such action as it considers appropriate, including (subject to clause 17.6) referring the matter to arbitration or commencing legal proceedings.

17.5 Arbitration

- (a) If the Parties to a Dispute have complied with clauses 17.2 to 17.4 then, if all those Parties agree, they may refer the Dispute to arbitration under the *Commercial Arbitration Act 2012* (WA).
- (b) The arbitration will be held within the Aboriginal Heritage Area or any other place agreed by the Parties.
- (c) The Parties shall appoint a person agreed between them to be the arbitrator of the Dispute.
- (d) If the Parties fail to agree on a person to be the arbitrator under clause 17.5(c), then the Parties shall request the President of the Law Society of Western Australia to appoint an arbitrator who has experience in the area of the Dispute and in Indigenous cultural matters.
- (e) Any Party to a Dispute may appeal to the Supreme Court of Western Australia on any question of law arising out of an interim or final award in the arbitration.

17.6 Breach of this clause

If a Party to a Dispute breaches clauses 17.1 to 17.4, the other Parties to the Dispute do not have to comply with those clauses in relation to the Dispute before starting court proceedings.

17.7 Obligations continue

Subject to clause 17.8, if a Dispute is referred for mediation or arbitration under any part of this clause 17 or court proceedings are started in respect of it, the Parties must, during the period of such mediation, arbitration or litigation and pending the making of a decision, determination or judgment as the case may be, continue to perform their respective obligations under this PSHA so far as circumstances will allow and such performance will be without prejudice to the final decision, determination or judgment made in respect of the matter in dispute.

17.8 Extension of time

Without prejudice to the power of a mediator, arbitrator or court to grant any extension of any period or variation of any date referred to in this PSHA, in order to

preserve the rights of a Party to a Dispute, the Party or Parties to the Dispute, as applicable, will consult with each other and use all reasonable endeavours to agree such extension or variation so required.

18. Confidentiality

18.1 Confidential information

Each Party agrees that the following information disclosed by one Party (**disclosing Party**) to another Party (**receiving Party**) is confidential (**Confidential Information**) and may not be disclosed except in accordance with clause 18.3:

- (a) information disclosed during the course of a Survey and the contents of any Survey Report provided under this PSHA, including any Sensitive Heritage Information;
- (b) information given by the Proponent to the PBC in respect of the Activities of the Proponent where the Proponent advises the PBC that the relevant information is confidential;
- (c) the information described in clause 18.2; and
- (d) any other information disclosed by one Party to another under this PSHA which is identified by the disclosing Party as confidential,

but not including information:

- (e) the receiving Party, prior to disclosure, already knew or created (whether alone or jointly with any third person) independently of the disclosing Party; or
- (f) that is public knowledge (otherwise than as a result of a breach of confidentiality by the receiving Party or any of its permitted discloseses).

18.2 Unrelated information obtained during Survey is confidential

In the course of a Survey being conducted the Aboriginal Heritage Liaison Officer may obtain, or cause to be obtained, information in relation to the native title rights and interests of the Native Title Group that is not related to the purpose of the Survey. Such information is separate from the Survey and is confidential to the Native Title Group.

18.3 Permitted disclosure

- (a) Subject to clauses 18.3(b) and 18.3(c), a receiving Party may disclose Confidential Information:
 - (i) if it has the prior consent of the Party which provided the information;

- (ii) to the extent required by any law or applicable securities regulation or rule;
 - (iii) to the extent that the information is reasonably necessary for any processes or applications under any native title laws or related to any statutory approvals;
 - (iv) in connection with any dispute or litigation concerning this PSHA or its subject matter;
 - (v) to the receiving Party's members, officers, employees, agents, auditors, advisers, financiers, consultants, contractors, joint venturers, partners and related bodies corporate, or an Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant appointed under this PSHA;
 - (vi) where the receiving Party is the Proponent, to a *bona fide* proposed assignee of the Proponent's rights or obligations under this PSHA;
 - (vii) where the disclosure is for the purpose of managing or planning any existing, planned or potential Activity;
 - (viii) to a proposed registered native title body corporate assignee of the PBC's rights, title and interests under this PSHA;
 - (ix) in accordance with clause 18.5;
 - (x) where disclosure is required by the Proponent to any judicial, legislative or executive arm of the Government of Western Australia or of the Commonwealth of Australia; and
 - (xi) as otherwise permitted or required by the terms of this PSHA.
- (b) To avoid doubt, where the Confidential Information is contained in a Survey Report, then the Proponent may disclose that Confidential Information to the DAA and ACMC, including for the purposes of the Proponent:
- (i) making an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application;
 - (ii) providing a copy of each Survey Report to the DAA for DAA's collection of Aboriginal Heritage Survey reports; and
 - (iii) seeking any necessary or desirable statutory approvals or pursuing any rights under law, including under the Aboriginal Heritage Act.
- (c) To avoid doubt, except for the circumstances described in clause 18.3(b), disclosure of Sensitive Heritage Information may only occur if the PBC consents to the form and content of the disclosure or the disclosure is required by any law or applicable securities regulation or rule.

- (d) The PBC must inform the Proponent of any information which it discloses during the course of the Survey to the Proponent, including by inclusion in a Survey Report, which comprises Sensitive Heritage Information.

18.4 Disclosure requirements

Before making any disclosure to a person under clause 18.3, the receiving Party must:

- (a) in each case, inform the entity or person to whom the Confidential Information is being disclosed of the receiving Party's obligations under this PSHA;
- (b) before doing so notify the disclosing Party and give that Party a reasonable opportunity to take any steps that that Party considers necessary to protect the confidentiality of that information; and
- (c) in the case of a disclosure to a person or entity under clauses 18.3(a)(v), 18.3(a)(vi), 18.3(a)(vii) or 18.3(a)(viii), but with the exception of employees or officers of a receiving Party, procure that the person or entity executes a deed with the disclosing Party in such form acceptable to the disclosing Party (acting reasonably) imposing on the person or entity an undertaking of confidentiality having substantially similar effect as this clause 18.

18.5 Provision of Aboriginal Heritage Information to DAA

Following the preparation of the Survey Report, the PBC must ensure that the Aboriginal Heritage Service Provider provides the following information to the Aboriginal Heritage Act Registrar:

- (a) a copy of the Survey Report: and
- (b) if Aboriginal Sites have been identified during the Survey, a Heritage Information Submission Form (see website details at Schedule 8,) with respect to each site.

19. Assignment

19.1 Generally

Neither the PBC nor the Proponent may assign, transfer, novate or otherwise dispose of its rights, title, obligations or interests under this PSHA except in accordance with this PSHA.

19.2 Assignment by Proponent

- (a) The Proponent may from time to time assign all or part of its rights, title, and interests under this PSHA to any person (whether by farm out, joint venture, sale or otherwise) where the Proponent is also assigning all or part of its interest in the Tenure to which this PSHA applies.
- (b) Before such assignment, the Proponent must:
 - (i) gives the PBC at least 20 Business Days' notice prior to the proposed assignment; and
 - (ii) within 20 Business Days after giving the PBC the notice referred to in clause 19.3(a)(i), obtain an executed deed of assumption in a form acceptable to the PBC (acting reasonably) in favour of the PBC and the Native Title Group by which the assignee agrees to be bound, alone or jointly with the Proponent, by the provisions of this PSHA and to assume, observe and perform (alone or jointly with the Proponent) the obligations of the Proponent under this PSHA.
- (c) Once executed, the Proponent shall provide a copy of the relevant deed to the PBC and shall do all other things necessary to give effect to the assumption by the assignee of the relevant obligations under this PSHA.

19.3 Assignment by PBC

The PBC may assign its rights, title and interests under this PSHA to a registered native title body corporate in accordance with the provisions of the NT Act (including due to the RNTBC Orders being vacated or replaced by a subsequent determination under sections 56 or 57 of the NT Act of the Federal Court) provided:

- (a) the PBC gives the Proponent at least 20 Business Days' notice prior to the proposed assignment; and
- (b) within 20 Business Days after giving the Proponent the notice referred to in clause 19.3(a), the proposed new registered native title body corporate enters into a deed, in a form acceptable to the Proponent (each acting reasonably), by which it agrees to be bound by this PSHA and to assume all of the PBC's obligations under this PSHA, and provides a copy of that deed to the Proponent; and
- (c) the PBC does all other things necessary to give effect to the assumption by the new registered native title body corporate of the obligations under this PSHA.

19.4 Effect of Assignment

- (a) Once an assignment by a Proponent of all of its rights, title and interests under this PSHA has occurred under clause 19.2, then the assigning Proponent will be deemed to have been released to the extent of the assignment from all

claims and liabilities arising under or in respect of this PSHA arising after the effective date of the assignment, but without affecting any claim or liability arising prior to such date.

- (b) Once an assignment of this PSHA has occurred under clause 19.3, the assigning PBC will be deemed to have been released, to the extent of the assignment from all claims and liabilities arising under or in respect of this PSHA arising after the effective date of the assignment, but without affecting any claim or liability arising prior to such date.
- (c) Unless otherwise agreed by the Parties in writing or required by law, an assignment under this clause 19 shall not affect the operation of this PSHA.

19.5 No encumbrance

- (a) Except as permitted by clause 19.5(b), no Party may grant an encumbrance, mortgage or charge in respect of the whole or any part of its rights, title and interests under this PSHA.
- (b) The Proponent may with the prior written consent of the PBC grant an encumbrance, mortgage or charge in respect of the whole or any part of its rights, title and interests under this PSHA provided that clause 19.2 shall apply mutatis mutandis to any assignment upon enforcement of such encumbrance, mortgage or charge.

20. Notices

Any notice:

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be delivered to the intended recipient by registered post or by hand or fax to the intended recipient's address or fax number specified in Schedule 1 (or the address in Western Australia or fax number last notified in writing by the intended recipient to the sender, including where so notified in an Activity Notice given to the PBC under clause 8.2);
- (c) will be taken to be received by the recipient:
 - (i) in the case of delivery in person, when delivered; and
 - (ii) in the case of delivery by post, 2 Business Days after the date of posting; and
 - (iii) in the case of delivery by fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number and

name of recipient and indicating that the transmission has been made without error, but if the result is that a notice would be taken to be given or made on a day that is not a Business Day or at a time that is later than 4.00pm (local time), it will be taken to have been duly given or made at 9.00am on the next Business Day.

21. GST

21.1 Interpretation

Words capitalised in this clause 21 and not otherwise defined have the meaning given in the GST Act.

21.2 GST payable

- (a) Where an amount of Consideration is payable for a Taxable Supply made under this PSHA (whether that amount is specified or can be calculated in accordance with this PSHA), it does not include GST and must be increased by the GST Rate.
- (b) The Party making a Taxable Supply under this PSHA must issue a Tax Invoice or Adjustment Note to the Recipient in accordance with the GST Act. Notwithstanding any provision to the contrary in this PSHA, payment will be due within 20 Business Days of a Party receiving a Tax Invoice in accordance with this clause 21.
- (c) If any Party has a right to be reimbursed or indemnified for any cost or expense incurred under this PSHA, that right does not include the right to be reimbursed or indemnified for that component of a cost or expense for which the indemnified Party can claim an Input Tax Credit.
- (d) A Party may issue a Recipient-created Tax Invoice in respect of payment made to it by the other Party.

22. Costs and duties

- (a) The Proponent shall bear any duties or fees or taxes of a similar nature associated with this PSHA.
- (b) Each Party shall bear their own costs including legal costs associated with the negotiation, drafting and execution of this PSHA.

23. Force Majeure and Aboriginal Cultural Business

- (a) If a Party is prevented in whole or in part from carrying out its obligations under this PSHA as a result of an event of Force Majeure or Aboriginal

Cultural Business, it must promptly notify the other Party accordingly. The notice must:

- (i) specify the obligations it cannot perform;
 - (ii) fully describe the event of Force Majeure or Aboriginal Cultural Business;
 - (iii) estimate the time during which the Force Majeure or Aboriginal Cultural Business will continue; and
 - (iv) specify the measures proposed to be adopted to remedy or abate the Force Majeure.
- (b) Following this notice, and while the Force Majeure or Aboriginal Cultural Business continues, this PSHA shall nevertheless continue and remain in force and effect but the obligations which cannot be performed because of the Force Majeure or Aboriginal Cultural Business will be suspended, and any time limit for performance of those obligations will be extended by the period of the Force Majeure or Aboriginal Cultural Business.
- (c) The Party that is prevented from carrying out its obligations under this PSHA as a result of an event of Force Majeure or Aboriginal Cultural Business must take all action reasonably practicable to mitigate any loss suffered by the other Party as a result of its failure to carry out its obligations under this PSHA.

24. General

24.1 Review and variation

Where this PSHA is to be amended or varied, then this PSHA may only be amended or varied by a document in writing signed by each of the Parties to the agreed amendment or variation.

