

## Why agreements matter



## About Rio Tinto

Every day at Rio Tinto we find, mine and process the Earth's mineral resources with a relentless drive for improvement through innovative thinking and disciplined delivery.

*Pictured opposite: Rio Tinto Gove Traditional Owner agreements ready for signature, June 2011.*

Rio Tinto's vision is to be a company that is admired and respected for delivering superior business value and for being the industry's trusted partner. To earn this trust we must continually find safer, smarter and more sustainable ways to run our business. We are always looking for new answers to complex global and local challenges we face but we will only succeed if we are inclusive and collaborate.

From our diverse portfolio, we supply the metals and minerals that help the world to grow. Our major products are aluminium, copper, diamonds, industrial minerals (borates, titanium dioxide and salt), iron ore, thermal and metallurgical coal and uranium.

Our people work in more than 40 countries across six continents. We are strongly represented in Australia and North America, and also have significant businesses in Asia, Europe, Africa and South America.

Delivering world class health, safety, environment and communities performance is essential to our business success. Meeting our commitments in these areas contributes to sustainable development and underpins our continued access to resources, capital and engaged people.

Our values – accountability, respect, teamwork and integrity – are expressed through our business principles, policies and standards and underpin the way we manage the economic, social and environmental effects of our operations and how we govern our business.

Our approach, coupled with our diverse portfolio of quality assets, positions us to deliver superior returns to our shareholders over time, and continue to grow on a global scale.



*Sincere thanks to the family of Willie Gudubi for permission to feature The Walgundu Story (1996) on the cover of Why agreements matter.*

## The Walgundu Story

In 1995 Rio Tinto Exploration (then CRA Exploration) negotiated Australia's first native title exploration agreement with the Mara, Alawa, Wandarang and Ngalkan peoples. The agreement covered the large St Vidgeon Station, a 6,500 square kilometre pastoral lease bordering the Roper River and the south eastern boundary of Arnhem Land in the Northern Territory, Australia.

Rio Tinto had interests in the region and wished to avoid any action that jeopardised any parties' rights during the course of mineral exploration. With support from the Northern Land Council, the Walgundu Exploration Agreement was negotiated.

Following the signing, Rio Tinto approached senior artist Willie Gudubi, a signatory of the Walgundu Agreement, native title claimant and Traditional Owner of the St Vidgeon area, to seek his interpretation of the agreement and his 'story' of the land.

This painting is his story, one of Willie's last before he passed away. The story of this painting remains untold in English.

*Aboriginal and Torres Strait Islander readers should be aware that this document may contain images or names of people who have since passed away.*



## Why agreements matter: a resource guide for integrating agreements into Communities and Social Performance work at Rio Tinto



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## Foreword

Developing strong and lasting relationships with local people, and recognising and respecting connection to land are principles embedded in Rio Tinto's culture and policies.

These relationships are particularly important with communities close to where we operate, and often established through the agreement processes.

Twenty years ago, then company chief executive Leon Davis outlined a vision to create mutual value by working in active partnership with Indigenous peoples, driving a shift in how our company operated.

Since then, we have approached land access and community engagement through negotiated agreements. These provide beneficiary payments, as well as deliver social and economic outcomes, and engage Indigenous people in our cultural heritage, employment, business development, and training and education activities.

My own experience of the agreement process began with the Yandicoogina Land Use Agreement when I was part of our Iron Ore business in 1997. It was Rio Tinto's first signed agreement, representing a new beginning for us and the people of the Innawonga, Bunjima and Nyiyaparli Traditional Owner groups.

Today we have more than 40 agreements globally, and have refined and improved our practice with each one. Our most recent agreements build on the experience and learnings of a 20 year journey and show a maturing in approach over time. They continue to act as a mechanism to give structure and intent to long-term relationships, but are also clearer on our mutual commitments to achieve long-term, intergenerational benefits.

Relationships are founded on trust and mutual respect. We endeavour to build these qualities in the development and implementation of our agreements. But Rio Tinto's progress has not been a journey in isolation. We have worked in collaboration with local people and made progress in many areas including government understanding and governance capability. This has helped to achieve greater levels of recognition and effective collaboration.

I'm proud of Rio Tinto's contribution to the knowledge base on agreement processes. I also want to highlight that agreements are not 'nice to haves'. Agreements show our respect and commitment to inclusive engagement with land-connected peoples. We work hand in hand to manage the shared risks, responsibilities and benefits, while also having security to plan our future operations in strong, prosperous regions.

Relationships with local people are the cornerstone of our work at Rio Tinto and I believe this shines through in the case studies, process and practice outlines, and key learnings in this guide.

It has been an incredible journey to date. I hope that by delving into the various elements outlined in this publication, you too can contribute to the delivery of better outcomes and stronger futures through agreements.



**Sam Walsh**

Chief executive



## Contributors to this guide

This guide is the fourth to be developed in partnership with the Centre for Social Responsibility in Mining (CSR), part of the Sustainable Minerals Institute at The University of Queensland. Other guides include *Why gender matters*, *Why cultural heritage matters* and *Why human rights matter*.

To capture agreement experience and promote good practice concepts and approaches, this guide has been reviewed by two groups – a group of Rio Tinto reviewers from different departments and geographical locations, and an External review panel of experts in agreement-making.

The External review panel was asked to advise and challenge Rio Tinto's thinking; and suggest key supporting resources and literature. While it was not possible to incorporate all feedback, the panel's input has been invaluable. Their inclusion does not imply their full endorsement of the content.

The Background reader is intended to provide more information on current international standards and influences on agreement-making as they affect businesses in general. It was also prepared by CSR and reviewed by both panels.

There was much background material already available. In particular, the Rio Tinto funded work undertaken by Professor Marcia Langton (School of Population Health, University of Melbourne) as part of Agreements, Treaties and Negotiated Settlements (ATNS), an Australian Research Council (ARC) Linkage Project, which began in March 2002.

Professor Langton partnered with CSR as a senior consulting author and collaborator to assist in the development of the publication.

Rio Tinto would like to thank all those who have provided information for the case studies and commented on various drafts of this guide.

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# Definitions

**Aboriginal people or peoples** is a term used in Australia and Canada. In Australia, it refers to the original peoples who inhabited the continent and offshore islands, except for islands in the Torres Strait that continue to be owned and occupied by Torres Strait Islanders. In Canada, the term refers to three groups of peoples: Indians, Inuit and Métis. Aboriginal peoples occupied the territory before European contact, having their own forms of government, social organisation, economies and spiritual beliefs. Their lives and cultures are closely connected with their land and natural environment.

**Community**, in the context of mining projects or operations, is generally used to describe the inhabitants of immediate and surrounding areas who are directly affected in some way by the project's or operation's activities. These effects may be economic, social and environmental in nature. They are also likely to have strong cultural and historical connections to the project or operation area. They may or may not currently reside on the land or use it for livelihood purposes. A community can display considerable diversity, especially where it has been established by government as a centralised location to house formerly dispersed Indigenous groups.

**Affected community, local community, neighbouring community, host community or impacted community** are often used interchangeably.

**First Nations** is the preferred term to refer to Indians of Canada, who are neither Inuit nor Métis. First Nations communities are sometimes referred to as bands. There are more than 600 First Nations communities across Canada. Despite its widespread use, there is no legal definition for this term in Canada.

**Indigenous peoples** are the earliest known inhabitants of a territory who occupied the land prior to the arrival of settlers with different cultural, ethnic and geographic origins who often marginalised the original inhabitants. The term is usually used to refer to Aboriginal peoples internationally, although usage in different places varies. Defining characteristics of Indigenous peoples are that they:

- Identify with a specific territory and have a close attachment to its natural environment.
- Have a collective name and sense of solidarity.
- Are widely recognised and self-identify as belonging to that group.
- Share a common ancestry or origins and history (often of dispossession).
- Have a distinctive shared culture and sometimes language.

**Land-connected peoples** have enduring cultural and historical connections to particular territories and use the land or ecosystems for subsistence, traditional or livelihood activities. These can include hunting,

fishing, herding, agriculture, and seasonal and cultural activities. Land-connected peoples may or may not hold legal tenure or formally sanctioned rights as traditional or customary owners of the land. They include, but are not exclusively, Indigenous peoples. The territory of land-connected peoples may be referred to as **traditional lands, Indigenous lands, ancestral domain** or similar terms.

**Land-rights holders** refers to those people whose rights, especially rights to access and use land, are or may be impacted by the project or mining operation.

**Native American** and **American Indian** refer broadly to people indigenous to the United States of America. **Native Tribes** is another term used in the US. There are 567 federally recognised American Indian/Alaskan Native Tribes that are subject to federal laws but have extensive powers of internal self-government.

**Native title holder** is used in Australia to refer to Indigenous (ie Aboriginal and Torres Strait Islander) people who are determined as holding certain rights to land under the *Native Title Act 1993 (Cth)*.

**Stakeholders** are those who have an interest in a particular decision, either as individuals or representatives of a group. They include people who influence a decision, or can influence it, as well as those affected by it. Stakeholders also include non-government organisations, governments, shareholders, employees and local community members.

**Traditional Owners** of the land are a local descent group of Indigenous people who have common spiritual affiliations to land and primary spiritual responsibility for that land or particular sites. The term is often used in Australia.

These definitions have been collated from various sources including:

Danish Institute for Human Rights (DIHR) (2007) *Applying a rights-based approach*.

Indigenous Studies Program, The University of Melbourne (2011) Agreements, Treaties and Negotiated Settlements Project.

<http://www.atns.net.au/glossary.asp>

Rio Tinto (2013) *Why human rights matter: A resource guide for integrating human rights into Communities and Social Performance work at Rio Tinto*.

Rio Tinto (2015) Community agreements guidance.

UN Permanent Forum on Indigenous Issues (n.d.) *Who are indigenous peoples? Indigenous People Indigenous Voices Factsheet*.

## Acronyms

<b>AIATSIS</b>	Australian Institute of Aboriginal and Torres Strait Islander Studies
<b>Alcan</b>	Aluminum Company of Canada
<b>ATNS</b>	Agreements, Treaties and Negotiated Settlements
<b>Comalco</b>	Commonwealth Aluminium Pty Ltd
<b>CRAE</b>	CRA Exploration
<b>CSP</b>	Communities and Social Performance
<b>CSRM</b>	The Centre for Social Responsibility in Mining
<b>EBITDA</b>	Earnings Before Interest, Tax, Depreciation and Amortisation
<b>EIA</b>	Environmental Impact Assessment
<b>ERA</b>	Energy Resources of Australia Ltd
<b>FPIC</b>	Free, Prior, and Informed Consent
<b>GRI</b>	Global Reporting Initiative
<b>IBA</b>	Impact Benefit Agreement
<b>ICMM</b>	The International Council on Mining and Metals
<b>IFC</b>	The International Finance Corporation
<b>ILUA</b>	Indigenous Land Use Agreement
<b>IOC</b>	Iron Ore Company of Canada
<b>NGO</b>	Non-government organisation
<b>PRA</b>	Participatory Rural Appraisal
<b>RBM</b>	Richards Bay Minerals
<b>RRA</b>	Rapid Rural Appraisal
<b>RTCA</b>	Rio Tinto Coal Australia
<b>RTIO</b>	Rio Tinto Iron Ore
<b>RTX</b>	Rio Tinto Exploration
<b>UN</b>	The United Nations
<b>UNDROP</b>	The United Nations Declaration on the Rights of Indigenous Peoples
<b>US</b>	The United States
<b>WB</b>	The World Bank
<b>WCCA</b>	Western Cape Communities Coexistence Agreement

## 1. Why do agreements matter?

Stable, life-of-mine access to land is fundamental to successful mining operations.

Rio Tinto's approach is to negotiate long-term land use agreements with all stakeholders, including the people who occupy and are affected by the land concerned. Central to making those agreements work is recognising and respecting what the land means to the people who occupy it.

Community agreements are long-term, often with horizons beyond 50 years. Through agreements, Rio Tinto seeks to establish relationships with related parties that pursue ways to share risk to deliver mutual value. This approach has been shown to build trust on both sides.

Agreement processes represent a giant step beyond traditional corporate social responsibility. They are fundamental to obtaining and sustaining the land access vital to Rio Tinto's operations, and enable approvals and consents to operate. They also deliver benefits directly to affected stakeholders and empower decision-making about how those benefits should be used within communities.

Through several decades of experience in Australia, Rio Tinto has evolved its agreement processes, and extended them across many of its projects and operations. Agreements today form a critical part of the thinking, planning, operation and closure actions of every project and operational site.

#### *A journey of change*

Each mining company has its own story of organisational learning in community engagement. Rio Tinto's has been a journey of change throughout several decades to reach its current position on community agreements. It's a position that aligns with the company's code of conduct, *The way we work*, and demonstrates Rio Tinto's understanding of the breadth and impact of agreements.

Like all resource companies, Rio Tinto has an interest in land. The company's role as a developer is to facilitate the transformation of orebodies and resources into a social or economic benefit for shareholders, governments and host communities. Gaining access to land marks the beginning of the company's operational capacity, however it also needs the social licence to operate that comes from a basis of mutual trust between Rio Tinto and its host communities.

Land can be associated with significant historical and cultural heritage. It can be the subject of pre-existing conflict with a range of competing land uses and have inherent environmental values which need to be protected. All of these factors shape people's views about the value of land and how it should be used. As a result, Rio Tinto operates in a complex environment where clashes can occur – the consequences of which can have a significant impact on the company's operations. It's a consequence that many mining companies, including Rio Tinto, did not fully appreciate until the late 1980s.

Rio Tinto's understanding of how land can be used for both economic and social benefit has evolved significantly in recent decades. As a business, Rio Tinto now understands the aim of agreement-making is two-fold. Agreements facilitate Rio Tinto's access to land, approvals and permits, paving the way for our continued presence in host communities. Agreements also enable the benefits of resource development to be shared among the communities connected to the land over the long term. Being accountable through agreement processes has taught Rio Tinto to see communities, land and resources differently. Agreements have shown the company there is a way to work through issues so that Rio Tinto no longer finds itself at odds with people. This stability is critical to building and maintaining a secure future for the company's operations.

#### *Whole-of-business responsibility*

Agreement-making is not isolated to any single part of the business. Agreements will often include commitments around land use, environment, mine planning, procurement and employment. Therefore the process of planning, making and implementing agreements is not the sole realm of the Communities team. It's the 'business of the whole business', and requires the understanding, prioritisation and efforts of everyone.

Understanding the history of agreements in Rio Tinto assists in understanding why agreements matter today, and will remain important in the future.

#### *Historical influences on agreement-making in Rio Tinto*

The defining moments in Rio Tinto's approach to community engagement can be traced back to experiences at specific sites and events in the company's history. Experiences in Papua New Guinea and Australia in the late 1980s and early 1990s were particularly significant; while changes in Australia's legal system further shaped Rio Tinto's approach to agreements globally.

<sup>1</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>2</sup> Native Title Act 1993 (Cth).

<sup>3</sup> Wand, P. *Land rights laws - past, present and future. Speech at CLC/NLC Conference, 16-17 August 1996.*

Rio Tinto holds 54 per cent of the shares of Bougainville Copper Limited (BCL). From 1972 until 1989 (when operations were suspended), BCL operated the open pit mine and processing facility at Panguna on Bougainville Island in the North Solomons Province of Papua New Guinea. In May 1989, production was brought to a complete halt and BCL personnel were subsequently evacuated following heightened militant activity against the mine and personnel by some factions from within the local communities.

Meanwhile, in Australia in the late 1980s, Rio Tinto was seeking to grow its iron ore operations in the Pilbara region of Western Australia. The company faced opposition from local Traditional Owner groups who sought to stop the expansion of the Marandoo iron ore mine. The groups used heritage and environmental legislation to delay progress on the expansion for two years. These experiences at Marandoo and Bougainville set Rio Tinto on a path to develop methods of engagement that built relationships and developed shared understandings.

#### **Legal and corporate change in Australia**

The change in Rio Tinto's approach to engagement with Aboriginal people was also fundamentally reshaped by key legal events in Australia with the High Court's *Mabo*<sup>1</sup> decision in 1992, and the introduction of Native Title legislation which recognised native title to land in 1993.<sup>2</sup> Under this law, a culture of agreement-making in Australia was facilitated by the 'right to negotiate' provision. Rio Tinto was the first to embrace this new right, despite initial resistance from the broader industry.

On his appointment as chief executive of the company in 1994, Leon Davis drove a change in the company's approach to community relations; specifically a desire for active social engagement with local communities. His decision in 1995 to publicly commit Rio Tinto to work with Native Title legislation in Australia and engage with Traditional Owners because it was 'the right thing to do' was a landmark moment in the company's history. It set Rio Tinto apart from other mining companies, committing to the standards expected by host communities and Indigenous people around the world.

Also at this time, the position of vice president for Aboriginal Relations was created and a Group managing director, Paul Wand, was appointed. He publicly stated that Rio Tinto's approach was to recognise Aboriginal disadvantage, connection to land and native title rights, as well as respect for cultural diversity, community aspirations for self-sufficiency and interests in land management.<sup>3</sup> In 1996, under Paul Wand's supervision, Rio Tinto published its first Australian Aboriginal and Torres Strait Islander Policy. All parts of the business in Australia were instructed that agreement-making would be the preferred approach to access land, rather than litigation.

#### **Supporting corporate change within Rio Tinto**

The company realised this new approach would not be successful without appropriate internal change management. In 1995, Rio Tinto engaged Professor Marcia Langton, then chair of the Australian Institute for Aboriginal and Torres Strait Islander Studies (AITSIS), Noel Pearson, Professor Ritchie Howitt and Dr Mary Edmunds, among others, to help inform the company about engagement challenges. This established Rio Tinto's commitment to listening, learning and changing based on advice from senior Indigenous leaders. The same year, the company formed its Aboriginal Foundation with three independent Indigenous members and three corporate staff as trustees. The Foundation was allocated A\$1.1 million per year, and was the first such fund in Australia.

Cultural awareness training was introduced for Rio Tinto's senior leaders, producing unprecedented opportunities for cultural exchange. For example, in 2001, senior Indigenous leaders joined managing directors and general managers from all Rio Tinto sites involved in agreement-making in Australia for a two-day, on-country engagement south of Gove in East Arnhem Land, Northern Territory. The group engaged in extensive dialogue about the opportunities to work together; and explored the benefits and importance of negotiated agreements to improve relationships between Traditional Owners and the company across its many operational sites.

*Cultural Leadership  
Retreat, Arnhem Land  
– Yirrkala, Australia,  
April 2001.*

*Participants:*

*Front row from left:  
Phil O'Brien, Simon  
Gosling, Peter Yu,  
Richard Aken, George  
Bujtor, Sue Clifford, Mick  
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Langton, unknown,  
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Stephenson, Wayne  
Willis, Ian Taylor,  
Peter Crooke, Dave  
Smith, Clinton Wolf,  
Barry Cusack, Keith  
Johnson, Helen Cusack,  
Joseph Elu, Leigh  
Clifford, Michael Bisset,  
Brendan Hammond.*



#### *Expanding an international approach to agreements*

While much of the history of agreement-making in Rio Tinto stems from its experiences in Australia, there are many important lessons from the company's operations globally.

In 2000, Rio Tinto's Diavik Diamond Mine in the Northwest Territories of Canada concluded participation agreements, and socioeconomic and environmental monitoring agreements, focusing closely on economic development. This, combined with a particular government focus on creating opportunities within the Northwest Territories, helped achieve successful agreements at Diavik. The role of the federal and territorial governments in socioeconomic and environmental monitoring agreements was also operationalised to a greater extent.

The establishment of the International Council on Mining and Metals (ICMM) in 2002 and the refinement of the International Finance Corporation's standards on social performance gave further impetus to formalising community relationships. Concepts such as Free, Prior,

and Informed Consent and social licence to operate gained currency, and the agreement-making process came to be seen as a means of helping to embed these concepts. Industry associations such as the Minerals Council of Australia and the Prospectors and Developers Association of Canada began to consider agreements in this context as a means of providing greater certainty and risk management.

During this period it also became apparent that agreements were not just about new projects but encompassed existing projects and operations. The Argyle Diamond Mine, which had operated since 1985, sought to expand its operations and in 2004 signed a partnership agreement with native title holders and other community groups. This agreement, which recently celebrated its 10 year anniversary, improved on the previous one, and fostered a new regional approach that extended beyond the life of the mine.

*Rirratjingu dancers at the signing of the Rio Tinto Gove Traditional Owners Agreement ceremony, June 2011.*



### *Building on our knowledge base*

In the 2000s, as the body of knowledge around agreements grew, Rio Tinto partnered with the Australian Research Council and the University of Melbourne to support the establishment of the Agreements, Treaties and Negotiated Settlements project which became a library of agreements data. Partnerships with the Australian National University, the University of Queensland and the Harvard Project on American Indian Economic Development further strengthened the company's knowledge of the impacts and benefits of agreements.

The development of new assets such as Oyu Tolgoi in Mongolia also allowed Rio Tinto to explore agreement processes in a context that went beyond Indigenous groups to land-connected peoples more broadly. This helped build further understanding and appreciation of how land has been used to benefit communities; and also the evolutionary nature of communities.

The company also began to consider agreements across the life cycle of a mine. Ultimately, agreements are a mechanism for accountability and provide companies and communities with mutual performance indicators that cover all stages; from exploration through to project planning and operations, including post-closure. The cases presented in this guide cover the broadest spectrum of that engagement.

### *Codifying behaviour and earning trust*

At times it might seem difficult for a resources company, with its scientific, engineering and operational focus, to understand different people's spiritual and cultural relationships with land. However, this is what the agreement-making process has been designed to help Rio Tinto do. The company has learned through agreement-making to define behaviour that makes sense to its business; and see land and communities differently.

<sup>4</sup> For a detailed retrospective of the company's agreement-making trajectory in Australia refer to Wand and Harvey (2013). "The sky did not fall – Rio Tinto after Mabo." In Bauman and Glick (eds). *The limits of change: Mabo and Native Title 20 years on.* Australian Institute for Aboriginal and Torres Strait Island Studies (AIATSIS), Canberra.

Meanwhile, communities have learned they can trust Rio Tinto to fulfil its obligations under agreements. What may have previously resulted in clashes can now result in genuine intergenerational benefits and cultural contact – from profit-sharing arrangements with Traditional Owners to site inductions that see safety briefings sit comfortably alongside a water or smoking ceremony.

More than 20 years after the *Mabo* decision in Australia, Rio Tinto has successfully negotiated more than 120 global exploration access agreements and all its current mining operations in Australia have consent and participation agreements in place.<sup>4</sup> Furthermore, more than 40 comprehensive participation agreements have formalised the company's approach and extended the practice of agreement-making worldwide.

### ***Using this guide***

This is the fourth in the series of good practice guides related to Rio Tinto's social performance.

This guide will assist Rio Tinto employees as well as other industry colleagues to manage the development and implementation of agreements more efficiently and effectively. The case research and process documentation in the How to section of this guide demonstrates the knowledge gained by Rio Tinto throughout years of negotiating and implementing agreements. The Background reader provides broader comparisons across the mining sector and additional external resources for practitioners.

While this guide does not attempt to represent all perspectives on this subject, it does seek to acknowledge the important contribution of Indigenous groups throughout our shared history of agreement-making. The views of Traditional Owners from the Pilbara region in Western Australia, and people involved in agreements negotiated at Weipa in Queensland and Argyle in Northern Australia, are included throughout this guide to provide some insight to their experiences in particular agreement contexts.

In December 2014, Rio Tinto approved that agreement-making be mandated as part of the Communities and Social Performance standard for Indigenous and traditional land-connected peoples where long-term presence in a community is planned, and encouraged its use in other communities. This formalisation of its relationships with communities honours the broader commitment which Rio Tinto has to economic and social development.

As the business evolves – and new people, projects and operations take the lead – the importance of agreement-making will remain. This guide is designed to support good practice and ongoing learning.



**Janina Gawler**

Global practice leader,  
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Social Performance

## Agreement-making in Rio Tinto

This timeline maps the development of agreement-making globally in Rio Tinto. Following the 1988 Kennecott Flambeau Agreement in Utah, United States, agreement processes in Rio Tinto progressed significantly from 1995.

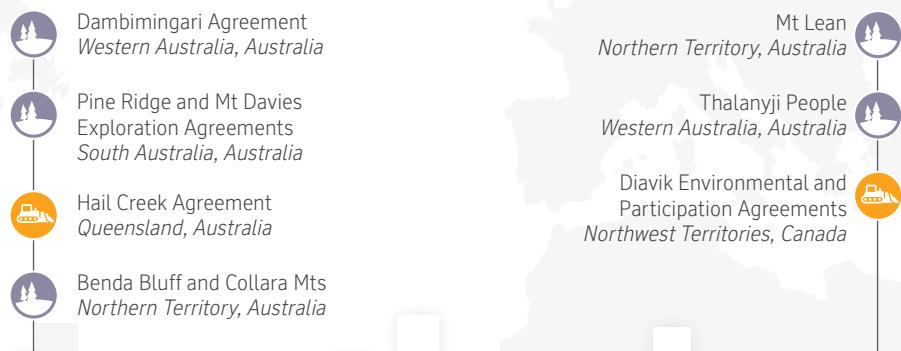


“Let me say this bluntly. CRA is satisfied with the central tenet of the *Native Title Act*. In CRA we believe that there are major opportunities for growth in outback Australia which will only be realised with the full cooperation of all interested parties. This government initiative has laid the basis for better exploration access and thus increased the probability that the next decade will see a series of CRA operations developed in active partnership with Aboriginal people.”

Leon Davis, managing director and chief executive CRA Limited Speech to the Securities Institute of Australia, March 1995

"I think it (Native Title) initially brought everyone together. I was involved in the negotiations, talking to the Yinhawangka people about the land use agreement for Yandi (Yandicoogina Land Use Agreement). That's what started it and everyone was excited. Excited that a company was coming to you to make an agreement because it had never been done before."

Roy Tommy, Yinhawangka (2014)



1997

1998

1999

2000

Century Zinc Agreement (divested)  
Queensland, Australia

RTIO Yandicoogina Land Use Agreement between Hamersley and the Innawonga, Bunjima and Nyiyaparli Peoples Western Australia, Australia

Alcan's Ely Bauxite Mining Project Agreement  
Queensland, Australia

White Lakes (Martu People) Agreement  
Western Australia, Australia

Diavik Environmental and Participation Agreements  
Northwest Territories, Canada

Gobawarra Minduarrra Yinhawangka and Robe Project Development Agreement  
Western Australia, Australia

The Upper Hunter Aboriginal Community and Coal and Allied Memorandum of Understanding  
New South Wales, Australia



Mine development

Land access

Cultural heritage

Environmental monitoring

 Western Cape Communities Coexistence Agreement  
*Queensland, Australia*

 Weipa Township Agreement  
*Queensland, Australia*

 Murowa Relocation Agreement  
*Murowa, Zimbabwe*



 West Angelas Project - Native Title Agreement between Robe and Ngarluma Yindjibarni People (Northern Link Agreement)  
*Western Australia, Australia*

 Argyle Diamond Mine Framework Agreement  
*Western Australia, Australia*

 Kelian Mine Closure Plan  
*East Kalimantan, Indonesia*

2001

2002

2003

2004

 Northern Territory Exploration and Mining Agreement (North Mining)  
*Northern Territory, Australia*



 RTCA Cultural Heritage Management System with Wangan Jaagalingu Peoples  
*Queensland, Australia*

 Wik and Wik Way Access Agreement for Exploration Permits  
*Queensland, Australia*

 Argyle Diamond Mine Heritage Protection Agreement, Argyle Diamond Mine Management Plan Agreement, Argyle Diamond Mine Heads of Agreement, Argyle Diamond Mine Participation Agreement  
*Western Australia, Australia*

 Yerehme Agreement with the Bunya Working group  
*Queensland, Australia*



2005



RTCA Tarong Project Agreement  
with the Wakka Wakka  
People (divested)  
*Queensland, Australia*



Maralinga Tjarutja Deed  
of Exploration  
*South Australia, Australia*



Kintyre Land Access Agreement  
*Western Australia, Australia*



RTCA Mt Pleasant Land Access  
Agreement with Native Title  
Party  
*New South Wales, Australia*



RTIO Hope Downs bilateral  
binding initial agreements with  
five Groups in the Pilbara  
*Western Australia, Australia*



North Bowen Basin Project Area  
(Cultural Heritage Process)  
*Queensland, Australia*



Eastern Guruma Indigenous Land  
Use Agreement  
*Western Australia, Australia*



Hamersley Iron Pty Ltd and  
Gobawarrah Minduarra Yinhawanga  
Heritage Protocol Agreement  
*Western Australia, Australia*

2006

2007

2008

RTIO Eastern Guruma Indigenous Land Use  
Agreement (Body Corporate Agreement)  
*Western Australia, Australia*



RTCA Wangan and Jagalingou (Clermont and  
Blair Athol) Aboriginal Communities Project  
Indigenous Land Use Agreement  
*Queensland, Australia*



RTCA Western Kangoulu (Kestrel) Aboriginal  
Communities Project Agreement  
*Queensland, Australia*



Richards Bay Minerals Economic  
Empowerment Agreement  
*South Africa*





2009

2010

2011

Exploration Agreement Groundhog  
Alaska, USA

Innu Nation Memorandum of  
Understanding Exploration  
Newfoundland and Labrador, Canada

Haisla Nation-RTA Legacy Agreement  
British Columbia, Canada

RTIO Ngarluma Indigenous Land Use  
Agreement (Body Corporate Agreement)  
Western Australia, Australia



RTA Gove Traditional  
Owners Agreement  
Northern Territory, Australia

Puutu Kunti Kurrama and Pinikura  
Claim Wide Participation Agreement  
Western Australia, Australia

Innu Rio Tinto Fer et Titane  
Declaration of Partnership and  
Mutual Respect  
Newfoundland and Labrador, Canada

Topnaar Relationship Agreement  
Kuiseb Delta, Namibia

Dampier Salt Ltd, Lake MacLeod,  
Heritage Protocol Agreement with  
Gnulli Native Title claim group  
Western Australia, Australia



Montagnais Declaration of  
Partnership and Mutual Respect



Quebec, Canada

NPM Wiradjuri

Relationship Agreement

New South Wales, Australia

RTIO Participation Agreements

signed with Ngarluma, Kuruma

Marthundunera, Puutu Kunti

Kurrama and Pinikura, Nyiyaparli

and Ngarlawangga Traditional

Owner Groups,

Western Australia, Australia





Dampier Salt Ltd, Port Hedland, Relationship Management Agreement with the Ngarda  
*Western Australia, Australia*

Oyu Tolgoi-Umnugobi Community Cooperation Agreement  
*Mongolia*



Eagle Mine Community Environmental Monitoring Program Agreement  
*Michigan, USA (divested)*



2012

2013

2014

2015



Agreements covering the Ranger Project Area were executed by the Mirarr Traditional Owners, ERA, the Northern Land Council, and the Commonwealth Government.  
*Northern Territory, Australia*

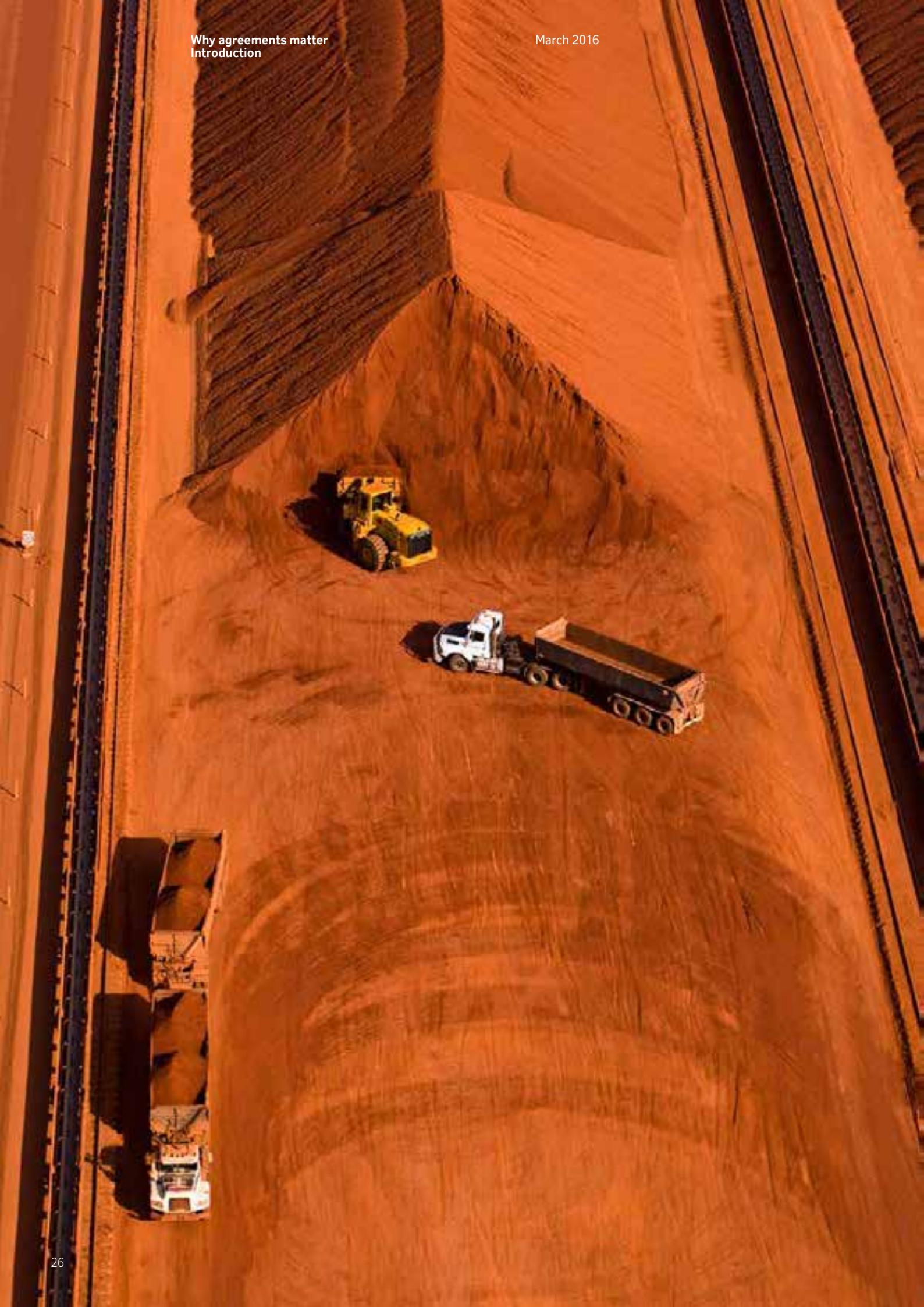


Mamuta Exploration Agreement  
*Mamuta, Chile*



Participation Agreements signed with Yinhawangka and Yindjibardni Traditional Owner groups.  
*Pilbara, Australia*

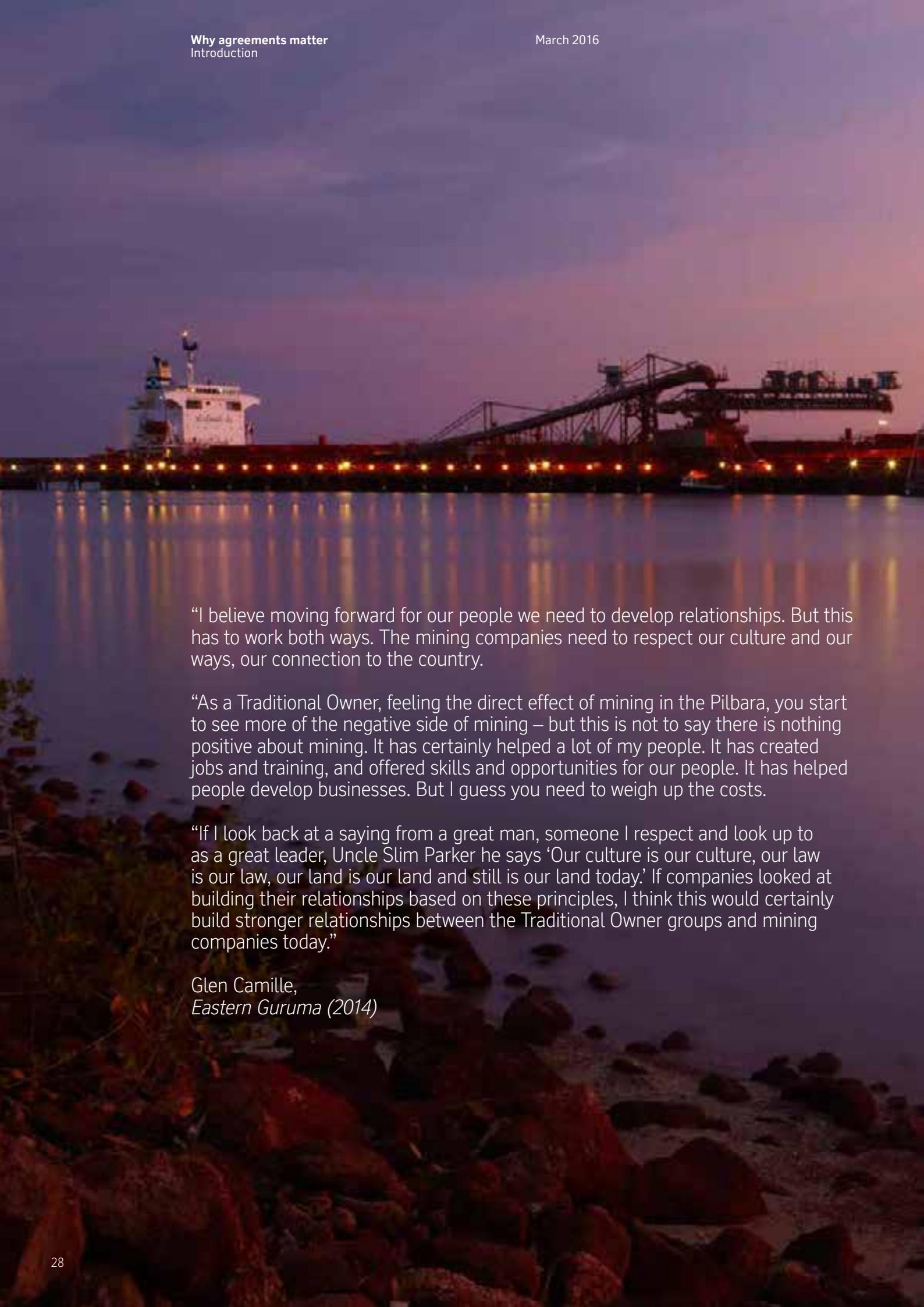




# How to guide

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Pictured left: Aerial view of bauxite haulage from stockpile at Gove alumina refinery, Australia.

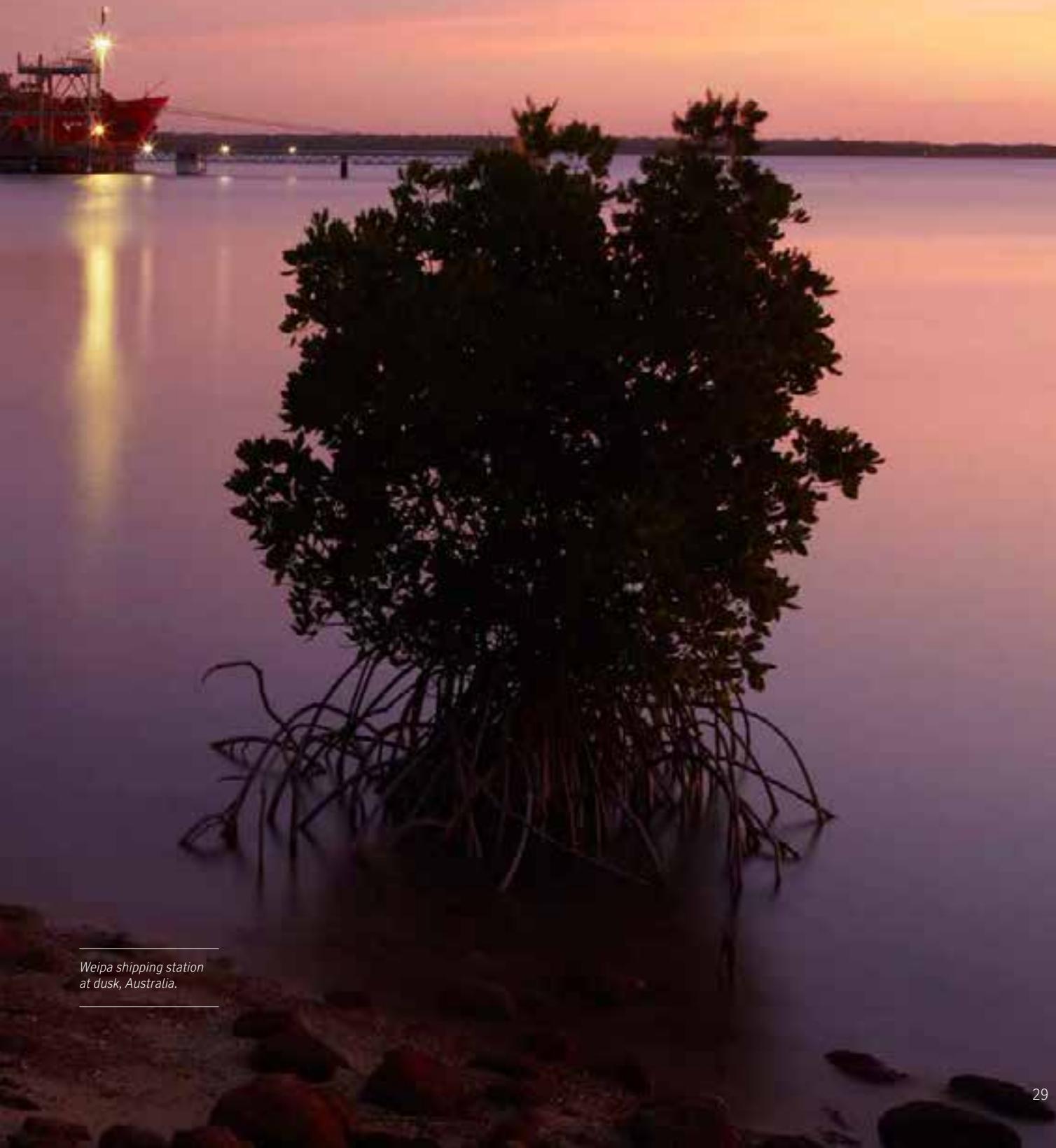


"I believe moving forward for our people we need to develop relationships. But this has to work both ways. The mining companies need to respect our culture and our ways, our connection to the country.

"As a Traditional Owner, feeling the direct effect of mining in the Pilbara, you start to see more of the negative side of mining – but this is not to say there is nothing positive about mining. It has certainly helped a lot of my people. It has created jobs and training, and offered skills and opportunities for our people. It has helped people develop businesses. But I guess you need to weigh up the costs.

"If I look back at a saying from a great man, someone I respect and look up to as a great leader, Uncle Slim Parker he says 'Our culture is our culture, our law is our law, our land is our land and still is our land today.' If companies looked at building their relationships based on these principles, I think this would certainly build stronger relationships between the Traditional Owner groups and mining companies today."

Glen Camille,  
*Eastern Guruma (2014)*



---

*Weipa shipping station  
at dusk, Australia.*

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## 2. About the How to guide

Rio Tinto has projects and operations in more than 40 countries. Many of these assets are located on lands that hold particular significance for local communities and land-connected peoples, including Indigenous peoples. This guide captures lessons from Rio Tinto's decades of experience in making and implementing agreements with local communities in different contexts.

The guide has been produced to help practitioners, project and operational managers understand the drivers, implications and capabilities needed to make and implement agreements. It has been written from the perspective of Rio Tinto and does not claim to capture all views or experiences of these issues, nor is it meant to create specific obligations with communities.

The discussion in each section highlights the main challenges and opportunities in agreement processes from Rio Tinto's experience. Case studies and vignettes from Rio Tinto's global projects and operations are included from places as diverse as Australia, Canada, Chile, Mongolia, Namibia and the US. They provide examples of Rio Tinto's experiences and illustrate why agreements matter at the local level. The How to guide is supported by a Background reader for people who are seeking further context on the topic of agreements. The Background reader, authored by CSRM, offers an international perspective on agreements and their history in the mining sector.

By making this accumulated experience publicly available, the intent is to provide an informative resource on this topic for others to access, including the wider mining industry, communities and governments. Rio Tinto hopes this will contribute to lifting both its own and the industry's performance in this area.

### **2.1 Why are community agreements important to Rio Tinto?**

Rio Tinto's activities impact on land. Wherever possible the company works to negotiate and implement agreements that respect people's rights or connections to that land, minimise adverse impacts and maximise local benefits. Making a community agreement is one of the most effective ways to secure access to land and secure community support. Agreements formalise the relationship between a project or operation as a new user of the land and those with existing connections to that land. They also provide a means to legally document commitments between parties and codify the behaviours that are expected from Rio Tinto personnel who work on that land.

Community agreements are commercial arrangements. They contain mutual obligations that are both enforceable and auditable. Agreements help to reduce potential negative effects of the project on communities and their environment. Getting agreement on impact mitigation, benefits, opportunities and obligations can reduce the risk of conflict or legal action that could delay a project, impact or halt an operation, or damage Rio Tinto's reputation.

Agreements are negotiated in circumstances where there is a legal obligation or where Rio Tinto policies and standards require them. Where there is no such legal obligation to reach an agreement, securing access to land on or adjacent to Indigenous lands can be made easier by forming an agreement. Agreements can also enable Rio Tinto to meet its commitments as outlined in its core values and global code of business conduct, *The way we work*.

## 2.2 Rio Tinto policies

*The way we work* states that:

*"We develop strong and lasting relationships with our local and regional host communities based on respect, a desire to learn and mutual benefit.*

- *Our relationships with local and regional communities are a key part of our projects and operations. We recognise and respect the cultures, lifestyles and heritage of our neighbours.*
- *We respect the diversity of Indigenous peoples and acknowledge their unique and important interests in lands, waters and environment as well as their history and traditions.*
- *We work with communities in creating mutually beneficial agreements; we share and explore our plans with them in a format and language they understand.*
- *We encourage local communities to participate in the economic activity our operations create. We support regional and community based projects that contribute to sustainable and independent development."*

Rio Tinto's work with local communities and Indigenous peoples must embody these core principles. This guide describes an approach to community agreements that is consistent with them. It also references Rio Tinto's Communities and Social Performance standard and guidance notes.

Rio Tinto has made formal policy commitments to sustainable development and to Indigenous peoples, diversity and human rights. These commitments oblige Rio Tinto to work closely with the members of affected communities in the locations where it operates; acknowledge their historical connections to land and waters; and commit the business to listening to Indigenous peoples to find mutually beneficial outcomes. These principles formed the basis of early agreement-making within Rio Tinto. The aim is to ensure broad-based benefit from these projects and operations. This includes leaving a positive legacy after a project has ended or an operation has closed. Community agreements are an effective way of reaching agreement on what this means in a local context.

### **Box 1: Rio Tinto's position on Indigenous communities, the UN Declaration on the Rights of Indigenous Peoples and Free, Prior, and Informed Consent**

Rio Tinto acknowledges and respects Indigenous and local communities' connections to lands and waters. We will work in a spirit of reciprocity, transparency and recognition of rights and cultures. We recognise that every Indigenous community is unique. Accordingly, we seek to reach a specific agreement with each community on how it wants to engage with us in the development and performance of our operations, including how each community may express its support and concerns regarding our activities.

We seek broad-based community support based on the following principles:

- mutually informed understanding of interests and activities;
- deep respect for social values and cultural property;
- good faith, mutual respect and long-term commitment;
- access to reliable independent advice;
- comprehensive information on proposed activities, including potential negative impacts and positive opportunities;
- community participation in social and environmental assessments;

- community participation in any resettlement planning and in elements of project design that may affect communities; and
- active support for local economic opportunity and participation.

The 2008 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) primarily concerns the relationship between Indigenous peoples and sovereign governments. Rio Tinto seeks to operate in a manner that is consistent with the UNDRIP. In particular, we strive to achieve the Free, Prior, and Informed Consent of affected Indigenous communities as defined in the 2012 International Finance Corporation Performance Standard 7 and supporting guidance. We are obliged to respect the law of the countries in which we operate, hence we will also seek consent as defined in relevant jurisdictions and ensure agreement-making processes are consistent with such definitions.

Neither Rio Tinto policy nor International Finance Corporation Performance Standard 7 intends that the implementation of Free, Prior, and Informed Consent contradicts the right of sovereign governments to make decisions on resource exploitation.

**Table 1: Categories of mine development agreements used in Rio Tinto**

Sub categories	Description
ILUA	Indigenous land use agreement (specific to Australia)
Comprehensive agreement	An agreement that is comprehensive in scale and scope. This category can also refer to the latest agreement in the process towards establishing a comprehensive mine development agreement. In this case the agreement would also be designated as a process agreement. It may also cover multiple mines and/or projects in one area (eg the Pilbara Participation Agreements).
Partial agreement	A process or framework agreement sets out the process to reach a comprehensive agreement.
	A project or mining agreement is less comprehensive, being limited in scope to a specific project or mine.
	A project or mining process agreement relates to the process of establishing a limited agreement at one specific project or mine.
Subject matter agreements	Some agreements may relate to specific requirements. In this case they will be designated according to the subject matter (eg cultural heritage agreements).

*5 Agreements, Treaties and Negotiated Settlements Project.  
<http://www.atns.net.au/page.asp?PageID=1#can>*

Historically, Indigenous and other land-connected peoples have often suffered detrimental impacts from mining on the lands in which they have interests or where they may or may not hold recognised title in their jurisdiction. Recognising this, Rio Tinto is committed to working in a positive manner with Indigenous and other land-connected peoples. This is evident in the company's position on Free, Prior, and Informed Consent (FPIC) (see Box 1). For more information on relevant Rio Tinto policies, guidance and international standards refer to Appendix A.

### 2.3 Types of community agreements

There are many forms of agreements. The type of agreement to be developed depends on the wants and needs of both the community and the company, as well as the legal context and obligations. To date within Rio Tinto, there are four main types:

- standalone cultural heritage agreements;
- land access (for exploration) agreements;
- Indigenous partnership agreements; and
- mine development agreements.

The Background reader has more detail about different types of agreements. There are a number of sub-categories of mine development agreements as outlined in Table 1.

Some types of agreements are specific to particular jurisdictions. For details of various types of agreements and treaties in different jurisdictions – Australia, Canada, New Zealand and South Africa – see the Agreements, Treaties and Negotiated Settlements website<sup>5</sup>, a University of Melbourne initiative supported by the Australian Research Council and Rio Tinto.

Being clear about the purpose and function of agreements will help develop appropriate content. Some fundamental matters to consider are:

- Who will be the parties to the agreement?
- What legal instrument will underpin the agreement?
- What stage(s) of a project or operation does the agreement need to cover?

The characteristics of successful agreements are varied. Some are primarily directed to achieving outcomes. However, experienced practitioners stress the importance of other values, as listed in Box 2.

### 2.4 The dimensions of agreement processes

All actions related to an agreement and its implementation are termed 'agreement processes'. This includes consultation, negotiation, ratification, implementation, monitoring, evaluation and review. In this guide, the term 'agreement-making' is often used instead of 'negotiation' to emphasise the difference between early agreement processes (characterised by two-way interactions) and commercial negotiations (which tend to be more transactional and adversarial).

Comprehensive agreements are multi-dimensional, have many interrelated parts and essentially form a contract. They can be developed at any stage of project or operational life and are usually implemented progressively. As a result, there is no single process to follow. Each agreement process and outcome must reflect the interests of parties to the agreement and the local context.

### **Box 2: A successful agreement**

- Is perceived by all parties as voluntary and not imposed on the parties.
- Involves all of the people who can demonstrate themselves to be the land-connected peoples.
- Has been negotiated by legitimate representatives.
- Sustains implementation and performance over time, even when there are changes in company personnel and leadership.
- Acknowledges potential price fluctuations of commodities over the life of the agreement.
- Stands the test of time and is reviewed and amended as necessary, with the full support of all parties.
- Is able to be changed and improved (if all parties agree) when things are not working and supports joint adaptation and problem-solving when challenges arise.
- Has clear commitments and benefits for both parties with a focus on long-term goals rather than short-term gains.

- Delivers on agreed commitments and builds in incentives for all parties to ensure that agreement commitments are upheld.
- Involves agreement-making processes, content and implementation approaches that are consistent with human rights principles.
- Proactively considers future generations.
- Is based on a genuine relationship and mutual trust between parties so that the agreement implementation is driven by its spirit and intent, not the legal references.
- Provides flexible frameworks for working together rather than rigid formulas for individual action.
- Acknowledges the importance of cultural heritage and an understanding of legacy and historical issues and their effect on religious responsibilities, spirituality and culture.
- Benefits the community as a whole rather than particular individuals.

The ATNS website provides information on various types of agreements and treaties in different jurisdictions.

The ATNS website provides information on various types of agreements and treaties in different jurisdictions.

**atns** agreements, treaties and negotiated settlements project

HOME ABOUT PROJECTS AGREEMENT MAKING DATABASE PUBLICATIONS EVENTS GLOSSARY LINKS CONTACT US

**ATNS DATABASE**

The Agreements, Treaties and Negotiated Settlements database (ATNS) is an online gateway to a wealth of information relating to agreements between Indigenous people and others in Australia and overseas.

This database offers a range of features including background information on each agreement; links to related agreements, organisations, signatures and events; a glossary of relevant terminology as well as direct access to published and on-line resources.

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3/06/2015 [New publication: From Conflict to Cooperation by Professor Mandie Langton](#)

3/04/2015 [Mongolian agreement making: Oyu Tolgoi signs Cooperation Agreement with Umnugobi communities](#)

3/03/2015 [Step forward in pipeline project for First Nations in British Columbia](#)

**EVENTS**

**A Symposium on Indigenous Peoples, Economic Empowerment and Agreements with Extractive Industries**

## 2.5 Framework for the How to guide

While there is no single process, some common dimensions critical to agreement-making are outlined below. This framework provides the structure for the remainder of the How to guide (see also Figure 1).

### Inclusive engagement

- Ensure that all relevant community members are provided with an opportunity to be involved in agreement processes and consulted on impacts and opportunities.
- Undertake broad-based internal engagement about the importance and obligations of the agreement, and ensure its implementation is understood across the business.
- Use the agreement to maximise local involvement through opportunities such as participatory assessments and monitoring, employment and procurement.
- Use the agreement as a mechanism for broad-based engagement with men and women from local communities. Agreements should complement other engagement processes.
- Enable the community to engage on an equal footing with the company by providing access to resources and support where required.

### Know and understand

- Establish a ‘fit-for-purpose’ knowledge base to help shape mutually beneficial agreements. This includes understanding the legal framework and the role of government.
- Identify and understand the social, economic, historical, heritage, gender and other characteristics of affected communities.
- Identify and understand the decision-making process, authority and governance structures of the relevant community groups.
- Identify and understand specific potential impacts on land-connected peoples.
- Identify and understand the full suite of approvals and permits required from all levels of government and the full range of expectations that affected communities may have.
- Understand the full range of agreement options by listening to community members and jointly engaging agreements experts and other potential contributors as needed.

### Plan and implement

- Develop an agreement-making strategy appropriate to the operational and community context that aligns with the agreement parties’ shared vision of the future.
- Build implementation planning into every step of the agreement process and allow plenty of time for each step.
- Align all relevant internal control systems and operational planning with the spirit of the agreement goals. Human resources policies, health and safety procedures, environmental management programmes, procurement policies and practice, community investment projects, and communities and social performance plans should all reflect the intent of the agreement.
- Contribute to the socioeconomic development of the region by effectively implementing relevant agreement commitments.

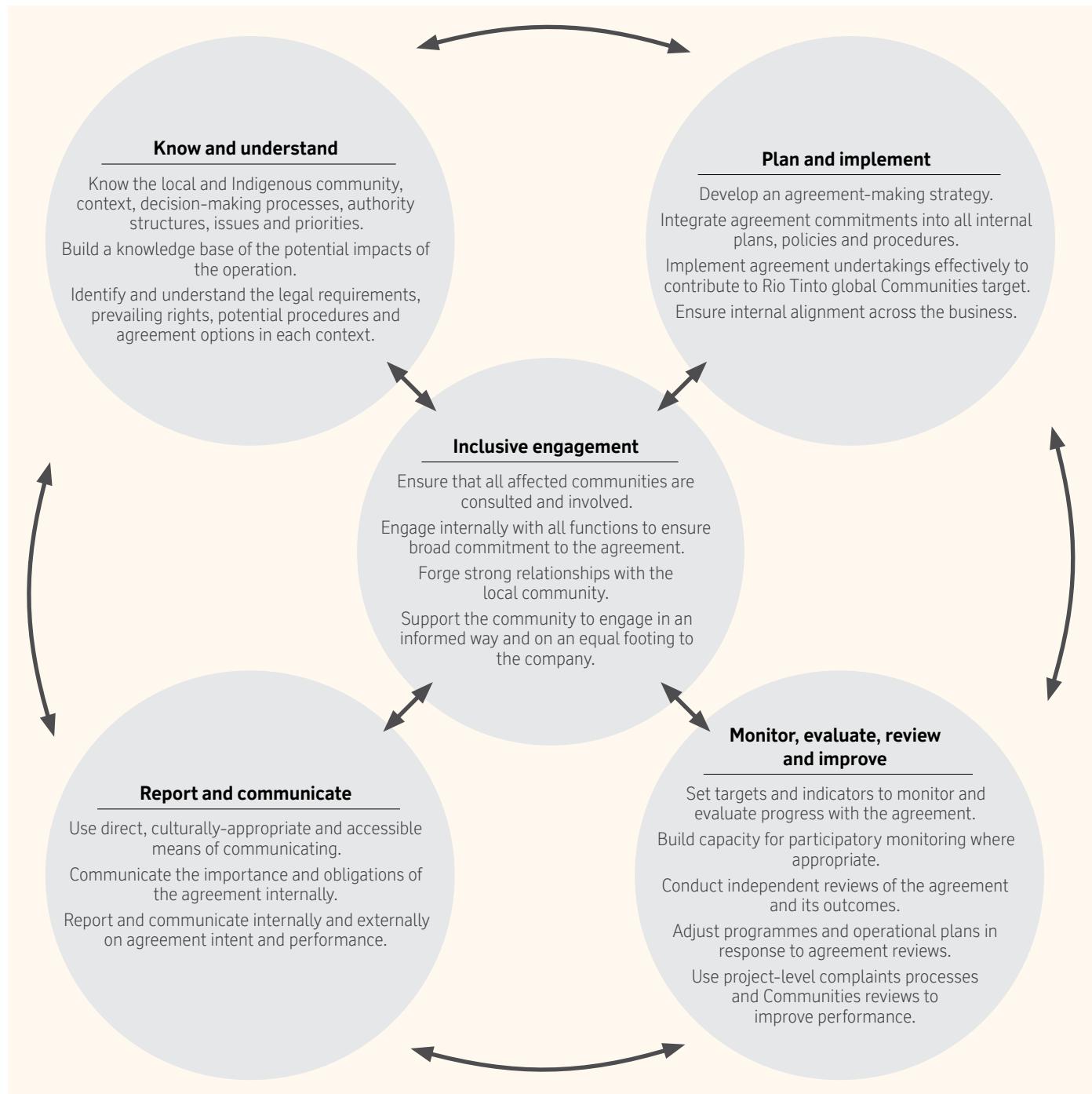
### Monitor, evaluate, review and improve

- Set targets and indicators to monitor progress towards achieving specific obligations and overall performance addressing the spirit and intent of the agreement.
- Develop participatory monitoring and evaluation processes that involve Rio Tinto personnel and representatives of the community.
- Use various tools, including social risk assessments, Communities reviews and complaints processes to continually improve performance.
- Use independent review mechanisms to agree and implement improvements to agreements and their outcomes.

### Report and communicate

- Communicate the importance and obligations of the agreement internally, and share and integrate information about the agreement across all operational functions.
- Communicate with community members and Rio Tinto employees and contractors using culturally appropriate and accessible means.
- Report on the operation’s agreement performance both internally and publicly through sustainable development reports and various other channels.
- Publish the agreement provisions and outcomes, while respecting intellectual property, privacy, commercial and other confidentiality requirements as agreed by all parties.

**Figure 1: Five dimensions of agreement processes**



### 3. Inclusive engagement

“Brendan Hammond (former managing director, Argyle Diamond Mine) demanded his people listen to us or they could pack their bags. We weren’t backward in coming forward either. The Relationship Committee is the basis. We know our relationship is a business. If Argyle is good, we benefit. If Argyle has a hard time, we have a hard time. Argyle is open; they let everyone know how it (the business of mining) is.”

*Ted Hall, Miriuwung (2007)*

For Rio Tinto, engagement means the active exchange of information, listening to each party’s concerns, suggestions and aspirations, and taking them into account. These processes are based on the international human rights standards to which Rio Tinto is committed.

Rio Tinto’s Communities and Social Performance (CSP) standard requires projects and operations to develop an agreed engagement plan appropriate to the nature, context and diversity of the host community and the business. Rio Tinto is a member of the International Council on Mining and Metals (ICMM) which encourages a proactive approach to engagement with Indigenous peoples (see Box 3).

#### **Box 3: ICMM Position Statement on Mining and Indigenous Peoples. Commitment 3**

Engaging and consulting with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle.

Engagement will be based on honest and open provision of information, and in a form that is accessible to Indigenous Peoples. Engagement will begin at the earliest possible stage of potential mining activities, prior to substantive on-the-ground exploration. Engagement, wherever possible, will be undertaken through traditional authorities within communities and with respect for traditional decision-making structures and processes.

*Source: ICMM (2010) Good practice guide: Indigenous peoples and mining. p. 16.*

When making agreements, engagement should start early in a project’s lifecycle. It should continue throughout the various stages: exploration and evaluation, project commissioning, mining and processing, post-production and closure. Regular and inclusive engagement helps the business respond to changing circumstances and community concerns. It ensures that the business and affected communities remain informed throughout the life of the agreement. Clear, regular engagement with the whole of the community helps Rio Tinto avoid misunderstanding and conflict, and ensure commitments are met.

#### **3.1 Principles of inclusive engagement**

Where agreements are required or sought, good engagement is essential for timely negotiation and settlement. Engagement should be directed to understanding, implementing and monitoring the agreement, and communicating agreement-related activities, concerns and achievements.

Engagement is more than communication and consultation; it’s the active consideration of other perspectives. This means responding to the concerns of individuals (both women and men, older and younger generations), organisations and groups affected by business activities. This does not always mean agreeing to everything, but it should involve active listening, consideration, responses and possibly actions. Such actions can involve parties actively modifying their proposed activity to take into account other parties’ perspectives or preferences, or making appropriate adjustments to reduce barriers to participation. Engagement is part of Rio Tinto’s preferred approach to Communities and Social Performance (see Figure 2). Engaging inclusively requires working from a verifiable knowledge base and engaging with affected parties to deliver programmes that reflect local community priorities.



The Argyle Relationship Committee meeting in 2015.

**Figure 2: Rio Tinto's approach to working with communities**



#### **Recognising diversity and including marginalised groups**

Acknowledging and including diversity is vital in engagement processes. Engagement, when inclusive, seeks to recognise, value and make use of diverse perspectives in shaping a mutually beneficial agreement. It means talking with people who might be ignored, discriminated against or marginalised, including women, minority groups, young people and elders. Considering views from different parts of a community allows for a greater variety of opinions to inform agreement processes.

Broad engagement takes into consideration that not all individuals, households and groups have the same access to resources or the same authority in community decision-making processes. Factors

that may influence the ability to participate include gender, ethnicity, class, caste, social status, age, education level, relative material wealth and income level. Engagement processes should work across such categories and include groups that would otherwise be marginalised in decision-making processes. Using broad and direct engagement strategies is important. For example, public events provide an opportunity to gain broad-based understanding and support for an agreement, and recognise that a range of concerns can exist within communities.

Tailoring engagement processes for different groups can reduce the risk of reinforcing existing barriers to participation, or creating new ones. Working with other parties on the agreement, Rio Tinto aims to explore various ways to improve opportunities for

6 Fisher, Ury and Patton (2011) *Getting to yes: Negotiating an agreement without giving in.* 3rd Edition, p. 86.

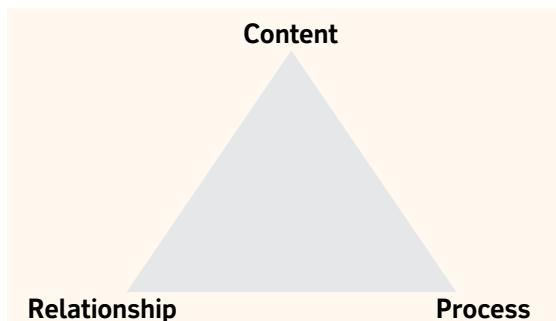
different community groups to engage with agreement processes. This might include, for example, holding multiple and diverse forums, using participatory approaches and making information available through diverse media and in multiple languages, where necessary. Meetings can take many forms, as can indications of agreement, so it is best to remain open to advice about what is appropriate to the context. Some people can feel excluded by the use of legal and technical jargon, an unfamiliar meeting venue or meetings that conflict with other commitments.

Rio Tinto's Community consultation and engagement guidance provides advice on good practice in engaging with local people. It explains that community consultation should encompass community issues and priorities as well as the concerns and needs of the business. See *Why gender matters* for a list of activities that could increase women's participation as part of an overall agreement engagement strategy.

### **Engagement for agreements – a three-part process**

Agreements require constant attention to three equally important issues: process, relationship and content (see Figure 3). One of the most common mistakes in developing community agreements occurs when parties rush to negotiate content and place too little emphasis on relationships and good process. Processes for negotiating and implementing an agreement should ensure that community members can participate in meaningful ways at appropriate stages. Early, inclusive engagement focuses on strengthening the relationship between the parties. Inclusive engagement underpins sound relationships and good process, which are just as vital as content. See sections 4 and 5 of this guide for discussion on what should go into planning and implementing the content of agreements.

**Figure 3: Three equally important parts of a community agreement**



### **3.2 Relationship-building throughout the life of the agreement**

Agreement processes and the content of agreements should be founded on robust relationships developed through sustained engagement. It's important to continue to engage once an agreement is signed in order to support implementation and a mature relationship.

The best agreements enhance an existing relationship by formalising and dignifying it. Where there are good working relationships, agreement-making will be more successful for all parties. In this sort of working relationship:

- There is mutual understanding between parties.
- Each party is more able to influence the other.
- Emotions are acknowledged and people are treated with respect even when they disagree.
- There is clear, two-way communication with good listening.
- Problems are dealt with directly, not ignored and not by demanding or offering concessions on substance.<sup>6</sup>

Case study 1 shows how face-to-face engagement at Kitimat (Canada) built trust between Rio Tinto's Aluminium product group and neighbouring First Nations communities, the Haisla and Cheslatta. It illustrates that work must go into ensuring that each party has equal footing since the power, resources and experience of the parties involved (companies, communities and governments) varied widely.

The disparity between company and community power may relate to differences in institutional strength, leadership skills and history. There is often a marked difference in the human, financial and information resources at the disposal of different groups. It's in the best interest of the business to ensure that the community enters into negotiations in a state of readiness. This may require adjustment to negotiation timelines. The business may consider providing support for capacity building, which might be provided through a mutually agreed third-party.