24.2 Entire agreement

This PSHA (together with the Proponent Acceptance Deed (if any)) constitutes the entire agreement between all of the Parties as to its subject matter and, in relation to that subject matter, supersedes any prior understanding or agreement between any of the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

24.3 Governing law and jurisdiction

- (a) This PSHA is governed by the law applicable in the State of Western Australia.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia.

24.4 Severance

If any provisions of this PSHA is void, voidable by any Party, unenforceable or illegal according to the law in force in the State of Western Australia, it shall be read down so as to be valid and enforceable or if it cannot be so read down, the provision (or where possible the offending words), shall be severed from this PSHA to the extent necessary unless it would materially change the intended effect and objectives of this PSHA.

24.5 Waiver

A right or power under this PSHA shall only be deemed to be waived by notice in writing, signed by the Party waiving the right or power :

- (a) no other conduct of a Party (including a failure to exercise, a delay in exercising or a partial exercise of a right or power or any forbearance or indulgence granted by one Party to another Party in respect of a right or power) operates as a waiver of the right or power or otherwise prevents the exercise of that right or power; and
- (b) a waiver of a right or power on one or more occasions by a Party does not operate as a waiver of that right or power if it arises again in the future or prejudices that Party's other rights or powers or future rights or powers in respect of the right or power waived; and
- (c) the exercise of a right or power does not prevent any further exercise of that right or power or of any other right or power.

24.6 No merger

The rights and obligations of the Parties will not merge on the completion of any transaction contemplated by this PSHA. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

24.7 Further action

Each Party must use all reasonable efforts to do all things necessary or desirable to give full effect to this PSHA and the matters contemplated by it.

Schedule 1 – Party Details

(Clause 20 Notices)

[XX –Insert PBC's name]
Notice details

Address: [XX – Insert PBC's address in
Western Australia]

Fax No: [XX – Insert PBC's fax details]

[XX –Insert Proponent's name]
Notice details

Address: [XX – Insert Proponent's address in
Western Australia]

Fax No: [XX – Insert Proponent's fax details]

Schedule 2 – Determination and Aboriginal Heritage Details

Item No.	Item Description	Details
Details of Determination		
Item 1	Name of Determination (or name of Native Title Group)	[XX]
Item 2	Date of Determination	[XX]
Item 3	Federal Court or High Court decision in which the Determination was made (including any decisions varying the original decision, where applicable)	[XX] as varied by [XX]
Details of ILUA (as recorded on the Register of Indigenous Land Use Agreements)		
Item 4	Short name of ILUA	[XX]
Item 5	National Native Title Tribunal file no.	[XX]
Item 6	Date registered	[XX]
Item 7	Local government region(s)	[XX]
Details of PBC		
Item 8	PBC's Indigenous corporation number (ICN), as recorded on the Register of Aboriginal and Torres Strait Islander Corporations under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)	ICN [XX]
Item 9	Whether PBC holds native title on trust for, or acts as a non-trustee agent or representative of, the Native Title Group	Trustee Non-trustee (Delete as applicable)

Pre-existing Aboriginal Heritage Agreements		
Item 10	Details of all pre-existing Aboriginal Heritage Agreements.	[XX – insert sufficient details of prior agreements]
Item 11	List of provisions of a pre-existing Aboriginal Heritage Agreement which will prevail over this PSHA (if the entire pre-existing Aboriginal Heritage Agreement prevails, write ‘whole agreement’).	[XX – insert sufficient details of prior agreements]
Item 12 – Details of RNTBC Orders		
Item 12(a)	Date of RNTBC Orders	[XX]
Item 12(b)	Federal Court or High Court decision in which the RNTBC Orders were made (including any decision(s) varying the original decision, where applicable)	[XX] as varied by [XX]

Schedule 3 – Aboriginal Heritage Area

(Clause 1.1 Definition of **Aboriginal Heritage Area**)

[XX – Insert maps and technical description]

Schedule 4 – Tenure and Tenure Areas

(Clauses 1.1 Definition of **Tenure** and **Tenure Areas**)

Part A: Tenure

The Tenure held by the Proponent to which this PSHA applies is as follows:

[XX – Insert details of each Exploration Tenement, Access Authority or LA Act High Impact Licence, as applicable]

Part B: Tenure Areas

A map identifying the boundaries of the above Tenure and the extent to which it is wholly or partially within the Aboriginal Heritage Area is set out below or attached:

[XX - Insert below, or attach, map]

Schedule 5 – Contents of Activity Notice

Part 1 – Primary contents of Activity Notice

(Clause 8.2 Giving the Activity Notice)

1.1 Basic information

Every Activity Notice must contain:

- (a) a statement that it is an Activity Notice issued under this PSHA (by reference to the name of the Determination or ILUA as set out in item 1 or item 4 of Schedule 2);
- (b) the name of the Proponent, and:
 - (i) an address in Western Australia for service of notices, under this PSHA, on the Proponent (if no address for service has previously been given by the Proponent); and
 - (ii) full contact details for a primary contact person within the Proponent (if a body corporate).

1.2 Key statements and nominations under clause 8.2

(Clause 8.2(c)(ii))

Every Activity Notice must, subject to clause 8.2(e), contain the following required key statements:

- (a) a statement of the extent to which the Activity Program consists of Low Ground Disturbance Activity, in the opinion of the Proponent; and
- (b) a statement of whether the Proponent considers that a Survey is required (taking into consideration the matters referred to in clauses 8.1(b) and 8.3); and
- (c) a nomination, by the Proponent, of a preferred Survey Methodology, being either a Site Avoidance Model or a Site Identification Model; and
- (d) where a Site Avoidance Model is nominated, a statement of whether the Proponent requires any Survey to be conducted in respect of:
 - (i) only the area or areas to be impacted by specific Activities as described and mapped in the Activity Notice (commonly known as a 'work program clearance' survey); or
 - (ii) a broader area or areas, encompassing the Activities and surrounding land as described and mapped in the Activity Notice (commonly known as a 'work area clearance' survey); and

- (e) a nomination, by the Proponent, of a proposed Survey fieldwork start date or end date; and
- (f) a nomination, by the Proponent, as to whether it requires:
 - (i) a Preliminary Advice (see clause 12.1(a));
 - (ii) a draft of the Survey Report (see clause 12.1(b)).

Where any of those key statements are omitted, Part 3 of this Schedule 5 provides default provisions.

Part 2 – Additional detailed contents of Activity Notice

(Clauses 8.2(b) and 8.2(c))

In accordance with clause 8 of this PSHA, the purpose of the information provided in and with the Activity Notice is to determine whether a Survey is required and if so, its nature and extent. In order to facilitate this objective, an Activity Notice must contain the following additional details where applicable:

- (a) a map showing clearly the area the subject of the Activity Notice; and
- (b) aerial photographs (if available) or smaller scale maps; and
- (c) where applicable, identifying numbers (or other identifying information) of each Tenure to which the Activity Notice relates; and
- (d) all known vehicular access routes to the area the subject of the Activity Notice; and
- (e) any ground disturbing notice provided to any government agency including (where mining exploration Activities are proposed) to the District Mining Engineer; and
- (f) details of any Activity Program, and the area and level of potential Activity, on the area the subject of the Activity Notice; and
- (g) the techniques and types of infrastructure, items of equipment and vehicles to be used in relation to any proposed Activity; and
- (h) the approximate number of personnel who will be involved in any proposed Activity; and
- (i) any water, biological or other materials or resources proposed to be obtained from the area the subject of the Activity Notice, in relation to any proposed Activity.

An Activity Notice may also set out:

- (a) whether there has been any previous Aboriginal Heritage Survey and, subject to any confidentiality restrictions, the age, methodology, participants, standard and results of that survey. If a written report of that previous Aboriginal Heritage Survey is in the possession or control of the giver of the Activity Notice, then (subject to confidentiality provisions) the Activity Notice shall be accompanied by a copy of the written report; and
- (b) the extent to which the area the subject of the Activity Notice has been affected by previous ground disturbing activities; and
- (c) whether the Aboriginal Heritage Act Register discloses any Aboriginal Sites on the area the subject of the Activity Notice; and
- (d) any additional information which explains what sort of Survey outcome is being sought (if a Survey is required); and
- (e) any other background material which will better help the PBC and the Native Title Group to understand the potential impacts of what is proposed.

Part 3 – Default provisions of Activity Notice

(Clauses 8.2(c) and 8.2(e))

For the purposes of clause 8.2(e), the following default provisions apply in respect of any item in part 1.2 of this Schedule 5 that is not specified or nominated in the Activity Notice.

Clause No.	Default Provision
Item (a)	The Activity Program contains no Low Ground Disturbance Activity.
Item (b)	A Survey is required.
Item (c)	Site Avoidance Model.
Item (d)	Only the areas of specific Activities described in the Activity Notice are required to be Surveyed.
Item (e)	Not applicable (Parties to discuss and agree proposed Survey fieldwork start date or end date).
Item (f)	There is no requirement for a Preliminary Advice or a draft of the Survey Report.

Schedule 6 – Costs for conduct of a Survey

(Clauses 8.5(a) and 10)

No.	Item	Rate	GST	Description
Ethnographic Assessment				
1.	Aboriginal Heritage Service Provider	\$900.00 (Indexed to CPI)	+GST	per person per day or pro rata for part thereof
2.	Principal Aboriginal Heritage Consultant (if agreed)	\$900.00 (Indexed to CPI)	+GST	per person per day or pro rata for part thereof
3.	External Consultant Anthropologist	At cost [Usually \$900-\$1000 (Indexed to CPI)]	+GST	per person per day or pro rata for part thereof
4.	Aboriginal Heritage Act Register Search	\$200.00 or as advised by DAA	+GST	per person per day or pro rata for part thereof
5.	Aboriginal Liaison Officer (if required)	\$500.00 (Indexed to CPI)	+GST	per person per day or pro rata for part thereof
Archaeological Assessment (if necessary and agreed)				
6.	Archaeologist (archaeological team external contractors)	At cost [Usually \$900 - \$1000] (Indexed to CPI)		
7.	Fieldwork and reporting	At cost [Usually \$900 - \$1000] (Indexed to CPI)		
Aboriginal Consultants (Clause XX)				
8.	Aboriginal Consultants – up to 6 unless otherwise agreed	\$500 (max) (Indexed to CPI)	+GST	per person per day or pro rata for part thereof
Regional Allowance (in addition to the Aboriginal Consultants' Costs set out above)				

No.	Item	Rate	GST	Description
9.	Aboriginal Consultants - up to 6 unless otherwise agreed	Equivalent to the Standard District Allowance Rate ("Rate") per week for the Regional Development Zone in which the relevant Aboriginal Consultant ordinarily resides. The Rate for the relevant Regional Development Zone is as referred to in the <i>District Allowance (Government Officers) General Agreement</i> , as adjusted from time to time,	+GST	per person per 5 day week or pro rata for part thereof
Field Expenses				
10.	Principal Aboriginal Heritage Consultant (if agreed), Aboriginal Heritage Liaison Officer or Anthropologist accommodation/meals	At cost	+GST	
11.	Archaeologist or Archaeological Team accommodation/meals	At cost	+GST	
12.	Aboriginal Consultants accommodation/meals	At cost	+GST	
Travel Expenses				
13.	Vehicle mileage (km)	\$ As per tax schedule for location	+GST	per km
14.	Hire Vehicle (if survey vehicle is hired)	commercial rates, plus fuel		

No.	Item	Rate	GST	Description
15.	Aboriginal Consultants travel expenses (if required)	Rate as per tax schedule for location	+GST	per km
16.	Airfares	At cost (economy)		
17.	Taxi travel (to and from airports or meetings)	At cost		
Incidental Expenses				
18.	Film, maps, report production and expendables	At cost	+GST	
Administration Fee and Disbursements				
19.	Administration Fee	10% of total expenditure	+GST	
20.	Disbursements	At cost		

Initials: Aboriginal Heritage Service Provider

Initials: Proponent/Authorised officer of the Proponent _____

CPI Indexation

Where a rate listed in this annexure is indicated to be "*Indexed to CPI*" it shall be varied annually on 31 August each year in accordance with the CPI Calculation.

Schedule 7 – Contents of Survey Report

(Clause 12.4)

Part 1 – Guidelines for all Survey Reports

1.1 Copyright and confidentiality

Insert a statement to the effect that the report may only be copied in accordance with this PSHA and subject to any other restrictions agreed to, from time to time, by the Proponent and the PBC on behalf of the Native Title Group.

1.2 Survey personnel

- (a) Author's name in full and occupation and author's business or company name.
- (b) Full name and gender of each Aboriginal Consultant, and the group they represent.
- (c) Full names and gender of other personnel participating in the Survey and their role.
- (d) Confirmation that the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant (as the case may be) considers the Aboriginal Consultants to be appropriate to speak for Aboriginal Heritage in relation to the area Surveyed.