Box 4 outlines agreement-related processes at Rio Tinto's Argyle Diamond Mine (Australia) that helped to build mutual relationships. These relationships had to make sense to both Rio Tinto and the Traditional Owners. Refer to Box 7 and Case study 2 for more details on agreement processes at Argyle.

<sup>7</sup> *The Harvard Project on American Indian Economic Development (2014) On improving tribal-corporate relations in the mining sector, pp. 50-54.*

Parties will generally find it difficult to agree on content and implement agreements if they have a fragile relationship and lack trust. Activities that can erode trust include:

- comprehension failure;
- cultural misunderstanding;
- changes in personnel;
- legacy issues; and
- different values and time horizons.<sup>7</sup>

Some of the strongest relationships emerge when more informal, personal bonds are forged alongside formal agreements. By making and taking opportunities to interact and share, goodwill and genuine mutual interest may develop. This is not something that can be prescribed or forced.

In parallel to building relationships with the business, local communities will often develop their own internal processes for agreement-making and implementation. This is likely where communities are developing new institutions to fulfil their agreement-related roles. Practitioners should allow time and space for these parallel processes to develop.

#### **Box 4: Engagement at Argyle Diamond Mine**

After almost two decades of difficult relationships between Argyle and the Traditional Owners of the mine lease area, Rio Tinto resolved to improve relationships. Argyle committed to a comprehensive process of engagement with Traditional Owners. After three years this resulted in the Argyle Participation Agreement, signed in 2004.

Many of the early meetings between Rio Tinto's representatives and the Traditional Owners had no formal agenda. In these meetings, Argyle personnel made a point of listening and acknowledging mistakes in the past. They came to understand that the relationship was regarded by local Aboriginal people as unsatisfactory because Argyle was not meeting its perceived obligations in the traditional exchange process (see Box 14). A more harmonious relationship needed to fit within that cultural framework.

There was also an imbalance in the different legal, financial and technical powers of the company and the community, including the company's control of financial resources for negotiation. Over time this

### **3.3 Attending to processes**

While it seems paradoxical, taking the time to jointly develop a good process will help diminish delays in reaching agreement on content. Parties are less likely to agree on content in the absence of a good process.

A good process ensures that the community agreement reflects a clear, mutually understood meeting of interests – of the business and the community. For these reasons, the process for reaching a community agreement needs to be well planned, resourced, implemented and documented. The process will vary according to the context but it should be designed and agreed as part of agreement preparation and the initial engagement. Table 2 describes factors that support good engagement processes.

imbalance was mitigated by meeting in settings and discussing subjects chosen by the Traditional Owners. However, the imbalance of financial resources remained a source of tension.

Community members undertook regular site tours to better understand the business and operations. A number of visual aids were used to explain the impact of the mining activity on the surrounding area, and interpreters were used to assist everyone in participating in the negotiations. Ultimately this carried through to having plain language 'explanation boxes' included in the agreement document. In return, the Traditional Owners provided the company with information about their customs, and performed ceremonies to ensure that the mining operation could be conducted safely and free from interruption by ancestral spirits. This enabled the company to demonstrate culturally appropriate behaviour and provided the basis of a reciprocal relationship.

*Source: Adapted from ICMM (2010) Good practice guide: Indigenous peoples and mining. p. 26.*

**Table 2: Factors that support good engagement**

Activities that contribute to positive engagement	Issues to take into account
Overcoming logistical constraints	<ul style="list-style-type: none"> <li>– Distance and remoteness</li> <li>– Available communication channels</li> <li>– Workloads / competing projects for both company and community</li> <li>– Time availability</li> <li>– Project timelines</li> <li>– Funding for engagement activities</li> </ul>
Interacting proactively, early and often	<ul style="list-style-type: none"> <li>– Levels of mutual understanding and trust</li> <li>– Acting to build a trusting relationship</li> <li>– Tone set for the relationship</li> <li>– Engaging before non-negotiable positions form</li> <li>– Preventing problems in advance</li> <li>– Opportunities for informal and social interactions</li> <li>– Involvement in community activities to personalise the organisational relationship</li> <li>– Delivering on commitments</li> </ul>
Listening actively to community views	<ul style="list-style-type: none"> <li>– Community alternatives and aspirations</li> <li>– Likely issues and risks</li> <li>– Opportunities for collaborative problem-solving</li> </ul>
Communicating openly about the company and proposals	<ul style="list-style-type: none"> <li>– Appropriate company information and perspectives to share</li> <li>– Dealing with uncertainties</li> <li>– Opportunities for questions, tours and informative demonstrations</li> <li>– Don't appease or promise what can't be delivered</li> </ul>
Providing adequate resources for engagement activities	<ul style="list-style-type: none"> <li>– Time-consuming participatory processes</li> <li>– Equalising resources of all parties</li> <li>– Skills and capabilities of personnel</li> <li>– Providing access to training and independent advice</li> </ul>
Investing in relationships for the long term	<ul style="list-style-type: none"> <li>– Developing capacity and capability of company personnel and community parties</li> <li>– Measures to provide continuity through personnel changes</li> <li>– Maintaining consistency in interactions</li> </ul>
Integrating engagement into the business plans of all functions and units	<ul style="list-style-type: none"> <li>– Allocating responsibilities and a budget</li> <li>– Defining objectives and timetables</li> <li>– Involving and aligning all Rio Tinto functions, not just the Communities and Social Performance team</li> </ul>
Respecting cultural protocols	<ul style="list-style-type: none"> <li>– Local advice on community engagement preferences</li> <li>– Unconventional engagement methods with cultural relevance</li> <li>– Adjusting timelines to accommodate cultural requirements</li> <li>– Traditional leadership and decision-making customs</li> </ul>
Adopting multiple strategies to hear the full diversity of views and interests, including minority views	<ul style="list-style-type: none"> <li>– Diverse character of the community</li> <li>– Groups who may traditionally have been excluded from some decision-making</li> <li>– Groups whose decision-making power is not exercised in public forums, especially when some others (eg non-Indigenous people or men) are present</li> </ul>

<sup>8</sup> Joint Working Group on Indigenous Land Settlements (2009) *Guidelines for best practice flexible and sustainable agreement making*. AIATSIS, Canberra.

<sup>9</sup> This is discussed in Senior (1998) *The Yandicoogina process: A model for negotiating land use agreements*. Regional Agreements Paper no. 6, AIATSIS, Canberra.

### Stages in negotiation

Agreement-making needs thorough preparation to progress through various steps. These matters are covered in more detail in section 4.

Practitioners should work closely with agreement negotiators in early engagement processes. See Box 5 for a list of important matters to focus on. Early engagement on these issues will help reach a settlement.

These processes can be time-consuming. This is one of the reasons that it can take years to conclude a community agreement, and interim agreements may be necessary to meet project timelines (see section 3.7).

During the substantive phase of agreement-making, parties need to ensure the agreement addresses key issues identified during early engagement. They should remain flexible about the details of concessions and benefits, and look for practical solutions.<sup>8</sup>

Agreement-making conducted in good faith and prepared thoroughly will provide the best prospect for securing land access for the project and delivering substantial and sustainable benefits for the host community, particularly in the case of land-connected or Indigenous peoples.<sup>9</sup>

#### **Box 5: Matters to focus on during early engagement over an agreement**

- Identifying parties to the agreement on the basis of their direct interests in the project or operational area and their legal status
- Understanding the role of government in the agreement process; and their expectations of companies
- Engaging broadly and proactively with the full diversity of community groups
- Settling on the agreed parties, representatives of the parties and observers
- Undertaking internal preparations, including risk assessments
- Aligning internal functions by communicating the company's vision, priorities and internal standards for its relationships with communities
- Establishing a negotiating process – sometimes set out in a memorandum of understanding – and other key process matters
- Agreeing on conditions and arrangements where the company agrees to resource the costs of negotiating, especially for disadvantaged parties
- Outlining the agreement drafting process
- Clarifying the communication process so that the members of the groups are fully aware of the terms being negotiated and kept up-to-date with progress
- Setting up a public notification of intent to reach an agreement so that grievances are considered before settlement
- Sharing information to enable genuine informed participation
- Planning an appropriate settlement ceremony

10 IFC (2007)

*Stakeholder engagement: A good practice handbook for companies doing business in emerging markets; The World Bank (2012) Mining community development agreements source book.*

11 Rio Tinto's Aluminium business started as Comalco (Commonwealth Aluminium Pty Ltd) in Australia in the mid 1950s. Comalco constructed Weipa in the 1960s. Rio Tinto bought out the minority shareholders in 2000 and Comalco became a fully owned subsidiary. The company was renamed Rio Tinto Aluminium (RTA) in late 2006 prior to Rio Tinto's acquisition of Alcan Inc. in 2007 and is now known as Rio Tinto's Aluminium product group.

### 3.4 Protocols for good-faith negotiations

Conducting community agreements in good faith is central to Rio Tinto's approach to agreement-making. In Australia, this is also a legal requirement (see Box 6).

Some additional principles of good-faith negotiation proposed by the International Finance Corporation and endorsed by the World Bank<sup>10</sup> are:

- involvement of legitimate representatives;
- willing engagement free from coercion or intimidation;
- joint exploration of key issues of importance;
- use of participatory approaches;
- accessibility in terms of timing and location;
- provision of sufficient time for decision-making;
- mutual respect and sensitivity to cultural and other differences;
- flexibility, consideration of multiple options, and willingness to compromise;
- documented outcomes; and
- equal access to the best available information.

### Importance of negotiating on principles

An important shift for Rio Tinto came when 'interest-based negotiation' (also referred to as 'negotiating on principles') replaced adversarial 'position-bargaining' approaches. The differences are outlined in Table 3.

Negotiation of the Western Cape Communities Coexistence Agreement (WCCA) was protracted, partly because the business unit, Comalco<sup>11</sup>, initially adopted a hard bargaining approach. After three years of failure to reach agreement, Comalco realised the Traditional Owners would not just capitulate and the negotiation approach and negotiators were changed. This was one of many learnings that gradually improved relationships over the years and led to the WCCA. This demonstrates the value of an approach that focuses on problem-solving and the interests of all parties rather than bargaining.

#### Box 6: Obligations associated with good-faith negotiations

In Australia, the courts have identified 18 criteria that indicate whether or not the parties have conducted themselves in good faith. The criteria can be summed up as a series of obligations:

- An obligation to communicate with other parties within a reasonable time and to respond to communication received within a reasonable time
- An obligation to make proposals to the other parties with a view to achieving agreement and to respond either by making counter-proposals or by way of comment or suggestion about the original proposal

- An expectation that parties will make inquiries of other parties if there is insufficient information available to make an informed choice about how to proceed in negotiations and an obligation on those other parties to provide relevant information within a reasonable time
- An obligation to seek from other parties appropriate commitments to the process of negotiation or in relation to the subject matter of negotiation and a reciprocal obligation to make either appropriate commitments to process, or appropriate concessions

Source: National Native Title Tribunal of Australia (2003)  
<http://www.austlii.edu.au/au/cases/cth/NNTTA/2000/290.html>

12 Fisher, Ury and Patton (2011) *Getting to yes: Negotiating an agreement without giving in.* 3rd Edition, pp. 11-12.

**Table 3: Alternative approaches to negotiation<sup>12</sup>**

Soft positional bargaining	Hard positional bargaining	Negotiating on principles
Participants are friends	Participants are adversaries	Participants are problem-solvers
The goal is agreement	The goal is victory	The goal is a wise outcome reached efficiently and amicably
Make concessions to cultivate the relationship	Demand concessions as a condition of the relationship	Separate the problem from the people
Be soft on the people and the problem	Be hard on the people and the problem	Be soft on the people and hard on the problem
Trust others	Distrust others	Earn the trust of others
Change your position easily	Dig in to your position	Focus on interests, not positions
Make offers	Make threats	Explore (multiple) interests
Disclose your bottom line	Mislead as to your bottom line	Avoid having a bottom line
Accept one-sided losses to reach an agreement	Demand one-sided gains as the price of the agreement	Invent options for mutual gain
Search for the single answer: one they will accept	Search for the single answer: the one you will accept	Develop multiple options to choose from: decide later
Insist on agreement	Insist on your position	Insist on using objective criteria
Try to avoid a contest of wills	Try to win a contest of wills	Try to reach a result based on standards independent of will
Yield to pressure	Apply pressure	Reason and be open to reasons: yield to principle not pressure

It's important to understand appropriate ways to acknowledge and express commitment to non-negotiable principles, policies or standards of the parties – notably in Rio Tinto's case, *The way we work*. Principles should be kept to a minimum and be high level so they are not mistaken for an articulation of non-negotiable positions.

Internal legal and financial experts should advise on and support the agreement-making processes. They need to be included early in the process so that they have sufficient background and context, and can develop a level of comfort with the approach being taken. Negotiators should ensure that the negotiation focuses on principles rather than engage in hard bargaining and the need for balanced outcomes. When checking how to incorporate community aspirations in acceptable ways ask, "how can we?" rather than, "can we?" This maintains the spirit of interest-based, respectful and good-faith negotiations.

### Resourcing engagement

The power, information and resources between companies and communities should be balanced as much as possible. Sound knowledge and information for communities can:

- Facilitate developing an agenda for agreement negotiation.
- Build understanding and trusting relationships between parties.
- Assist in the smooth conduct of the negotiations and informed decision-making.

In entering into an agreement-making process, information that is suitable for sharing with other parties must be clarified (see section 4.2). A transparent, two-way flow of information must start from the outset (see section 7). Failure to disclose information that is key to the agreement can cause major tensions.

13 Brereton, Owen and Kim (2011)  
*Good practice notes: Community development agreements. World Bank extractive industries sourcebook.*

To enable informed participation, the parties will need resources to participate, particularly for vulnerable groups. In Canada, funding in certain provinces is provided by Government. In some situations, Rio Tinto has provided funding for groups to secure their own independent legal representation and other professional advice, but the parties need explicit understanding from the outset about the nature and extent of such support. If any funding for negotiations is to be provided by Rio Tinto this should be outlined through a formal and transparent mechanism, such as a memorandum of understanding, which should:

- Give the community some security of funding.
- Outline agreed milestones and protocols to ensure that negotiations progress in a timely manner.
- Balance the need for efficiency and accountability with the flexibility to adapt to changing or unexpected circumstances.
- Include explicit agreements about the circumstances and processes that can lead to modification of funding arrangements.

Under-resourced processes or ad hoc changes to support for community participation can impede the ability of communities to engage among themselves or with the company. This can quickly derail an agreement.

### **When negotiations falter from lack of engagement**

It's unlikely that negotiations will proceed smoothly at all times. When negotiations falter, it's important to encourage parties 'back into the room' and to maintain dialogue about agreement options. The process should focus on maintaining dialogue and engagement, not on criticising and adjudicating. Explore constructive ways of breaking the impasse. Understanding the root cause of emotional responses and disagreements will help keep engagement efforts on track. Questions to ask when facing a stalemate or disagreement include:

- What is causing concern – the personalities, the process or the proposition?
- Is there additional relevant information to share?
- Is there a misunderstanding between parties?
- Are the options too limited?
- What is the main issue preventing them from agreeing?

Misunderstanding is a common cause of negotiations breaking down. This may occur due to differences of viewpoint, background or cultures, as well as many other factors. These make it possible not to 'hear' what others intend to say. In these situations, maintain a flexible 'world view' and maximise incentives to reach agreement.

When relationships become adversarial, it's counter-productive to be defensive or to retaliate. Instead, respond with questions and efforts to increase understanding of others' interests. Demonstrating a willingness to listen, to genuinely understand others' concerns and to openly consider alternative options will reopen lines of communication. Changing the meeting location or venue, or adjusting the mode of communication, can sometimes help shift the conversation.

Where there has been limited or no engagement with the community, it can be particularly difficult to begin agreement processes. In these situations, it is preferable that relationships be built before initiating agreement-making. Argyle and Weipa (see Case study 2) illustrate cases where relationships had broken down between some parties and were not established with others. These examples illustrate the value of developing greater knowledge of the community with the assistance of ethnographic expertise.

## **3.5 Representation and inclusion in agreement processes**

### **Identifying communities to engage with**

It's critical to identify who should be party to the agreement and determine how they are included and represented. Identifying the primary parties requires an understanding of the local community and context. In some cases this can be difficult and will require specialised knowledge (see section 4). No matter how generous the terms of an agreement may appear, they are unlikely to prove acceptable if all appropriate people are not included in agreement-making processes.

Agreement-making applies to all situations where businesses and communities agree to formalise consents, commitments and mutual obligations with each other. The resulting agreements should prioritise the interests of those whose livelihoods, assets, culture or wellbeing is connected to an area that will be impacted. This has been the approach taken with land-connected Aboriginal communities in Australia and Canada by Rio Tinto.<sup>13</sup> In some cases, land-connected peoples may now live a long way from the project or operation, so specific measures are required to include them in the process.

Requiring a formal or legal claim or title to land may exclude some people from being party to the agreement. In many societies, land ownership resides only with men. In India, landless farm labourers and lower castes may not be recognised as impacted since they do not have formalised legal land titles. A history of forced relocation may have also disrupted some links to customary land and other cultural practices. Agreement-makers need to consider all people with land-use interests in the impact area, and recognise the diverse socioeconomic and socio-political situations of these different groups.

For Rio Tinto, identifying relevant parties for agreement-making is more than a social mapping exercise. It involves engaging with land-connected groups and their chosen representatives.

These include:

- Indigenous peoples with customary land connections in the area;
- Indigenous peoples with historic connections to the area (eg through relocation);
- people with contemporary connections to the area (eg through marriage, purchase of property and farming);
- all land owners and claimants, especially those who are likely to be affected by activities;

- those whose land rights, interests and formal claims may be impacted;
- those whose culturally, ceremonially or spiritually significant resources will be affected; and
- authorities (both traditional and modern) with responsibilities for addressing impacts of the operation/project or for representing valid community groups.

Indigenous communities (like all communities) are not uniform and their diversity poses a challenge for agreement processes. Box 7 illustrates how considerable community diversity can be taken into account when identifying who to engage about an agreement.

#### **Box 7: Identifying parties to an agreement in diverse communities**

Like many Rio Tinto sites, Argyle Diamond Mine is in a region with considerable diversity in Aboriginal groups. In the Kimberley region there are:

- 11,500 Aboriginal people making up 40 per cent of the total population;
- 198 Aboriginal communities, five of them in the immediate vicinity of the mine site:
  - Glen Hill (Mandangala)
  - Turkey Creek (Warmun)
  - Doon Doon (Woolah)
  - Bow River (Juwulinypyany)
  - Crocodile Hole (Rugan)
- 34 Aboriginal language groups;
- Aboriginal people maintaining strong ties to traditional legal and cultural practices; and
- the Argyle Mine Lease covering traditional land of both Miriuwung and Gidja peoples. Both groups have strong cultural ties to lands in East Kimberley.

Such widely dispersed families and clans do not necessarily share the same goals or have easily identifiable representatives.

Argyle Diamond Mine had a relationship with some Traditional Owners through their 20-year-old Good Neighbour Agreement. However, this was primarily with one family group. This effectively disenfranchised other Traditional Owners of the mine area. Argyle also had no real relationship with the regionally recognised Aboriginal representative body, the Kimberley Land

Council. Negotiating a new agreement required identifying and building relationships between the mining company and the original Good Neighbour signatories, and with all Traditional Owners and the Land Council as their representative.

The process of community identification for what became the Argyle Participation Agreement involved third-party expertise. Comprehensive ethnographic and genealogical studies were conducted by two anthropologists commissioned by the Kimberley Land Council. The anthropologists recognised and worked within traditional Aboriginal authority structures. They defined traditional ownership in accordance with Indigenous law and culture, rather than proximity to the mine or prior involvement in claims.

Their study identified 22 families from seven Aboriginal groups who were structured into inside groups and outside groups. These primary and secondary groups represented those who would be most affected by the mining operations, and less affected groups who still had responsibilities in relation to the land of the mine lease and to adjacent areas. This was used to inform which communities would be parties to the agreement and the allocation of agreement benefits.

*Source: Adapted from Australian Human Rights Commission Native Title Report 2006: Chapter 5: The Argyle Participation Agreement <https://www.humanrights.gov.au/publications/native-title-report-2006-chapter-5-argyle-participation-agreement#5>*

Not everyone will become parties to an agreement. For some agreements, the community parties are the relevant group with legally sanctioned title to the land, as is the case for most Australian agreements. In other cases, such as Eagle Mine in Michigan (Rio Tinto interest now sold), the parties may include environmental and specific residential groups. There are also examples of agreements that include the whole of a residential community or regional community, such as at Oyu Tolgoi in Mongolia and Kitimat in Canada.

### **Identifying representative institutions**

For practical reasons, agreement processes cannot involve every community member acting as an independent agent and participating in all agreement processes. Instead, parties need to engage through representatives. This applies to the parties that Rio Tinto negotiates with and to the company itself. There will be a principal Rio Tinto negotiator who manages internal processes to reach an agreed Rio Tinto position on issues. Likewise, other parties will choose people to represent their interests.

Determining the organisations that best represent the community parties may take time and require fostering new links between diverse community groups. These organisations will preferably be cohesive and have a recognised structure and a community purpose beyond the interests of individual members. Some may be formed specifically for agreement purposes. Examples include tribal or band councils, government entities, statutory representative organisations, traditional authorities, non-governmental organisations, civic organisations, and context-specific institutions like Native Title Representative Bodies in Australia. Where organisations have little experience in negotiating, consideration should be given to their

need to develop these capabilities. See Box 8 for more details on effective engagement with Indigenous decision-making.

Another option is to work through established local-level political structures such as elected leaders and local government councils. This was done in the case of the Oyu Tolgoi-Umnugobi Community Cooperation Agreement in Mongolia. However, remember that:

- Most local councils find it difficult to fully understand or represent the interests, issues and concerns of all groups within their community.
- Parallel governance systems may exist with tribal or hereditary leaders, and local and regional government bodies.
- Communities with hierarchical cultures, and age-based and experience-based authority structures will not usually have formal representative bodies.
- The communal nature of many Indigenous communities makes it difficult to identify and designate leaders or representatives to lead negotiations.

Rio Tinto agreement negotiators should seek advice to identify the appropriate people for a negotiating process (ie those who will be recognised as representing broad-based interests in the land under discussion). While working through representatives is necessary and important, Rio Tinto does not rely on the community representatives exclusively. The company also has complementary and parallel processes in place to enable information to flow between Rio Tinto and the community. There are many examples where this has been done collaboratively, including Argyle Diamond Mine (see section 7 for more on two-way information flows).

### **Box 8: Features of a negotiation process that is sensitive to Indigenous decision-making processes**

A negotiation process that is sensitive to Indigenous decision-making processes needs to include:

- mechanisms for information flow directly to local groups, as well as to representatives on a representative body, community council or negotiating team;
- sufficient time for consideration and consensus formation between meetings;
- the appropriate use of meetings (eg for disseminating information, exploring options and alternatives);

- the use of various means of ratifying decisions according to advice from negotiation partners about local custom (eg by majority vote, consensus or formal plebiscite); and
- skilled meeting facilitation by people who understand Indigenous decision-making processes and are able to manage and mediate conflict between groups.

*Source: Adapted from Limerick, Tomlinson, Taufatofua, Barnes, and Brereton (2012) Agreement-making with Indigenous groups: Oil and gas development in Australia. CSRM, University of Queensland. p. 65.*

### Engaging with multiple stakeholders

Where multiple groups are identified as parties to the agreement, a decision needs to be made about whether to adopt a multi-stakeholder approach and negotiate with all relevant parties, develop bilateral agreements with each separate community or stakeholder groups, or have a composite approach using some multilateral and bilateral processes. Table 4 outlines three examples that have taken different approaches to multi-stakeholder engagement.

A composite approach is often regarded as more transparent, equitable and less divisive. However, it will not suit every situation. Forming multiple agreements rather than one all-encompassing agreement might be the most suitable approach when:

- a project affects groups that are culturally, politically or administratively distinct, or groups that may have different legal interests or who may be impacted differently;
- communities and/or their respective territories will experience different impacts from the project;
- there are not strong existing inter-group relations or there are inter-group tensions;
- claims to land are contested or overlapping;
- flexibility and diversity are desirable, rather than consistency of approach; and
- separate negotiation and implementation do not disproportionately increase the resource demands.

The resettlement at the Murowa Diamond Mine in Zimbabwe (interest now sold by Rio Tinto) is a good example of why it's important to engage with many different groups when dealing with unforeseen challenges in agreement-making (see Box 9).

Identifying and including the broad range of traditional land claimants was a challenge for Rio Tinto Coal Australia (RTCA) in negotiating with the Wangan and Jagalingou Aboriginal communities over the Clermont (interest now sold by Rio Tinto) and Blair Athol mines in Australia. Personal animosity and disagreement between different groups represented in the claim group resulted in the separate identification of Wangan and Jagalingou interests. Based on available anthropological evidence, fundamental issues relating to land claims were being questioned, and new land claims further complicated the process. In the face of these challenges, RTCA continued to engage with all claimants. The company created a number of maps and documents to illustrate that any future projects were unlikely to be in contested areas. This engagement resulted in all the Native Title claimants setting aside their own differences and supporting an agreement with RTCA on a 'whole of claim' basis.

**Table 4: Examples of approaches to engagement with multi-stakeholder groups**

Location	Parties	Engagement approach
Western Cape, Australia	11 Traditional Owner groups, the Cape York Land Council representing them and four Indigenous Community Councils	One joint agreement: the Western Cape Communities Coexistence Agreement.
Pilbara, Australia	Nine Traditional Owner groups	Composite approach: each Traditional Owner group has a bilateral agreement with Rio Tinto's Iron Ore business covering financial benefits and the operation and development of mining activities, and most have opted into a voluntary regional agreement covering non-economic participation benefits.
Diavik, Canada	Five Aboriginal groups	Composite approach: each Aboriginal group has a bilateral participation agreement with Diavik, which is supplemented by a social and economic monitoring agreement and an environmental agreement with the Government of the Northwest Territories, Diavik and all five Aboriginal groups.

#### **Box 9: Broad engagement and the Murowa Relocation Agreement**

For the Murowa Relocation Agreement, Rio Tinto engaged intensively with potential resettlers and also with governments – particularly at the provincial level. It was time-consuming to address the diverse concerns of these parties to ensure a fair and satisfactory resettlement.

The development of the Murowa Diamond Mine in Zimbabwe required the resettlement of 142 families, a number of which live a traditional subsistence lifestyle. Rio Tinto began negotiating with affected communities, government and NGOs in 2000. The process paid special attention to female and child-headed households, ensuring they were given equal opportunities to voice their concerns and aspirations. A committee inclusive of women and young people was elected by the community to represent them. Women were consistently more able than men to provide the necessary information relating to issues such as landholdings and crops planted. Negotiations were mediated by an external moderator.

Rio Tinto committed to secure land tenure for the Murowa resettlers and ensure their livelihoods were restored, if not improved. Rio Tinto purchased six blocks of land, known as the ‘Shashe Block’, in the nearby Masvingo Province. The agreement specified the number of families to be relocated and

an ‘asset for asset’ based scheme of compensation. A relocation agreement was signed in May 2001 between potential resettlers, provincial administrators and Rio Tinto.

At the time there was no regulatory requirement in Zimbabwe for such an agreement and the commitments made by the government were difficult to enforce. Due to the Zimbabwe Government’s land reform and resettlement programme, a number of families from Masvingo had commenced settling on the farms Rio Tinto intended for Murowa families. Also, the host province would not support the agreed sizes of the replacement land plots. This became a major issue with the affected community who viewed this as Rio Tinto breaking a commitment.

Rio Tinto undertook two additional years of community engagement. The process was transparent and inclusive of both Murowa and Masvingo families, the government and landowners. A simple yet important part of this process was not to use technical terms or legal jargon. Women played a critical role. A mutually agreed resettlement solution was achieved through community initiated trade-offs. An addendum to the agreement was made and by 2003 all the families had been resettled at Shashe. The mine began operating in 2004. Rio Tinto sold its interest in 2015.

### **3.6 Corporate leadership and internal engagement**

Commitment and support from all levels of management are critical to successful agreements. Proper internal engagement also helps build a good agreement strategy, a negotiation plan, a final agreement and implementation plans.

Considerable work is required to secure an internal mandate before proceeding to engage externally. Internal engagement and sign off from relevant senior leadership are needed to secure resources for agreement processes. Also, the involvement of operational managers in negotiations can be beneficial. They can help the negotiating team to better understand what obligations can be committed to in the various areas. In turn, this builds early ownership and increases the likelihood of successful implementation.

At each project or operation, senior leadership must exhibit ownership of the agreement. Managers should highlight the strong connection between a community agreement and core business functions. This includes an appreciation of the costs of delays to approvals or production as a result of the failure of an agreement. Including details of agreements in induction programmes and incentives also helps to share information about agreements with all team members.

Engaging with internal stakeholders is as much a part of agreement processes as external engagement, and it should happen as early in the agreement process as possible. There is a tendency for senior managers and other employees to regard responsibility for this work as sitting solely with the Communities department, rather than being a whole-of-business undertaking. All functional managers at operating sites need to be included so that they accept responsibility for implementing relevant provisions and ensure their direct reports understand their specific responsibilities.

These may include the following:

- Procurement – implementing an agreed local purchasing policy
- Human Resources – rolling out agreed local and/or Indigenous employment strategy
- Environment – involving host communities in agreed joint environmental monitoring activities
- Mine planning and land access – ensuring project scope and planned activities are communicated accurately and covered in the agreement
- Cultural heritage – including protection and management activities

Successful agreements mobilise the entire site in their implementation. Agreements can also help break down functional silos. For example at Diavik, the Environment team worked closely with the Communities team and community leaders to monitor water quality and fish health in local waterways.

Learning from missed opportunities is equally helpful. Going into the Argyle Participation Agreement, the Human Resources department was not able to identify many local Aboriginal people for pre-employment training. Subsequent surveys with a new approach resulted in several hundred candidates being identified.

The mining industry characteristically has high turnover of personnel, so it's important that processes and commitments are well-documented. Senior management must understand the importance of continuity in agreement processes and embed systems to retain the institutional knowledge base. Strong internal relationships and regular engagement keep all parts of the business informed and help ensure common messaging. In this way, internal and external engagement processes complement each other.

### **3.7 Fostering mutual ‘ownership’ with interim agreements**

Agreeing on principles and processes at an early stage can help build trust between the parties, develop ‘ownership’ and build institutional capability. Taking time early on to jointly develop a good process diminishes the risk of later delays in reaching agreement on content. It also engenders a sense that the process and the agreement it leads to are joint efforts.

There are many examples of early engagement between agreement parties. Engagement early in the project cycle may lead to a discrete agreement for a specific project stage (eg exploration) or to interim agreements. Types of project-stage or interim agreements include exploration agreements, memoranda of understanding, process agreements and binding initial agreements.

At Oyu Tolgoi, the steps to an agreement included a memorandum of understanding in April 2011, setting out a joint vision, followed over several months by workshops to develop a process agreement. This agreement provided a framework for subsequent interactions to develop the details in what became the final Community Cooperation Agreement. The total process took almost four years. Rio Tinto’s Communities agreements guidance provides further advice about the steps involved in developing an agreement, including the value of interim agreements.

The steps between interim agreements and the final agreement can relate to a series of specific issues. Some process matters need early attention. This usually includes clarifying arrangements for funding participation in negotiations. Otherwise it is productive to focus attention on non-contentious issues early in the process. This contrasts with a typical commercial negotiation, where so-called ‘threshold’ issues are tackled first.

Unlike a typical commercial negotiation, which tends to be more transactional, community agreement-making seeks to establish a long-term constructive relationship based on trust. Building familiarity and trust by reaching agreement on non-contentious issues leads to confidence to tackle bigger issues later on. Developing a pattern of behaviour that focuses on shared objectives and similarities can make all the difference in reaching final agreement. If all parties to the agreement are engaged in staged agreement success they are more likely to ‘own’ the associated rights and responsibilities. However, while interim agreements can allow select areas of consensus to be implemented quickly, experience shows that once one party has achieved its primary goal, there can be less urgency to negotiate the remaining, more contentious issues.

Subsidiary interim agreements about process or specific provisional objectives can remain as stand-alone agreements or subsequently be subsumed into a final agreement. In Rio Tinto’s Pilbara native title negotiations, there was a sequence of agreements progressing from binding initial agreements to participation agreements and finally to a regional agreement (see Box 10). Confidence and mutual commitment developed from engaging consistently through this sequence. This is evidenced by the fact that all Aboriginal groups with participation agreements ultimately agreed to ‘opt in’ to a voluntary regional agreement that provided region-wide implementation consistency.

#### **Box 10: Binding initial agreements – Pilbara, Australia**

Rio Tinto’s Iron Ore business and seven Pilbara native title claim groups signed binding initial agreements in 2006 over mine development areas in the Pilbara region. These initial agreements were significant milestones in the Pilbara agreement processes. They provided Traditional Owners’ consent and support for Rio Tinto’s current and future operations at a crucial time – the start of the iron ore boom.

Without an agreement, Rio Tinto risked serious native title and cultural heritage-related delays to its expansion and development plans. Affected Pilbara Traditional Owner groups were working together and intent on equal treatment. They initially exercised certain rights of objection available to them.

The solution identified was the binding initial agreement, a contract that contained:

- community consents;
- specific, enforceable financial benefit provisions;
- agreement for an accelerated programme of cultural heritage clearance operations; and
- ‘agreement to negotiate’ with an aim of entering into a comprehensive agreement.

The ‘agreement to negotiate’ proposal committed the parties to negotiate comprehensive participation agreements with each native title group, focused

on broader socioeconomic and social issues, and included opportunities for contracting, employment, training, business development, environmental protection and general capacity building.

In the binding initial agreements, the Iron Ore business was able to secure the consent and support of key native title groups from the outset of the mining boom with significant benefit to the company’s business. The company had achieved its most urgent goal of expediting its mine expansion plans. It took a further five years to negotiate the first of the comprehensive participation agreements with some of the groups. This arguably stretched the goodwill of the Traditional Owners. While the first participation agreements were being negotiated, the parties also developed and negotiated the broader regional development framework agreement that helped demonstrate Rio Tinto’s commitment to engagement at a regional level (in addition to the direct engagement provided for in the participation agreements) and helped build and establish relationships.

*Source: Rio Tinto (undated) Aboriginal policy and programmes in Australia. p. 11.*

<sup>14</sup> Adapted from  
IICMM (2010) Good  
practice guide:  
*Indigenous peoples  
and mining; The World  
Bank (2012) Mining  
community development  
agreements source book.*

## **Checklist 1 will help identify and adopt good engagement practices for agreement processes.<sup>14</sup>**

### **Checklist 1: Inclusive engagement**

Do engagement processes start early in the agreement process?	[✓]
Have all of the rights holders and affected groups been identified and engaged?	[✓]
Do engagement processes include all relevant (including vulnerable) groups?	[✓]
Have any barriers to the participation of all affected groups been removed?	[✓]
Are engagement processes tailored for different groups?	[✓]
Do engagement methods respect local customs?	[✓]
Is information being shared honestly, transparently and in a manner that is understood by the land-connected people?	[✓]
Does the engagement plan reflect good-faith principles?	[✓]
Has the engagement plan been integrated into operational plans?	[✓]
Are all communication, consultation, engagement and commitments being documented?	[✓]
Are engagement activities resourced?	[✓]
Have relevant managers and teams within Rio Tinto been engaged in the agreement-making?	[✓]
Do induction programmes provide details about the agreement and commitments?	[✓]
Are agreement-related measures included in operational plans and KPIs?	[✓]

## Case study 1: Kitimat, Canada

### Acknowledging the past and sharing the future



Kitimat  
British Columbia, Canada

*15 Rio Tinto acquired Alcan in 2007. The operations are now part of Rio Tinto's Aluminium product group.*

Rio Tinto's Aluminium product group operations in British Columbia sit within the traditional lands of 13 First Nations groups. The company has a formal agreement with the Haisla First Nation and protocol agreements with three other First Nations. In 1950, Northwestern British Columbia was transformed to host the country's largest-ever construction and engineering project, which included a water reservoir at Nechako, a power house at Kemano and an aluminium smelter at Kitimat. At that time, the people of the Cheslatta Carrier Nation were involuntarily removed from the lands where they had lived for generations to make way for the water reservoir. Haisla First Nation people also witnessed thousands of acres of traditional lands taken over by the project for the construction of the smelter facility. Moving on from this painful past has only been possible in recent years with commitment to engagement, respectful relationships and benefit-sharing by all parties.

#### A history of displacement and division

British Columbia lies in the western most province of Canada and is home to two thirds of the country's First Nations. In 1950, the government of Canada awarded the water licences, land rights, engineering and construction for the project to the Aluminum Company of Canada (Alcan)<sup>15</sup>; and led the Cheslatta relocation programme to make way for the project. The construction of the dam, power house, transmission lines, smelter and two town sites took only four years to complete.

The relocation of the Cheslatta, carried out by the Federal Government, saw the Cheslatta's homes and possessions burned, the people dispersed to distant lands, and finally, their land was partially flooded. As the project progressed, thousands of acres of Haisla First Nation traditional lands near Kitimat were also impacted. New town sites and thousands of new residents flooded into what had been sparsely populated area. Neither the Cheslatta nor the Haisla had a say in project development and no opportunity to share in the economic benefits at that time.

*Pictured opposite:  
Kitimat, British Columbia,  
Canada - landscape  
and mountains.*



### Recognising the need for change

In 1982, the *Canadian Constitution Act* affirmed Aboriginal rights and established the government's duty to consult and accommodate First Nations in the development of land and resources. While the legal and social landscapes were shifting, Rio Tinto Alcan faced expansion challenges. In 1979, the company announced a C\$1.3 billion plan to build four new generators at Kemano and a second tunnel from the reservoir to the power house. Although the company had the legal right to this expansion based on its 1950 agreement with the Government of British Columbia, the project faced strong opposition from the Cheslatta people and the communities in the affected area. In 1995, the Government of British Columbia put a halt to the project.

Recognising that engagement with First Nations groups would be fundamental to the future of the business, Rio Tinto's Aluminium product group began to work on building formal relationships with the Haisla, the Cheslatta and their other First Nations neighbours. From 2000, the Communities team in British Columbia focused on working to change the company's relationships with First Nations groups and the wider public.

### Developing trust and understanding

Engagement and awareness raising has also been necessary inside the company. The Communities team has worked closely with senior managers to develop their historical and cultural awareness, and build the business case for agreement-making. The direct involvement of managers in the relationship-building process with First Nations groups has been highly effective in achieving trust and understanding. This personal experience has helped them to understand the past, present and future from a First Nation's perspective. It has also clarified the value of the agreement, and the potential risks to the business of not having an agreement in place.

Building a formal agreement has also meant working through complex issues of responsibility and forgiveness to reach a 'place of readiness' where both parties are able to move forward together through shared commitment and mutual respect. It is relationships that deliver agreements, and building trust requires face-to-face engagement, over long periods of time. As noted by Rio Tinto's Aluminium product group's vice president for Strategic Projects: "The process starts with the interests of each group and the company. Not just their interests today, but also the legacy of the past and the hopes for the future. Each agreement has to be unique and specific."

Pictured right: Cheslatta Carrier Nation member Abel Peters, 89, signs the 'paid in full' document.

Pictured far right: More than 12,000 acres of traditional territory was returned to Cheslatta Carrier Nation.

Source: BC Local News, Canada, viewed 15 January 2016, <http://www.bclocalnews.com/news/138880064.html?mobile=true#>



*Spirit of the Kitlope  
Dancers performing at  
the opening ceremony  
Canadian Cancer  
Society's 'Relay for  
Life' held annually at  
Kitimat, Canada.*



Regardless of how tough a meeting is, it always ends with everyone shaking hands and you stay until you get there."

Agreements are about the past, the present, and the future. For First Nations peoples, acknowledging the past is a fundamental step to moving forward. Abel Thomas Peters, a respected Cheslatta elder (now deceased) was a young man in 1952. Over the course of two years, he watched as his people and family were involuntarily removed from the lands where they had lived for generations. Sixty years later, in a symbolic exchange in front of elders and community members, Abel Thomas Peters handed five Canadian dollar bills minted in 1952 to a senior Rio Tinto executive in exchange for 12,000 acres of land along the banks of the Nechako Reservoir. On that day in 2012, people from the Cheslatta Carrier Nation and employees of Rio Tinto came together to acknowledge the past and mark a shared hope for the future. The return of the land was the culmination of ten years of discussion between Rio Tinto and the Cheslatta Carrier Nation.

### **Agreements in place today**

The Aluminium product group currently has a 30-year agreement with the Haisla First Nation group. Formal engagement began in 2000, with a mutual desire to work together on shared interests such as stewardship, capacity and skills building, and cultural awareness. In 2001, the parties signed a formal protocol agreement that set out both groups' intent to establish a mutually beneficial relationship. In 2007, the Haisla and Rio Tinto began a more in-depth process to settle past differences, share the economic opportunities of the operations and secure Haisla support for operations in the future. The final agreement was ratified by the Haisla First Nation membership in February 2010.

## 4. Know and understand

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“The door opened with a new agreement to put our cultural practices in to the mine. (Companies need to) get on the ground. Get a sense of how people live and their culture. Build a knowledge of where the Aboriginal people are coming from. The bosses need to gain this understanding.”

*Ben Ward, Miriuwung (2007)*

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<sup>16</sup> See Rio Tinto (2015) Social and economic knowledge base guidance for detail and examples of data required.

A good knowledge base is critical for planning and implementing successful community agreements. Building a foundation of knowledge and understanding of host communities and their interests is also a requirement of the Rio Tinto Communities and Social Performance standard.

The knowledge base must be up-to-date and include data on the social, cultural, demographic, legal, environmental and economic factors, and general interactions that shape life in local communities.<sup>16</sup> It can include information about land management, livelihoods and employment, income levels, health and education standards, gender dynamics and household living conditions. It should also describe important historical information about the host community, including its colonial history, changing patterns of land use, land use conflicts and any prior experience and relationships with mining or other developments. Understanding the human and customary rights of the host community, and the full suite of approvals and consents required for a project to proceed, is also critical.

Developing a verifiable knowledge base that is fit-for-purpose should start early and draw on a review of secondary data, local knowledge and external expertise as needed. This may include geographers, development economists, anthropologists, ethnographers, archaeologists and demographers. It's also important to understand the legal and regulatory aspects of agreements, and how these work alongside historical and cultural influences to inform agreement-making processes.

### 4.1 Foundational knowledge for agreement processes

The Rio Tinto Social and economic knowledge base guidance can assist in scoping the work necessary to develop a verifiable knowledge base for an agreement process. This may include baseline community assessments, socioeconomic situational analyses, social impact assessments and social risk assessments. Achieving a balance between open-ended research and acquiring the optimal amount of information for a specific purpose at appropriate effort and expense is important. This is often referred to as knowledge that is fit-for-purpose.

#### Reviewing secondary data

Knowledge base research needs to begin with a review of secondary data. This usually means desktop studies of publicly available material, including local government codes and plans, local government annual reports, land use plans, environmental studies, maps, aerial photos, census statistics, health and education status indicators, media files and court reports. Communities and Indigenous groups will often have strategic plans that should also be considered. Ideally, data should be collected at local and regional levels to provide broader context that will assist with the agreement-making process.

<sup>17</sup> Australian Human Rights Commission Native Title Report 2006: Chapter 5: The Argyle Participation Agreement <https://www.humanrights.gov.au/publications/native-title-report-2006-chapter-5-argyle-participation-agreement#5>.

### Commissioning third-party research

Following an assessment of secondary data, commissioning specific pieces of research can help fill the gaps and tailor a knowledge base that is fit-for-purpose in establishing an agreement. Box 11 lists some examples.

Appropriately engaging with host community members on the basis of knowledge gained from a trusted third-party with anthropological and historical expertise is essential before commencing community agreement processes. Early studies must identify the right groups to engage, including Indigenous groups with land connections (see also section 3.5). The knowledge gained can inform:

- the appropriate people, leaders, representative structures and procedures for agreement-making;
- the appropriate arrangements for implementing an agreement;
- an understanding of local community members' early aspirations on compensation, protection and benefits during mining operations, and expectations on closure conditions and post-mining land uses; and
- suitable cultural awareness training and familiarisation to provide for all non-locals who will be involved in agreement processes.

To serve these purposes, the knowledge base in relation to Indigenous groups should include details of:

- customary rights and responsibilities;
- social structures, roles, responsibilities and authority patterns;

- behavioural protocols, particularly customary ways of dealing with concern, complaint and conflict;
- governance and decision-making processes;
- land relationships, environmental and natural resource use rights;
- holders of knowledge rights over local foods and medicines;
- traditional modes of health management and education delivery;
- the nature of the existing local economy, and subsistence and livelihood activity;
- intangible cultural heritage, such as language, stories, art, music, ceremonies and spirituality, and how it forms the fabric of acceptable social behaviour.

Trusted third-parties were used to define communities and groups for the Participation Agreement at the Argyle Diamond Mine. Rio Tinto requested that the Kimberley Land Council, a well-regarded regional Aboriginal representative organisation, commission an ethnographic study of the area around the mine. The study identified families from seven Aboriginal groups who held primary or secondary rights to the mining area. This informed which communities would be covered by the agreement<sup>17</sup> and showed the value of an expert study endorsed by the community as a means of acquiring relevant knowledge. Box 12 explains how understanding community demographics and socioeconomic circumstances in the Pilbara region helped to improve agreement processes for Rio Tinto's Iron Ore business.

#### **Box 11: Examples of specialist studies to enrich the socioeconomic knowledge base for agreement-making**

- Studies of demographic trends
- Cultural heritage assessments
- Archaeological surveys
- Surveys of local vegetation and wildlife use
- Indigenous, household and agricultural water use studies, including how it's regulated
- Ethnographic and social group interaction studies
- Social wellbeing indicators
- Livelihood and household surveys
- Community health surveys
- Labour market studies
- Assessment of local businesses and potential suppliers
- Gender analysis

### **Box 12: Having a good knowledge base in the Pilbara**

A demographic study in the Pilbara region of Western Australia commissioned by Rio Tinto's Iron Ore business in 2005 demonstrates how important a comprehensive knowledge base can be. The study examined the socioeconomic effects of mining in the Pilbara over 40 years. It found that Aboriginal people had not generally benefited directly from mining, and in many ways were worse off:

“Despite substantial growth in economic activity and employment opportunity in the Pilbara since the 1960s, the overall employment rate for Indigenous people rose only slightly from 38% in 1971 to just 42% in 2001.”

This prompted Rio Tinto to seek to increase the participation of Pilbara Aboriginal people in the burgeoning economy, specifically through the agency of local participation agreements and a regional framework agreement. In return, Traditional Owners with newly recognised legal rights in land supported the expansion of the company's mining permits and operations to service a booming market.

*Source: Taylor and Scambary (2005) Indigenous people and the Pilbara mining boom: A baseline for regional participation. Research Monograph No. 25, Centre for Aboriginal Economic Policy Research, The Australian National University.*

<sup>18</sup> O'Faircheallaigh (2000) Negotiating major project agreements: The 'Cape York Model'. Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) Research Discussion Paper No. 11, Canberra. p. 11.

<sup>19</sup> For example, Food and Agriculture Organisation (FAO) (1999) Conducting a PRA training and modifying PRA tools to your needs. PRA Tool Box <http://www.fao.org/docrep/003/x5996e/x5996e06.htm>; and Rietbergen-McCracken and Narayan (1998) Participation and social assessment: Tools and techniques. World Bank. [http://www.oikodomos.org/workspaces/app/webroot/files/references/text/amartin\\_11\\_Toolkit\\_participation.pdf](http://www.oikodomos.org/workspaces/app/webroot/files/references/text/amartin_11_Toolkit_participation.pdf)

In the case of historically vulnerable and disadvantaged groups, development NGOs, activists and human rights defenders may also provide valuable information.

In the Indian state of Madhya Pradesh, professional expertise was needed to learn about the diverse tribal groups in the 15 villages around the Bunder Diamond project, an advanced exploration project still at the pre-feasibility stage.

#### **Learning from communities**

Communities themselves are valuable sources of knowledge and strong community involvement in knowledge base studies is essential. Social and economic impact assessments and anthropological studies benefit from communities having significant input into design and content. There are also examples where communities—rather than the company—control the impact assessment process.<sup>18</sup>

Specific techniques can be used to tap into the wealth and diversity of community knowledge. These include a Participatory Rural Appraisal or Rapid Rural Appraisal, which can be used to collect and analyse data in close cooperation with local people. Appropriate methods for local contexts can be selected from many available toolkits.<sup>19</sup>

Practitioners should adhere to the principles of inclusive engagement discussed in section 3 to engage a broad range of community members and gain valuable knowledge for agreements.

## **4.2 Legal, regulatory and non-legal aspects of agreements**

### **Understanding the legal context**

It's essential to understand which agreement-related issues are relevant in a particular jurisdiction.

In some countries, governments place specific legal obligations on project developers to enter into agreements with affected communities. The Oyu Tolgoi Investment Agreement with the Mongolian Government required a community-level cooperation agreement. In other places, such as Australia, national statute requires negotiation of conditions of access and operation with Aboriginal native title holders and registered claimants. Such statutory requirements are increasingly common and it's important to seek early advice from legal experts within Rio Tinto about specific situations. Broader trends in the legal and regulatory context are discussed in the Background reader.

Sound legal knowledge underpins adherence to local, regional and national laws. Rio Tinto also considers compliance with relevant customary and procedural requirements to be good practice.

Lack of clarity about project scope and timing, or the approvals, consents, land tenure system and other requirements of various authorities, can derail negotiations. This is a particular risk in regions with emerging economies where governance structures and lines of authority might not be clear. At Oyu Tolgoi in Mongolia, the national government approves mining-related activities but the local government is responsible for issuing several important approvals including land-related approvals. The result of incomplete knowledge may be an agreement that does not cover everything required to satisfy all levels of authority.

Thorough due diligence is necessary to provide an understanding of specific rights and responsibilities that apply in a given context. This can be supplemented by an analysis of previous experiences or of how governments or other companies have interacted with local communities in the past. Practitioners should also be aware of any relevant agreements that local communities and people already have with other companies, governments or organisations. It's also important to clarify the status of land and associated rights and land use limitations, and verify information in community agreement-making. Incomplete information can jeopardise an entire exploration effort, as Box 13 illustrates.

Some jurisdictions specify timelines for agreement negotiation, or have requirements to register agreements. It may also be relevant to understand legislation with a global reach, such as the anti-corruption legislation in Europe and the US. As agreement requirements take shape, other relevant legislation may emerge (eg around environment, mining or cultural heritage issues).

While few jurisdictions have specific legal or procedural requirements that provide for veto powers on development by recognised land rights holders,

most have legal provisions for consultation and accommodation. The Background reader provides examples of types of consent requirements in different jurisdictions, and explores the issue of Free, Prior, and Informed Consent (FPIC) in an international context.

Legal requirements provide the minimum standards to be contained in an agreement. In South Africa, economic empowerment legislation stipulates that 26 per cent of company ownership is transferred to black South Africans, while mining legislation requires companies to develop, implement and maintain a Social and Labour Plan providing wider economic and social benefits to neighbouring communities as a condition of retaining mining tenure. Accordingly, in 2009 BHP Billiton and Rio Tinto, then the 50/50 shareholders in Richards Bay Minerals (RBM), implemented a transaction divesting 10 per cent ownership in RBM to the four local tribal communities with interests in RBM's mineral leases, 14 per cent to local and regional strategic partners, and two per cent to a share participation plan for employees. RBM has since implemented a Social and Labour Plan, and is now exploring ways to develop local enterprise by incorporating new measures that go beyond the minimum regulatory requirements to deliver greater value to the company and the community.

### Knowledge for informed decisions

Agreements rely on informed decisions based on a full understanding of relevant information. During agreement-making, critical information to share internally includes who the legitimate representatives of the host community are; the present and future interests of the community; and predictions about community members' likely responses to company behaviours, processes and decisions. During implementation, all functions will benefit from insights into evolving community context and interests.

#### **Box 13: Rectifying a bad start at Mamuta**

In Mamuta (a region bordering Peru and Bolivia in northern Chile), two government organisations indicated to Rio Tinto Exploration (RTX) that an area required for construction access was state land and a road could be built. However, seven months after construction began, members of an Indigenous community contacted RTX and said that the road was on Indigenous land. The Ministry of Public Works then confirmed that the area was legally registered land of the community. There was a protest by members of the Indigenous community who had opposed exploration and mining projects before. RTX withdrew

from the area and began negotiations with Indigenous leaders about compensation options. After initially threatening a lawsuit, the Indigenous community signed an agreement with RTX. The agreement focuses on business and employment opportunities, plus modest social investments and compensation payments. This is the first time this Indigenous community has supported an exploration project that crossed their customary lands to reach its work site.

*Source: Notes on Kennecott Exploration and Rio Tinto Exploration agreements, Matt Jeschke.*

Agreement processes work best when knowledge and information flow both ways. Leaders should consider what information about the company, project or operation needs to be shared with various stakeholders. Not everyone will be familiar with the mining industry and how it operates. Community representatives might need information about matters such as:

- the project or operation;
- the company's way of working;
- policies and systems for local recruitment and procurement including minimum requirements;
- decision-making processes and authority;
- business cycles and timelines;
- feasibility studies;
- broad publicly available financial considerations;
- factors creating uncertainty or limiting information;
- sources, holders and ways of protecting information; and
- how the business and legal environment operates.

Providing such information helps demonstrate good faith. However, this doesn't mean all information needs to be or can be disclosed. Good judgement and expert advice will determine what is appropriate for each agreement.

The concept of 'available knowledge' is something that needs to be understood by all parties. A lot of knowledge is uncertain or may be held by a limited number of people. For example, parties need to understand that knowledge about an orebody or a sacred site may dictate a change of plans. When additional, emerging knowledge is likely to result in changes for the other party, and impinge on their expectations, the reasons for the change and the likely effects should be discussed openly as soon as possible. See Case study 5 for an example of this in the Pilbara. Procedures for dialogue about such changes should be agreed and understood in advance.

Confidentiality is another important consideration in agreement processes. While acknowledging that maximum transparency is desirable, all parties should recognise and respect others' intellectual property rights, cultural and commercial sensitivities. If any information is shared that is confidential or restricted, this should be made clear to all parties. Such matters and how to handle them consistently should be explicitly discussed and agreed by all parties. See section 7.1 for further details.

After an agreement is in place, knowledge sharing must continue. A common challenge in implementing complex long-term agreements is that the implementing parties (distinct from the negotiating parties) find it difficult to understand the agreement's content and intent. All site employees and contractors need to have a working knowledge of the provisions and obligations relevant to their area of work. The community also needs a thorough knowledge of the agreement and its provisions.

#### **4.3 Cultural awareness and mutual understanding**

Awareness of the local culture and customs of host communities can enhance agreement processes. It's critical to recognise and respect different perspectives and values. For example, in the early days of the Argyle Diamond Mine, Rio Tinto had little understanding of local Aboriginal culture and beliefs and the company's actions seemed inappropriate and disrespectful to Traditional Owners. External cultural advisers were eventually able to explain the significance of Indigenous ceremonial frameworks and the relationship improved as Box 14 explains.

**Box 14: The many layers of meaning in ritual: the *wirnan***

Ignoring or misunderstanding culture, rituals and beliefs of a host community undermines relationships and impedes agreement processes. At Argyle Diamond Mine, Rio Tinto was initially unaware that it was operating in an area where a customary exchange cycle, the *wirnan*, operated. The *wirnan* is:

“... a complex and integral element of Aboriginal people’s secular and ritual lives ... *Wirnan* is clearly an expression of the relationships among people, between people and country, and between people, the country and the Dreaming. It informs and influences everyday activities and expectations.”

Local Aboriginal people could not understand why company people continued to act inappropriately, even though they had been given customary or ‘skin’ names and had been involved in highly meaningful ceremonies. The company failed to recognise that it had become bound up in this ritual exchange economy.

The whole basis of the original Good Neighbour Agreement at Argyle (signed in 1980) clashed with the cultural foundations and principles of the *wirnan*.

For instance, the company insisted that benefits would not include cash or vehicles, which it regarded as consumables without long-term community value. Even when the mine provided emergency assistance or benefits more in line with local cultural values and practices, management did not appreciate that they were aligning with the *wirnan*.

It took decades before the company’s policies and practices began to reflect culturally based principles of respectful engagement and reciprocity. The change was partly attributable to perceptive individuals and partly due to the persistence of Aboriginal people themselves.

Sources: Doohan (2013) *Transformative practices: Imagining and enacting relationships in the context of resource development, the Argyle case*. Asia Pacific Viewpoint. 54(2): 218–231. Quote from p. 226.

Doohan, Langton and Mazel (2012) *From paternalism to partnership. The Good Neighbour Agreement and the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia*. Chapter 13 in Langton and Longbottom (eds) *Community futures, legal architecture: Foundations for Indigenous peoples in the global mining boom*. pp. 231-250.

**Understanding connections to land**

Understanding people’s connections to land is imperative as it is land-connected people who are impacted most when a company seeks to develop a natural resource. Respecting and appreciating attachment to and reliance on land requires close engagement and local expertise. Box 15 details important knowledge about the land connections of the Traditional Owners of Argyle Diamond Mine.

Conflict often emerges because of a lack of understanding of people’s ideas about the land, its value, cultural meanings and uses. People use land for economic, spiritual, cultural, recreational and various other purposes. The herders of Mongolia provide another example of the complex connections involved (see Box 16).

**Cultural awareness training**

Rio Tinto staff, particularly those with direct responsibilities for agreement processes and community relations more broadly, must undertake local social and cultural awareness training. The training can provide an awareness of laws, customs and social norms of host communities and include an appreciation of different gender perspectives.

In Australia, cultural or social awareness training is tailored for different purposes and people (see Table 5). Rio Tinto’s agreements in the Pilbara include provisions for this training to be delivered by local Aboriginal people, creating a business opportunity for locals and ensuring appropriate local perspectives are included. The frequency and style of training can vary depending on the context.

**Box 15: Understanding sacred sites – Argyle Diamond Mine**

A key reason for conflict at Argyle Diamond Mine in past decades was damage to sacred sites, which instigated more than two decades of antagonism. These were among the most critical issues to be resolved when the company began to renegotiate the terms of the agreement.

From the Aboriginal perspective, the landscape of the Kimberley is peopled by powerful spiritual ancestors who reside in places throughout the area. The sacred narratives of the Aboriginal people of this area are referred to as the Ngarranggani (the Dreaming or Dreaming stories).

One of these places is a site cared for and celebrated solely by senior women associated with the sacred narrative of Daiwul, the Barramundi Woman. This site became the mine pit. Another site was of primary significance to a group of senior men and was of the most restricted status under Aboriginal law. The lack of care and respect for this site was deeply distressing for these men.

Under the Participation Agreement (signed in 2004), Argyle Diamond Mine and Traditional Owners work together to look after Aboriginal sites. They have the formal Indigenous Land Use Agreement and a more flexible Management Plan Agreement. The management plans detail an agreed survey methodology, work programme, archaeological survey, work clearance survey and payment scheme. The agreement also provided for a fence to be erected around Devil Devil Springs to keep cattle out and that employees would only enter this site in an emergency.

Rio Tinto and the Daa'wam and Dawawang (the Traditional Owners of the Argyle mine site) committed to working together so that Traditional Owners can visit their country. Traditional Owners are also able to offer ideas about how to rehabilitate the country once the mine shuts down.

Source: Doohan, Langton and Mazel (2012) *From paternalism to partnership. The Good Neighbour Agreement and the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia*. Chapter 13 in Langton and Longbottom (eds) *Community futures, legal architecture: Foundations for Indigenous peoples in the global mining boom*. pp. 231-250.

**Table 5: Types of cultural awareness training in Australia<sup>20</sup>**

	<b>Company-wide induction training</b>	<b>Supervisors of Indigenous employees/ Human Resources</b>	<b>Senior leadership training</b>
Duration	1 day or less	1-2 days	Typically 2 days, often involves an overnight camp on country with Traditional Owners.
Content	Company commitments to Indigenous people and relevance to employees  Overview of local Indigenous people including history, cultural behaviours and landscape, and issues to be aware of such as cultural heritage protection  Basic information on working with Aboriginal people, issues to expect and how to respond	Detailed case studies of the issues Aboriginal employees can face  Company policy on how to respond to cultural issues that may emerge  Clear policy and management systems in relation to factors such as cultural leave	Not a structured course but an opportunity for Traditional Owners and company senior management to build relationships  Camping, fishing, hunting and story-telling activities often included
Follow up	Some offer refresher courses at multi-year intervals	Refresher course every 1-4 years	For some, refresher courses at multi-year intervals

<sup>20</sup> Barclay, Parmenter and Barnes (2014). *Good practices in Indigenous employment, training and enterprise development*. CSRM, p. 26.

#### **Box 16: Understanding Mongolian pastoralists**

Herder groups in Mongolia have responsibilities for given areas of common grazing land within frameworks of collaborative pasture management.

The importance of land connections for Mongolian herders is evident in subtle ways. The word *nutag*, which means homeland, is a powerful and often used term. Land is also critical to the herders' livelihood which revolves around seasonal migrations between pastures. The traditional mobility strategy or *otor* is finely attuned to their harsh and variable environment. It connects them to many places and gives them and their livestock access to extensive sources of pasture and water. Their use of land and water makes them vulnerable to a number of changes that mining can bring, including:

- a reduction and degradation of pastures and rangelands vital for their livestock;

- dust from unpaved mining-related roads spoiling the landscape, sickening livestock and polluting the pastures, air and water;
- displacement from significant places, such as regular winter and spring camps; and
- fragmentation of land and reduced mobility for the herders and their animals as mines and related infrastructure infringe on territory.

According to Mongolian cultural and spiritual tradition, landscapes are inhabited by spiritual entities, *gazariin ezed*. Consequently there are cultural prohibitions on wasting or damaging the soil, trees, or water resources. To Mongolian pastoralists, the landscape has cultural and social meanings as well as utilitarian value. Their identity is framed with reference to their complex connections to nature.

*Source: Upton (2010) Living off the land: Nature and nomadism in Mongolia. Geoforum. 41(6): pp. 865–874.*

The Argyle Participation Agreement commits Rio Tinto to compulsory cross-cultural training for workers employed for over six months and contractors who work closely with the Indigenous community. All site workers must go to a *manthe* ceremony when they first come to the mine as part of Argyle Diamond Mine's site safety induction procedures. This training and local ritual are valuable expressions of respect and recognition of the local culture (see Box 17).

#### **4.4 Dealing with history in agreement processes**

The last two decades have seen dramatic changes in the attitudes of governments and mining companies in acknowledging the rights of Indigenous peoples. Rio Tinto was among the first to embrace working differently, respecting Indigenous rights and seeking better relationships, including comprehensive agreements. However, it's important to remember that many people who have connections to land have had negative experiences of mining in the past, which have left a legacy of distrust, non-cooperation or ill-will.

**Box 17: The example of *manthe* at the Argyle Diamond Mine**

In the spirit of mutual respect, and as part of Argyle Diamond Mine's reconciliation and relationship-building with local Aboriginal people, local Traditional Owners have been asked to conduct a ceremony for employees and visitors. This traditional ceremony, called *manthe*, is performed to welcome visitors to this area of Gidja and Miriuwung territory. It ensures their safety from the powerful spiritual beings that reside in the sacred sites on the mining lease area.

The ceremony is carried out by the senior Gidja and Miriuwung men and women who are the custodians of the Barramundi Gap site that the mine is constructed on. All employees and contractors attend the ceremony as part of their induction and prior to 'ground breaking' for all new works. It's conducted regularly to give everyone a chance to attend.

In customary terms, this ancient ceremony makes all visitors 'safe on country'. In literal terms, it involves listening to songs and walking through the smoke from a small fire of local gum leaves that are also lightly brushed across the employees by the women elders. In metaphysical terms, it is far more meaningful and profound. For the elders, it's a critical fulfilment of customary responsibilities to visitors on their traditional lands. For some 18 years, the mine had operated without the ceremony being conducted, and the elders hold themselves responsible in large part for incidents that occurred on the site during this period.

For the Traditional Owners and the mine, *manthe* is now seen as an important contribution to site health and safety, for the maintenance of customary land connection and for demonstrating community engagement on community terms.

At Mamuta in Chile, the Indigenous community's history of antagonism towards mining projects and companies is relevant (see Box 13). La Granja in Peru is another example where past experiences of mining projects have challenged good community relations and reaching agreements. The experience at Eagle Mine in the US (interest now sold by Rio Tinto, see Case study 7) shows how agreement processes can help secure qualified consent from concerned environmental groups. Box 18 explains how acknowledging the past helped build trust at Pebble Mine in Alaska (interest now sold by Rio Tinto).

Rio Tinto's past actions also set expectations. In 2005, Energy Resources of Australia Ltd (which is 68 per cent owned by Rio Tinto) agreed not to develop the Jabiluka uranium deposit in Australia without the approval of local Traditional Owners. Such cases may create expectations elsewhere. A thorough consideration of local contexts and issues is required each time.

**The role of apologies**

Agreements provide an opportunity to acknowledge a poor historical record. This can then lead to reconciliation and an agreement to work together for the future. Many agreements have included formal acknowledgements of the past, and in some instances, an apology. An apology may be offered at the agreement signing ceremony and often takes a symbolic form such as traditional 'healing' or 'cleansing' rituals. At the Western Cape Communities Coexistence Agreement signing ceremony in 2001, senior Comalco personnel apologised on behalf of the company for taking 40 years to formally recognise Aboriginal land connections. The State Minister representing the Premier also apologised for the Queensland Government's forced resettlement of local residents of the township of Mapoon in 1963. Case study 2 outlines the apologies and acknowledgement of historical wrongs in this case and at Argyle.

#### **Box 18: Dealing with history through an Exploration Agreement at Groundhog**

The Indigenous peoples living around the Pebble Mine in Alaska historically had negative experiences of exploration and mining. Their suspicion and mistrust of mining companies led to strong opposition to the Pebble project, 19 per cent owned by Rio Tinto at the time (interest now sold).

In the face of this opposition to the Pebble project, Rio Tinto Exploration (RTX) began independent exploration of the nearby Groundhog project. There were strong community concerns around subsistence hunting, fishing and food gathering that locals use to supplement income from mainly seasonal employment in the nearby Dena'ina Athabascan village of Nondalton.

RTX began building its knowledge of the local issues and representative organisations, especially the Nondalton Tribal Council and Kijik Corporation. Hostility at early meetings softened as it became clear that RTX was willing to listen and learn. Relatively small adjustments by RTX to its proposed

activities demonstrated understanding and made a difference to acceptance. The changes included:

- agreement not to fly helicopters over certain areas;
- the presence of RTX's exploration director at meetings with the community;
- written commitments on communication protocols;
- local employment opportunities;
- community monitoring of environmental impacts; and
- facilitating learning exchanges with other communities affected by mining operations.

Delivering on these undertakings helped change attitudes and build trust. After initially opposing local residence by any RTX employees, some members of the community began encouraging them to live in the area.

*Source: International Indigenous Peoples Workshop (2014) From good practice guidance to good practice on the ground. New York. [www.icmm.org](http://www.icmm.org)*

Apologies for past wrongs are not always directly related to a mine or an agreement. The Australian and Canadian governments have delivered apologies to Indigenous peoples for various wrongs including routine separation of Aboriginal children from their families and subsequent institutionalisation. Such gestures are very important in demonstrating an understanding of past injustices and experiences, and providing the basis for relationship-building and potential for agreement-making about specific projects.