1.3 Survey date(s)

Insert the date(s) on which fieldwork was conducted.

1.4 Spatial information

- (a) The general location of the area within which the Survey was undertaken (e.g. title numbers 'x' to 'z', or the 'abc' pastoral lease, or the area shown on a map contained in the Survey Report).
- (b) Grid references of the Survey Area.
- (c) A map of the Survey Area.

1.5 Other information

- (a) Summary of results of searches of the Register of Sites at the DAA including the site number and name, if given, and the reference number.
- (b) A general description of the fieldwork undertaken.

- (c) Details of ethnographic and (if relevant) archaeological work carried out during the Survey.
- (d) Description of the Survey Methodology used by the Survey Team (that is, a Site Avoidance Model or a Site Identification Model) and any other relevant methodological notes.
- (e) In respect of any Aboriginal Objects identified:
 - (i) a description of such Aboriginal Objects;
 - (ii) the location of any Aboriginal Objects so identified; and
 - (iii) the date on which each Aboriginal Object was identified.
- (f) Any discussion and recommendations.

Part 2 – Additional guidelines for Survey Reports where Site Avoidance Model is used

2.1 Details of areas where Activity should not be undertaken (because of the presences of an Aboriginal Site within that area) and other Survey information

- (a) Description of any areas where Activity should not be carried out because of the presence of an Aboriginal Site within that area.
- (b) Grid references of the area where Activity should not be carried out, i.e. Eastings and Northings (of the coordinate description e.g. AMG/MGA), the AMG Zone (i.e. Zone 51) and the type of equipment used – GPS or DGPS or other.
- (c) Dimensions of the area, e.g. approximately 100m east-west and 50m north-south.
- (d) Location, i.e. where the area to be avoided is located in relation to tenure or significant topographical feature, e.g. the northern corner of mining lease X about 100m east of the prominent hill.
- (e) Full names of person(s) who provided the information set out at (a) –(d) above.

Part 3 – Additional guidelines for Survey Reports where Site Identification Model is used

3.1 Details of new or registered Aboriginal Sites recorded during the Survey and other Survey information

Please complete and attach a copy of the Heritage Information Submission Form – see clause 18.5 and Schedule 8.

3.2 Recommendations and comments

Recommendations regarding the Aboriginal Site, e.g. whether the site is:

a place of importance or significance where persons of Aboriginal descent have, or appear to have left any object used for or made or adapted for use for any purpose connected with traditional cultural life of Aboriginal people (past or present); and/or

- a sacred/ ritual or ceremonial site of importance and special significance to persons of Aboriginal descent; and/or
- a place of historical, anthropological, archaeological or ethnographic importance and/or significance; and/or
- a place where Aboriginal objects are traditionally stored; and

recommendations for how the Aboriginal Site(s) should be protected.

Schedule 8 – DAA Survey Database Information

(Clause 18.5 Publication of Survey Data on DAA Survey database)

The Department of Aboriginal Affairs *Heritage Information Submission Form* available for download on the DAA's website by accessing:

<http://www.daa.wa.gov.au>

and searching for *Heritage Information Submission Form*

Please download, complete and submit this form to the Department of Aboriginal Affairs in compliance with clause 18.5.

Schedule 9 – PBC Consent to the lodging of a programme of work

(Clause 15.1)

[Letterhead of PBC]

Our ref: [number]

[Name of Proponent]

[Address of Proponent]

[Date]

Dear [Name of Proponent or relevant officer of the Proponent]

PBC consent to the lodging of a programme of work

We refer to the programme of work which we received from you on [insert date] in accordance with clause 15.1 of the Proponent Standard Heritage Agreement (PSHA) we entered into on [insert date].

In that programme of work you describe works that will take place within the boundaries of the registered site/s identified as [insert DAA site identifier].

You advise us that you propose to lodge this programme of work as required by the Mining Act, including those works which will take place within the boundaries of [DAA site identifier] site/s.

We are pleased to confirm that the [PBC] consents to the [Proponent] lodging the proposed programme of work, including those works proposed to be carried out within the boundaries of [DAA site identifier] Site. We further confirm that this is a letter of consent for the purposes of clause 15.1(a)(i)(A) of the PSHA entered into on [insert date].

Yours faithfully

[PBC]

Signing Pages

EXECUTED as a deed.

Executed in accordance with section 99-5)
of the *Corporations (Aboriginal and*)
Torres Strait Islander) Act 2006 (Cth) on)
behalf of [XX –insert name of PBC]:)

Director (signature)

Director or secretary (signature)
(Delete whichever is not applicable)

Director (print full name)

Director or secretary (print full name)

Date

Executed by [XX – Insert name of)
Proponent] ACN [XX – Insert ACN number])
in accordance with section 127(1) of the)
Corporations Act 2001 (Commonwealth):)

Director's signature

(print name)

Director/Secretary's signature

(print name)

The Common Seal of [XX – Insert name of Proponent] ACN [XX – Insert ACN number] was hereunto affixed by authority of its Directors in the presence of:)
)
)
)

Director's signature

(print name)

Director/Secretary's signature

(print name)

Executed by [XX – Insert name of Proponent (if an individual)] in the presence of:)
)

Witness' Signature

(print name)

Appendix G: Victorian Land Use Activity Agreement

Land Use Activity Agreement

being part of the Recognition and Settlement Agreement under s 4 of the *Traditional Owner Settlement Act 2010* (Vic)

between

[insert Traditional Owner Group Entity name]

Indigenous Corporation Number **[#####]**

and

the State of Victoria

NB. Provisions highlighted in teal signify matters which are to be completed by negotiation. Provisions highlighted in yellow signify matters which require completion to reflect the particular agreement, for example **[insert Traditional Owner Group Entity name]**.

Table of Contents

1.	Parties	2
2.	Registration and Effective Date (s 72(1) and s 73(1) of the Act)	2
3.	Ministerial Consent	2
4.	Aboriginal Cultural Heritage	2
5.	Agreement Land (s 31(2)(a) of the Act)	3
	5.1 Definition of Agreement Land	3
	5.2 Variation of Agreement Land	3
6.	Traditional Owner Rights recognised in the Recognition and Settlement Agreement	3
7.	Emergency situations	4
8.	Land Use Activities to which this Land Use Activity Agreement applies	4
9.	Routine Activities	4
	9.1 Activities to which this clause applies	4
	9.2 Earth Resource and Infrastructure Authorisations for exploration or prospecting	4
10.	Advisory Activities	5
	10.1 Activities to which this clause applies	5
	10.2 Ministerial directions as to Advisory Activities	5
11.	Negotiation Activities	5
	11.1 Negotiation Activities, Class A	5
	11.2 Negotiation Activities, Class B	6
12.	Agreement activities	6
13.	Activities that fall under more than one category of Land Use Activity	6
14.	Multiple activities may be treated as a single activity	6
15.	Review of listing and categorisation of Land Use Activities	7
16.	Community Benefits	7
17.	Variation	8
18.	Anti-avoidance	8
19.	Definitions and Interpretation	9
	19.1 Definitions	9
	19.2 Interpretation	13

Table of Contents

Schedule 1	Ministerial Consent (Clause 3)	15
Schedule 2	Agreement Land (Clause 4)	17
Schedule 3	Land Use Activities (Clauses 9 to 12)	20
Schedule 4	Conditions for Earth Resource Or Infrastructure Authorisations to be Routine Activities (Clause 9.2)	30
Schedule 5	Draft Ministerial Directions as to Advisory Activities (Clause 10.2)	35
Schedule 6	Process as to multiple activities (Clause 14)	37
Schedule 7	Community Benefits (Clause 16)	38

Date

2012

**[insert Traditional Owner Group Entity name]
Indigenous Corporation Number [####]**

[insert address of Traditional Owner Group Entity]

(the Corporation)

and

the State of Victoria

(the State)

Background

- A. This Land Use Activity Agreement forms part of the Recognition and Settlement Agreement entered into by the Parties on [insert date] under s 4 of the *Traditional Owner Settlement Act 2010* (Vic).
- B. For the purposes of s 32 of the *Traditional Owner Settlement Act 2010* (Vic), this Land Use Activity Agreement:
 - (a) specifically lists Land Use Activities the carrying out of which are subject to this Land Use Activity Agreement; and
 - (b) specifies which of the listed Land Use Activities are Routine Activities, Advisory Activities, Negotiation Activities, Class A, Negotiation Activities, Class B, or Agreement Activities.
- C. The *Traditional Owner Settlement Act 2010* (Vic) provides for the procedures that apply to Negotiation Activities and Agreement Activities specified in this Land Use Activity Agreement.
- D. The Act also provides for the Minister to make directions as to the notification of the Corporation regarding any proposals to carry out Advisory Activities specified in this Land Use Activity Agreement.

Agreed terms

1. Parties

The Parties to this Land Use Activity Agreement are:

- (a) the Corporation; and
- (b) the State.

2. Registration and Effective Date (s 72(1) and s 73(1) of the Act)

- (a) Pursuant to s 72(1) of the *Traditional Owner Settlement Act 2010* (Vic), on entering into this Land Use Activity Agreement, the Minister must lodge this Land Use Activity Agreement with the Registrar for registration on the Register of Land Use Activity Agreements.
- (b) This Land Use Activity Agreement commences when all of the following pre-conditions to commencement have been fulfilled:
 - (i) notice of the registration of this Land Use Activity Agreement is published in the Government Gazette; and
 - (ii) the ILUA is registered on the Register of Indigenous Land Use Agreements; and
 - (iii) the Minister has issued directions in accordance with s 34 of the *Traditional Owner Settlement Act 2010* (Vic).

3. Ministerial Consent

The consent of any Minister (other than the Minister entering into this Land Use Activity Agreement) required under s 30(3) of the *Traditional Owner Settlement Act 2010* (Vic) is attached at Schedule 1.

4. Aboriginal Cultural Heritage

- (a) The Parties do not intend this Land Use Activity Agreement, or any agreement made under Division 3 of Part 4 of the *Traditional Owner Settlement Act 2010* (Vic), to result in any inconsistency with the *Aboriginal Heritage Act 2006* (Vic) and procedures or instruments pursuant to that Act.
- (b) If any matter arises in connection with this Land Use Activity Agreement that is covered by the *Aboriginal Heritage Act 2006* or a procedure or an instrument made pursuant to that Act, then the Parties:
 - (i) acknowledge that the relevant procedures under the *Aboriginal Heritage Act 2006* (Vic) regarding that matter will apply; and
 - (ii) agree not to duplicate or seek to duplicate any of the procedures referred to in clause 4(b)(i).

- (c) For the avoidance of doubt, to the extent that the *Aboriginal Heritage Act 2006* (Vic) deals with matters relating to Aboriginal Cultural Heritage, any protection given under that Act against prosecution will only apply where parties have complied with the requirements of the *Aboriginal Heritage Act 2006* (Vic).

5. Agreement Land (s 31(2)(a) of the Act)

5.1 Definition of Agreement Land

- (a) Subject to clauses 5.1(b) and 5.1(c), the Land Use Activity Agreement applies to the area described in Item 1 of Schedule 2.
- (b) This Land Use Activity Agreement does not apply to the areas specified in item 2 of Schedule 2.
- (c) This Land Use Activity Agreement will cease permanently to apply to an area or part of an area described under clause 5.1(a) in the event that a Land Use Activity that is specified in Item 3 of Schedule 2 is carried out in relation to that area or part of that area.
- (d) This Land Use Activity Agreement will cease permanently to apply to an area or part of an area to which clause 5.1(c) applies immediately on the carrying out of the relevant Land Use Activity.

5.2 Variation of Agreement Land

The Parties will take all reasonable steps to ensure that, areas specified under clause 5.1(b) are included in the Agreement Land through a variation to this Land Use Activity Agreement under clause 17 in the event that the Parties agree that the basis for excluding the area has been removed, ceased or no longer has effect.

6. Traditional Owner Rights recognised in the Recognition and Settlement Agreement

- (a) The traditional owner rights recognised in the Recognition and Settlement Agreement in accordance with s 9 of the *Traditional Owner Settlement Act 2010* (Vic) are:
 - (i) to enjoy the culture and identity of the [traditional owner group];
 - (ii) to maintain a distinctive spiritual, material and economic relationship with the land and the natural resources on or depending on the land;
 - (iii) to access and remain on the land;
 - (iv) to camp on the land;
 - (v) to use and enjoy the land;
 - (vi) to take natural resources on or depending on the land;

- (vii) to conduct cultural and spiritual activities on the land; and
- (viii) to protect places and areas of importance on the land.

7. Emergency situations

- (a) Pursuant to s 39 of the *Traditional Owner Settlement Act 2010* this Land Use Activity Agreement is not to be taken to prevent or impose any requirements on the carrying out of any activity by a Decision Maker in an emergency for the purpose of protecting property, life or the environment.
- (b) The State will make reasonable efforts to inform the Corporation in relation to any activities to which clause 7(a) applies as soon as practicable.

8. Land Use Activities to which this Land Use Activity Agreement applies

- (a) Pursuant to s 32(1) of the *Traditional Owner Settlement Act 2010* (Vic), this Land Use Activity Agreement only applies to the Land Use Activities listed under clauses 9 to 12.
- (b) This Land Use Activity Agreement does not apply to a Land Use Activity specified in item 6 of Schedule 3, even if, but for this clause, this Land Use Activity Agreement would otherwise apply to it.

9. Routine Activities

9.1 Activities to which this clause applies

The Land Use Activities specified in item 1 of Schedule 3 are Routine Activities.

9.2 Earth Resource and Infrastructure Authorisations for exploration or prospecting

- (a) Pursuant to s 33(2) of the *Traditional Owner Settlement Act 2010* (Vic), the granting of any Earth Resource Or Infrastructure Authorisation for the purpose of exploration or prospecting under any of the following acts:
 - (i) the *Mineral Resources (Sustainable Development) Act 1990*;
 - (ii) the *Petroleum Act 1998*;
 - (iii) the *Geothermal Energy Resources Act 2005*;
 - (iv) the *Offshore Petroleum and Greenhouse Gas Storage Act 2010*; or
 - (v) the *Greenhouse Gas Geological Sequestration Act 2008*;on the terms specified in Schedule 4 is a Routine Activity.

10. Advisory Activities

10.1 Activities to which this clause applies

The Land Use Activities specified in item 2 of Schedule 3 are Advisory Activities.

10.2 Ministerial directions as to Advisory Activities

- (a) The Parties acknowledge that a Decision Maker who proposes to carry out an Advisory Activity in the Agreement Land must comply with any Ministerial direction given under s 34(1) of the *Traditional Owner Settlement Act 2010* (Vic) that may apply from time to time to the carrying out of that activity.
- (b) The State will send the Corporation a copy of any Ministerial directions given under s 34(1) of the *Traditional Owner Settlement Act 2010* at the same time as it is sent to Decision Makers.
- (c) A draft direction for the Minister's consideration is attached at Schedule 5.
- (d) The Parties acknowledge that the Minister may revoke and reissue any Ministerial directions issued under s 34(1) of the *Traditional Owner Settlement Act 2010* (Vic) from time to time.
- (e) If the Minister proposes to revoke or reissue a direction under s 34(1), the Minister will consult with the Corporation in relation to the proposed revocation or reissuing and will exercise this power in accordance with the principles of procedural fairness.
- (f) This clause is not intended to fetter the Minister's discretion in making any direction under s 34 of the *Traditional Owner Settlement Act 2010*.

11. Negotiation Activities

11.1 Negotiation Activities, Class A

- (a) The Land Use Activities specified in item 3 of Schedule 3 are Negotiation Activities, Class A.
- (b) Pursuant to s 32(3)(b) of the *Traditional Owner Settlement Act 2010* (Vic), a Land Use Activity specified in item 3 of Schedule 3 must be a Significant Land Use Activity.
- (c) Without derogating from clause 11.1(a), the Parties agree that the granting of any Earth Resource Or Infrastructure Authorisation for the purposes of exploration or prospecting under any of the following acts:
 - (i) the *Mineral Resources (Sustainable Development) Act 1990*;
 - (ii) the *Petroleum Act 1998*;
 - (iii) the *Geothermal Energy Resources Act 2005*;

- (iv) the *Petroleum (Submerged Lands) Act 1982*;
- (v) the *Offshore Petroleum and Greenhouse Gas Storage Act 2010*; or
- (vi) the *Greenhouse Gas Geological Sequestration Act 2008*;

on terms other than those specified in Schedule 4 are Negotiation Activities, Class A.

11.2 Negotiation Activities, Class B

- (a) The Land Use Activities specified in item 4 of Schedule 3 are Negotiation Activities, Class B.
- (b) Pursuant to s 32(3)(a) of the *Traditional Owner Settlement Act 2010* (Vic), a Land Use Activity specified in item 4 of Schedule 3 must be either a:
 - (i) Limited Land Use Activity; or
 - (ii) Significant Land Use Activity.

12. Agreement activities

- (a) The Land Use Activities specified in item 5 of Schedule 3 are Agreement Activities.
- (b) Pursuant to s 32(3)(b) of the *Traditional Owner Settlement Act 2010* (Vic), a Land Use Activity specified in item 5 of Schedule 3 must be a Significant Land Use Activity.
- (c) The Corporation agrees to respond to a notification made under s 49 of the *Traditional Owner Settlement Act 2010* (Vic) within a period of three months from the date that the notice comes into effect.

13. Activities that fall under more than one category of Land Use Activity

Subject to clause 9.2, if a Land Use Activity is capable of falling under more than one category in Schedule 3, a categorisation that provides a higher level of procedural rights to the Corporation takes precedence over a categorisation that provides a lower level of procedural rights to the Corporation.

14. Multiple activities may be treated as a single activity

For the purpose of s 37 of the *Traditional Owner Settlement Act 2010* (Vic), the Parties agree to follow the process specified in Schedule 6 to enable negotiations and decisions by the Corporation under this Land Use Activity Agreement in relation to the carrying out of more than one Land Use Activity on the land to be conducted as a joint process.

15. Review of listing and categorisation of Land Use Activities

- (a) The Parties will consider varying the Land Use Activities to which this Land Use Activity Agreement applies and their categorisation as part of the initial outcomes review under clause **[insert number]** and the periodic outcomes review under clause **[insert number]** of the Recognition and Settlement Agreement.
- (b) The Parties must consider varying the Land Use Activities to which this Land Use Activity Agreement applies and their categorisation when a change in law introduces, creates, varies or eliminates a land use activity which:
 - (i) Is of the same type of a Land Use Activity which is categorised as an Agreement Activity or a Negotiation Activity; or
 - (ii) If permitted, would exclude or restrict public access in the area affected for a period of more than ten years.
- (c) When considering a proposed variation referred to in clause 15(a), the Parties may take into account any relevant consideration including:
 - (i) changes in technology;
 - (ii) changes in law;
 - (iii) the priorities of each Party;
 - (iv) clarifying the status of an act or an activity under this Land Use Activity Agreement; or
 - (v) additions to or changes regarding the categorisation of Land Use Activities under other registered Land Use Activity Agreements.
- (d) For the avoidance of doubt, any variation of the kind referred to in clause 15(a) is not intended to apply to Land Use Activities that have been done or carried out before the variation or change.

16. Community Benefits

- (a) The Parties agree that:
 - (i) the State will provide Community Benefits to the Corporation in accordance with Schedule 7;
 - (ii) any Community Benefits that are provided in accordance with Schedule 7 are full and final satisfaction of the Corporation's entitlement under the *Traditional Owner Settlement Act 2010* (Vic) to any Community Benefits for any Land Use Activity to which the Community Benefits relate; and
 - (iii) neither the Corporation nor a member of the Corporation will receive consideration, whether pecuniary or otherwise, from a

person other than the Responsible Person in return for the Corporation providing its agreement under Part 4 Division 3 to the Responsible Person in relation to a Land Use Activity to which a formulae in Schedule 7 applies.

- (b) This clause 16 does not prevent the Corporation from negotiating with a Responsible Person who is not also the Decision Maker for non-monetary Community Benefits in relation to a Land Use Activity to which this clause applies.
- (c) The Parties acknowledge that this clause does not affect the ability of either Party to apply under s 53 of the *Traditional Owner Settlement Act 2010* (Vic) to the Victorian Civil and Administrative Tribunal for a determination.
- (d) The Parties agree that:
 - (i) the Corporation may apply in writing to the Minister for the payment of community benefits in accordance with the formula in Schedule 7 for a Significant Land Use Activity that is granted on or after [insert date] but before the Effective Date, and that is a:
 - (A) Public Land Authorisation that is listed in Item 3, 4 or 5 in Schedule 3; and
 - (B) grant of an estate in fee simple that is listed in Item 4 or 5 in Schedule 3;
 - (ii) the State will provide community benefits to the Corporation in accordance with the formula in Schedule 7 for a Significant Land Use Activity referred to in Clause 16(d)(i), unless that Significant Land Use Activity was the subject of a relevant procedure under the *Native Title Act 1993* (Cth) or is listed in Item 2.2 of Schedule 2 as a planned future use.

17. Variation

- (a) This Land Use Activity Agreement may only be varied by the Parties by agreement in writing.
- (b) The Parties acknowledge that under s 38 of the *Traditional Owner Settlement Act 2010* (Vic), the provisions of Part 4 of the Act apply to any variation of this Land Use Activity Agreement as if the varying of the agreement were the entering into of a new agreement.
- (c) If this Land Use Activity Agreement requires re-registration due to a variation consented to in accordance with clause 17(a), in accordance with s 72(1), the Minister will seek to have this Land Use Activity Agreement re-registered on the Register of Land Use Activity Agreements.

18. Anti-avoidance

- (a) The State will not cause, or suffer, the alteration of the terms or conditions of a proposed land use activity to which this LUAA would apply for the primary purpose of avoiding any of the following:

- (i) a Land Use Activity that would otherwise be categorised as an Agreement Activity from falling into that category;
 - (ii) a Land Use Activity that would otherwise be categorised as a Negotiation Activity, Class A, from falling into that category;
 - (iii) a Land Use Activity that would otherwise be categorised as a Negotiation Activity, Class B, from falling into that category.
- (b) The State agrees that the allocation of a Commercial Lease will be subject to a competitive allocation process, unless an exemption to enter into direct negotiations is approved by the Relevant Land Minister or delegate.
- (c) The State agrees that where the allocation of a Commercial Lease falls into the Advisory category, and is intended to be allocated through a direct negotiation process to a person who has previously held a Lease over the same area of land, then the Decision Maker will notify the Corporation of this intent, and advise the Relevant Land Minister or delegate of any concerns raised by the Corporation within a period of 10 working days since the Corporation received the notification.

19. Definitions and Interpretation

19.1 Definitions

In this Land Use Activity Agreement, unless the context otherwise requires or a contrary intention appears:

Aboriginal Cultural Heritage has the same meaning as in s 4 of the *Aboriginal Heritage Act 2006*;

Advisory Activity means a Land Use Activity specified under clause 10;

Agreement Activity means a Land Use Activity specified under clause 12;

Agreement Area means the area defined in Schedule 1 of the Recognition and Settlement Agreement;

Agreement Land means the area defined in clause 5.1;

Business Day means Monday to Friday excluding public holidays in Victoria;

Commercial Purpose means any purpose other than:

- (a) the purpose of a Community Purpose Lease, Licence or Permit, and
- (b) the purpose of a Specified Public Work;

Community Benefit has the same meaning as in s 27(1) of the *Traditional Owner Settlement Act 2010* (Vic);

Community Purpose Lease, Community Purpose Licence, and Community Purpose Permit each means a Public Land Authorisation that:

- (c) either:
 - (i) is granted for a purpose that is solely or primarily for community, social, religious, educational, health, charitable or sporting purposes;
 - (ii) permits the use of land for providing services that are non-commercial in nature and aimed at improving community safety or welfare; and
- (d) is granted to an organisation that does not:
 - (i) permit the distribution of profit to members;
 - (ii) operate gaming equipment under the *Gambling Regulation Act 2003* (Vic); or
 - (iii) have, or plan to have, a gross annual turnover of more than \$1 million in operating the leased premises;

Commercial Lease, Commercial Licence, and Commercial Permit each means a Public Land Authorisation that is not, respectively, a Community Purpose Lease, Community Purpose Licence or Community Purpose Permit;

Corporation means the [insert Traditional Owner Group Entity name] (Indigenous Corporation Number [#####]), being a Traditional Owner Group Entity;

Decision Maker has the same meaning as in s 29 of the *Traditional Owner Settlement Act 2010* (Vic);

Dispute means a dispute relating to the interpretation and operation of this Land Use Activity Agreement;

Earth Resource Or Infrastructure Authorisation has the same meaning as in s 27(1) of the *Traditional Owner Settlement Act 2010* (Vic);

Effective Date means the day that this Land Use Activity Agreement comes into effect under clause 2(b);

Government Party has the same meaning as in s 26 of the *Native Title Act 1993* (Cth);

Grantee Party has the same meaning as in s 29 of the *Native Title Act 1993* (Cth);

Indigenous Land Use Agreement means the indigenous land use agreement under Subdivision C of Division 3 of Part 2 of the *Native Title Act 1993* (Cth) at Attachment 2 of the Recognition and Settlement Agreement;

Infrastructure means any:

- (a) Specified Public Work;
- (b) other building or man-made structure; or

(c) work that has changed the natural condition or topography of the land;