#### **4.5 Understanding what to include in agreements – some examples**

Agreements need to suit the context: there is no 'one-size-fits-all' approach. However, it's useful to understand the potential scope of provisions. Appendix B outlines typical elements in a comprehensive community agreement. Some common elements relate to:

- land access provisions and consent to certain activities;
- various forms of financial benefits and participation;
- local employment and training opportunities;
- economic development and business opportunities;
- social, cultural and community support;
- environmental co-management;
- cultural heritage management, protection and protocols; and
- governance and procedural arrangements, including implementation provisions.

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*21 Agreements,  
Treaties and Negotiated  
Settlements Project.  
[http://www.atns.net.au/  
page.asp?PageID=1#can](http://www.atns.net.au/page.asp?PageID=1#can)*

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One of the many factors that influence the sort of commitments that are included in an agreement will be the type of agreement. For instance, exploration agreements may focus only on the short-term with another agreement required if an orebody is discovered. Cultural heritage agreements may have little about training and local business stimulus. The Agreements, Treaties and Negotiated Settlements database<sup>21</sup> provides a resource to review the provisions of agreements of different types in various contexts. The following sections outline valuable understandings about just two of the elements addressed in most agreements – employment and cultural heritage. Other typical elements are listed in Appendix B.

### **Including employment provisions in agreements**

When economic participation is a high priority for host communities, agreements should include clauses relating to the selection, training and employment of local or Indigenous peoples. In some cases, employing people from host communities or local Indigenous groups has improved company-community relationships more than any other commitments or processes. Agreements can express commitment to local employment in various ways, including setting targets and recruitment priorities (see Table 9).

Strict employment requirements and competencies can make it more difficult for people who have experienced social and educational disadvantage to secure positions. Including affirmative action strategies in agreement provisions can address existing barriers. Strategies may include pre-employment engagement, work-readiness and training programmes. It's often subtle employment support features – based on an understanding of a more communal, less material culture – that are important to local Indigenous peoples. These can be specified in the agreement and include such things as:

- close mentoring;
- community involvement in trainee selection criteria, without compromising Human Resources, anti-discrimination or anti-corruption policies;
- a whole-of-family approach to employee mentoring; and
- work-readiness and life-skills coaching (for example in financial management).

Without supports like these, employment targets for local community or Indigenous workers are hard to achieve. As a result, communities may become cynical about employment and training provisions and promises for them to participate in the business. Cynicism can also arise when there is misunderstanding about fewer jobs being available after construction. The Haisla Nation-Rio Tinto Alcan Legacy Agreement sought to address this by including provisions to build resilience in the local community during the transition to operation. Section 5.2 discusses implementation of employment-related elements of agreements.

### **Including cultural heritage provisions in agreements**

Indigenous peoples almost universally see cultural heritage management and protection as paramount. Rio Tinto typically undertakes cultural heritage studies prior to ground disturbing activities taking place, even when there is no legal requirement to do so. The knowledge gained through these studies is used to agree on measures for protecting identified cultural heritage.

Cultural heritage management plans are a central requirement of many agreements and some agreements are specifically focused on this important issue. Without suitable cultural heritage arrangements, there can be significant delays to a company gaining access to a resource (see Case study 5 about the Pilbara). Agreements should specify ways to involve respected and knowledgeable local people in cultural heritage studies. Other issues to address include producing cultural heritage reports and cultural heritage decision-making as these will guide ongoing processes for the life of the mine at many Rio Tinto operations.

**Checklist 2 provides a guide for developing a knowledge base for agreement processes.**

**Checklist 2: Know and understand**

Has an understanding of the cultural, social and economic context and interests of affected groups been developed?	[ v ]
Have community representatives been provided with the information and other resources to make informed decisions?	[ v ]
Is there an awareness of relevant regulatory and legislative obligations, including cultural heritage?	[ v ]
Are there any existing agreements between the affected groups and other companies or organisations?	[ v ]
Have affected groups had any negative experiences with mining companies in the past and does the business understand this legacy?	[ v ]
Has an assessment of traditional and customary land ownership been conducted over lands owned, leased and/or managed by Rio Tinto?	[ v ]
Did the socioeconomic knowledge base studies engage with a diverse range of people?	[ v ]
Did the knowledge base studies include historical, livelihood, cultural, spiritual and heritage values?	[ v ]
Is there an understanding of local aspirations from the community about closure conditions and post-mining land uses?	[ v ]
Did the environment and social impact assessment consider potential direct and indirect, positive and negative effects of the project or operation?	[ v ]
Are Rio Tinto and the community aware of the common types of provisions included in community agreements?	[ v ]
Are Rio Tinto personnel aware of local customary norms?	[ v ]
Do all functional units understand the agreement provisions and their own responsibilities under the agreement?	[ v ]

## Case study 2: Weipa, Queensland and Argyle, Western Australia

### The power of agreements in resolving legacy issues



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Weipa, Queensland, Australia  
Argyle, Western Australia

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22 Keith Johnson,  
acting chief executive  
of Comalco Ltd, speech  
delivered at the  
signing of the Western  
Cape Communities  
Coexistence Agreement,  
Weipa, 14 March, 2001.  
[http://www.riotinto.com/documents/ReportsPublications/MDG\\_Western\\_Cape\\_Communities\\_Coexistence\\_Agreement.pdf](http://www.riotinto.com/documents/ReportsPublications/MDG_Western_Cape_Communities_Coexistence_Agreement.pdf)

Rio Tinto operations are located in countries where past injustices toward Indigenous people have resulted in historical legacies that may severely hinder progress in developing good relationships through agreement-making. In some cases, apologies have been offered as acts of reparation, either from government or companies. The purpose of these apologies was to give a written or spoken expression of regret and remorse for wrongs of the past.

#### Weipa, Queensland

##### Acknowledging injustice

In March 2001, at the signing of Rio Tinto Aluminium's Western Cape Communities Coexistence Agreement (WCCA), a formal written apology was delivered to the Aboriginal people of the Weipa area by Keith Johnson, then acting chief executive of Comalco Ltd and then Premier of Queensland, Peter Beattie. Keith Johnson apologised for the failure of the company to engage properly with the people of the Western Cape area:

"... relations between Comalco and the communities of the Western Cape have not always been harmonious ... at times, those relations have been difficult ... Conflicts have not always been resolved quickly. We have not always been good listeners. Comalco is sorry that our relationships have not always been as good as we would all have liked. When the lease was granted to Comalco in 1958, the Native Title of the Indigenous people of the Western Cape was unrecognised and unacknowledged. Comalco must, and does now, in this Agreement, face up to that unfinished business. Comalco is sorry that it has taken more than 40 years to get here."<sup>22</sup>

Thirty-eight years earlier, in April 1963, the official opening of Weipa's first export wharf took place. In November 1963, Queensland police forcibly removed the remaining Aboriginal residents of the Presbyterian Mission of Mapoon on Cape York, after some of their houses were demolished and their church and other houses burned. This was the final act of a process commenced nine years before to close the mission. The same year, the Comalco Agreement Act passed by the Queensland Government granted the company special bauxite mining leases in the adjacent areas for the next 84 years.

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*Senior Wik-Waya elder Tony Kerindun meeting with Rio Tinto chief executive Sam Walsh in November 2015.*

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*Ray Ahmat, first local Aboriginal superintendent at Weipa operations 2015.*

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The Queensland Government had made clear its intentions to close Aboriginal communities during the previous decade. Most believed that the purpose was to remove Aboriginal objections to enable the development of bauxite mining in the area. The connection between the Queensland Government's treatment of the Mapoon people and the mining operation was clear to at least the Aboriginal observers. Aboriginal people in Weipa still recall the destruction of Mapoon and their forced removal. As Keith Johnson stated:

“The closure of Mapoon by the director of Native Affairs and the forced removal of people in 1963, although not at the instigation of Comalco, was a particularly sad chapter in the history of the Western Cape. There are Elders amongst us today, and others from the communities, for whom the years have done little to dull the pain of that memory. I want to acknowledge the pain still felt by those Mapoon families affected by removal and relocation against their wishes....on behalf of Comalco I want to say sorry to the people of the Western Cape; sorry that it has taken 40 years to come to a clear understanding on how we can co-exist in a way that will meet all our aspirations; and so work together to create a better future for us all.”

Queensland Premier Beattie's letter, read on the occasion of the signing, apologised on behalf of the government for the harm, hurt and distress caused to the residents by actions taken between 1950 and 1963.

*Manthe at the 10 year anniversary celebration of the Argyle Agreement, 2014.*



## Argyle, Western Australia

### *Not all agreements are good*

In Western Australia's Kimberley region, operations at Argyle Diamond Mine commenced in 1983. The first diamonds were found in 1979, 15 years after Weipa's bauxite deposits were developed. Aboriginal people were seeking recognition of their rights and interests in their land, particularly in the face of mining developments.

Argyle was set to become one of the world's largest diamond mines. However, in the course of searching for diamonds, Traditional Owners claimed that the exploration company, CRA Exploration (CRAE), damaged sites that Aboriginal people held sacred. For Aboriginal people, the mine pit is home to the ever-present Barramundi woman, Daiwul. Aboriginal custodians, both male and female, have a special responsibility for such sites of significance. Their stewardship comes with rights and obligations, and transgressions are punishable under Aboriginal law. The destruction of the Daiwul and other sites during the project left a legacy of resentment and legitimate grievance among the custodians.

The company's response to protests against the mining project was the Good Neighbour Agreement, signed by CRAE and five Aboriginal people in July 1980 in the company's office in Perth. For two decades, Argyle's engagement with the local Aboriginal people was founded on a flawed and profoundly unjust arrangement. The Good Neighbour Agreement accorded the Traditional Owners and neighbouring communities minimal benefits. There were no explicit commitments to employment opportunities or respectful management of cultural heritage.

### **A foundation for new relationships**

In 1998, Argyle Diamond Mine's new general manager Brendan Hammond (who went on to become managing director) took responsibility for reviewing the feasibility for continuing mining operations. At this time, the mine was due to close within five years. However, Hammond was interested in pursuing an option for underground mining, which would extend the mine's operations for 20 years. One aspect he could not reconcile was the absence of Aboriginal workers at the mine, given the high Aboriginal population in the region. There were only four Aboriginal employees and two of them were gardeners. He saw this as indicative of a problem in the mine's relationships with the Aboriginal community. Hammond sought expert advice to develop an understanding of legacy issues that affected the company's relationships with Aboriginal people. One result of the review was that the Community Relations function became directly answerable to the general manager of the mine.

In 2001, Argyle signed a Memorandum of Understanding with the regional Aboriginal representative body, the Kimberley Land Council, which provided a framework for negotiations towards a new agreement under the *Native Title Act 1993*. Even though a Native Title Agreement was not legally required, this aligned with Rio Tinto's goal to commit to new relationships with local Aboriginal communities.

Hammond also sought to mend the legacy of the destruction of sacred sites that had occurred with the development of the mine. He introduced a weekly performance of the Traditional Owners' welcome ceremony, or *manthe*, and required all employees and visitors to be present. This led to regular contact between employees and the Aboriginal elders, increasing the confidence and trust among them. In 2003, Hammond wrote an apology to the Aboriginal members of the agreement negotiation steering committee for the damage caused to their sacred sites. The apology was accompanied with an offer of unencumbered funds for the benefit of senior Traditional Owners to maintain their culture. In his letter to senior Traditional Owners, Hammond wrote:

"I acknowledge, on behalf of Argyle, that the mine's operations have damaged Barramundi Gap and have impacted on your land. This payment is offered to the Traditional Owners as a form of apology for this."

"I know that money cannot replace what has been lost, but I hope that this offer will be accepted by you in a spirit of goodwill so that our relationship can continue to grow and be strong. This is a serious offer and is made in good faith so Argyle wants to be sure that it is accepted by all the senior Traditional Owners for the Argyle mining lease area."

"My offer is to be shared equally between the women whose dreaming has been affected, and the men who hold ceremonial responsibilities for the mining lease area. I am offering to place this payment into one or more trusts ... This payment is separate from the new long-term agreement that we are making with you ... regarding the future of operations at Argyle."

These were the first funds to flow into trust structures that were set up through the agreement-making process.

In 2004, the Argyle Participation Agreement and Participation Management plans were settled by the parties. The result was an innovative Agreement with high standards and effective structures for formal engagement with local Aboriginal people. The Agreement explicitly sought to 'renew and refresh the relationship' between Argyle and the Aboriginal owners during the life-of-mine, and provide benefits that would last beyond the project's life. As a result of the renewed relationship, a large number of local Aboriginal people subsequently worked at the mine, with the Aboriginal proportion of the workforce reaching a high of 25 per cent in 2008.

### The power of an apology

For new parties entering a region, the ramifications of past actions may not be easily recognisable. Acknowledging the harm caused in the past is the first step toward addressing unresolved legacy issues. These apologies made in the context of settling agreements have enabled new and positive relationships to emerge between Rio Tinto and host communities. Many years on, the agreements at Weipa and Argyle have resulted in substantial economic benefits, civic development and protection of land and culture in these areas. Furthermore, the business and host communities understand that it is an ongoing process to monitor, evaluate and improve on agreement implementation and outcomes. A process in which relationship building and communication are essential.

## 5. Plan and implement

“The funny thing about it (the mining boom and the agreements) is that it gave a lot more people a chance to get out on country (to do survey work) but it also gave us an opportunity to do better planning: How could we use that compensation money? How could we set up more programmes? How could we increase the inflow into those programmes as well? It was sort of a good thing for us because the companies upped the antes; they took more land but it also involved signing more contracts, so it put us in a pretty good position. But especially in an Aboriginal situation, you have to be aware of what you have in that area and what you are giving up. It’s a very hard balancing act.”

*Cyril Lockyer, Kuruma Marthudenera Elder (2014)*

Inclusive engagement and a verifiable knowledge base provide the foundations for planning and implementing agreements. They support other critical success factors including good governance, adequate budgeting and staff resources, effective programmes and initiatives, robust management systems and accountable leadership.

All agreement processes must be soundly planned and well-resourced. A common oversight is to focus on content without thinking about the resources that will be required during implementation. Signing a mutually satisfactory agreement is an important milestone, not an end in itself. Verbal or written expressions of commitment are not enough. Roles and responsibilities must be assigned, structures created and resources allocated to put the provisions of an agreement into practice.

While there isn’t a standard implementation model to guide practitioners (strategies and approaches must be determined by the context and the parties involved), agreements are more likely to succeed if there are clear goals agreed on by committed people working

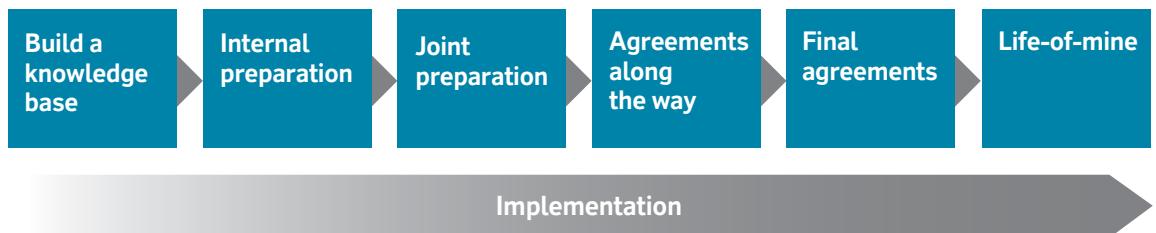
towards concrete targets. Figure 4 shows some indicative steps in this process. Good risk management also requires planning for a scenario where parties fail to reach agreement. See section 3.4 for details on how to manage situations when relationships become adversarial.

### 5.1 Planning for successful implementation

Successful implementation requires that both the business and agreement provisions are clear about:

- the goals, commitments and responsibilities of all parties;
- the resources required, including budgets, skills and capabilities;
- how to integrate commitments into business planning and standard operating procedures;
- governance arrangements and organisational structures;
- agreement management systems, including targets and goals; and
- the means of implementation – the ‘how’ as well as the ‘what’.

**Figure 4: Indicative steps in community agreement-making and implementation**



### **Box 19: Assessing implementation of the Western Cape Communities Coexistence Agreement**

The Weipa bauxite mine on the western side of the Cape York Peninsula in Far North Queensland is on land customarily owned by 11 Traditional Owner groups. Since 2001 it has been the subject of one of the most comprehensive of Rio Tinto's numerous agreements in Australia: the Western Cape Communities Coexistence Agreement (WCCA).

A study assessing the implementation of the WCCA two years after signing found mixed success. It found good progress with:

- implementing employment and training aspects;

- protecting cultural heritage; and
- establishing governance and administration systems.

However, achievement of other objectives was hampered by deficits in other areas, primarily a lack of knowledge and awareness of the intent and operational provisions of the agreement among both company employees and community members.

*Source: Crook, Harvey and Langton (2006) Implementing and monitoring Indigenous Land Use Agreements in the minerals industry: The Western Cape Communities Coexistence Agreement. Chapter 5 in Langton et al (eds) Settling with Indigenous people: Modern treaty and agreement-making. pp. 95-112.*

<sup>23</sup> O'Faircheallaigh (2003) *Implementing agreements between Indigenous people and resource developers in Australia and Canada, Aboriginal Politics and Public Sector Management Research Paper No. 13*. <https://www.griffith.edu.au/business-government/griffith-business-school/pdf/research-paper-2003-implementing-agreements.pdf>

Gibson and O'Faircheallaigh (2015) IBA Community toolkit: Negotiation and implementation of impact and benefit agreements. <http://gordonfoundation.ca/publication/669> (Section 5, p.188-203).

Possible strategies for implementing agreements between mining companies and host communities include:

- Having negotiators draft agreements with explicit consideration of how each commitment will be implemented.
- Following a standard list of implementation questions for parties to address.
- Establishing structures with the primary purpose of giving continued attention to implementation.
- Securing strong support from senior leaders with authority to commit resources and enforce decisions.
- Establishing mechanisms for monitoring and evaluating progress.
- Setting clear goals, roles and responsibilities.
- Mobilising adequate resources (human, financial, technical and information).<sup>23</sup>

## **5.2 Obligations, compensation and benefits**

Mining projects and operations change the life, livelihoods and landscapes of people connected to the land involved. Rio Tinto works closely with host communities to ensure they receive fair compensation and a share of benefits in exchange for secure access to land. These dual intentions should be expressed in the objectives of an agreement.

The distinction between compensation and benefits is important. Compensation provides mitigation or recompenses for things that are lost to individuals and communities when the company acquires land. Benefits are additional contributions and opportunities that are often the subject of intense negotiation. Benefits can include financial flows, employment and training opportunities, and local business support (see Box 20).

In some jurisdictions, compensation is a legal right according to schedules prescribed by the state which leave limited scope to negotiate. Every jurisdiction is different and practitioners should ensure they understand the legal context before proceeding to negotiation.

### **Box 20: Understanding the distinction between compensation and benefits**

Compensation recompenses for loss of something, such as resources, amenities or livelihood. The amount should equal the value of a loss both economic and intangible. A good compensation process accurately determines the rightful recipients and then compensates the value of their loss. In most cases, 'like for like' is the desirable basis (eg land for land, house for house). In reality, this can rarely be achieved and it frequently takes some other form, such as money. However, money as compensation can pose challenges for achieving lasting positive outcomes (see the examples in the Compensation and benefits for land access guidance).

Benefits are investments adding value to the community and individuals as part of a project. They constitute the extra things that developers can offer as a result of opportunities created by the development (eg employment, development assistance, inflated prices for land, business opportunities and joint government lobbying).

Compensation equals payment for what is taken away; benefits are where value is added.

*Source: Extract from Rio Tinto (2015) Compensation and benefits for land access guidance. pp. 3-4.*

**Table 6: Implementation success factors<sup>24</sup>**

<sup>24</sup> Adapted from Barnes (2014) *Building an implementation framework for agreements with Aboriginal landowners: A case study of the Granites Mine. Master thesis. University of Queensland.* p.153.

<b>Successful agreement implementation must commit to:</b>	
Contextual factors	<p>Understanding the social and cultural setting (including historical context and any social tensions) in host communities.</p> <p>Helping the community to understand how the company works.</p>
Purpose and intent	<p>Demonstrating strong corporate commitment and leadership in implementing the agreement as an overall strategy, rather than ticking off clauses.</p> <p>Having clear, precise and explicitly defined goals in the agreement.</p> <p>Maintaining momentum in transitioning from negotiation and signing to implementation.</p>
Local participation	<p>Maintaining a grassroots connection with local communities.</p> <p>Adopting good practice and procedures for consultation, obtaining and representing views and interests.</p> <p>Having a feedback and information flow to host communities.</p> <p>Ensuring that the community has capacity to implement the agreement.</p>
Operating approach	<p>Demonstrating good governance and administration of entities and structures established under the agreement.</p> <p>Having people of sufficient seniority within the business closely involved and accountable.</p> <p>Having adequate human and financial resources for implementation, including training for personnel.</p> <p>Ensuring good planning for implementation and action.</p> <p>Effectively designing initiatives based on research and expert advice.</p> <p>Having robust management systems for monitoring compliance with the agreement, and to track and review implementation outcomes.</p>

Box 21 notes how an agreement at Diavik Diamond Mine includes both aspirations and tangible, measurable goals. Appendix B lists these and other typical elements of a comprehensive community agreement. Table 6 identifies other factors that determine successful implementation, while Box 19 shows how implementation is assessed in practice.

#### **Contributing to regional economic development**

Agreement benefits should be directed to communities as a whole. They should not enrich individuals, political groups or their supporters. In some cases, compensation may be directed to individuals.

#### **Box 21: Example of an agreement stating aspirations to deliver benefits and opportunities**

Extract from Dogrib Partnership Agreement for Diavik Diamond Mine (Canada)

- The Project is expected to contribute to the social, economic and cultural well-being of the Dogrib.
- Diavik Diamond Mine and the Dogrib Council wish to provide a framework to ensure that training, employment and business opportunities are made available to the Dogrib.
- This agreement is intended to assist the Dogrib to participate in project related training, employment and business opportunities.

Agreements may commit parties to training, direct and indirect employment, business development, procurement and supply chain arrangements. Provisions like these help to build local economies and create opportunities for financial independence. Through experience, Rio Tinto has found that stronger regional economies better support operations during their active life, and build community sustainability when operations close.

The link between community development and business objectives should be made through the Communities and Social Performance plans. These plans must define (at the business level) objectives and targets for investment in regional economic development to support opportunities for local businesses. This approach is consistent with the Rio Tinto Communities and Social Performance global target, which requires operations and projects to demonstrate a positive contribution to the economic development of their local communities. It also supports Rio Tinto's business objectives by fostering reliable suppliers.

Another way to support regional economic development is to consider options for shared infrastructure. Thoughtfully designed ancillary infrastructure, such as waste management facilities, ports, power lines, water pipelines and roads, can serve business and civic purposes and enhance the local economy. Options for community access, under suitable conditions, to company-built infrastructure should be considered.

Agreements also need to prepare communities for the post-mining period. Case study 4 on the agreement with the Yolngu people in northeast Arnhem Land (Northern Territory, Australia) describes an agreement that positions local Indigenous institutions at the centre of the region's future and post-closure commercial development.

### **Formulating financial payments**

Financial payments – for the purposes of compensation, benefits or both – can take many forms. The advantages and disadvantages of each option should be clearly presented. Community representatives must be well-informed about the business cycle, the nature of commodity markets and projections for the project or operation. They must also have sound, independent financial advice available before making decisions. Options for financial payments include those in Table 7.

The suitability of arrangements will depend on many factors, including the duration of the agreement, the stage of the project and the circumstances of the community. Communities are often most interested in reducing risk. No matter how emotionally appealing it is to be 'an owner', they may prefer to receive early and assured benefits. The company benefits from certainty and from scheduling that aligns with their capacity to pay. A combination of the approaches in Table 7 is often best (eg a mix of fixed payment and profit-based transfers). In this way, annual community payments are guaranteed at a minimum predictable level, even in the face of poor market conditions, and communities are motivated to support the success of the business.

### **Establishing future income streams**

A good way to secure long-term benefit is through a 'future fund'. Endowment funds, foundations and trusts are popular as a means of implementing agreement commitments. They should be adapted to the local context and may align with local and regional development plans.

Trusts and foundations are legal entities that hold assets or funds on behalf of the community parties to an agreement. They provide for lump-sum or regular payments to be invested as principal, with specified amounts or the interest earned to be used on a recurrent basis. They can be co-managed and the agreement should outline:

- the governance and financing structure;
- whether it has a grant-making or operational approach;
- the agreed intent and purposes for which funds can be used;
- eligible beneficiaries and geographic or other focus;
- the degree of independence from the mining company; and
- community participation in governance.

The examples in Table 8 show how endowments may contribute to long-term economic, social and cultural objectives, and may receive contributions from additional sources.

**Table 7: Some options for formulating financial payments**

Payment option	Advantages	Disadvantages
A single up-front payment and/or agreed monthly, quarterly or annual payments.	<p>All parties know how much is involved from the outset and can plan ahead.</p> <p>Long-term returns are attained if capital is soundly invested.</p> <p>Payments from the outset allow preparation for taking advantage of emerging opportunities.</p>	<p>To some extent, these are arbitrary numbers.</p> <p>This option is not attuned to project stages or operation's income stream.</p> <p>It's difficult to graduate payments to match inflation and other variations.</p>
Agreed regular fixed payments aligned with contemporary land rentals in the region/country and inflation.	<p>The community gets a regular stream of income.</p> <p>This is a long-term option with graduation of payments possible.</p> <p>Benefits accrue from the outset.</p> <p>Payments are not vulnerable to unanticipated changes to impact, scale and profitability.</p>	<p>If not suitably indexed, payments may not keep up with inflation.</p> <p>Payments are not sensitive to unanticipated increases in profitability.</p>
Payments based on the amount of land disturbed.	<p>This option is useful in cases of broad-acre surface disturbance where remediation can successfully return land to post-closure community uses, such as bauxite and mineral sands mining.</p> <p>It links payments to a major impact for land-connected people.</p> <p>Payments flow pre- and post-production whenever possible.</p>	<p>Payments are vulnerable to production fluctuations and external markets.</p>
<p>Payments based on operational outcomes, such as a percentage of profits.</p> <p>Such payments can be formulated based on published earnings, such as earnings before interest, tax, depreciation and amortisation (EBITDA), and often have agreed 'caps' and 'floors'.</p> <p>Other variations are royalties linked to the volume of production (unit royalties) or to the value of production (ad valorem royalties).</p>	<p>Motivates the community to help the operation be successful.</p> <p>With agreed 'caps' and 'floors', this option provides communities with some guarantees and protection from market fluctuations.</p>	<p>There are no pre-and post-production payments, and payments are vulnerable to fluctuations.</p> <p>There are disadvantages linked to the type of royalty chosen, eg:</p> <p>Volume-based payments give low returns for communities in times of high prices and high outlays for companies in times of high-volume, low-priced production.</p> <p>Value-based payments provide a share of benefits to the community if prices or production increases but this can be onerous for the company if costs increase and margins drop.</p>

**Table 8: Examples of sustainable income streams established under agreements**

Argyle Diamond Mine (Australia)	Iron Ore Company of Canada	Rio Tinto Aluminium Weipa (Australia)	Kitimat (Canada)
Gelganyem Trust – investing revenue share	Sustainable business development	Western Cape Communities Coexistence Agreement Charitable Trust	Joint Venture Training Institute
The majority of an annual reparation payment, which is based on a percentage of earnings before interest, tax, depreciation and amortisation (EBITDA) are placed into an enduring sustainability fund.	IOC sold a railway for a nominal sum to a company owned by three Aboriginal groups. This company operates the passenger train service providing a low cost means of transport to the communities. It also has the opportunity to foster haulage business with mining companies in the Northern Quebec/ Labrador region.	Annual contribution from Rio Tinto. Annual contribution from state government. Both increase with production and prices. Majority of annual funding is placed in long-term secure investments.	Rio Tinto's Aluminium product group and Haisla formed a joint venture to buy and operate the Kitimat Training Institute. Useful for Rio Tinto trainees during construction. Also serves other local employers and builds employability and in-demand skills for the future.

### Managing financial payments

Establishing or entrusting an entity to manage financial benefits requires a mutual understanding between agreement parties about:

- what the value of payments will be;
- how the value will be determined;
- how long the payments will continue;
- what disbursements can be spent on or allocated to;
- how the fund distributing entity will be managed; and
- how capacity to manage cash flow will be developed.

To assist decision-making, endowment entities can plan for community development investment by allocating funds to specific purposes, such as education and health. Sub-committees can then manage disbursements in discrete packages. This means governing boards or committees don't have to make numerous, detailed decisions across the entire range of community priorities. The structures and functions of agreement-related trusts and institutions can vary as Box 22 shows.

The governance arrangements for disbursing funds are particularly sensitive. They need to ensure that financial benefits are:

- Received, managed and distributed by a specified governance body recognised as acting in the interests of the beneficiaries (this may be pre-existing or established for the purpose).
- Channelled to a collective benefit, rather than to the private income of individuals.
- Publicly reported with associated (annual) variation where linked to business performance.
- Independently audited at regular intervals with results reported to all parties and to all members of the affected communities.

Box 23 outlines what to consider when establishing, selecting or adapting institutional entities for the governance and distribution of agreement financial benefits. Section 5.6 has more details on other aspects of agreement governance.

*25 Barclay, Parmenter and Barnes (2014). Good practices in Indigenous employment, training and enterprise development. CSRM.*

### Maximising employment opportunities

Rio Tinto frequently includes local and Indigenous employment as key commitments in agreements. However, entering regular paid employment at a mine site can be daunting for local, especially Indigenous, people. Fulfilling local employment commitments requires planning and collaboration across the business. Human Resources, Training and Communities teams need to work with community participants to develop strategies to boost local employment.

With more than 60 per cent of operating costs typically spent on wages and procurement<sup>25</sup>, employing locally can deliver a stable workforce for the business and provide substantial benefits to host communities. Maximising job opportunities for local and Indigenous people can often be achieved without increasing labour costs or compromising productivity. Table 9 describes how some sites have implemented their employment commitments.

Local employment targets, recruitment and selection strategies should consider gender and other characteristics of marginal groups in host communities. Employment commitments can also include helping local and Indigenous employees along career paths beyond entry-level positions.

Many jobs at mine sites are filled by contractors, which can be challenging for meeting local employment targets. Agreements should state that employment targets and commitments extend to contractors. This may require major contractors to commit to agreement-related employment targets. The project cycle also poses challenges, as different phases provide different employment opportunities. The number and kind of positions, and skill levels required, change from construction to operation. Agreement terms and implementation plans need to recognise these workforce changes across the life of the mine.

#### Box 22: Two trusts established by the Argyle Diamond Mine Participation Agreement

1. The Gelganyem Trust has 11 trustees constituting nine representatives of the seven Traditional Owner groups and two independent trustees. It administers four funds: the Sustainability Fund, the Law and Culture Fund, the Education and Training Fund and the Miriuwung and Gidja Partnership Fund. The Sustainability Fund provides future generations of the Miriuwung and Gidja people with a significant capital base.

The trust focuses on meeting the immediate needs of the Traditional Owners, and the types of allowable expenditure and distribution process are covered by the trust deed. The trust's

many projects include an Indigenous business development facility, scholarship funds, renal health care and holiday programmes for youth at risk. The trust has successfully leveraged funding from the federal and state governments and private funding partners.

2. The Kilkayi Trust has only two trustees and administers payments from Argyle to the individual families who are party to the Indigenous Land Use Agreement.

*Source: Wall and Pelon (2011) Sharing mining benefits in developing countries. World Bank Extractive Industries for Development Series No. 21. p. 18.*

**Box 23: Important considerations for benefit fund distributing institutions**

**Representation**

- What degree of community representation and control is desirable?
- What existing institutions might be considered (rather than setting up new entities for community decision-making)?
- Is broader representation, including independent experts, desirable?
- Does it have balanced gender representation?

**Transparency and accountability**

- Are there clear processes in place for public accountability?
- Is the institution's decision-making transparent to the community?
- Are the decisions of the institution regularly reported to the community?
- Are the institution's books regularly audited by an independent third-party and the results made available to the community?

**Culturally appropriate**

- Does the institutional structure have 'cultural fit'?
- Is the institution's membership based on land connections, or some other criteria?
- Is there provision for ongoing, culturally appropriate training of community decision-makers within the institution?

**Purpose**

- Is the institution directed to community purposes, rather than to the benefit of individuals?
- Is the institution's purpose aligned with objectives that serve a broader community group?
- Is the institution an agent for community objectives, rather than having a purpose of its own?

- Is there a process in place where community members regularly revisit long-term objectives and for the institution to adjust accordingly?
- Is the organisational structure fit-for-purpose or does the organisation structure tend to drive the purpose?

**Financial management**

- Are payments to individuals explicitly banned or minimised?
- Is the institution tax-effective?
- Does the institution have a number of specific purpose sub-funds with pre-determined allocations?
- Is a proportion of the institution's income allocated to an endowment fund to provide for long-term accumulation and an intergenerational benefit?
- Are administration costs sufficient and kept low?
- Is the institution set up to leverage financial contributions from the government or other sources?

**Monitoring and improvement**

- Do the founding documents set out a clear process for amending the institution's rules?
- Do amendment provisions prevent impulsive change and provide for an effective process for change when required?
- Are there arrangements, commitments and capacities in place to measure outcomes?

## Case study 3: Oyu Tolgoi, Mongolia

### Adapting community agreement-making to a different legal context



Oyu Tolgoi  
Umnugobi Province, Mongolia

Pictured opposite:  
*Famous Mongolian horsemen in traditional costume gather to attend in national celebration around the statue of Genghis Khan outside Houses of Parliament in Ulaanbaatar, Mongolia.*

The Oyu Tolgoi mine is located in the Gobi Desert in Umnugobi Province of southern Mongolia. In full production it will be one of the largest copper mines in the world. Under the Oyu Tolgoi Investment Agreement signed in 2009, a joint venture was established in which the Government of Mongolia owns 34 per cent of the business. The Investment Agreement also established many commitments for Oyu Tolgoi to maintain its 'licence to operate', which included developing a Community Cooperation Agreement in partnership with Umnugobi authorities. Operating under a different legal system from that in which the business normally operates, and with limited detail about what should be included, Rio Tinto set out to achieve a comprehensive community agreement that would meet international standards while remaining true to Mongolian history, legal tradition and societal expectations.