Land Use Activity has the same meaning as in s 28 of the *Traditional Owner Settlement Act 2010* (Vic);

Land Use Activity Agreement means this agreement, including any schedules, annexures, attachments and appendices to this agreement;

Law means:

(a) common law; and

(b) Commonwealth, Victorian or local government legislation, regulations, by-laws and other subordinate regulations;

Lease means, unless otherwise specified, a lease that is a Public Land Authorisation;

Licence means, unless otherwise specified, licence that is a Public Land Authorisation;

Limited Land Use Activity has the same meaning as in s 27(1) of the *Traditional Owner Settlement Act 2010* (Vic);

Minister means the Minister administering the *Traditional Owner Settlement Act 2010* (Vic);

Major Public Work means a Specified Public Work that is listed under item 4(a) or (b) of Schedule 3;

Minor Public Work means a Specified Public Work that is of the type listed under item 2(f) of Schedule 3;

Native Title and **Native Title Rights and Interests** have the same meaning as in s 223 of the *Native Title Act 1993*;

Native Title Party has the same meaning as in s 29 and s 30 of the *Native Title Act 1993*;

Negotiation Activity means a Land Use Activity specified under clause 11;

Negotiation Activity, Class A means a Land Use Activity specified under clause 11.1;

Negotiation Activity, Class B means a Land Use Activity specified under clause 11.2;

Old Earth Resource Approval has the same meaning as in s 73(4) of the *Traditional Owner Settlement Act 2010* (Vic);

Parties means the parties to this Land Use Activity Agreement, set out in clause 1;

Permit, unless otherwise specified, means a permit that is a Public Land Authorisation;

Public Land has the same meaning as in s 3 of the *Traditional Owner Settlement Act 2010* (Vic), which for the purposes of this Land Use Activity Agreement is not to be taken to mean land that is held in fee simple other than land that is Aboriginal title land held in fee simple by a traditional owner group entity;

Public Land Authorisation has the same meaning as in s 27(1) of the *Traditional Owner Settlement Act 2010* (Vic);

Recognition and Settlement Agreement means the recognition and settlement agreement of which this Land Use Activity Agreement forms a part, entered into by the Corporation and the State under s 4 of the *Traditional Owner Settlement Act 2010* (Vic) dated [insert date];

Register of Indigenous Land Use Agreements has the same meaning as in s 253 of the *Native Title Act 1993* (Cth);

Relevant Land Minister has the same meaning as in s 3 of the *Traditional Owner Settlement Act 2010* (Vic);

Responsible Person has the same meaning as in s 27 of the *Traditional Owner Settlement Act 2010* (Vic);

Routine Activity means a Land Use Activity specified under clause 9;

Settlement Package means the agreements entered into by the Parties in settlement of the [Native Title determination application in Federal Court proceeding XXXX <OR> [traditional owner group names]'s assertion that its members have Native Title Rights and Interests in the Agreement Area], being the Indigenous Land Use Agreement, the Traditional Owner Land Management Agreement and the Recognition and Settlement Agreement;

Significant Land Use Activity has the same meaning as in s 27(1) of the *Traditional Owner Settlement Act 2010* (Vic);

Specified Public Work has the same meaning as in s 27(1) of the *Traditional Owner Settlement Act 2010* (Vic);

State Agency means:

- (a) a government department;
- (b) a public statutory authority;
- (c) a government business enterprise;
- (d) a committee of management where the Secretary of a State Agency is appointed as the committee of management; and
- (e) but does not include any local government body.

[traditional owner group name] means: [insert]

This definition is the same as that which applies in the other agreements in the Settlement Package. The [traditional owner group name] is the Traditional Owner Group for this Agreement;

Traditional Owner Group has the same meaning as in the *Traditional Owner Settlement Act 2010* (Vic);

Traditional Owner Group Entity has the same meaning as in the *Traditional Owner Settlement Act 2010* (Vic);

Traditional Owner Land Management Agreement means the traditional owner land management agreement under the *Conservation, Forests and Lands Act 1987* (Vic), attached to the Recognition and Settlement Agreement;

Traditional Owner Right has the same meaning as in s 9 of the *Traditional Owner Settlement Act 2010* (Vic). The Traditional Owner Rights recognised in the Recognition and Settlement Agreement are set out in clause 6 of this Land Use Activity Agreement;

Utility means:

- (a) a licensee under the *Water Industry Act 1994* (Vic);
- (b) an authority under the *Water Act 1989* (Vic);
- (c) a gas transmission company or gas distribution company under the *Gas Industry Act 2001* (Vic);
- (d) a distribution company, a transmission company or a generation company under the *Electricity Industry Act 2000* (Vic); or
- (e) a carrier under the *Telecommunications Act 1997* (Cth).

19.2 Interpretation

In this Land Use Activity Agreement, unless the context otherwise requires:

- (a) an expression defined in the *Traditional Owner Settlement Act 2010* (Vic) has the same meaning when used in this Agreement;
- (b) a reference to any person includes a reference to that person's personal representatives, successors and transferees (whether by assignment, novation or otherwise pursuant to law);
- (c) a reference to any group includes a reference to the members of that group from time to time;
- (d) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation or instruments of a legislative character issued under, that legislation or legislative provision;
- (e) the singular includes the plural and vice versa;
- (f) a reference to an individual or person includes a company, corporation, partnership, firm, joint venture, association (whether incorporated or not), body, authority, trust, state or government and vice versa;

- (g) a reference to a part, clause, sub-clause, schedule, or attachment is to a part, clause, sub-clause, schedule or attachment of or to this Land Use Activity Agreement;
- (h) the 'Background' paragraphs form part of this Land Use Activity Agreement;
- (i) a reference to any agreement, arrangement, understanding, document, deed or protocol is to that agreement, arrangement, understanding, document, deed or protocol (and, where applicable, any provisions) as amended, novated, supplemented or replaced from time to time;
- (j) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (k) headings are included for convenience and do not affect the interpretation of this Land Use Activity Agreement; and
- (l) an agreement, representation or warranty on the part of or in favour of 2 or more persons binds or is for the benefit of them jointly and severally.

Schedule 1 Ministerial Consent (Clause 3)

[Note: In some cases it may be useful to attach the consent of other Ministers in addition to those required under s 30(3) of the *Traditional Owner Settlement Act 2010* (Vic), depending on the content of Schedule 2 and Schedule 3.]

[The draft text below is a guideline as to the possible wording of the relevant consents.]

I, Ryan Smith MP, as the Minister administering the:

- *Crown Land (Reserves) Act 1978*;
- *National Parks Act 1975*;
- *Forests Act 1958*;
- *Land Act 1958*; and
- *Wildlife Act 1975*;

for the purposes of sections 30(3)(a) and 30(3)(b) of the *Traditional Owner Settlement Act 2010* consent to the making of the Recognition and Settlement Agreement including a Land Use Activity Agreement under Part 4 of that Act between the State of Victoria and the

[Corporation (Corporation number)].

Ryan Smith MP

Minister for Environment and Climate Change

Dated _____

I, Michael O'Brien MP, as the Minister administering the:

- *Mineral Resources (Sustainable Development) Act 1990*;
- *Petroleum Act 1998*;
- *Pipelines Act 2005*;
- *Geothermal Energy Resources Act 2005*;
- *Greenhouse Gas Geological Sequestration Act 2008*; and
- *Offshore Petroleum and Greenhouse Gas Storage Act 2010*; **[delete if not required]**

for the purposes of section 30(3)(a) of the *Traditional Owner Settlement Act 2010* consent to the making of the Recognition and Settlement Agreement including a Land Use Activity Agreement under Part 4 of that Act between the State of Victoria and the **[Corporation**

(Corporation number)].

Michael O'Brien MP

Minister for Energy and Resources

Dated _____

I, Peter Walsh MP, as the Minister administering the:

- *Wildlife Act 1975*;
- *Forests Act 1958*;
- *Fisheries Act 1995*;
- *Water Act 1989*;

for the purposes of sections 30(3)(b) of the *Traditional Owner Settlement Act 2010* consent to the making of the Recognition and Settlement Agreement including a Land Use Activity Agreement under Part 4 of that Act between the State of Victoria and the **[Corporation (Corporation number)]**.

Peter Walsh MP
Minister for Agriculture and Food Security
Minister for Water

Dated _____

I, Gordon Rich-Phillips MLC, as the Minister administering Division 6 of Part I of the *Land Act 1958*, for the purposes of section 30(3)(c) of the *Traditional Owner Settlement Act 2010* consent to the making of the Recognition and Settlement Agreement including a Land Use Activity Agreement under Part 4 of that Act between the State of Victoria and the **[Corporation (Corporation number)]**.

Gordon Rich-Phillips MLC
Assistant Treasurer

Dated _____

Schedule 2 Agreement Land (Clause 4)

1. Plan and written description

The Agreement Land is all the Public Land which falls within the boundary depicted on the map/plan provided in this Item 1 being the boundary described in writing in this Item 1 also, subject to the exclusions in clauses 5.1 (b) and (c) (items 2 and 3 below).

[insert plan and written description of Agreement Land outer boundary; to be updated to reflect permanent changes; attach specific parcel plans as necessary]

2. Areas to which this Land Use Activity Agreement does not apply to

2.1 Existing Infrastructure

- (a) Land where Infrastructure that exists at the Effective Date has the effect of excluding or restricting public access, either by practically or by regulation, continuously or from time to time; including:
- (i) land that is necessary for, or incidental to, the operation of the Infrastructure including all of a leased area where the Infrastructure is on leased land; and/or
 - (ii) land adjacent or proximate to Infrastructure that is covered by a modification or extension of that Infrastructure; and/or
 - (iii) land on which the Infrastructure has been demolished to enable the replacement or refurbishment for the same purpose; and
 - (iv) specifically:
 - (A) the entire road reservation area, and the road, where the road has been constructed;
 - (B) railways and tramways and their respective reservations;
 - (C) that part of a cemetery or crematorium reserve or other area of Public Land that is being utilised as a cemetery or crematorium;
 - (D) public recreation facilities that are for organised sporting activities; and
 - (E) Major Public Works.
- (b) Item 2.1(a) does not apply to existing Minor Public Works.
- (c) Item 2.1(a) ceases to apply to Infrastructure if:

- (i) the Infrastructure is removed so as to permit safe public access to the former footprint of the Infrastructure; or
 - (ii) the land on which the Infrastructure is located is granted, sold or transferred in a fee simple estate; or
 - (iii) the Infrastructure consists of a road which is sought to be upgraded.
- (d) In the case of item 2.1(c)(ii), item 2.1(a) ceases to apply immediately before the grant, sale or transfer.

2.2 Planned future use

- (a) Land that, at the Effective Date, was held in fee simple and that has since been purchased or acquired by the Crown for a Major Public Work;

- (b) [list future uses specified at time of Land Use Activity Agreement execution; include description for each.]**

Criteria that may be considered as basis for exclusion include but are not limited to:

- (i) Where the Public Land has been compulsorily acquired or purchased or is to be purchased or compulsorily acquired for a purpose other than a park or conservation and the land was previously freehold land;**
- (ii) If there are Government approved recommendations of the Victorian Environmental Assessment Council or its predecessors;**
- (iii) If the land has recently (within the two years preceding the negotiation of the Land Use Activity Agreement) been formally reserved or rezoned for a particular purpose (other than for parks or conservation purposes);**
- (iv) If there are contractual arrangements in place with a third party for work associated with the development of the land;**
- (v) If a tender, expression of interest or request for quote process for the development of the land has commenced; or**
- (vi) If a formal plan for the development of the land has been developed and released to the public for consultation or other purposes.]**

Note: If the planned future use does not proceed, the land may be added to the Agreement Land by a variation under clause 17.

2.3 Additional exclusions

This Land Use Activity Agreement does not apply to an area that meets a description below at the time the Recognition and Settlement Agreement was signed:

- (a) Land that is vested in Victorian Rail Track by an Act of Parliament (whether or not it is Crown land);
- (b) Land that is vested in a municipality under s16 of the *Crown Land (Reserves) Act 1978*;
- (c) Item 2.3(a) and 2.3(b) cease to apply to any area of land that is surrendered to, or otherwise resumed by, the Crown.

(d) [insert other areas of land agreed to be excluded, as necessary]

3. Excluded Areas

(a) An area to which any of the following Land Use Activities are carried out in compliance with Division 3 of Part 4 of the Act on or after the Effective Date are permanently excluded from the Agreement Land immediately on the carrying out of the activity:

- (i) The grant of an estate in fee simple other than pursuant to s 19 of the *Traditional Owner Settlement Act 2010* (Vic).