#### Understanding Mongolian law and traditions

The legal system in Mongolia is one of Continental Law and there is no tradition of community agreement-making similar to that under which Rio Tinto typically operates (that is, under Common Law legal systems in other parts of the world). Prior to the Oyu Tolgoi agreement, community cooperation agreements in Mongolia did not contain a lot of detail and focused on limited transactional exchanges, such as the developer providing a kindergarten building or some other tangible contribution. The Oyu Tolgoi Investment Agreement itself contained no detail on how a community agreement may be structured or what it may contain. While there is nothing to prevent more comprehensive content being included, Continental Law tends to encourage 'top-down' formulation, whereas Common Law tends to encourage 'bottom-up' processes. Mongolian Minerals Law also requires resource developers to establish agreements with local government, but again, provides few details on any desired form and content in such agreements.



Oyu Tolgoi-Umnugobi  
Community Cooperation  
Agreement signing  
ceremony April 2015.



Another major challenge was the lack of an institutional tradition for directly representing land-connected herders in negotiations with government and companies. Mongolia is a country strongly influenced by its proud traditions and nomadic heritage. It experienced rapid development in the 20th century, emerging from feudal conditions into a centrally planned socialist nation in the 1930s, to democracy since 1992. Gobi nomadic herders are not ethnically or linguistically distinct from other Mongolians, although they have generalised ethnographic land connections recognised in Mongolian Law. They are not an Indigenous people, either by international definition or self-identification. In seeking to recognise herder land connections, and also remain faithful to Mongolian history and statute, a community cooperation agreement needed to be negotiated and signed with local and provincial governments representing the mine-affected communities. This is very different to agreements with non-government community institutions in other places Rio Tinto operates.

In addition, local government in Mongolia, like in many economic frontiers, tends to lack financial and institutional capacity for negotiating comprehensive agreements. Moreover, significant leadership and staff turnover associated with four-yearly election cycles works against long-term stability and representation. This meant that substantial time was needed to work through the gaps in mutual comprehension of what a comprehensive community agreement might entail. Rio Tinto needed to set aside many of its expectations based on community agreements reached in Common Law countries like Australia and Canada, and the Umnugobi parties needed to understand that substantially more detail than they were used to would be required in the agreement.

### Getting the structures right in context

Leading up to the agreement, Oyu Tolgoi had communicated and delivered community benefits into the four partner communities – Khanbogd, Manlai, Bayan-Ovoo and Dalanzadgad – based on what it thought was best. The Community Cooperation Agreement provides for a much greater flow of information, and a more inclusive form of engagement and decision-making than has historically occurred. The agreement explicitly sets out detailed rules and obligations for all parties in this regard. It also commits Oyu Tolgoi to provide US\$5 million each year into a Development Support Fund for community-proposed projects and programmes, and it describes how various committees and boards will be established to govern the agreement and the Development Support Fund. This high degree of detail about rules, obligations and governance committees in a formal agreement is new to Mongolia.

There are a number of agreement schedules concerning specific ‘thematic’ areas to which partner communities want Oyu Tolgoi to pay special attention. Mainly these are about expected behaviours and activities of Oyu Tolgoi employees and contractors when interacting with local herders, other community members and the local environment. Each of them has a working group comprising Oyu Tolgoi and partner community people who have a special interest in the subject area. They include:

- water management;
- environmental management;
- animal husbandry and pastureland;
- history, culture and tourism;
- basic social services;
- local business and procurement; and
- infrastructure and capital projects.

All the working groups report to an overarching relationship committee, which ratifies any recommendations and presents them to Oyu Tolgoi. In this way, community-based people and herders can participate in the implementation of the agreement. This bridges older traditions of centralised governance and the expectations of a newly democratic nation that wants to meet international standards. Importantly, all parties agreed that the Community Cooperation Agreement – and all documents, records, reports and activities arising from it – should be completely transparent and publicly available. Again, this is a new development for Mongolia.

Final agreement was reached in early 2015 and the Oyu Tolgoi-Umnugobi Community Cooperation Agreement was signed by the chief executive officer of Oyu Tolgoi and the Umnugobi governor on behalf of partner communities witnessed by provincial and local-level governors and council chairmen.

By establishing a cooperative and transparent governance structure, the Oyu Tolgoi-Umnugobi Community Cooperation Agreement sets up workable governance based on existing norms. It also enables inclusive implementation that meets international standards. It demonstrates that cross-fertilisation of ideas from one part of the world to another is possible provided older traditions are respected and company representatives do not try to force the pace of negotiation.

To view the Community Cooperation Agreement visit [http://ot.mn/media/ot/content/our\\_commitments/communities/ca/OT\\_Cooperation\\_Agreement\\_EN.pdf](http://ot.mn/media/ot/content/our_commitments/communities/ca/OT_Cooperation_Agreement_EN.pdf)

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Ancient petroglyphs from Javkhlan rock, near the Oyu Tolgoi project area in Mongolia.

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**Table 9: Examples of implementing agreements' employment commitments**

	<b>Agreement commitment</b>	<b>Examples of specific actions</b>
Employment targets	Local employment objectives in agreements are sometimes vaguely described as 'best endeavours' to employ locally. It's better for agreements to be more specific. For example, specifying a set percentage of local employment, a phased increase or annual increments that aim for demographic representation.	The Argyle Diamond Mine Employment and Training Management Plan was reviewed in 2015 and endorsed by the Relationships Committee. There is now an employment target of 25 per cent of employees being local Aboriginal people.  The Iron Ore agreements in the Pilbara specify that the local Aboriginal workforce will reflect the Aboriginal population in the Pilbara. In 2015, this is around 12 per cent.
Local educational partnerships	Quality educational facilities attract skilled employees to a mine and build a strong pool of local talent. Some agreements commit sites to partner with local schools and colleges to link school-based programmes with industry requirements.	Rio Tinto's Aluminium business at Weipa has a partnership under the Western Cape Communities Coexistence Agreement with Western Cape College. It has resulted in higher student retention, stronger achievement and improved employment outcomes. As at August 2015, over 20 per cent of the workforce is Indigenous, with approximately 14 per cent being local Aboriginal persons.
Recruitment priorities	The principle of the 'best person for the job' can include criteria recognising the value of employees with an attachment to the land. A hierarchy of preferred applicants applies at some sites. This may be tied to sovereign investment agreements and community agreements.	The Haisla Nation-Rio Tinto Alcan Legacy Agreement creates a local employment preference for First Nation applicants in both Rio Tinto's Aluminium business and its contractors.
Disseminating information about vacancies	Information about employment opportunities can be shared with host communities in various ways. Local media, regular listings to community training organisations and groups, and community visits can all be used to disseminate information.	The Argyle Diamond Mine maintains a local employment database that lists potential applicants with their qualifications and experience. The mine notifies these potential applicants when opportunities arise.
Selection strategies	Position prerequisites can be adjusted for applicants from host communities or to give recognition for on-the-job experience.	Diavik Diamond Mine waives standard educational requirements for Aboriginal candidates.  The Iron Ore business in the Pilbara shifted its employment policy from employing 'appropriately qualified' Aboriginal people to any Aboriginal person who wants a job and meets basic entry-level requirements.
Traineeships and pre-vocational programmes	Sometimes an agreement specifies the level of funding for training programmes or stipulates annual local intake. Such terms dictate implementation priorities.	At Diavik, training and apprenticeships have played an important role in fulfilling agreement commitments and connecting Aboriginal people with employment opportunities. Forty-five Aboriginal people have completed apprenticeships since operations began. Diavik currently supports 15 Aboriginal apprentices and a quarter of the workforce is Aboriginal.
Counselling and family support programmes	Having a supportive home environment means employees are more likely to stay in their jobs. Counselling support programmes are provided in some situations for families as well as employees.	At both Weipa and Diavik there are programmes to prepare local Indigenous employees and their families for lifestyle changes associated with shift rotation work.
Retention of workers	Some sites introduce mentoring or buddy programmes to make the workplace more supportive for local employees.	Argyle actively mentors 32 Aboriginal trainees and apprentices. Many issues for Aboriginal employees arise during time off, so mentors can be contacted 24/7 to tackle problems as they arise.

**Box 24: Agreement commitments to procure from host communities at five mines**

**Diavik Diamond Mine** in Canada's Northwest Territories spent more than C\$1 billion with First Nations' businesses in the first six years after construction started in 2000. These businesses were able to progressively increase their capability and economies of scale by working with three major diamond mines in the region. Some large contracts are recognised in participation agreements with five neighbouring Aboriginal groups. These contracts were set up so that, subject to satisfactory performance, the Aboriginal contractor will have the work as long as the mine is in production. The Diavik Socioeconomic Monitoring Agreement targets 70 per cent of the mine's expenditure to local Northern businesses. Diavik uses preferential weighting to choose contractors, prioritising Northern and Aboriginal businesses or businesses that have a high proportion of Aboriginal employees. Collaboration between Communities practitioners, Procurement teams and Operations helps the mine meet its procurement targets.

**The Oyu Tolgoi-Umnugobi Cooperation Agreement** in Mongolia includes commitments to local business development and increasing local procurement of goods and services, such as developing annual local procurement spend targets and reporting performance against these targets, organising training sessions to support local suppliers on business and HSE practices, and recognising and rewarding local suppliers. Oyu Tolgoi has run a supplier qualification programme since 2012 and is working with local suppliers to develop and improve their performance and their capacity to supply more goods and services to the project. The mine also uses supplier screening, desktop assessment and site audits to identify any gaps in suppliers' ability to meet Rio Tinto's procurement expectations. The total amount spent with suppliers in the South Gobi has increased significantly from US\$1.5 million in 2011 to US\$42.5 million in 2014. The 2015 target of US\$60 million will be just over ten per cent of total spend and one-sixth of all procurement from national suppliers.

**Rio Tinto Simandou's** microfinance programme in Guinea, West Africa aims to improve small business development in local communities in the Simandou project areas. In the absence of a formal community agreement, the local business development commitment is written into an agreement with the government. Among other things, the programme invested US\$90,000 over two years to support and provide training to local small and medium enterprises. Over 1,000 local entrepreneurs have received training in business and credit management,

and the programme has successfully supported the emergence of young entrepreneurs, including women. Some local enterprises have obtained contracts with Rio Tinto and Rio Tinto contractors.

**Two agreements at Iron Ore Company of Canada (IOC)** contain procurement provisions. The Resources Development Agreement between IOC and the Innu Nation of Labrador, and the Community Participation Agreement between IOC and NunatuKavut Community Council were reached in 2014. Both record the parties' agreement to use reasonable efforts to optimise business opportunities for First Nations' businesses at IOC facilities. Specific measures include First Nations maintaining and updating a business registry; IOC providing information about work and procurement requirements, bid and tender opportunities; and IOC conducting an annual procurement workshop for NunatuKavut Community Council members.

**Rio Tinto's Iron Ore business** in the Pilbara seeks to provide business development support and procurement opportunities to local Pilbara Aboriginal businesses. The target for spending with these businesses reflects the proportion of the Aboriginal population in the Pilbara (12.2 per cent at the last Australian Census in 2011). Rio Tinto's implementation strategy to meet the target includes:

- Appointing an Aboriginal liaison officer to identify contract opportunities for local Aboriginal firms.
- Providing strategic support to Pilbara Aboriginal businesses to meet Rio Tinto safety and other standards.
- Developing a business register to better understand local capacity and capabilities.
- Giving preferential weighting in tender assessments for Pilbara Aboriginal businesses.
- Breaking down large tenders into packages that could be serviced by these businesses.
- Offering some tenders only to Pilbara Aboriginal businesses.

### **Facilitating local procurement**

Communities benefit when operations purchase goods and services from local businesses and businesses that employ local and Indigenous people. The mining industry offers a range of opportunities for Indigenous businesses to secure service or supply contracts in remote regions where other employment and contracting prospects may be limited. Box 24 provides examples of agreements' commitments to local and Indigenous procurement; and arrangements for prioritising local procurement.

Actions that build supportive relationships with local contractors and suppliers include:

- assistance with prequalification;
- training in business management; and
- assistance to access commercial loans on fair terms.

Sometimes Rio Tinto is obliged by an agreement to give advance notice to potential local suppliers of any contract over an agreed amount where this is permitted by law. This can be done via a business liaison officer or a joint business development task force.

Another strategy is to require businesses bidding for contracts over a specified threshold to demonstrate how they will involve local businesses. For example, in implementing its Participation Agreement, Argyle Diamond Mine must notify the Business Development Taskforce (the Yawoorroong Jiddiawaddam group, comprising company and Traditional Owner representatives) if tenders are to be called. All tenders have an Aboriginal engagement weighting on their evaluation and bidders must demonstrate how they will involve Traditional Owner businesses; and employ, train and otherwise benefit Traditional Owners. Similar arrangements are being put in place for the South of Embley project in Cape York, Far North Queensland.

### **5.3 Resourcing and budgeting for implementation**

To be implemented successfully, agreements need adequate resourcing and enough of the right people working together. It's important to properly estimate the effort and resources needed. Different combinations of funds, capability, expertise, staff, information and other resources are required at different stages, which must be planned for over the life of the agreement as part of the annual operational budget cycle.

Planning and budgeting need to look beyond specific activities defined in the agreement by also providing for the following:

- Administrative functions
- Ongoing engagement, consultation and communication activities
- Building capability (including training for Rio Tinto personnel and community representatives)
- Monitoring performance
- Securing third-party expertise
- Resolving any disputes

All of these activities, if done properly, will go a long way to support successful implementation. If neglected, they can undermine an agreement, damage relationships and disrupt operations. The business should apply the same rigour to estimating implementation costs as it does to project and operational estimates. This involves systematic consideration of matters, including likely costs, margins of error, responsibilities and penalties.

Some agreements include graduated or variable payments and budgets with higher expenditure at certain project stages or if achievements fall below a threshold. Other agreements, like the Argyle Participation Agreement, specify a management payment to support the Trust Executive Office to implement the agreement for a number of years, until the trusts are self-supporting.

### **Staff roles and competencies**

Within Rio Tinto, senior site managers (typically the general manager, Operations) have overarching responsibility for implementing agreements, supported by a range of site functions delivering on commitments. They need to be confident that they have the right team to design and deliver agreements. This includes dedicated Communities, Human Resources, Procurement and other personnel.

The individual competencies and skills required are wide ranging. Rio Tinto employees and community members need to understand mine plans, communicate across cultures and work with limited resources. Having an agreement is not enough. Success rests largely on the skills and ability of parties to fulfil their obligations. Building the capacity and capability of all parties should be an integral part of implementation plans.

<sup>28</sup> Based on Rio Tinto (2011) *Communities and Social Performance competency*.

Required competencies for Rio Tinto employees<sup>28</sup> include the ability to:

- Work with local businesses to ensure they understand the safety and other requirements needed to work on Rio Tinto sites.
- Assess and explain community expectations of the business, particularly around livelihoods, economic participation and the mutual commitments necessary to secure and maintain resource access and business certainty.
- Identify formal and informal land tenure and water access arrangements, and work through community decision-making processes to gain agreement on the use of these resources.
- Work with knowledgeable locals and professional heritage experts to develop an in-depth appreciation of matters of cultural significance and to value the world views, lifestyles and heritage of host communities.
- Develop environmental management plans, in accordance with the values of local land-connected

people and the terms of the agreement, that have a sound scientific basis and meet regulatory requirements.

- Understand and foster institutional arrangements within which durable agreements can be made and implemented.
- Appreciate the difference between compensation and benefits as well as the importance of delivery and governance systems for compensation payments and benefits distribution.
- Develop agreement implementation plans and work internally (including by involving senior management when required) and with communities to deliver agreement outcomes.
- Monitor and foster multi-party (communities, civic organisations, NGOs, government and company) compliance with agreement commitments

Another set of competencies relates to the logistics of implementing agreements. Box 25 outlines an example from Weipa about logistics and other challenges.

#### **Box 25: Logistics and other challenges of agreement implementation**

Agreements require ongoing commitment to the ‘big issues’ and attention to the ‘small stuff’ to ensure they are effectively implemented over time. Much of this work relates to process, including the logistics involved in holding meetings.

For example, the Western Cape Communities Coexistence Agreement (WCCA) at Weipa, Australia involves 11 Traditional Owner groups, each represented by two committee members. Meetings with these 22 members (or their proxies) involve coordinating multiple movements across remote north Queensland simply to get people ‘around the table’. Distances are significant, with more than 800 kilometres between some family groups. Several representatives are completely cut off in the wet season and are only able to attend if charter flights are arranged. Other logistics include arranging long distance road transport, accommodation and meals while members attend meetings.

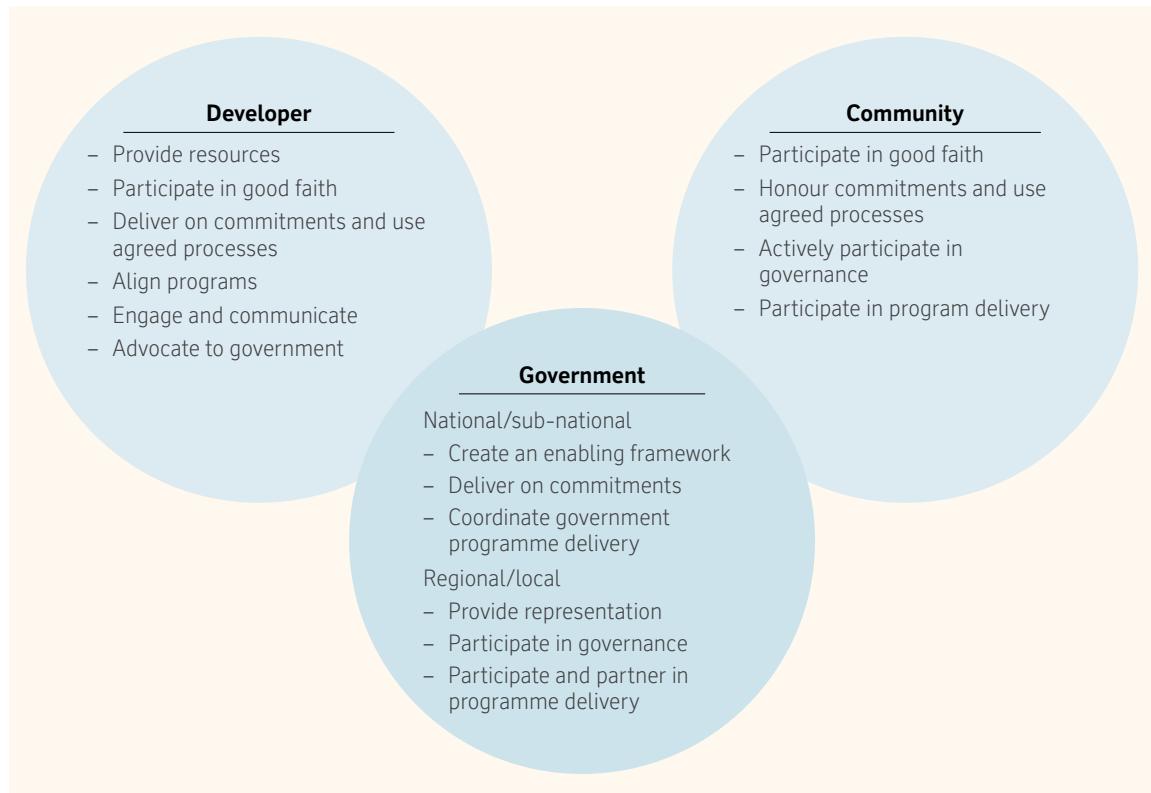
These matters can be complex under any circumstances, but more so when communities live in areas that are exposed to extreme weather

conditions that include monsoons and cyclones. Family commitments and other cultural aspects can also increase the degree of difficulty in ensuring that meetings have the required quorum. It’s vital that the company and the WCCA Executive Office work together with representatives and others on these matters. Experience suggests that close co-ordination between all parties is essential if meetings are to take place so that agreement implementation can proceed.

Likewise, communication is no simple task. Access to mobile phones and other technology has certainly made the challenge easier in recent years, but not everyone has access to technology. Notices of committee meetings are still communicated by word of mouth and posted on every community noticeboard to ensure that all bases are covered. Regular scheduled community visits by the Weipa Communities team are essential for both relationship-building and communication about agreement implementation and its outcomes.

29 Brereton, Owen and Kim (2011)  
*Good practice notes: Community development agreements. World Bank extractive industries sourcebook.* p. 26.

**Figure 5: Roles and responsibilities of key parties in agreements<sup>29</sup>**



Developing capabilities to fulfil agreement-related roles requires ongoing professional development and training. Cultural awareness and gender sensitivity training is critical for all employees and contractors as part of implementing the agreement (see section 4.3). Another key training component concerns governance, particularly for trustees and directors of any endowment bodies established to manage agreement funds (see section 5.6).

#### **5.4 Roles, responsibilities and partnerships**

Agreements need to clearly define who the primary parties are; and the roles, responsibilities and behaviours expected of each (see Figure 5).

#### **Government relationships**

Government is an important stakeholder in any operating context. Rio Tinto business units have direct relationships with different levels of government, from national to local levels. In most jurisdictions, governments have primary responsibility for stimulating economic growth. Agreements should aim to align with government plans for regional economic development. Rio Tinto businesses are encouraged to engage with governments to support broad-based economic growth and development, and revenue transparency, in the countries and regions in which they operate.

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30 Agreements,  
Treaties and Negotiated  
Settlements Project  
[http://www.atns.net.au/  
page.asp?PageID=1#can](http://www.atns.net.au/page.asp?PageID=1#can)

There are certain advantages to engaging and partnering with government in agreement implementation. Partnering with governments can offer legitimacy and scale to company efforts. Ensuring that agreements align with or complement regional development plans can also enhance the sustainability of particular initiatives and contributions. With government as an active and committed partner, agreement activities and initiatives are more likely to continue after mine closure.

Projects and operations should be aware, however, that governments do not always support company-community agreement processes. Some governments may not be willing to facilitate community participation or may view that an agreement poses a threat, particularly when the state does not recognise a particular group as Indigenous. Local people may have suffered a history of marginalisation and may not want the government involved either. Under these circumstances, joint action by companies and communities can be a powerful force for change. Through a constructive process of engagement, companies and communities can bring benefits to a mining region and encourage the recognition of the rights of certain marginalised groups.

While it is preferable to negotiate agreements directly with affected communities, some jurisdictions require that government is a party to an agreement. For instance, the Oyu Tolgoi-Umnugobi Cooperation Agreement (Mongolia) was signed by Oyu Tolgoi LLC and the Umnugobi *aimag* (province) governor on behalf of four *soums* (districts) – Khanbogd, Manlai, Bayan-Ovoo and Dalanzadgad – collectively referred to as the Oyu Tolgoi Partner Communities (see Case study 3).

There are many issues to consider when thinking about engaging governments in agreement processes. Some questions include:

- What is the relationship between the government and the community?
- What role is the government likely to play in agreement processes?
- Are there tensions about the government as a ‘third-party’?
- Will the company be expected to deliver public services or infrastructure that would normally be the responsibility of government?
- What role are government agencies expected to play in implementation?
- When and how will government involvement be sought and maintained?

### **The benefit of partnerships for agreement implementation**

Support from respected and influential organisations and individuals can be particularly helpful during agreement implementation. Training providers and implementing NGOs may already have successful programmes in the area. Partnering with public, private, civic and community organisations can harness complementary skills and resources.

Rio Tinto has experience partnering with NGOs, other industries and government to implement agreements. One example is the Mine Training Society in Canada. The society is a jointly developed initiative between Aboriginal governments, the Government of the Northwest Territories, the Government of Canada and mining companies operating in the Northwest Territories. It was set up to help implement the training and employment commitments made in agreements (including Diavik Diamond Mine’s) between the companies and the governments. The Mine Training Society is an independent organisation that facilitates training and work rotations throughout the region, and supports employment opportunities in the local industries. As Rio Tinto’s core business is not training or education, partnering with other organisations in the region to deliver training to locals was mutually beneficial.

Likewise, as part of its agreement commitments to employment, the Iron Ore business in the Pilbara participated in a Regional Partnership Agreement, facilitated by the Minerals Council of Australia and the Australian Government. The agreement was between seven Indigenous organisations, four employers, two local governments, state and federal governments. These institutions worked together to reduce unemployment among local Aboriginal people and create over 100 new positions per year between 2007 and 2012. This provided a strong foundation so that in 2013 there were more than 1,000 Aboriginal people employed by Rio Tinto’s Iron Ore business in Western Australia.<sup>30</sup>

## Case Study 4: Gove, Australia

### Engaging with legacy to enable a different future



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Gove  
Northern Territory, Australia

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26 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, per Blackburn J.

Rio Tinto owns and operates a bauxite mine located in northeast Arnhem Land in the Northern Territory, Australia. Since exploration of the area's bauxite reserves commenced in 1955, the mine and alumina refining operations (currently curtailed) have been at the centre of a well-known grievance in Australian Aboriginal land rights, which led to an historic bark petition being presented to the Australian Government in 1963.

In 2007, Rio Tinto acquired the northeast Arnhem Land operations as part of its acquisition of Canadian aluminium corporation, Alcan. Before acquisition, there had been little engagement between management and the Yolngu people, the recognised Traditional Owners, on the fundamental historical grievance of 'lack of consent'.

In 2008, facing unresolved issues around tenure, and wishing to find a way to 'move on' rather than defend the legacy of previous mining companies, Rio Tinto set out to engage with three Yolngu clans about the underlying grievance and address the longest running Aboriginal mining dispute in Australian history. The resulting agreement positions local Yolngu clans and institutions at the centre of the region's future, and provides opportunities for local economic development.

#### Acknowledging the past

In 1962, without reference to the Traditional Owners, a mining lease was granted over a large area in the northeast of the Arnhem Land Aboriginal Reserve. In response, the Yolngu clan leaders representing the Traditional Owners drew up the bark petition, which outlined their concerns about mining and the mining lease granted over their land. The petition was presented to the Australian Commonwealth House of Representatives in 1963. A Select Committee investigated the Yolngu's concerns and made a series of recommendations to the Government, including formal recognition of Yolngu rights to hunting areas and access to, and protection of, sacred and other sites. Despite the committee's recommendations, Parliament did not recognise their rights – including the fundamental issue of 'consent'. It's believed that this was based on legal views then prevailing, known inaccurately as *terra nullius*, or land belonging to no one.<sup>26</sup>

While the bark petition was ignored, it set in train a number of developments that maintained the Yolngu grievances at the centre of land rights and Native Title debates for more than four decades. These included the Gove land rights case (1969–71); the Woodward Commission into Aboriginal Land Rights (1973–74); the enactment of legislation to recognise Aboriginal land rights in the Northern Territory (1974–76); and the Blue Mud Bay case (2005–08) that affirmed Yolngu traditional sea rights.

Gumatj dancers at the signing of the Rio Tinto Gove Traditional Owner Agreement ceremony, June 2011.



*Yirrkala bark painting surrounding petition with 12 faded signatures dated 14 August 1963. Sent from Yirrkala, Northern Territory to the House of Representatives in 1963. Formally presented for display in Old Parliament House in 1977 and moved to the new Parliament House in 1988.*

*Source: <http://www.foundingdocs.gov.au/scan-sid-57.html>*

The passage of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* led to the transfer of Aboriginal reserves, such as the Arnhem Land Reserve, to Aboriginal ownership in the form of Trusts representing the Traditional Owners. Further, the Act led to other Traditional Owners in the Northern Territory having the legal right to consent to development on their land and negotiate with companies for compensation. However, because the mining leases were granted before 1976, the grievances of the Yolngu clans of Arnhem Land were not addressed until Rio Tinto acquired the operation and required engagement with the Traditional Owners to comply with its own company policies.

#### Rio Tinto's engagement with legacy issues

Some limited arrangements with Traditional Owners were in place when Rio Tinto took over operations at Gove. These included statutory royalty-type payments and local employment arrangements through contracted services. But these were marginal to the core concerns of the Yolngu people. Faced with unresolved issues around lease renewals and unfulfilled commitments, Rio Tinto entered a negotiation process to address the underlying grievance arising from the original expropriation of land without consent.



Gumatj women in celebratory dress at the signing of the Rio Tinto Gove Traditional Owner Agreement ceremony, June 2011.



27 Gillard (2011) As we share this day of celebration, we look towards that day. Speech at the signing of Rio Tinto Gove Traditional Owners Agreement by Prime Minister Julia Gillard, 8 June 2011. <http://pmtranscripts.dpmc.gov.au/release/transcript-17903>

The negotiations took place over three years between 2008 and 2011. Rio Tinto was involved in negotiations with the Gumatj and Rirratjingu clans and with the Northern Land Council. During the process, all grievances and issues were carefully considered and arrangements for their redress were included in the agreement to the satisfaction of all parties.

The Gove Traditional Owners Agreement was signed in the presence of the then Australian Prime Minister Julia Gillard in June 2011. At the ceremony, Yolngu leaders told the Prime Minister that the matter was now resolved and that the agreement allowed the Yolngu people to finally 'start healing' and 'move on.' Acknowledging the legacy of history, the Prime Minister said at the signing ceremony:

"This is an agreement to be proud of because it heralds a better future which will be built together... (it represents) [a]n agreement struck between a mining company and Traditional Owners, a bark petition addressed from one Australian people to the nation as a whole, an act to constitute the Commonwealth of Australia." <sup>27</sup>

### An agreement for the future

The Gove Traditional Owners Agreement sets out in detail how the company and the Yolngu people have acknowledged and reconciled the past, and are working together towards a shared future. The agreement positions local Aboriginal institutions at the heart of the region's future economic development by providing for:

- training and employment;
- transfer of ownership for designated infrastructure assets to the Yolngu people;
- support for 'green' energy initiatives;
- contract mining options for Yolngu-owned mining companies;
- other enterprise support schemes;
- cross-cultural programmes;
- processes for business contract notifications;
- joint leadership forums; and
- a life-of-mine revenue stream into Yolngu Trust Funds.

Careful governance provisions are also included under the statutory oversight of the Northern Land Council. Unlike many other agreement-making contexts, the Yolngu people already had existing royalty-receiving corporations, and had acquired experience in managing funds and businesses. The agreement has been able to build on these entities to strengthen and broaden the economic opportunities for the region.

For Rio Tinto, the agreement delivered security of tenure for another 42 years of mining operations through formal and direct 'consent' on the extension of ancillary leases. It also ensured settlement and waiver of all past claims, and resolution of various other competing land claims. For the affected Yolngu clans, the agreement delivered specified benefits and, importantly, set up formal consultative and leadership forums for ongoing engagement and resolution of potential future complaints. This framework for continuous dialogue and problem-solving is highly valued by all parties.

### An agreement for challenging times

In 2013, under deteriorating global trading conditions, Rio Tinto made the difficult decision to curtail the alumina refinery operations with the option to restart should business conditions permit. This did not

affect the bauxite mine, which continues operating. Rio Tinto understood that the refinery's curtailment would be economically devastating for the residents of Nhulunbuy and the Yolngu communities in the region. A forum was initiated to help build a more broad-based regional economy.

Throughout the transition, the Yolngu community has been resilient and supportive. While some Yolngu people are happy to see the non-resident population decrease, others are hopeful about future opportunities based on mining and exporting bauxite, and the broader economic options opened up by the agreement.

The whole process has highlighted the importance of recognising the legacy issues from past mistakes when seeking to reach agreement about the future. For the Yolngu, the future could not be explored without being grounded in both the present and the past. Cultural heritage preservation and providing a place for new and old ceremonial practices are now part of the partnership. For the Yolngu people, this has positioned local Indigenous institutions at the centre of the region's future and given them confidence to explore new opportunities.

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*Students from Nhulunbuy High School participating in training and employment programmes at Gove.*

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## 5.5 Integrating commitments into operational planning

Expectations about meeting agreement commitments should be reflected in operational plans and performance indicators. There should be incentives for company management at all levels, including the senior operational leaders, for achieving agreement-related outcomes. Table 10 shows examples of agreement elements relevant to different site functions.

### Agreement activities across project life cycles

Agreement-related activities will vary across the life of the project or the mine. Table 11 illustrates a sample of these.

The greatest disruption to the community and the environment occurs during construction. At this stage, the company will often provide foundation payments and tangible infrastructure to establish community endowments and signal goodwill.

Financial contributions continue during operation, according to the financial arrangements. Strategies to maximise employment vary in intensity throughout the life of the mine, but are at their highest in construction and operations stages. The scope and scale of business development and supplier contracts with host community businesses will also change over time (see Box 26).

Cultivating community independence is a common goal of agreements. Planning an exit strategy in collaboration with the host community should be an explicit aim. Ideally, there will be a viable and self-sustaining local economy in post-mining years. The Rio Tinto Closure standard requires that its businesses start planning for closure from the earliest stages of project development. Good performance in managing a mine's closure and legacy can enhance Rio Tinto's reputation and future land access. The experience at Kelian (Indonesia) illustrates how an agreement can support closure (see Case study 9).

### Box 26: Business development activities across the project life at Kitimat (Canada)

The Haisla Nation-Rio Tinto Alcan Legacy Agreement 2010 and the Modernisation Program Agreement 2012 provided good opportunities for members of the Haisla First Nation, giving them priority as local employees, suppliers and contractors. Constraints on education and training are being addressed by Rio Tinto's and Haisla Nation's joint ownership of a local training school, Kitimat Valley Institute (KVI). KVI provides Rio Tinto with trainees and is gradually diversifying to serve other industries.