(ii) [insert or delete as necessary]

Schedule 3 Land Use Activities (Clauses 9 to 12)

1. Routine Activities

- (a) A Public Land Authorisation (s 28 (a) of the *Traditional Owner Settlement Act 2010*) that is:
 - (i) An unused road Licence;
 - (ii) The transfer of an existing authorisation;
 - (iii) A new Licence or Permit for 10 years or less.
- (b) An Earth Resource Or Infrastructure Authorisation, where the exploration or prospecting is to be carried out in accordance with the conditions for carrying out such exploration or prospecting that are set out in Schedule 4 of this Land Use Activity Agreement (s 27, 28 (b) and 31(3) and (4) of the *Traditional Owner Settlement Act 2010*).
- (c) Maintenance and other low impact works (s 28 (e) of the *Traditional Owner Settlement Act 2010*) that include:
 - (i) Erection and maintenance of fences, gates and signage;
 - (ii) Maintenance of minor public works and other Infrastructure;
 - (iii) Maintenance of grounds, roads and tracks (e.g. weed control, grass cutting).

2. Advisory Activities

- (a) A Public Land Authorisation (s28 (a) of the *Traditional Owner Settlement Act 2010*) that is a:
- (i) Lease, Licence or Permit for a Minor Public Works;
 - (ii) Bee farming range Licence (apiary);
 - (iii) Grazing or stock Licence;
 - (iv) Licence for forest produce (e.g. tree ferns, leaves, flowers, sleepers, eucalyptus oil, seed, posts, poles and timber);
 - (v) Licence for extractive materials (e.g. gravel, limestone, sand, salt etc.);
 - (vi) Permit for recreation events (e.g. car rallies, rave parties, rogaining/orienteering, mountain biking etc.);
 - (vii) An agricultural Lease covering less than 40 hectares, including Leases for plantations and aquaculture (specified agricultural Lease);
 - (viii) Community Purpose Licence or Permit for more than 10 years;
 - (ix) Community Purpose Lease for 21 years or less;
 - (x) Commercial Lease for 10 years or less;
- excluding an authorisation that is associated with a Major Public Works or that is listed at Item 1(a) of this Schedule.
- (b) An Earth Resources Or Infrastructure Authorisation (s 28 (b) of the *Traditional Owner Settlement Act 2010*) that is:
- (i) Issued under the *Mineral Resource (Sustainable Development) Act 1990* for the purposes of extracting stone from an existing reserve set aside for that purpose, or from a reserve recommended for that purpose by the Victorian Environmental Assessment Council or its predecessors and approved by Government;
 - (ii) A pre-licence survey under Part 4 Division 2 of the *Pipelines Act 2005* for a proposed pipeline that is for the purposes of the establishment, use or operation of any Specified Public Works (see s 27, Limited Land Use Activity (b) of the *Traditional Owner Settlement Act 2010*).
- (c) A Management Plan or Working Plan that is prepared under the:
- (i) *Fisheries Act 1995* (s 28);
 - (ii) *National Parks Act 1975* (s 17, 17B, 17D or 18);

-
- (iii) *Wildlife Act 1975* (s 18 or s 32).
 - (d) A change in the status of land, including the reservation of land, the revocation of the reservation of land, or the change in the boundary of a reservation, that is under the *Crown Land (Reserves) Act 1978*.
 - (e) A land management activity that is the:
 - (i) Planned controlled burning of the land (s 28 (d) of the *Traditional Owner Settlement Act 2010*);
 - (ii) Regeneration works and associated activities (s 28 (f) of the *Traditional Owner Settlement Act 2010*);
 - (iii) Rehabilitation of vegetation, or a river, creek or stream (s 28 (e) or (f) of the *Traditional Owner Settlement Act 2010*);
 - (iv) Destruction of rabbit warrens (s 28 (c, e or f) of the *Traditional Owner Settlement Act 2010*).
 - (f) The construction of Infrastructure (s 28 (e) of the *Traditional Owner Settlement Act 2010*), that is a Specified Public Work, or that does not require a Public Land Authorisation, other than a Major Public Work, that is, or is similar to, a:
 - (i) Fish ladder;
 - (ii) Sport or recreation facility (unless earth moving is required);
 - (iii) Walking track;
 - (iv) Other track (where there is an existing footprint);
 - (v) Road improvement (from one class to another);
 - (vi) Car park;
 - (vii) Pump, bore or other works on a waterway;
 - (viii) Lighting of public places;
 - (ix) Jetty or wharf;
 - (x) Tide gauge;
 - (xi) Navigation marker or other navigational facility;
 - (xii) Weather station or tower;
 - (xiii) Storage shed;
 - (xiv) Toilet block;
 - (xv) Picnic facility;

- (xvi) Work that is undertaken in an Alpine Resort area as that term is defined in the *Alpine Resorts Management Act 1997* (Vic);
 - (xvii) Work that is of the type described in the Schedule to the *Telecommunications (Low Impact Facilities) Determination 1997* (Cth), as amended from time to time;
 - (xviii) Other minor works carried out by or on behalf of the Crown which fall within the definition of Specified Public Work.
- (g) A change or modification to an approved Timber Release Plan (s 28 (j) of the *Traditional Owner Settlement Act 2010*).

3. Negotiation Activities, Class A

- (a) An Earth Resource Or Infrastructure Authorisation (s 27 and s 28 (b) of the *Traditional Owner Settlement Act 2010*):
- (i) That allows for the mining, extraction, injection, utilisation, treatment or processing of an earth resource above, on or below the surface of the land, for the purposes of commercial development and production of an earth resource, other than a prospecting licence; or
 - (ii) For the purposes of exploration or prospecting for an earth resource, if the exploration or prospecting is not to be carried out in accordance with the conditions for carrying out such exploration or prospecting that are set out in Schedule 4 of this Land Use Activity Agreement.
- (b) A Public Land Authorisation (s 27 of the *Traditional Owner Settlement Act 2010*) that is a:
- (i) Commercial Lease for more than 10 years and up to and including 21 years;

excluding an authorisation that is associated with a Major Public Works or that is listed in Item 1(a) or Item 2(a) of this Schedule.

4. Negotiation Activities, Class B

- (a) Major Public Works (s 27 and s 28 (c) and (e) of the *Traditional Owner Settlement Act 2010*), and associated activities, including:
- (i) The construction of new vehicular roads, tracks, railways and bridges where there is no existing footprint;
 - (ii) The construction of public recreation or sport facilities where earthmoving is required;
 - (iii) The construction of new educational, health or emergency service facilities, or similar;
 - (iv) A project that involves the alienation of Crown land by the granting of an estate in fee simple that is for a public purpose, other than a grant, vestment or transfer pursuant to s22A of the *Land Act 1958*;
 - (v) A Specified Public Work that involves the alienation of Crown land by the granting of a Commercial Lease for more than 10 years or a Community Purpose Lease for more than 21 years;
 - (vi) A project that has been declared to be a major project, declared project or similar according to legislation, or has otherwise been enabled through an Act of Parliament;
 - (vii) The construction of Infrastructure through a public-private partnership;
 - (viii) Any other works carried out by, or on behalf of, the Crown that will require the exclusion of the public for effective operation.

but excluding:

- (ix) A Specified Public Work undertaken in an Alpine Resort area as defined in the *Alpine Resorts Management Act 1997* (Vic); and
- (x) A work undertaken by a Utility that is of a type described in the Schedule to the *Telecommunications (Low Impact Facilities) Determination 1997* (Cth), as amended from time to time.

Note: This item forms part of the definition of Major Public Works. Major Public Works may also be multiple activities that are conducted under a joint process (s 37 of the *Traditional Owner Settlement Act 2010*).

- (b) A Specified Public Work undertaken by a Utility (s 28 (c) and (e) of the *Traditional Owner Settlement Act 2010*), including:
- (i) An electricity transmission or distribution facility;
 - (ii) A gas transmission or distribution facility;
 - (iii) A cable, antenna, tower or other communications facility;

-
- (iv) A pipeline or other water supply or reticulation facility;
 - (v) A drainage facility, or a levee or device for the management of water flows;
 - (vi) An irrigation channel or other irrigation facility;
 - (vii) A sewerage facility;

but excluding:

- (viii) A Specified Public Work undertaken in an Alpine Resort area as defined in the *Alpine Resorts Management Act 1997* (Vic); and
- (ix) A work undertaken by a Utility that is of a type described in the Schedule to the *Telecommunications (Low Impact Facilities) Determination 1997* (Cth), as amended from time to time.

Note: Infrastructure undertaken by a Utility may require a Public Land Authorisation(s) or alienation of land through the grant of an estate in fee simple. Infrastructure undertaken by a Utility may be Major Public Works.

- (c) A new Timber Release Plan (s 28 (i) of the *Traditional Owner Settlement Act 2010*)
- (d) A Public Land Authorisation (s 27 of the *Traditional Owner Settlement Act 2010*) that is a:
 - (i) Commercial Licence or Commercial Permit for more than 10 years;
 - (ii) Community Purpose Lease for more than 21 years; or
 - (iii) An agricultural Lease covering 40 hectares or more.

excluding an authorisation that is associated with a Major Public Works or that is listed in Item 1(a) or Item 2(a) of this Schedule.

5. Agreement Activities

- (a) The grant of an estate in fee simple other than:
 - (i) A grant made pursuant to s 14 or s 19 of the *Traditional Owner Settlement Act 2010* (Vic);
 - (ii) A grant made for the purpose of a project that is for a public purpose; and
 - (iii) A grant, transfer or vestment made pursuant to s22A of the *Land Act 1958*.
- (b) A Public Land Authorisation (s 27 of the *Traditional Owner Settlement Act 2010*) that is a:
 - (i) Commercial Lease for more than 21 years;

excluding an authorisation that is associated with a Major Public Works or that is listed in Item 1(a), Item 2(a) or Item 4(d)(iii) of this Schedule.
- (c) Major Works and/or clearing of land (s 28 (c) or (e) of the *Traditional Owner Settlement Act 2010*) for Commercial Purposes (clause 30.1), where a Public Land Authorisation is not required, and excluding Major Public Works.

6. Land Use Activities to which this Land Use Activity Agreement does not apply

6.1 Land Use Activity Agreement does not apply to Land Use Activities that existed or commenced before the Effective Date (s 73(2) of the Act)

The Parties acknowledge that pursuant to s 73(2) of the Act, this Land Use Activity Agreement does not apply to:

- (a) any Public Land Authorisation or Earth Resource Or Infrastructure Authorisation in existence before the coming into effect of this Land Use Activity Agreement, and any activity carried out in accordance with that authorisation; or
- (b) any other Land Use Activity that had commenced before the coming into effect of this Land Use Activity Agreement.

6.2 Land Use Activity Agreement does not apply to Earth Resource Or Infrastructure Authorisations already valid under the *Native Title Act* (s 73(3) of the Act)

The Parties acknowledge that pursuant to s 73(3) of the Act, this Land Use Activity Agreement is not taken to apply to:

- (a) the granting of an Earth Resource Or Infrastructure Authorisation, or
- (b) amendment or variation to an Earth Resource Or Infrastructure Authorisation that allows a change to an activity authorised by that authorisation;

if immediately before the Effective Date there was an Old Earth Resource Approval granted on the basis that it was valid or had been validated under the Native Title Act.

6.3 Land Use Activities consistent with joint management plan (s 32(4) of the Act)

- (a) A Land Use Activity or class of Land Use Activity specified in paragraph (b) that is consistent with a joint management plan for the land is not subject to this Land Use Activity Agreement.

(b) [specify all Land Use Activities, classes of Land Use Activities or particular Land Use Activities]

6.4 Transitional Exclusions

- (a) The Land Use Activity procedures do not apply to any Land Use Activities in relation to the projects specified in paragraph (d) to the extent that the projects are, as of the Effective Date, the subject of:

- (i) a negotiation toward an agreement that has the effect that the Land Use Activity is valid as a future act under the *Native Title Act 1993*;
 - (ii) a process under ss 35-42 of the *Native Title Act 1993* (which relate to future act determinations);
- provided that the negotiation or process has concluded by **[insert time]**.
- (b) The Corporation agrees to:
 - (i) provide a response to a notice provided in relation to a negotiation referred to in item 6.4(a)(i) within a period of three months from the date of that notice;
 - (ii) take all reasonable steps to conclude each negotiation referred to in item 6.4 (a)(i) by **[insert date]**.
 - (c) If a process referred to in item 6.4 (a)(ii) concludes before **[insert date]** but does not result in a determination as to whether a future act may be done, the Land Use Activity procedures still do not apply to the project if at least one Native Title Party and at least one of the Grantee Party or Government Party immediately return to a negotiation of the kind referred to in item 6.4 (a)(i), provided that the negotiation has concluded by **[insert date]**.

(d) [insert particular projects]

6.5 Additional Exclusions

- (a) Land Use Activities carried out pursuant to:
 - (i) a Public Land Authorisation or an Earth Resources Or Infrastructure Authorisation that has been granted in accordance with Part 4 of the *Traditional Owner Settlement Act 2010* (Vic); or
 - (ii) a Land Use Activity that has been granted or carried out before the Effective Date; or
 - (iii) a Land Use Activity that is carried out pursuant to a lease issued under the *Alpine Resort Management Act 1997* (Vic).

(b) [include other Land Use Activities agreed by the Parties]

Schedule 4 Conditions for Earth Resource Or Infrastructure Authorisations to be Routine Activities (Clause 9.2)

Part A - General

1. This Schedule applies to:
 - a. an Earth Resource Or Infrastructure Authorisation granted for the purpose of exploration or prospecting, including:
 - i. An exploration licence, prospecting licence or retention licence granted under the *Mineral Resources (Sustainable Development) Act 1990*;
 - ii. An exploration permit or retention lease granted under either the *Petroleum Act 1998*, *Geothermal Energy Resources Act 2005*, or *Greenhouse Gas Geological Sequestration Act 2008*;
 - iii. A special access authorisation or a special drilling authorisation granted under the *Petroleum Act 1998*;
 - iv. A greenhouse gas assessment permit, greenhouse gas holding lease, petroleum exploration permit or petroleum retention lease granted under the *Offshore Petroleum and Greenhouse Gas Storage Act 2010*;
 - v. Any other authorisation granted under these Acts for the purpose of exploration.
2. If a titleholder accepts the conditions in this Schedule, no additional conditions under the *Traditional Owner Settlement Act 2010 (Vic)* or this Land Use Activity Agreement are to be imposed on the titleholder in relation to the works carried out by the titleholder under their Earth Resource Or Infrastructure Authorisation on Agreement Land.

Definitions applying generally

3. In this Schedule:

“*authorisation*” means an Earth Resource Or Infrastructure Authorisation of the type listed in clause 1(a) of this Schedule.

“*Department*” means Victorian Department of Primary Industries.

“*titleholder*” means:

- a. In Part A the holder or applicant (as applicable) for an Earth Resource Or Infrastructure Authorisation granted under any of the Acts in clause 1(a).
- b. In Part B the holder or applicant (as applicable) for an Earth Resource Or Infrastructure Authorisation granted under the:
 - i. *Petroleum Act 1998*;
 - ii. *Geothermal Energy Resources Act 2005*;
 - iii. *Greenhouse Gas Geological Sequestration Act 2008*;
 - iv. *Offshore Petroleum and Greenhouse Gas Storage Act 2010*.
- c. In Part C, the holder or applicant (as applicable) for an Earth Resource Or Infrastructure Authorisation granted under the *Mineral Resources (Sustainable Development) Act 1990*, other than a prospecting licence holder.

- d. In Part D, the holder of a prospecting licence granted under the *Mineral Resources (Sustainable Development) Act 1990*.

Access to land subject to Land Use Activity Agreement

4. Subject to the titleholder's:
- a. Conditions and plans contained within and under their authorisation;
 - b. Public and occupational health and safety requirements applying to works under the authorisation;
 - c. Obligations under a law of Victoria or the Commonwealth applying to works under the authorisation;

A titleholder must minimise interference with the entry, occupation and use of any part of the land subject to their authorisation, by traditional owners in exercise of traditional owner rights recognised under a Recognition and Settlement Agreement to which that land is subject.

Consultation and Communication

5. The titleholder acknowledges that it has a duty to consult with the Corporation throughout the period of their authorisation.

Information

6. The titleholder shall keep the Corporation informed about progress of the project works and promptly provide to the Corporation:
- a. notification of the grant of the authorisation;
 - b. notification of any approvals, renewals, amalgamations or relinquishments in relation to the authorisation;
 - c. notification of an assignment or transfer of the authorisation, or any interests or obligations under that authorisation;
 - d. a copy of any plan or any variation to a plan required under the authorisation, (e.g. a standard or area work plan, operation plan and/or environment plan);
 - e. for an exploration licence under *the Mineral Resources (Sustainable Development) Act 1990*, where a work plan is not required, a copy of a work schedule which includes a description of the exploration site work activities that are planned;
 - f. information reasonably requested by the Corporation which relates to the exploration and to the titleholder's obligations under the authorisation, save that the titleholder may withhold commercially sensitive information.
7. The titleholder shall provide a summary of all site works completed on Agreement Land to the Department as part of the annual report.
8. For titleholders under Part C, the summary shall include the details set out in items 2 and 3 in Table A to this Schedule.
9. Where an Act or regulation under an Act which an Earth Resource Or Infrastructure Authorisation is granted do not stipulate annual reporting requirements, the information required in clause 6 must be provided to the Department at the time specified by the Department in writing.

Work schedules, work plans and other documents

10. If requested, the titleholder must make reasonable attempts to consult with the Corporation (with a view to explaining and clarifying details) regarding the work schedule, the standard or area work plan, or any other information provided to the Corporation under clause 6.
11. The titleholder must notify the Corporation and the Department at least 7 days prior to commencing works on Agreement Land.
12. The titleholder must provide the Corporation with a copy of the work schedule for any program of works, at the same time as the titleholder consults with the Department (being at least 21 days prior to the commencement of site works).

Procedures relating to amounts payable under Schedule 4

13. Payments made under this Schedule include GST.
14. All amounts payable under this Schedule must be indexed annually according to the consumer price index for Melbourne, as published by the Australian Bureau of Statistics from time to time.
15. Evidence of payments made under this Schedule must be provided to the Department as part of the titleholder's annual reporting requirements related to their authorisation, as applicable.
16. Where requirements under an Act which an Earth Resource Or Infrastructure Authorisation is granted do not stipulate annual reporting requirements, evidence of payments must be provided to the Department at a time specified by the Department in writing.

Part B – Specific conditions on petroleum, geothermal and greenhouse gas exploration

Definitions

For the purpose of this Part of Schedule 4:

17. "Units of work" are defined in relation to the following table:

Activity	Unit of Work
Drilling of a well	One
2D seismic survey covering 100 linear kilometres or less	One
2D seismic survey covering more than 100 linear kilometres	Two
3D seismic survey covering 50 square kilometres or less	One
3D seismic survey covering more than 50 square kilometres	Two

An "average work program" means a total work program under the authorisation, which includes up to and including three units of work.

An “exceptional work program” means a total work program under the authorisation, which includes more than three units of work.

Payment for exploration activities

18. The titleholder must pay the Corporation the following amount:

- a. For an average work program, an upfront fee of \$5,000 is payable as a fee for the duration of the Earth Resource Or Infrastructure Authorisation, as applicable; or
- b. For an exceptional work program, an upfront fee of \$7,500 payable for the duration of the Earth Resource Or Infrastructure Authorisation, as applicable.

19. A payment under clause 18 becomes payable at the renewal of the permit or lease.

20. A payment under clause 18 must be made no later than 30 days following the registration of the Earth Resource Or Infrastructure Authorisation.

21. To avoid doubt, payments under clause 18 are not refundable in whole or part.

[NOTE: The fees for exploration under petroleum, geothermal or greenhouse gas authorities are an upfront fee, whereas fees for minerals exploration include an annual access fee as well as activity based fees. The different approach to construction of the fees between these sectors reflects the variability in mineral exploration works compared with oil and gas exploration. An upfront fee is more appropriate for exploration under a petroleum, geothermal or greenhouse gas exploration.]

Part C – Specific conditions on mineral exploration

22. The titleholder must pay the Corporation in accordance with Table A of this Schedule for works carried out under a licence.

23. The payments required under clause 22 become payable by the titleholder following the grant of the Earth Resource Or Infrastructure Authorisation.

[NOTE: Specific timing for payment Schedule to be determined]

24. Notwithstanding clause 23, payment under Item 1 of Table A is not due until the titleholder accesses Agreement Land.

Part D – Specific conditions on prospecting licence holders

25. The titleholder must pay the fees in accordance with item 4 of Table A in Schedule 4.

26. To avoid doubt, no additional fees to those set out in clause 25, are payable under this Land Use Activity Agreement, for carrying out works under a prospecting licence on Agreement Land.

Schedule 4 - Table A

Schedule 4 – Payments made pursuant to interests granted under the <i>Mineral Resources (Sustainable Development) Act 1990 (Vic)</i>				
Item	Tenement	Activity / Milestone over Agreement Land	Description	Rate
1	Exploration Licence or Retention Licence	After access to Agreement Land following Grant of Licence Survey work Hand tools	Access to Agreement Land defined in Schedule 2 to a LUAA. Including geological, geophysical, geochemical and/or other technical investigations. Surface rock samples or surface soil samples taken by hand tools.	<ul style="list-style-type: none"> \$1750 per year for all activities in Item 1.
2	Exploration Licence or Retention Licence	Drilling	Exploration drilling, < 300 mm diameter hole at the surface.	<ul style="list-style-type: none"> \$2 per drill hole for depths < 5m; \$5 per drill hole for depths > 5m & < 20m; \$10 per drill hole for depths > 20m & < 100m; \$50 per drill hole for depths > 100m & < 200m; \$100 per drill hole for depths > 200m.
			Large core bulk sample drilling.	<ul style="list-style-type: none"> \$10 per cubic metre.
3	Exploration Licence or Retention Licence	Excavating/clearing	Excavating, incl. costeaning, trenching, channelling, access tracks, and clearing of vegetation.	<ul style="list-style-type: none"> \$1,000 per hectare.
4	Prospecting Licence	All activities permitted under a Prospecting Licence	Standard fee.	<ul style="list-style-type: none"> Upfront fee of \$2,670 payable at grant of licence or \$534 for each year of a Prospecting Licence, paid annually upfront.

Schedule 5 Draft Ministerial Directions as to Advisory Activities (Clause 10.2)

INTRODUCTION

The State of Victoria and the [Corporation] have entered into a Land Use Activity Agreement (the Agreement), under Part 4 of the *Traditional Owner Settlement Act 2010* (the Act).

This Agreement relates to certain areas of public land within Victoria. Annexure 1 includes a map/description of the land (Agreement Land).

The Agreement categorises certain activities that can occur on this public land as Advisory Activities: a list of Advisory Activities is included under Annexure 2.

Under section 34 of the Act, I have the statutory responsibility to provide written directions as to actions that must be taken by the State and its delegates (as Decision Makers) prior to carrying out an Advisory Activity, or authorising the carrying out of an Advisory Activity, as the case may be.

MINISTERIAL DIRECTIONS

Under section 34 of the Act, I direct as follows:

- (a) A Decision Maker (as defined under section 29 of the Act) who is proposing to carry out an Advisory activity (listed in Annexure 2) on any Agreement Land (as in Annexure 1):
 - (i) must comply with, or exceed, the standards detailed in paragraphs (b), (c), (d) and (e) below; and
 - (ii) should apply the other considerations detailed in paragraphs (f), (g), (h) and (i) where relevant; and
 - (iii) at all times exercise his or her decision-making power in accordance with the principles of natural justice.

Minimum Standard

- (b) A Decision Maker must notify the Corporation that has an Agreement over the area to which the Advisory Activity relates. Notification may be in writing, including electronic form (e.g. being posted on an official website), and must include:
 - (i) The name of the government department, agency or authority giving the notice;
 - (ii) A description of the activity, why it is required, what legislation gives effect to the activity, and activity timelines;
 - (iii) A description of the land or waters affected (allotment, section, parish, county, road address or description, geographical location GPS), a relevant topographic map, plans or specifications where appropriate, and if available, aerial or other photographs of the site;
 - (iv) An invitation to comment that specifies to whom comments should be sent and the time-period within which comments will be accepted;

- (v) The name of a person who may be contacted for further information or explanation of the proposed activity.
- (c) The minimum time-period for the initial consultation between the Decision Maker and the corporation is 28 days from the date of the notification.
- (d) Where comments are received from the Corporation, the decision maker must:
 - (i) provide a response that acknowledges receipt of those comments;
 - (ii) actively consider those comments and, where practical, discuss those comments, and possible ways to resolve the issues with the Corporation; and
 - (iii) once a decision has been made, and where requested by the Corporation, the decision maker must send a subsequent letter detailing what, if any, action was taken in response to the comments received.
- (e) The Decision Maker must maintain records of all correspondence with the Corporation made with respect to these directions.

Other considerations

- (f) These directions describe formal procedures for engagement between a Decision Maker and the Corporation with respect to Advisory Activities. However, the Parties agree that engagement should go beyond formal procedures and establish a relationship between Parties that is flexible enough to respect and accommodate the needs of each party.
- (g) A notification and consultation process undertaken in accordance with these directions may include details of two or more Advisory Activities.
- (h) The Corporation has the right to choose not to receive notification for particular Advisory Activities. It may do this by writing to the Attorney-General.
- (i) There may be different procedures arranged for the notification of certain Advisory activities, if it is by mutual agreement of the Attorney-General and the Corporation.