Direct employment opportunities decreased as the Kitimat modernisation project approached completion. Employment peaked at 2,900 in 2014 and the aluminium smelter is expected to provide about 1,000 operational jobs post commissioning in 2015. The KVI joint venture should ease the transition from peak construction activity to future projects. It operates as a profitable business, positioned to build a pool of skilled workers for the region's burgeoning liquefied natural gas export trade and associated industries.

**Table 10: Examples of alignment of functions and systems with agreement provisions**

Site functions and work areas	Alignment with agreement provisions
Human Resources	Cross-cultural training for all employees
Workplace preparation for local employment	Recruitment, retention and training for local and/or Indigenous employees
Procurement	Business development opportunities
Site preparedness for local procurement	Convening annual forum of contracting opportunities Information sessions and pre-qualification assistance

<b>Site functions and work areas</b>	<b>Alignment with agreement provisions</b>
Environment	Land and water management
Environmental co-management	Participatory monitoring Rehabilitation plans Upcoming permits and approvals required
Communities	Community baseline studies
Social science studies; socioeconomic mitigation; and cultural heritage	Social impact assessments Consultation and engagement Resettlement Cultural heritage surveys and protection of significant heritage sites Gender and diversity policies and commitments
Mine Planning	Preparedness to avoid or mitigate social impact
Minimisation of future social impacts	Protection of significant social sites and heritage clearance Well-forecast resettlement requirements
Legal	Compliance with the agreement and the law
Risk advice and final resort on disputes	Dispute resolution mechanisms
Finance	Trust, foundation and royalty payments
Governance of financial contributions	
Operations	Mitigating impacts Relationship-building and implementation activity

**Table 11: Sample agreement-related activities across a full life cycle**



## 5.6 Governance arrangements

Governance arrangements for agreements need careful planning and implementation. They should be streamlined and simple – taking into account local capacity, funding levels and the range of interests to be included.

Involving existing community organisations or representative bodies (eg tribal governments, local councils, Aboriginal corporations or non-government organisations) can help to increase acceptance of the agreement within the community. This also strengthens the capacity of those organisations to fulfil local and regional governance roles. If suitable institutions don't exist, specific companies, committees or organisations must be designed to establish checks and balances on political power.

Organisations that may have a role in the governance of agreements include the following:

- Organisations consulted or negotiated with to make agreements
- Organisations created by the agreement processes: trusts, prescribed bodies corporate, agreement implementation committees, relationships committees
- Decision-making arenas (formal and informal) based in Aboriginal law or tradition where decisions affecting governments and corporations are typically made

A common governance model is to set up a joint implementation or relationship committee for overseeing day-to-day activities, with a separate arrangement for managing financial flows. Box 27 gives three examples of how agreement activities can be implemented and monitored.

Different history and circumstances dictate different governance arrangements. At Kitimat (see Box 27), the training institute is a joint venture, whereas Iron Ore Company of Canada transferred a portion of its railway to a company owned by three Aboriginal groups. At Hope Downs in Western Australia, a co-management committee comprising Traditional Owner groups and Rio Tinto representatives oversees a cooperative model for environmental and cultural management at the mine (see Case study 6).

Issues to consider when setting up governance structures are outlined in Table 12.

## 5.7 Enforcement processes

Agreements with clear, agreed goals that are implemented by people working to concrete targets are more likely to be successful. Commitments qualified by phrases such as 'to the extent possible' or 'best endeavours' will set an agreement on a path of weak delivery. Quantified commitments and targets should be documented and monitored in a register of agreement obligations. A commitments register should have the characteristics outlined in the left column of Table 13.

Agreement implementation will be more successful with consequences to motivate action. Rio Tinto agreements in the Pilbara have evolved from promising 'best endeavours' to achieve local Aboriginal employment to setting employment targets with consequences if these aren't met.

Implementation plans should be explicit about incentives and penalties for both the business and the community. Within the business, KPIs and incentives for employees at the front line of agreement implementation should be linked to agreement success. Similarly, procedures can be developed to deal with unfulfilled obligations or breached commitments (eg formal means of redress when contracts for local suppliers fall below target levels or if a heritage site is damaged).

Penalties can be turned into positives. Under the WCCCA, a provision requires Rio Tinto's Aluminium product group to increase spending on employment and training programmes if employment targets are not reached. A complex graduated scale applies. For example, if the Indigenous employment level remains steady or decreases from one three-year review to the next, the budget for employment and training must increase by 20 per cent. This is not triggered unless educational outcomes in schools in the local Aboriginal communities are maintained, recognising the reciprocal responsibilities of the community to encourage school attendance and achievement, and of governments to provide quality education.

Processes for handling complaints and grievances about agreements are covered in section 6.3.

**Box 27: Three approaches to implementation committees**

**Relationship Committee at Argyle Diamond Mine (Western Australia)**

The Participation Agreement between Argyle Diamond Mine and Traditional Owners established a Relationship Committee to govern ongoing implementation of the agreement. Committee members need to:

- Understand the Indigenous Land Use Agreement and land management plans.
- Understand the operations, policies and procedures of the mine.
- Understand the procedures of the Relationship Committee.
- Be able to understand and assess budgets and other financial statements relevant to the Relationship Committee.
- Be able to understand and assess written and oral reports.

Training is provided as necessary to ensure such capabilities.

The Relationship Committee comprises 26 Traditional Owner and four Argyle representatives. It meets four times a year to monitor implementation. The agreement outlined other provisions to ensure smooth governance arrangements, including commitments to provide training for committee representatives. It also established a Secretariat and an Executive Committee to streamline administration; organise training; facilitate Traditional Owners' communication with the company; and ensure community involvement by organising meetings, disseminating announcements and providing updates.

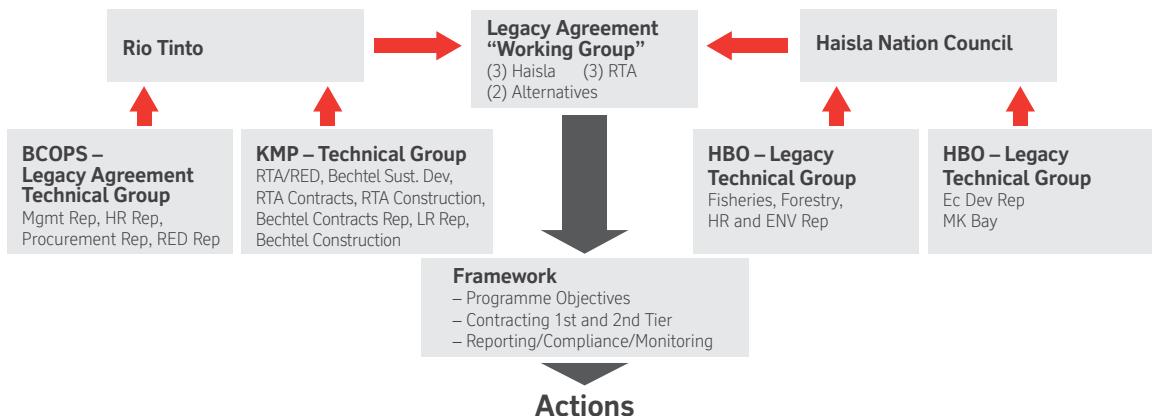
**Governance arrangements at Oyu Tolgoi (Mongolia)**

The Oyu Tolgoi-Umnugobi Cooperation Agreement established a Relationship Committee that meets four times a year. It oversees all interactions between Oyu Tolgoi, Umnugobi Aimag and the Partner Communities in the Cooperation Area. It comprises nine local government and community representatives, and four senior company operations managers. The Committee has five Working Groups overseeing the seven thematic areas in the agreement, each with community and company representatives from the Relationship Committee and others chosen for expertise. Oyu Tolgoi provides secretariat support for the Relationship Committee and its Working Groups. A separate Development Support Fund manages the distribution of Oyu Tolgoi's annual financial contributions to community projects, and programmes proposed by community groups and local governments.

**Joint Working Group at Kitimat (Canada)**

A Joint Working Group is responsible for overseeing the implementation of the Haisla Nation-Rio Tinto Alcan Legacy Agreement. The Working Group is made up of three representatives from each of the parties, and makes consensus-based recommendations aimed at improving the implementation of the agreement. The Haisla Legacy Trust is separately managed by a professional trustee. It holds and distributes financial contributions from Rio Tinto's Aluminium business for the benefit of members of the Haisla Nation, as shown in Figure 6.

**Figure 6: Implementation structure of Haisla Nation-Rio Tinto Alcan Legacy Agreement<sup>31</sup>**



**Table 12: Questions to consider in designing governance arrangements for agreement committees and boards**

Arrangements	Questions to ask	Comments and considerations
Committee membership	<p>What existing community organisations or joint committees could be involved in implementing the agreement?</p> <p>Who in the local or Indigenous community has the authority (formal or customary) to accept responsibility?</p> <p>Does whoever is representing the company have the appropriate authority?</p>	Agreement committees' members should be trusted, respected and capable of acting for the broader good to influence the activities undertaken, the way funds are committed and regular monitoring of delivery on commitments.
Roles and capacities	<p>Where committees are set up under implementation arrangements, what are the roles and desired experience of members?</p> <p>What are their current actual skills and experience?</p> <p>What is the succession plan?</p>	When company and community members lack the skills and experience needed for committee functioning, capacity-building initiatives should be planned.
Accountability and reporting lines	<p>What accountability mechanisms are there for committee members to report back to their constituencies?</p> <p>Who receives committee minutes and reports?</p> <p>How are transparency and confidentiality balanced?</p>	Supplement routine minutes and written reports with various forms of reporting to ensure that information is disseminated regularly to managers, site teams and community members, and that there are opportunities for questions and feedback.
Administration and logistical arrangements	<p>How will the agreement committees operate?</p> <p>What logistical and administrative support is available?</p> <p>What time and where will meetings be held?</p>	Consider the number of meetings per year, whether there is funded administrative or secretariat support, and any sitting fees or other reimbursements for committee members.

**Table 13: Examples of do's and don'ts in a register of commitments**

Do	Don't
Include who is responsible	Include unallocated responsibilities
Include timeframes for delivery and progressive targets	Rely on open-ended times for completion
Record unambiguous and concrete targets	List vague and general targets
Track the development of capacities, processes and structures	Assume that processes and structures will always work as planned
Track consequences and outcomes	Measure only 'best efforts' or inputs

**Checklist 3 will help identify systems required to plan and implement agreements.<sup>32</sup>**

<sup>32</sup> Adapted from Allbrook and Jebb (2004) *Implementation and resourcing of Native Title and related agreements; O'Faircheallaigh (2003) Implementing agreements between Indigenous peoples and resource developers in Australia and Canada.*

**Checklist 3: Plan and implement**

Have the goals of the initiatives and activities in implementation plans been clearly defined?	[ <input checked="" type="checkbox"/> ]
Are the initiatives and activities feasible and appropriate to the context?	[ <input checked="" type="checkbox"/> ]
Are roles, responsibilities and expected behaviours of agreement parties clearly defined?	[ <input checked="" type="checkbox"/> ]
Are governance arrangements culturally appropriate and do they consider local capacity?	[ <input checked="" type="checkbox"/> ]
Are there implementation deeds/schedules included (eg costs and timeframes)?	[ <input checked="" type="checkbox"/> ]
Are there robust arrangements for a broad-based distribution of benefits?	[ <input checked="" type="checkbox"/> ]
Is agreement implementation incorporated into operational planning?	[ <input checked="" type="checkbox"/> ]
Are operational components of the agreement flexible enough to cater for unforeseen circumstance?	[ <input checked="" type="checkbox"/> ]
Have adequate and appropriate resources been made available for implementation?	[ <input checked="" type="checkbox"/> ]
Have potential partners to collaborate on implementation been identified?	[ <input checked="" type="checkbox"/> ]
Have enforceable mechanisms (with rewards and penalties) been incorporated into the agreement?	[ <input checked="" type="checkbox"/> ]

## Case study 5: Pilbara, Western Australia

### Implementing flexibly under special circumstances



Pilbara  
Western Australia, Australia

Rio Tinto's Iron Ore operations in the Pilbara region of Western Australia span 15 active mines, 1,700 kilometres of railway and four independent port terminals. The company has participation agreements with the nine Aboriginal groups that are Traditional Owners of the land where mining and infrastructure are located. In 2012, the Iron Ore business was in the midst of massive expansion of its operations. This included development of new mines and expansion of existing mines and associated infrastructure. The port and rail infrastructure critical to the expansion programme were situated within the traditional lands of the Ngarluma people, who had already been significantly impacted by mining developments in this area since the 1960s.

The cultural heritage surveys and site clearance assessments required to progress with the expansion programme involved an unprecedented volume of work within short time frames. The existing participation agreement provided a platform to discuss implementing new cultural heritage practices to meet these work demands. Negotiating under special circumstances required robust relationships that would support joint efforts to find a solution and allow all parties to benefit from positive market conditions.

#### Bringing history into context

The land of the Ngarluma people includes a section of the Pilbara coast and extends inland towards the Chichester Ranges. When mining operations were established in the inland Pilbara during the 1960s and 1970s, railway and port infrastructure was created within this land. An initial construction workforce was later followed by a permanent residential population in the newly established towns of Dampier, Wickham and Karratha. These developments had an enormous impact on the land and society of the Ngarluma people. Despite this, the Ngarluma people have retained a strong cultural identity and connections to their country. In 2005, these connections were formally recognised in a Native Title determination, one of the first for the Pilbara region.

The mining boom in 2012 required significant expansion of the existing Cape Lambert port and the rail infrastructure running through Ngarluma country. For the Ngarluma people, many of whom had lived through the societal changes that came with the original mining development of the Pilbara, these expansions were viewed as a potential source of further upheaval to their existing ways of life, their cultural lands and identity.

*Opening of the Cape Lambert Port with the support of the Ngarluma people, 2011.*



### Facilitating engagement on cultural heritage

In 2011, the Iron Ore business and the Ngarluma people finalised a comprehensive participation agreement. This provided a formal governance structure to discuss the proposed port and infrastructure expansion, as well as the necessary cultural heritage surveys over this land.

In negotiating the agreement, a key concern for the Ngarluma people was to ensure that comprehensive cultural heritage surveys would be undertaken by the Ngarluma people in conjunction with cultural heritage professionals prior to any mining activities taking place. Furthermore, the agreement recognised that some places were of such significance to the Ngarluma people that they would be excluded from mining or other development impacts. Acknowledging this point was key to finalising the agreement with the Ngarluma people.

The agreement also included a cultural heritage protocol which set out the processes for notifying the Ngarluma people of heritage survey requests, how these surveys would be conducted and the recommendations for managing cultural heritage identified during the survey.

This participation agreement between the Ngarluma people and the company meant that there was a consistent flow of information about planned expansion activities. However, the size of the planned expansions and the timeframes within which they were to be completed was far beyond anything previously undertaken by Rio Tinto with an Indigenous group in the Pilbara. The business's need to rapidly expand was a key driver in accelerating the timing of the cultural heritage surveys, while for the Ngarluma people, there was an opportunity for immediate employment opportunities and economic benefits.

It was recognised that current processes for organising and undertaking cultural heritage surveys would not deliver the clearances required to access land for construction within the preferred timeframes. As a result, it was essential to develop an updated process that did not compromise any of the key technical or engagement steps required or breach the terms of the agreement.

Aerial view of Cape Lambert, Pilbara, Australia.



### Agreeing special terms for cultural heritage surveys

The Iron Ore business's Heritage team determined that all necessary cultural heritage surveys needed to be completed within an 18 month timeframe. Added to the challenge was that Rio Tinto was not the only developer proceeding with expansion at this time, meaning other companies were also seeking involvement from Ngarluma representatives on project planning. The resulting demands on the Ngarluma people's resources were significant.

Both parties agreed that the steps and process surrounding cultural heritage surveys should not change where this could compromise the quality of the work undertaken. The health and safety of all people involved in the surveys was of paramount concern and no changes in the survey model could compromise health and safety. It was also agreed that previously identified significant cultural heritage places would continue to be protected; and the expansion would remain within the levels of 'acceptable change' determined in the agreement.

Two full-time cultural heritage survey teams were established as a result of these discussions. These teams included Ngarluma people, independent heritage consultants and Rio Tinto's Heritage employees who would work on a regular roster programme to complete the required cultural heritage surveys. This approach benefited both parties; providing certainty for the company that the work would be completed within a specific timeframe and certainty around employment opportunities for Ngarluma people, rather than standard cultural heritage survey practices, which were more sporadic and shorter in duration.

In all, the equivalent of 20 full-time positions were devoted to conduct the cultural heritage surveys by Rio Tinto and Ngarluma people over a 16 month period with 116 surveys completed during that time. The number of days spent conducting cultural heritage surveys more than doubled from the previous year. This was only possible because of the streamlined roster approach. Furthermore, there was no lost time due to injury or any significant medical treatment cases and no unauthorised impacts to cultural heritage.

Joanne Farrell, Jean Churnside and Janina Gawler celebrate the signing of the Ngarluma Rio Tinto Indigenous Land Use Agreement in Roebourne, November 2010.



Les Hicks and Pansy Hicks celebrate the signing of the Ngarluma Rio Tinto Indigenous Land Use Agreement in Roebourne, November 2010.

### Good relationships enable benefits to be shared

The agreement provided the necessary governance structure to enable the initial discussions between the Iron Ore business and the Ngarluma people for determining the terms under which cultural heritage surveys were to be conducted. The strengthened relationship enabled the cultural heritage surveys to continue over the 16 month period relatively unimpeded, which meant the land clearance requirements for the expansion programme were met. During and immediately following this period, a regular flow of information about the expansion plans was provided to the Ngarluma people. In turn, the results and recommendations resulting from the cultural heritage surveys were implemented as construction began to proceed.

By following this process, Rio Tinto was able to gain the necessary land access within the preferred timeframes. By working through the logistical challenges, all parties were able to make the most of the positive market conditions. Going forward, the requirements of the agreement continue in respect to cultural heritage survey requirements. The improved relationship and flexibility shown by both parties under these special circumstances provides a solid framework for ongoing engagement.

Refer to Rio Tinto's *Why cultural heritage matters* for additional information about the cultural heritage practices in the Pilbara (Case study 11).



## 6. Monitor, evaluate, review and improve

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“They (Rio Tinto) have gone out of their way over the past few years to improve things, especially through the Western Cape Communities Coexistence Agreement (WCCA), and I’d say they should continue in attempts to improve. I think the WCCA group themselves are just starting to understand what the real job is and what we can do, not only with the agreement, but outside it too. Comalco was slow to implement the agreement, with not enough people involved. From our side, we were slow catching on. There was a double learning.”

*Peter Guivarrá, Mayor of Mapoon, 2009*

A good agreement should include procedural provisions to monitor, evaluate, review and improve, ideally involving the participation of all parties. Monitoring and evaluation are ongoing, largely internal processes that provide timely updates on how agreements are being implemented and any emerging issues that need to be addressed. Review is a far more comprehensive process that takes place at set intervals with the aim of asking more fundamental questions about an agreement. All of these activities are designed to improve outcomes by ensuring transparency and demonstrating a willingness to be held accountable – to specific provisions and the overall intent of the agreement.

### Definitions

Procedural provisions are commonly included in agreements (see Box 28). This section defines four of them.

#### *Monitor*

The Rio Tinto Communities standard requires monitoring of the business’s social performance. Agreement monitoring refers to the systematic collection and analysis of information about agreement deliverables and outcomes. This allows the parties to track progress against an agreement’s intent and agreed benchmarks. Evaluating progress can lead to adjustment, corrective action and improvement in agreement delivery.

#### *Evaluate*

Evaluation considers the effectiveness of delivery against agreement commitments and objectives for all parties. It should take place at pre-determined intervals (eg annually) or at agreed milestones like the completion of a particular task. It should focus on both specific outcomes and how parties are performing against governance commitments, such as regular attendance at information sharing sessions.

#### *Review*

Review of the agreement is a substantial process to assess whether the agreement is achieving its core purpose. A review subjects the agreement and agreement performance to independent scrutiny. Reviews should take place periodically, for instance at five-yearly intervals. The purpose is to identify ways to improve agreement outcomes. Adjustments to the agreement may be required to suit new or emerging circumstances and address persistent issues identified through monitoring and evaluation. Reviews should involve the input of third-parties to provide impartial external expertise.

#### *Improve*

Well-structured agreements should be flexible, ‘living’ documents that allow for continuous improvement, without threatening fundamental commitments. Changes to plans, operating practices and objectives should occur when monitoring, evaluation or review identifies opportunities. Where a review finds flaws in the agreement itself, it may need to be amended to achieve improvements.

## 6.1 Tracking results through monitoring and evaluation

Continuous monitoring and evaluation throughout the life-of-mine and the life of the agreement enable parties to:

- Gauge how successful the agreement is and whether parties are delivering on their commitments.
- Maintain ownership of a ‘living’ agreement.
- Manage risk and build an evolving relationship.
- Provide a foundation for credible reporting and communication.

Continually capturing insights and lessons about what happened and why will lead to better results – especially where monitoring is undertaken jointly by all parties to the agreement. See section 6.2 for more details about participatory monitoring and evaluation.

The Rio Tinto Communities agreements guidance outlines how monitoring and related activities are central to agreements. Table 14 notes the role played by monitoring in supporting agreements and clarifies specific processes, such as the importance of dispute resolution mechanisms.

### Box 28: Common procedural provisions in agreements

- Amendment and review of the agreement
- Allowance for agreement extension to cover project expansion and/or other projects or activities
- Confidentiality and release of information
- Implementation committee
- Monitoring of agreement implementation
- Formal evaluation of the agreement
- Dispute resolution
- Enforceability and remedies

**Table 14: The role of monitoring in supporting agreements**

Community agreements involve:	Monitoring supports this by:
A value exchange: community support in exchange for value received (inclusive of social and economic outcomes).	Providing evidence of the ongoing value to each party.
An institutionalised relationship: a structured relationship between the business and community organisations that represent the common interest of the majority of community members on a continuing basis.	Providing evidence that the actions of all institutional parties represent the common wishes of most of their individual members.
Mutual obligations: all parties to the agreement have obligations in achieving shared objectives. The obligations to each other are clear and can be described internally and to members of the community, governments, civil society and others.	Providing evidence of each party's fulfilment of obligations.
Clear evidence of community support for the project: the agreement sets out the terms of the community's support for the project/operation.	Providing evidence of compliance with terms of support and the provision of this support.
Clear expected outcomes: measurable outcomes and consequences for non-performance based on a robust monitoring and reporting framework.	Measuring achievements against agreed desired outcomes.
Clear accountabilities for delivering agreement commitments: agreed and defined accountability across the business functions for their agreement implementation responsibilities, with corresponding accountabilities on the part of the community representative institution.	Identifying any specific responsibilities (including responsibilities for monitoring and evaluation itself) that are not being fulfilled to indicate the areas where attention is required.
Mutually agreed enforcement and dispute resolution mechanisms: mechanisms for addressing disputes and consequences for non-compliance that are applicable to all parties.	Providing evidence of non-compliance, which then activates these mechanisms.

### **Monitoring to learn and improve**

The outcomes of agreements vary. There are some instances, such as the Western Cape Communities Coexistence Agreement (WCCA) at Weipa, where an agreement has resulted in substantial economic benefits, civic development and protection of land and culture. In other instances, benefits have been less apparent where circumstances have not improved as much as the agreement signatories had hoped. Monitoring helps all parties to track performance and understand how different outcomes have come to pass.

Success is often measured through the achievement of targets, such as a specified percentage of local community members achieving employment on a site. However, achieving targets is not the only goal of agreements. Ultimately, community perceptions regarding whether or not the ‘value exchange’ in an agreement is being achieved are shaped by how people view outcomes and impacts. An effective monitoring framework captures diverse perspectives.

To understand what is working and what isn’t, agreements need to have a process for monitoring key indicators throughout the life of the agreement. This requires early dialogue between parties to work out which indicators to monitor, and the approach and methods to use. Parties also need to understand what information will be disseminated, including the type and form of public disclosure.

### **Monitoring frameworks and indicators**

For indicators to reflect short-term expectations, long-term benefits and underlying values, parties to an agreement need to be engaged in designing the performance-monitoring framework.

Precise, quantifiable agreement performance measures are valuable in monitoring, evaluation and review processes. However, quantitative indicators don’t always help to understand the contextual, lived experiences that influence the inputs, outputs and outcomes of agreements. Qualitative data is also important to agreement monitoring. It consists of opinions, perceptions or judgements that indicate the subjective experience – rather than the frequency, quantity or magnitude of activities or experiences.

Table 15 gives examples of quantitative and qualitative measures and how they can be used to measure:

- inputs or resources;
- outputs or activities;
- outcomes or real changes; and
- impacts or long-term, sustainable changes.

Monitoring the performance of agreements’ training provisions, for example, requires reporting on a range of indicators besides just the number of trainees.

This includes:

- The quality of training programmes. (Are participants competent to do the work assigned to them without supervision?)
- Systems of selection and recruitment for training. (Are candidates regarded by most community members as having been selected on merit?)
- Employment outcomes for participants. (Does training lead, in most cases, to an actual job?)

Combining qualitative and quantitative indicators of inputs, outputs, outcomes and (if possible) impacts is more informative than only tracking the amount spent on training or the numbers involved in specific courses.

Agreement performance indicators must be chosen and measured carefully. It’s fairly straightforward to develop targets for local direct employment. A longer-term goal of broad-based ‘employability’ is more complex to monitor. Employability involves local people attaining the skills to work in the broader economy, not just the business. Such goals require a ‘set’ of indicators, such as the rise or decline of small businesses operating locally; the turnover rate of local people into/out of company employment and into other economic sectors; and the number of young people moving away for higher education. The type, number and nature of skills and services procured from locally-based businesses could also help track an employability target.

Tracking employment equity targets can also be complex. Indicators can include tracking the number and level of jobs held by local men and women or Indigenous people. Retention and upward mobility rates (the rate at which particular groups of people are promoted) may provide a different picture of career opportunities for different groups of people; rather than simply tracking recruitment numbers and/or their overall proportion in the workforce.

<sup>33</sup> Parmenter, Barnes and Brereton (2011) RTIO Indigenous retention study. Report to Rio Tinto Iron Ore. CSRM.

### Outcomes monitoring

It's also valuable to track actual outcomes. For instance, local employment targets may have been met, but outcomes resulting from those jobs could be different from those envisaged. As well, outcomes for residents who have moved into the area may differ from those agreed for the pre-mine local community. The Iron Ore business's participation agreements in the Pilbara set specific employment targets. A study of Aboriginal retention in the region in 2011 found that a high proportion of Aboriginal employees left Rio Tinto to take up positions elsewhere in the mining industry.<sup>33</sup>

Although not beneficial for Rio Tinto, this is a positive outcome for the employees and means that sustainable employment for an individual will not be evident from any single company's records. In other cases, increased income may result in undesirable outcomes, such as domestic conflict or spending on gambling and alcohol rather than household assets. While Rio Tinto isn't directly responsible for such matters, they are important indicators of community wellbeing. Outcome monitoring should aim to track performance and/or progress against intention and help identify unintended consequences. Table 16 provides some examples of agreement goals, targets and monitoring indicators.

**Table 15: Examples of quantitative and qualitative indicators of agreement performance**

Type	Example quantitative measure	Example qualitative measure
Input	\$ spent	Level of personnel involved: are they decision-makers? (eg can they authorise requests or decisions arising in meetings with community members?)
	Hours of staff time	
	\$ value of site's local spend	
Output	Number of activities	Types of participants: do they come from a changing and broad base of community members, or are they the same select group of people most of the time?  Nature of new experiences: are inexperienced people progressively involved in agreed activities, or is it the same people turning up every time?
	Number of participants	
	Percentage of female participants	
Outcome	Number of people whose lives have been changed/improved	Nature of change in skills, knowledge, behaviour or practices: lower levels of domestic violence and teen pregnancy; community organisations taking on the work that was previously undertaken by the company; local household income sources progressively expanding beyond welfare (via direct mine employment or otherwise).
	Performance of participants against benchmarks	
	Number of people with new qualification, skill or position	
	More local people at work regularly	
Impact	Reduced prevalence of unemployment, chronic disease in the community	Improvements in wellbeing and overall health, local people advancing their education or career status.
	Increased life expectancy	

**Table 16: Examples of agreement goals, targets and indicators**

<b>Agreement goal</b>	<b>Targets (may or may not be included in the agreement itself)</b>	<b>Indicators</b>
Provide Indigenous employment	<p>Indigenous employees to make up X per cent of the workforce by 2016.</p> <p>Indigenous employees to make up Y per cent of employees at supervisor or manager level by 2016.</p> <p>The number of Indigenous recruits to increase each year.</p>	<p>Percentage of the workforce that is Indigenous.</p> <p>Number of Indigenous employees (male and female).</p> <p>Number of local and non-local Indigenous employees.</p> <p>Position type (eg permanent, contractor, part/full time) and role (eg truck driver).</p> <p>Turnover rates by gender.</p> <p>Reasons for leaving.</p>
Maximise local procurement	<p>Regular information sessions about forthcoming opportunities and pre-qualification requirements to be provided to local contractors and businesses.</p> <p>Commitment to disaggregate large contracts to match local business capability.</p>	<p>Number of information sessions held and attendance.</p> <p>Ratios of Tier 1, 2, and 3 suppliers.</p> <p>Value of goods and services procured locally.</p> <p>Percentage local procurement/total business procurement.</p> <p>Company budget allocated to a local supplier development programme and attendance rates.</p> <p>Satisfaction of community businesses and potential suppliers with information and contracting processes.</p>
Protect cultural heritage	<p>Zero heritage incidents/legislative breaches.</p> <p>Detailed recording of all chance finds in place by end 2016.</p> <p>Zero damage to identified heritage places.</p>	<p>Number of heritage incidents and legislative breaches – measured quarterly and reported annually.</p> <p>Number of chance finds – measured quarterly and reported annually.</p> <p>Number of instances of unauthorised damage to and/or destruction of identified heritage places – measured quarterly and reported annually.</p>
Empower women	<p>X women (company and community members) participating in leadership development programmes each year.</p> <p>Women to represent Y per cent of senior management by 2016.</p> <p>Women to represent Z per cent of 2016 graduate intake.</p>	<p>Level of activity or involvement in management of agreement committees or working groups, by gender.</p> <p>Level of satisfaction in participation agreements working groups by end of year one, by gender.</p> <p>Number of women in senior management positions.</p> <p>Number of women in graduate intake.</p>

A monitoring framework should be meaningful for all parties throughout the life of an agreement. It should provide an accurate record of contributions, implementation processes, events, decisions and results over time. The framework should state:

- who will conduct the monitoring;
- how it will be resourced;
- how often reports will be made;
- who will receive and have access to reports; and
- how results will be used and responded to.

One tool used to monitor agreements is a register of commitments. This can ensure that commitments are systematically tracked by different people and parties. The characteristics of a commitments register are outlined in section 5.7.

### **Monitoring reciprocal obligations**

Monitoring is considerably strengthened if linked to performance measures. On site, aligning managers' performance measures to agreement monitoring can demonstrate genuine commitment, responsibility and accountability. Management scorecards and rewards that are linked to earnings or promotion should measure achievement of agreement outcomes.

<sup>34</sup> Plastrik (2012)  
*Unity of place: Giving birth to community environmental monitoring. Rio Tinto Marquette Community Foundation and Superior Watershed Partnership and Land Trust, Michigan.*

Where benefits are tied to specific deliverables linked to business and community success, performance measures should reflect mutual obligation. In the Pilbara, the company supports education for local Aboriginal people and the relevant communities ensure their children attend school. In this case, a measure of the company's contributions to local education is linked to a performance measure on the rates of school attendance (not just enrolment).

## 6.2 Monitoring oversight

The membership and composition of monitoring bodies needs to be considered carefully. Composition will influence the perceived transparency, impartiality and credibility of monitoring reports. Membership also provides opportunities for considering different perspectives and for criticism to be voiced. Committees may include community representatives, independent advisers and Rio Tinto personnel. Other possible configurations of monitoring bodies include:

### *Parties to the agreement*

The company and the host community may be represented in monitoring teams. The Weipa Communities Heritage and Environment Management Plan is monitored by a multi-party body consisting of the Traditional Owners endorsed by the WCCA Coordinating Committee and Rio Tinto Weipa representatives.

### *Multi-disciplinary membership*

A range of relevant professional backgrounds and affiliations may be involved from the community, the company, government agencies, mutually-respected NGOs and other independent bodies (eg universities).

### *Independent monitors*

Another option is to engage independent environmental and social monitoring bodies to provide monitoring oversight. Independent oversight is valuable where there are complex and unpredictable environmental or social impacts, and the overall business context is volatile. A third-party may also be necessary where trust is low or specific expertise is required. At Eagle Mine (interest now sold by Rio Tinto), an independent NGO, the Marquette Community Foundation, coordinates routine monitoring and reporting of the environmental performance (see Case study 7).

### *Participatory or joint monitoring and evaluation*

Joint participation by community members in monitoring activities serves to strengthen trust and the relationship between the agreement parties (see Box 29). Case study 6 describes the co-management model developed to monitor and improve environmental and cultural impacts of mining at Hope Downs in Western Australia. The Eagle Mine (Rio Tinto interest now sold) complements the environmental monitoring done by the independent NGO with participatory monitoring by the community. Community members contribute to a scorecard that publicly reports ratings.<sup>34</sup>

#### **Box 29: Participatory monitoring**

Participatory monitoring is an inclusive and collaborative process. It involves host community members and affected groups in the monitoring process, not just as informants, but as active participants. Community members are involved in designing the monitoring system, agreeing on appropriate indicators, undertaking measures and collecting data. A participatory approach promotes a greater sense of community ownership and helps ensure that proper weight is given to local knowledge. This approach can build substantial rapport between the business, communities and other stakeholders.