Application

- (j) These directions apply to the Agreement Land detailed in Annexure 1.
- (k) These directions apply to the Land Use Activities that are listed in Annexure 2.
- (l) The requirement for the State and its delegates to follow these directions is effective from **[insert date]**.

Hon. Robert Clark MP

Attorney-General

Date:

Schedule 6 Process as to multiple activities (Clause 14)

Application of joint process

- (a) All persons required to reach agreement under Division 3 of Part 4 of the *Traditional Owner Settlement Act 2010* (Vic) in relation to two or more Land Use Activities may agree in writing to enable the Corporation's negotiations and decisions regarding those Land Use Activities to be conducted as a joint process, provided that all Land Use Activities to which the joint process relates relate to a single enterprise.

Note: A joint process should specify the Land Use Activities to which it relates, clearly identify the enterprise to which the Land Use Activities relate, and specify the particular actions each party is required to take and at what time.

Note: The fact that a joint process applies to a Land Use Activity does not alter the requirements that apply to the Land Use Activity under the *Traditional Owner Settlement Act 2010* (Vic).

Schedule 7 Community Benefits (Clause 16)

1. Land Use Activities to which this Schedule applies

- (a) Subject to item (b), this Schedule applies to:
- (i) all Agreement Activities and Negotiation Activities where a State Agency is the Responsible Person;
 - (ii) Negotiation Activities and Agreement Activities where a State Agency is issuing a Public Land Authorisation or approving a new timber release plan.
- (b) This Schedule does not apply to:
- (i) Earth Resource Or Infrastructure Authorisations;
 - (ii) Land Use Activities where a State Agency is not the Responsible Person; or is not issuing a Public Land Authorisation;
 - (iii) A Negotiation Activity that is the subject of an Application for VCAT determination under s 53 of the Act.

2. Community benefits formula

- (a) The Parties agree that:
- (i) if an agreement is made under Division 3 of Part 4 of the Act in relation to a Land Use Activity described in item 1 of this Schedule; and
 - (ii) that agreement provides that Community Benefits are to be provided to the Corporation;

then the State will provide Community Benefits to the Corporation in accordance with the table in item 4 of this Schedule.

3. Non-monetary Community Benefits

- (a) The State may, by agreement with the Corporation, provide all or part of an agreed monetary quantum of Community Benefits in non-monetary form.

4. Community benefits formula

- (a) The Parties agree that each formula specified in the right hand column of the table below applies to the corresponding Land Use Activity specified in the left hand column.

Negotiation Activity	Applicable Formula
Commercial Leases for more than 10 and up to and including 21 years (excluding Major Public Works)	Formula A
Major Public Works (including Infrastructure undertaken by a Utility)	Formula A (where a Lease, Licence or Permit applies) Formula B
Commercial Licences and Commercial Permits for more than 10 years	Formula A
Agriculture Leases covering 40 hectares or more, including Leases for plantations and aquaculture	Formula A
Community Purpose Leases for more than 21 years	Formula A
New Timber Release Plans	Formula C
Agreement Activity	Applicable Formula
The grant of an estate in fee simple other than a grant pursuant to s 14 or s 19 of the <i>Traditional Owner Settlement Act 2010</i> (Vic) or a grant made for the purpose of a project that is for a public purpose.	Formula D
Commercial Leases more than 21 years (excluding Major Public Works)	Formula E
Major works and/or clearing of land for Commercial Purposes (where a Public Land Authorisation is not required, and excluding Major Public Works)	Formula F

5. Formulae

FORMULA A

ACRONYMS: RENTAL Received (RR)

Community benefits (payable each
year that the Lease rental is received) =

$$\begin{aligned} & (\$ \text{ amount of RR}^1 \text{ in } \$0 - \$20,000 * X\%^2) \\ & + (\$ \text{ amount of RR in } \$20,001 - \$100,000 * X\%) \\ & + (\$ \text{ amount of RR in } \$100,001 - \$500,000 * X\%) \\ & + (\$ \text{ amount of RR in } \$500,001 - \$1,000,000 * X\%) \\ & + (\$ \text{ amount of RR above } \$1,000,001 * X\%) \end{aligned}$$

PLUS GST

Note: The Corporation will also be entitled to reimbursement of reasonable negotiation costs (as prescribed by regulation)³

¹ Public Works (where a Lease applies) and Commercial Leases will be at market value as determined by the issuing authority, based on the market valuation as specified in Valuer-General's valuation report. For Community Purpose Leases discounted below the market value, the Community Benefits will be based on the discounted rate actually paid. A discount may be applied on account of the community purpose of the Lease at the discretion of the issuing authority. Rental as determined by the issuing authority, and under certain circumstances (e.g. times of hardship due to drought etc), the issuing authority may reduce or exempt the rental payable in any particular year. That is, the Community Benefits will be based on the actual rental payments received by the issuing authority in each year.

² All percentages in this formula are inclusive of a 10% solatium.

³ As provided for under section 52 of *Traditional Owner Settlement Act 2010*.

FORMULA B

ACRONYMNS: UNIMPROVED MARKET VALUE (UMV)

$$\begin{aligned} \text{Community benefits} = & \left\{ \begin{aligned} & (\$ \text{ amount of UMV}^4 \text{ in } \$0 - \$100,000 * X\%^5) \\ & + (\$ \text{ amount of UMV in } \$100,001 - \$500,000 * X\%) \\ & + (\$ \text{ amount of UMV in } \$500,001 - \$1,000,000 * X\%) \\ & + (\$ \text{ amount of UMV in } \$1,000,001 - \$10,000,000 * X\%) \\ & + (\$ \text{ amount of UMV above } \$10,000,000 * X\%) \end{aligned} \right\} \end{aligned}$$

PLUS GST

Note: The Corporation will also be entitled to reimbursement of reasonable negotiation costs (as prescribed by regulation)⁶

⁴ UMV means market value of the area required for the public work, less the value of physical or structural improvements (i.e., buildings), as specified in Valuer-General's valuation report (or as otherwise agreed by both parties).

⁵ All percentages in this formula are inclusive of a 10% solatium.

⁶ As provided for under section 52 of *Traditional Owner Settlement Act 2010*.

FORMULA C

Community benefits (payable each year that the Timber Release Plan is current) =

$$\begin{array}{r}
 \text{Dividend}^1 \quad * \quad \frac{\text{adjusted area harvested}^2 \text{ by VicForests within TRP that is covered by LUAA}^3 \text{ in that year}}{\text{Total adjusted area harvested}^2 \text{ by VicForests in that year}} \quad * \quad \left[\begin{array}{l}
 (\$ \text{ TO group share of Dividend}^4 \text{ in } \$0 - \$20,000 * X\%) \\
 + (\$ \text{ TO group share of Dividend}^4 \text{ in } \$20,001 - \$100,000 * X\%) \\
 + (\$ \text{ TO group share of Dividend}^4 \text{ in } \$100,001 - \$500,000 * X\%) \\
 + (\$ \text{ TO group share of Dividend}^4 \text{ in } \$500,001 - \$1,000,000 * X\%) \\
 + (\$ \text{ TO group share of Dividend}^4 \text{ above } \$1,000,001 * X\%)
 \end{array} \right]
 \end{array}$$

PLUS GST

Note: The Corporation will also be entitled to reimbursement of reasonable negotiation costs (as prescribed by regulation)⁵

1. Dividend

- Annual Dividend - as reported in VicForests Annual Report.
- Note that VicForests is required to pay a dividend in accordance with a determination of the Treasurer of Victoria under the *State Owned Enterprises Act 1992*. An obligation to pay a dividend only arises after consultation between the VicForests Board and the Treasurer of Victoria and a formal determination is made by the Treasurer.

2. Adjusted area harvested (hectares) - is defined as the area harvested within the financial year in which the dividend is paid adjusted for both clearfell logging and thinning harvesting activities. For the purposes of this formula, area thinned by VicForests will be weighted at 50% of the equivalent clearfell area. This is to reflect that fact that thinning activity normally results in the harvesting of 50% of the basal area, compared to clearfell logging. For example, if VicForests harvests 5,000ha (clearfell) and 2,000ha (thinned) the adjusted area harvested will be calculated as follows: 5,000ha + (2,000ha * 0.50) = 6,000ha.

3. LUAA – Land Use Activity Agreement negotiated between the State and a traditional owner (TO) group.

4. TO share of adjusted dividend – the proportion of the Dividend that is payable to the Corporation in that year for that TRP covered by the LUAA.

5. As provided for under section 52 of *Traditional Owner Settlement Act 2010*.

6. Formula includes 10% solatium.

FORMULA D

ACRONYMNS: MARKET VALUE (MV); UNIMPROVED NET MARKET VALUE (UNMV)

UNMV = Sale price less financial value of third party interest(s)⁷ less MV of improvements⁸ less costs to sell⁹

$$\text{Community benefits} = \left\{ \begin{array}{l} (\$ \text{ amount of UNMV in } \$0 - \$100,000 * X\%^{10}) \\ + (\$ \text{ amount of UNMV in } \$100,001 - \$500,000 * X\%) \\ + (\$ \text{ amount of UNMV in } \$500,001 - \$1,000,000 * X\%) \\ + (\$ \text{ amount of UNMV in } \$1,000,001 - \$10,000,000 * X\%) \\ + (\$ \text{ amount of UNMV above } \$10,000,000 * X\%) \end{array} \right\}$$

PLUS GST

Note: The Corporation will also be entitled to reimbursement of reasonable negotiation costs (as prescribed by regulation)¹¹

⁷ Value, most likely expressed as a percentage of market value, of third party interests as specified in Valuer-General's valuation report (or as otherwise agreed by both parties). Examples of third parties that might have an interest in Crown land include local councils, non-state tenants, and community or not-for-profit organisations.

⁸ Value, expressed in dollar terms, of physical or structural improvements, i.e. buildings, as specified in Valuer-General's valuation report (or as otherwise agreed by both parties).

⁹ Costs to sell include both incremental costs directly attributable to the disposal of an asset (e.g. legal costs; valuation costs; professional expenses; survey costs; and marketing costs) and costs incurred as part of preparing the land for sale (e.g. professional expenses or fees arising from rezoning or planning scheme amendments; remediation costs associated with the land (not improvements); fencing; and removal of improvements). Costs to sell does not include costs arising from relocating community facilities.

¹⁰ All percentages in this formula are inclusive of a 10% solatium.

FORMULA E

ACRONYMNS: RENTAL Received (RR)

$$\begin{aligned} \text{Community benefits (payable each} \\ \text{year that the Lease rental is received)} = & \left\{ \begin{aligned} & (\$ \text{ amount of RR}^{12} \text{ in } \$0 - \$20,000 * X\%^{13}) \\ & + (\$ \text{ amount of RR in } \$20,001 - \$100,000 * X\%) \\ & + (\$ \text{ amount of RR in } \$100,001 - \$500,000 * X\%) \\ & + (\$ \text{ amount of RR in } \$500,001 - \$1,000,000 * X\%) \\ & + (\$ \text{ amount of RR above } \$1,000,001 * X\%) \end{aligned} \right\} \end{aligned}$$

PLUS GST

Note: The Corporation will also be entitled to reimbursement of reasonable negotiation costs (as prescribed by regulation)¹⁴

¹¹ As provided for under section 52 of *Traditional Owner Settlement Act 2010*.

¹² Rental received: for Commercial Leases this will be at Market Value as determined by the issuing authority, based on the market valuation as specified in Valuer-General's valuation report. Under certain circumstances (e.g. times of hardship due to drought etc), the issuing authority may reduce or exempt the rental payable in any particular year. That is, the Community Benefits will be based on the actual rental payments received by the issuing authority in each year.

¹³ All percentages in this formula are inclusive of a 10% solatium.

¹⁴ As provided for under section 52 of *Traditional Owner Settlement Act 2010*.

FORMULA F

ACRONYMNS: UNIMPROVED MARKET VALUE (UMV)

$$\text{Community benefits} = \left\{ \begin{array}{l} (\$ \text{ amount of UMV}^{15} \text{ in } \$0 - \$100,000 * X\%^{16}) \\ + (\$ \text{ amount of UMV in } \$100,001 - \$500,000 * X\%) \\ + (\$ \text{ amount of UMV in } \$500,001 - \$1,000,000 * X\%) \\ + (\$ \text{ amount of UMV in } \$1,000,001 - \$10,000,000 * X\%) \\ + (\$ \text{ amount of UMV above } \$10,000,000 * X\%) \end{array} \right\}$$

PLUS GST

Note: The Corporation will also be entitled to reimbursement of reasonable negotiation costs (as prescribed by regulation)¹⁷

¹⁵ UMV means market value less the value of physical or structural improvements, i.e. buildings, as specified in Valuer-General's valuation report (or as otherwise agreed by both parties).

¹⁶ All percentages in this formula are inclusive of a 10% solatium.

¹⁷ As provided for under section 52 of *Traditional Owner Settlement Act 2010*.