### **Assigning roles and responsibilities**

Monitoring by various bodies can take many different forms. Sub-committees can be established to routinely monitor specific matters (eg quality of off-site water discharge) or different parts of agreements (eg environmental management, employment and training or business development provisions). The role of these bodies is to:

- design task-specific monitoring systems;
- oversee the collection of highly technical monitoring information (often by external specialists such as anthropologists and environmental scientists); and
- provide explicit monitoring reports.

Higher-level representatives within the company and the community can then meet less regularly to monitor overall results. These higher-level bodies:

- receive specific monitoring reports;
- consider implications of these reports relative to each other; and
- determine appropriate actions and responses in light of overall monitoring results.

## Case study 6: Hope Downs, Western Australia

### Developing a cooperative model for environmental and cultural management



Hope Downs, Pilbara  
Western Australia

The Weeli Wollie springs and creek is a unique hydrological and cultural feature in the Pilbara region of Western Australia. The Hope Downs iron ore mine (a joint venture operation between Hope Downs Iron Ore and Rio Tinto) is located approximately five kilometres west of Weeli Wollie. The area is listed as a priority ecological community by the Western Australian state government and is highly significant to the Banjima and Nyiyaparli people. The springs are linked to the spirit of the Yurduba rainbow serpent who is the guardian of permanent waterholes. The Weeli Wollie area continues to be a special meeting place where Banjima, Nyiyaparli and other Indigenous groups gather at certain times to participate in law and culture ceremonies. A number of key projects have helped maintain strong cultural connections to Weeli Wollie and co-manage the impacts from Hope Downs mine.

#### Understanding the impact on land, water and culture

In the semi-arid East Pilbara region, permanent water sources are a rare and vital resource. Indigenous people are intimately connected to these water sources and as custodians feel an obligation to sustain and protect them for current and future generations. Mining in this area required a pit to be excavated below the water table; a process that would require dewatering and discharge of large volumes of groundwater. A considerable section of Weeli Wollie springs is located within the cone of depression from the dewatering, with most of the groundwater subsequently discharged back into Weeli Wollie creek and springs.

In undertaking the mine feasibility study, the project team identified that a process that evaluated the potential impacts on Weeli Wollie creek and springs could be undertaken by the Banjima and Nyiyaparli people. At this time, the mine was also seeking to meet environmental requirements placed on the project by the state government. An additional challenge was therefore to address both the environmental and cultural concerns in an integrated management process.

#### Working together to overcome the challenge

In July 2006, Banjima and Nyiyaparli people and representatives from Hope Downs held a bush meeting at Weeli Wollie. They met to discuss how they could work together to manage any potential impacts of mining on cultural and environmental values of the Weeli Wollie springs and the creek system. As a result, the Weeli Wollie Creek Co-Management Committee was formed. It provided a forum where the opinions of each of the parties could be heard and suggested management actions could be discussed and agreed together before being implemented.

The emphasis is on co-management through direct engagement between the Banjima and Nyiyaparli people and Hope Downs employees. An overarching objective is to ensure that the Hope Downs operations have as minimal impact on the cultural and environmental significance of Weeli Wollie as possible. Another key objective for the committee was for Banjima and Nyiyaparli people to retain their

Weeli Wollie Creek  
Co-Management  
Committee, 2011.



strong cultural connections to the land, and be able to develop business management skills to enable economic development.

### The co-management model

The current committee comprises five members each from the Nyiyaparli and Banjima people and four representatives from Rio Tinto including the general manager of Hope Downs. The committee and invited elders meet several times a year to discuss emerging and ongoing issues related to the cultural and ecological values of Weeli Wollie. They monitor and evaluate the effectiveness of existing programmes to assess how they are meeting their objectives. This includes reviewing advice from independent specialists, undertaking regular field visits to Hope Downs and Weeli Wollie, including interacting with Hope Downs' employees. Findings of monitoring activities and other investigations to date indicate that dewatering and discharge activities associated with mine development can be carried out in a sustainable manner while conserving the cultural and spiritual significance of the area.

A number of key projects have been undertaken by the committee since 2006 which have contributed to maintaining strong cultural connections to Weeli Wollie and co-management of the impacts from the Hope Downs operation. These projects include:

- Establishing an environmental training programme for Banjima and Nyiyaparli people;
- Recording the Indigenous cultural stories of the 'Women of the Creek';
- Participating in monitoring the fresh water ecology of the Weeli Wollie system, also known as the 'Living Water Survey';

- Erecting signage boards that contain traditional knowledge regarding the cultural and spiritual significance of the area;
- Recording the Indigenous stories and songs of the 'Men of the Creek';
- Regular camp-outs of Traditional Owners and Hope Downs 1 Mine employees that encourage developing a greater awareness and appreciation of the cultural, ecological and spiritual values of the area.

### Enduring professional relationships

This co-management model has resulted in an enduring professional relationship between Hope Downs and the Banjima and Nyiyaparli people. Since mining commenced in 2007, environmental and cultural issues have been managed in an integrated system, and information about the mine's activities and performance are continually monitored and evaluated to ensure minimal impacts to the cultural and ecological values of Weeli Wollie. The committee has also recognised that the lessons learned during the management of Weeli Wollie have resulted in a better understanding of the broader region, enabling stronger regional planning for the future. Reflecting on the effective governance structure of the committee, Rio Tinto has sought to use this model in establishing local implementation committees in subsequent agreements with other Indigenous groups in the Pilbara region.

35 Collins (2014)  
*Undermining the  
Upper Peninsula. In  
These Times (March  
12) available at  
[http://inthesetimes.  
com/article/16281/  
undermining\\_  
michigans\\_upper\\_  
peninsula](http://inthesetimes.<br/>com/article/16281/<br/>undermining_<br/>michigans_upper_<br/>peninsula)*

36 Rio Tinto (2015)  
*Community complaints,  
disputes and grievance  
guidance, p.6. See  
also IFC (2009)  
Good practice note:  
Addressing grievances  
from project-affected  
communities.*

### 6.3 Complaints, dispute and grievance resolution processes

The clearest, most comprehensive agreement with a first-class monitoring system cannot pre-empt all the problems that may arise; even the strongest relationships may experience some conflict. Having processes to deal with complaints, disputes and grievances at site level is a requirement of the Rio Tinto Communities and Social Performance standard.

Good processes can help manage disagreements and strengthen relationships. It's important that complaints, disputes and grievance mechanisms are appropriate to the context, the relationship and the agreement. They must be regarded by local people as fair and culturally appropriate. Processes that are attuned and accessible to local cultures are more likely to effectively resolve community concerns.

Reducing agreement shortcomings, unintended consequences or poorly-understood effects can also help resolve complaints before they escalate. This greatly reduces the risk of operational disruption and/or damage to corporate reputation. Monitoring provisions and an effective complaints and grievance process can create opportunities for companies and communities to identify problems early and together develop solutions before they escalate. Experiences at Eagle Mine (Rio Tinto interest now sold, see Case study 7) illustrate the importance of addressing community concerns, and the role that agreements and monitoring can play in resolving issues. Even with the environmental monitoring agreement in place, there are continuing concerns among the Keweenaw Bay Indian community about the mine's impact on water quality.<sup>35</sup>

There are differences between general community complaints and those related to agreements. General community concerns may relate to dust, noise or general amenity, whereas an agreement complaint may be linked to a specific commitment or agreement process. The way these complaints are handled may be different. The way to register agreement-related complaints is often specified in an agreement. This may include working through representatives of agreement-related bodies, such as an implementation committee or a dedicated committee for handling agreement-related complaints.

Initial steps in a process for addressing agreement-related complaints as they arise will be handled internally. It may proceed to a complaints committee involving respected and impartial community members to manage mediation. Ideally agreements outline processes to follow if complaints cannot be resolved and need to be escalated.

Figure 7 represents the essential elements for an effective complaints, disputes and grievance process.<sup>36</sup> These procedures should include:

- a dedicated and accessible avenue to raise issues and concerns;
- specified procedures that can escalate in a controlled way;
- systematic record-keeping and documentation;
- secure resourcing;
- techniques of dialogue, consideration of options and dispute resolution; and
- a commitment to substantive outcomes that address or resolve the issue in some way.

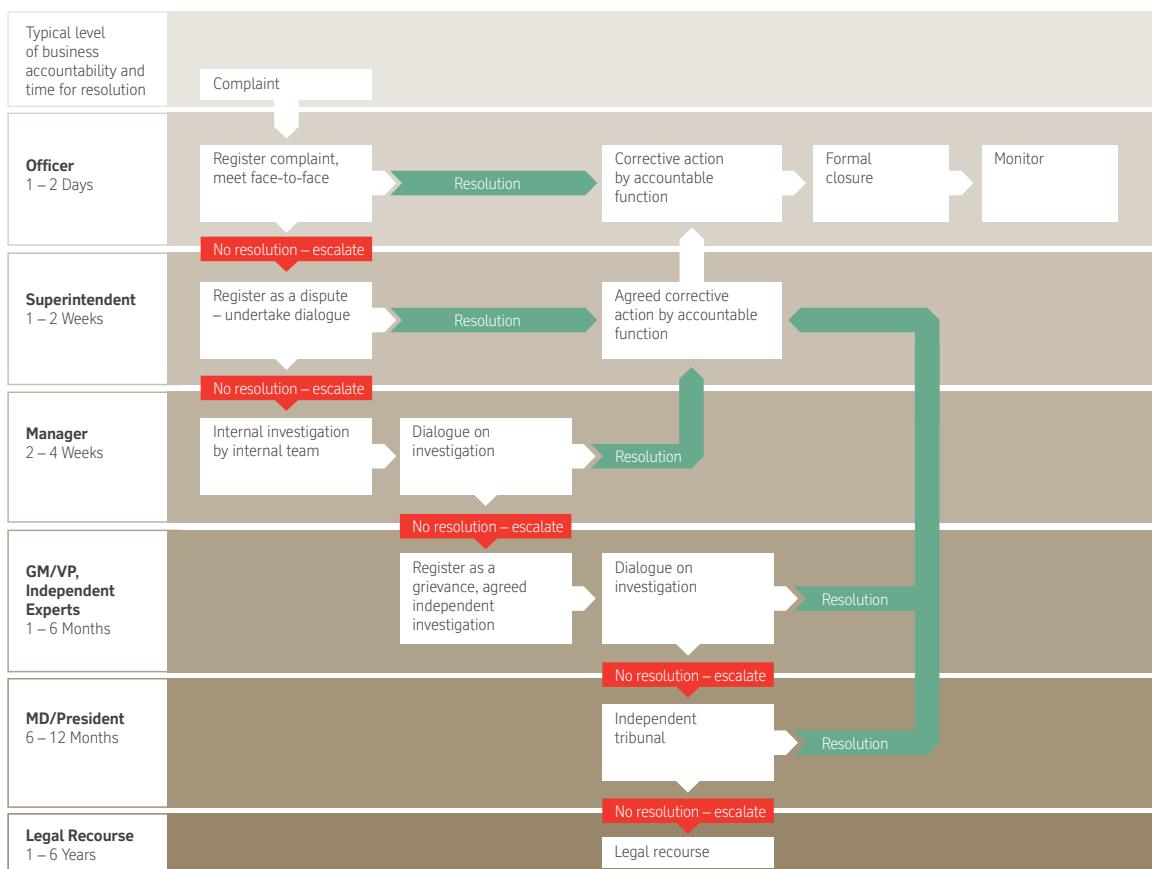
Like all agreement provisions, complaints, grievance, and dispute resolution processes must be monitored and reviewed to ensure they are effective over time.

### 6.4 Independent review processes

#### Reviews – what, when and who?

A critical process in managing the agreement itself is to conduct regular reviews. A review is a comprehensive process that occurs at defined intervals and examines fundamental questions about whether the agreement is achieving its purpose. It provides a point-in-time assessment of the appropriateness and effectiveness of objectives, governance structures and policies related to the agreement. It informs implementation and risk management. Importantly, the review process is different from monitoring, which is a largely internal and ongoing process to update progress against implementation plans and emerging issues.

**Figure 7: Essential elements for an effective complaints, disputes and grievance process**



Reviews of agreements should always be approached with the purpose of improving outcomes, not just proving that commitments were delivered. A clause-by-clause audit of the agreement is not a satisfactory way to ensure the intent is being achieved. Functions of a review include:

- clarifying agreement objectives and intent, and extent to which they have been achieved;
- investigating issues detected in monitoring;
- taking into account changing circumstances;
- obtaining feedback from those impacted by the agreement;
- drawing lessons and contributing to future policy and strategy; and
- providing public scrutiny and accountability for agreement outcomes.

Agreements bind all parties and provide certainty about intent and arrangements into the future. Most mine development agreements are made on the basis that they remain in place for the life-of-mine and beyond that into closure. For all but the most short-term agreements it's appropriate to build provisions for periodic review into the agreement. It's better to agree to a schedule of review cycles rather than leave this open. Reviews may be scheduled at critical milestones for the community, project or operation. Or they may be at regular intervals such as every three to five years.

Agreements can anticipate and define the composition of review teams. Individual circumstances determine whether a collaborative process involving the parties to the agreement is appropriate; and the role of an independent third-party. The review team needs to be independent, be seen to be independent from any of the parties and be able to hold its own view.

### Strategies for successful reviews

Experience points to some factors influencing the success of review processes:

- Adequate resources should be provided for reviews. It's easy to underestimate the time and resources required to review an agreement. Broad company support for the agreement and the reasons for reviewing the agreement are vital to ensure support for appropriate resourcing.
- The quality of information available to the review team is critical. Monitoring programmes can support a review by providing plenty of relevant information.
- Define the triggers, scope and conduct of reviews in the agreement after canvassing options with all parties. Consult with legal advisers to ensure that

provisions for reviews are feasible; and experienced agreements practitioners to ensure provisions for reviews are practical.

The provisions in two Rio Tinto agreements for reviews are outlined in Table 17.

Rio Tinto business units have recently reviewed agreements at Diavik, Argyle and Weipa. Each of these reviews concluded that agreement implementation required adjustment to achieve intended outcomes. Besides committing to regular, funded reviews, parties should agree on how to respond to agreement review findings.

**Table 17: Sample arrangements for reviewing agreements**

Agreement	Rio Tinto and Nyiyaparli People Claim Wide Participation Agreement (2011), Western Australia	Haisla Nation-Rio Tinto Alcan Legacy Agreement (2010), Canada
When will reviews happen?	Every five years for whole agreement.  The benefits-management structure to be reviewed two years after Rio Tinto makes the first payment and then every three years thereafter.	Every five years
What will they examine?	Key achievements, shortcomings and means of more effectively implementing the agreement.  The benefits management structure, shortcomings in its operation or means to more effectively operate it including apportionment of mining benefit payments.	Agreement implementation
Who will conduct them?	Rio Tinto and the Nyiyaparli People	A working group oversees the implementation of the agreement. Chairperson alternates between Haisla Nation and Rio Tinto.
Who will pay for them?	Each party will bear its own costs	Not specified
Will the results be public?	Not specified	Not specified
What responses are possible?	Not specified	By consensus the working group can recommend ways to improve the implementation of the agreement.
Provisions for renegotiation?	The participation agreement can be amended if the parties agree.	The parties may negotiate adjustments 18 months prior to each term of the agreement.
Term of agreement	Life of Rio Tinto operations in the Pilbara.	An initial term of 30 years is set. The agreement then renews for ten year intervals until production ceases.

### **Renegotiating agreements after review**

A review may identify unintended consequences, shortcomings or unrealistic performance expectations; and conclude that the enshrined commitments or arrangements should be amended. Renegotiating should be undertaken when change cannot be achieved by adjusting and modifying implementation arrangements.

In a few cases, there is explicit provision for the whole agreement to be renegotiated (see Box 30). This might occur:

- where a mine has a long life and stipulates renegotiation at particular intervals, such as every 20 years;
- when the output of the mine exceeds a certain threshold;
- when returns fall below a certain level;
- if there is a stipulation for agreement renegotiation upon change of ownership; or
- if inconsistencies develop between the terms of the agreement and environmental or other approvals.

Case study 5 and Box 10 provide examples of renegotiating agreements at a time of expansion to improve on previous arrangements. Some circumstances do not warrant renegotiation of the whole agreement, but adjustments may be necessary when:

- company ownership changes;
- there are social, legal or economic changes that were not envisaged by the agreement; and
- unintended negative consequences arise during the implementation of the agreement.

### **Balancing certainty and flexibility**

Legal frameworks may limit the extent to which amendments to an agreement can be proposed. For example, Australia's *Native Title Act 1993* does not enable amendments to Indigenous Land Use Agreements. If amendments are envisaged, agreement provisions should make the limits of those amendments clear. It should be made explicit that amendments can only occur with the agreement of all parties, and that a review cannot result in the termination of an agreement.

### **Box 30: Provisions for renegotiating agreements**

The Kennecott Flambeau Agreement (1988) was overseen by a Local Impact Committee formed by two of the chief elected representatives of each of the County of Rusk, the town of Grant and the city of Ladysmith in northern Wisconsin, United States. Clause 24 provided conditions for renegotiation.

"Any of the parties may reopen agreement negotiations if:

- A qualified person reports that environmental damage and costs to local government are significantly higher than anticipated.
- The mine is expanded by more than ten per cent of that envisioned in this agreement and/or the Operator acquires a large amount of property adjacent to the mine.
- The local governments argue, at the Department of Natural Resources mining permit application hearing, that the environmental and financial premises on which this agreement is based have changed since its negotiation and these changes will adversely affect the environment and the community.
- The mine closes for more than six months for reasons other than industrial disputes, economic shutdown or force majeure.
- In the event that commercial amounts of uranium or thorium are discovered in the mine.

The participating local governments also have the right to reopen specific provisions in this agreement if the Operator seeks variances from its commitments which may have an adverse effect on the community or environment."

*Source: Kennecott Flambeau Agreement (1988) MDInt013.01*

A common strategy to provide certainty and also maintain flexibility is to include implementation detail in 'schedules' rather than the main body of the agreement. The main part of the Oyu Tolgoi-Umnugobi Cooperation Agreement describes the rules and the arrangements for the Relationship Committee and the Development Support Fund. A number of schedules relate to specific 'thematic' areas and behaviours that partner communities want Oyu Tolgoi to pay special attention to (see Figure 8).

**Figure 8: Oyu Tolgoi-Umnugobi Cooperation Agreement – structured for flexibility**



Another strategy to balance certainty and flexibility has been employed in the Pilbara Participation Agreements and Regional Standards, whereby commitments are divided into two categories:

- specific commitments which can be enforced through legal proceedings; and
- implementation commitments which can be reviewed by an independent expert.

Flexibility can also be catered for by specifying circumstances (or performance) that will prompt a change in requirements/obligations and the specific redress expected if this occurs. For instance:

- Exploration access agreements may indicate some conditions that will continue if a discovery is made and resource development proceeds.
- Mine development agreements will usually contain clauses about rights of renewal of mining and operating interests (eg extending operational life or obtaining new operating interests within the agreement footprint) without necessarily having to renegotiate the whole agreement.

The Pilbara Participation Agreements demonstrate this performance-related flexibility. These currently commit Rio Tinto to having 12.2 per cent of its workforce comprised of Aboriginal employees. This target reflects the Indigenous population in the Pilbara and is amended after every nation-wide census. If the company fails to meet this employment target, Rio Tinto is required to provide 12 tertiary scholarships to a total value of AUD \$200,000 a year for Pilbara Aboriginal people, subject to the Traditional Owners meeting their mutual obligations.

Similarly, Case study 5 illustrates how dialogue and flexibility in expediting cultural heritage surveys (in ways not specified in the agreement) allowed Rio Tinto and Pilbara Traditional Owners to benefit economically from increased production at a time of high prices. Rio Tinto's Aluminium business at Weipa also links employment and training budgets to employment outcomes for local Aboriginal people, again demonstrating how desirable flexibility is for agreement implementation plans.

## 6.5 Role of agreements post-closure

Where agreements are long-term or cover the full life-of-mine they should establish arrangements for flexible implementation and regular review. Consideration should also be given to closure provisions since mineral resources are finite and mines don't operate indefinitely. The challenges of establishing a long-term agreement include:

- defining the term of the agreement;
- anticipating exit conditions and an exit strategy; and
- making provisions for non-operating conditions, particularly for the post-mining period.

Post-mining provisions may include a specified end point for provisions and relationships and/or for 'final' reviews and dissolution of agreements. Legal teams will advise on terminology and arrangements to handle this phase. Figure 9 illustrates a hypothetical example of how the life of an agreement can align with the life-of-mine; and how provisions in the agreement (eg employment targets and royalty payment schedules) may have specific terms and phase out by closure.

Some options for specifying the phasing out or limits to benefit payments should be considered. These include:

- Indexed amounts over a defined period matching the expected life-of-mine.
- Payments being scheduled to phase out sequentially in line with production volumes.
- Payments being scheduled to cease with the end of production or the project (even though decommissioning and rehabilitation activities may continue for some years).
- Payments dropping once production ceases, or the project ends and while rehabilitation occurs, to a fixed annual lease payment for the land occupied.
- Payments being made into an endowment fund or foundation so that when the mine stops operating and its cash flow ceases community financial benefits can be maintained by annuities paid from the endowment fund.

**Figure 9: Hypothetical timeline of agreement**

Year	Agreement ends	End of project life	Annual payment to representative body for administration ends
1+50	Joint oversight committee ends	Lease relinquished	Employment obligations end
1+40		Participatory monitoring continuing	
1+30		Passive rehabilitation continuing	Employment numbers reduce but proportional obligations continue
1+20	20-year review	Decommissioning and active rehab complete	Annual payments for distribution to Tribes end
			Annual payments to perpetual fund end
1+18	Operations-related committees end	End of economic life	Annual payments for education and training end
1+15	15-year review		
1+10	10-year review	Peak production	Peak local employment
1+5	5-year review	3 <sup>rd</sup> year of production	
1	Agreement signed	Construction commences	
	Committees established		

### Achieving enduring value for communities

While the focus is often on negotiating the agreement and making arrangements for the project and operational phases of the mine, attention must also be paid to the longer term. Characteristics of agreements that seek to achieve enduring value for the community include:

- Capacity building and progressive transfer of authority, roles and responsibilities to local management committees, foundations and forums.
- Business incubation, mentoring and development to foster economic self-reliance.
- Work to align and integrate agreement initiatives with the plans of local authorities and civic society.
- Provisions for future endowment, rather than short-term ‘windfall’ benefits.

Taking a long-term perspective on agreement-making has implications for closure planning. Outcomes envisaged in an agreement for post-mining land use can be at odds with the rehabilitation conditions required by government, environmental and other authorities. Local people may want to use a former mine site and residual infrastructure, even where government provisions stipulate rehabilitation of final land forms and dismantling of infrastructure upon relinquishment of the mining lease. Reconciling conflicting aims can be difficult, but the agreement can express the community’s aspirations for closure.

**Table 18: Examples of agreement provisions designed with a commitment to sustainability beyond mining**

Agreement provisions for sustainability	Examples
Company support for land to revert to Native Title Holders once the mining lease is relinquished, even in instances where native title is legally deemed to have been extinguished by subsequent uses.	The WCCA provides for extinguishment or ‘yielding’ of native title, but further that after land ceases to be subject to Rio Tinto’s interests, native title rights and interests again have effect. Rio Tinto also agrees to surrender certain rehabilitated land that is no longer required, with the state agreeing to use best endeavours to transfer that land back to relevant Traditional Owner groups.
Agreements about eventual (re)placement of cultural artefacts temporarily removed for safe-keeping during operations.	This is also provided in the WCCA.
Agreements about desired landforms and vegetation during rehabilitation for subsequent land use by the local community.	The Pilbara Participation Agreements and Life-of-Mine Planning Regional Standard under the Regional Framework Deed do not specify subsequent land uses, but establish arrangements for progressive participatory planning of these during production.
Provision of training and qualifications in non-mining vocations to increase employability and provide career pathways outside of mining.	Agreements could specify a gradual shift in fields of apprenticeship and training.
Support for local economic diversification and adaptable local businesses to minimise mine-dependency.	In Canada, examples of transferring infrastructure to the community include Iron Ore Company of Canada’s sale of a railway line to a company owned by three Aboriginal groups. Rio Tinto’s Aluminium business also has several programmes to maximise the reuse of remaining assets (eg land, buildings and facilities) when industrial plants close.
Mine-related regional development agreements providing for the establishment of community-controlled trusts with accumulation funds to ensure there is an asset for future generations.	Traditional Owners at Argyle Diamond Mine receive a percentage of the operation’s earnings before income tax, depreciation and amortisation (EBITDA) that is managed in two trusts, the Gelinganyem Trust and the Kilkayi Trust. The Gelinganyem Trust is a capital fund that will provide an independent income post-mine in perpetuity. The Kilkayi Trust makes payments annually to meet current needs (see Box 22).

Since many matters are beyond the control and authority of Rio Tinto or the community, it may not be possible or advisable to specify post-closure conditions in the agreement. However, the agreement should establish arrangements for Rio Tinto and the community to engage with government in progressive participatory closure planning during operation, as shown in Table 18.

Through agreements, Rio Tinto aims to build strong relationships with local communities based on shared benefits, transparency and trust. The basis can be laid in agreements for long-term community self-sufficiency, not dependency. Provisions should be embedded in agreements in order to minimise impacts of closure and maximise a mine's positive legacy.

**Checklist 4 provides a guide for planning to monitor, evaluate, review and improve agreements.**

**Checklist 4: Monitor, evaluate, review and improve**

Are agreement commitments fully documented in a register or other accessible form?	[ <input checked="" type="checkbox"/> ]
Does the monitoring framework include measures for all actionable agreement provisions?	[ <input checked="" type="checkbox"/> ]
Was the host community involved in the selection of performance indicators?	[ <input checked="" type="checkbox"/> ]
Do indicators reflect both short-term expectations and long-term benefits?	[ <input checked="" type="checkbox"/> ]
Are indicators being tracked regularly using accurate and reliable data? Is relevant data gender-disaggregated?	[ <input checked="" type="checkbox"/> ]
Are host community or other organisations involved in monitoring and evaluation?	[ <input checked="" type="checkbox"/> ]
Are formal periodic reviews of the agreement and its implementation catered for?	[ <input checked="" type="checkbox"/> ]
Do implementation aspects of the agreement allow for flexible adjustment?	[ <input checked="" type="checkbox"/> ]
Have changes and improvements occurred as a result of monitoring and evaluation?	[ <input checked="" type="checkbox"/> ]
Is there a culturally-appropriate process for community members to report concerns and complaints?	[ <input checked="" type="checkbox"/> ]
Are there provisions for the post-mining period?	[ <input checked="" type="checkbox"/> ]

## Case study 7: Eagle, United States

### Addressing community concerns with independent environmental monitoring



Eagle  
Michigan, United States

Eagle Mine is located 13 miles from the shores of Lake Superior in the US, the largest body of fresh water in North America. Rio Tinto Exploration discovered Eagle's nickel and copper reserves in 2002. Many people in the local community of Marquette, Michigan were unhappy about a new mine. One of the main reasons people live in the area is because they value nature and the rural lifestyle. Litigation related to the permits served to exacerbate already negative opinions, mistrust and fear about the potential environmental impacts from the future mine. In mid 2011, a new Eagle senior leadership team and the Communities, Communications and External Relations team worked with the Superior Watershed Partnership and the Marquette County Community Foundation to build trust in the local community. This resulted in an agreement to collaborate on an environmental monitoring programme for the mine facilities and transport routes.

#### Balancing opportunity and environmental impact

Rio Tinto filed applications for mining permits for the Eagle deposits in 2006 and received approvals in 2007. In 2008, the local Native American Tribe and environmental groups submitted lawsuits challenging the permits and after 11 appeals that all ruled in favour of the State, the courts upheld the original permits. The State of Michigan finalised permits in 2010 and Rio Tinto began construction activities shortly thereafter, until July 2013. At this time the company sold 100 per cent of its interest in the mine to Lundin Mining Corporation. Lundin executed first production in late 2014.

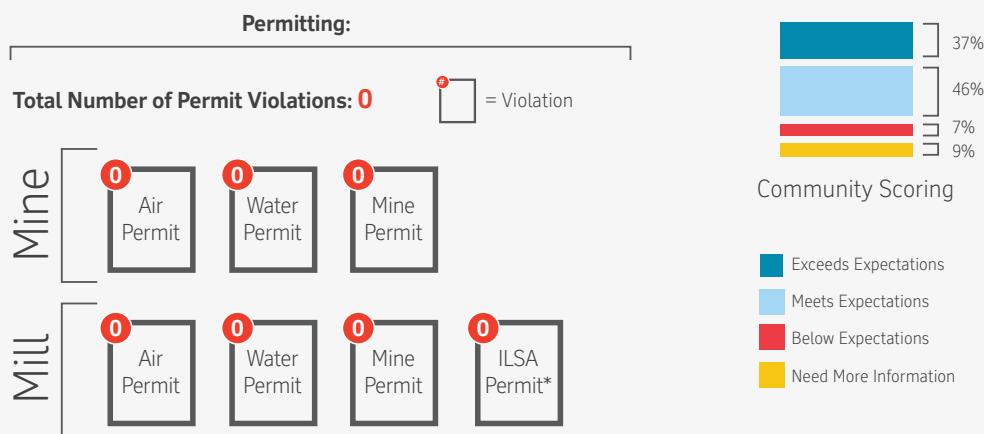
Mine surface construction was under way in mid 2011, with many people in the local community unhappy about the mine. Even those supporting it did not want the economic benefits to come at the cost of negative environmental impacts. The site sits at the headwaters of a river that is home to a rare species of trout. Many local people did not believe the company was transparent and truthful about its commitment to mitigating environmental impacts, nor did they believe that the government was looking out for their best interests.

Eagle's independent monitoring programme records mine performance against set criteria. It publishes a report card online which is discussed at community forums.

# Environmental Performance

Scoring Period: March - August 2012 | Sample Size: 293

As a community you've told us that the Upper Peninsula's natural resources are very precious and that you would like to see an independent monitoring program in place. Based on your feedback, we said we would not harm the local environment. We have set a target of zero permit violations, and we have agreements with the Marquette County Community Foundation (MCCF) and the Superior Watershed Partnership (SWP) to implement a Community Environmental Monitoring Program (CEMP). Here's how we're doing:



\*Inland Lakes and Streams Act. This permit relates to the tailings pit.

## Community Environmental Monitoring Program

The MCCF will ensure that the monitoring is independent, they will manage funding, and they will resolve any disputes over the monitoring program.

The SWP will independently monitor the mine, the mill, the ore transport route, and air quality in Powell Township. The SWP will conduct verification of Eagle's monitoring program and any additional monitoring the SWP feels is important to protect the environment.

In the next scoring period monitoring results from the CEMP will be included in the scorecard.

CEMP website: [www.cempmonitoring.com](http://www.cempmonitoring.com)

## Our response to community feedback:

During our forums the community asked us to provide more information on our environmental performance. We have responded by updating our website to include more information about our performance and we've made reports and data easier to locate. We will include a link on our website to the CEMP website for access to SWP reporting and analysis.

The community also requested participation from SWP during our forums. SWP will participate in the next round of Eagle community forums and also hold their own public meetings.

**RioTinto**  
September 2012



For more information see:

Plastrik (2012) *The unity of place: Giving birth to community environmental monitoring. Rio Tinto Marquette Community Foundation and Superior Watershed Partnership, Michigan.*

[http://eaglemine.com/  
wp-content/uploads/  
CEMP\\_CaseStudy1\\_  
Aug2013.pdf](http://eaglemine.com/wp-content/uploads/CEMP_CaseStudy1_Aug2013.pdf)

Plastrik (2013) *Do you need a CEMP? How your community and your company can design and implement a community environmental monitoring program.*

[http://eaglemine.com/  
wp-content/uploads/  
How  
ToDesignandImplement  
CEMP\\_091213.pdf](http://eaglemine.com/wp-content/uploads/How<br/>ToDesignandImplement<br/>CEMP_091213.pdf)

Dixon and Zandvliet (2013) *Walking the talk: Community rating of Eagle's social performance. Triple R Alliance.*

[http://eaglemine.com/  
wp-content/uploads/  
Walking-the-Talk-Eagles-  
Social-Performance-  
Approach.pdf](http://eaglemine.com/wp-content/uploads/Walking-the-Talk-Eagles-Social-Performance-Approach.pdf)

### Seeing the opportunity through relationship-building

The anticipated mine life would be short – no more than eight years. Continuing conflict, disagreements and legal haggling would put a tight production schedule at risk, strain employee and community morale, and increase the costs of the mine. Allaying the community's fears and building trust required an approach that provided tangible, credible and demonstrable data on Eagle's environmental performance. The former Communities, Communications and External Relations director recalls, "The business had been focused on solving the problem with an engineering solution. We needed to complement this with a solution that would help to improve our relationships."

The team listened to the community groups and individuals who had deep concerns about the project. Many of these meetings were one-on-one. In one such discussion, the Communities, Communications and External Relations director and the leader of the Superior Watershed Partnership discovered they had a shared goal of achieving transparent, credible and best-in-class environmental performance. This conversation and shared idea eventually resulted in a 62 page legal agreement to collaborate on monitoring. The executive director of the Superior Watershed Partnership recalls, "When it became clear that the mine would be legally permitted, everyone – whether they supported the mine or opposed it – agreed that additional monitoring would be a good idea. It took months of often contentious negotiations but the end result, a globally unprecedented independent monitoring programme, has been worth the effort."

### Independent, transparent, community-led monitoring

In October 2012, the three organisations signed a legally binding agreement to launch an independent environmental monitoring programme. The Community Environmental Monitoring Programme is an arrangement between Eagle, the Superior Watershed Partnership and the Marquette County Community Foundation. The agreement created a fully independent mechanism to conduct verification monitoring of Eagle's impacts on air, groundwater, surface water, wildlife and plant life, and report the findings to the public.

Pictured left: Forests surrounding Lake Superior where independent monitors measure and publicly report Eagle's impacts on air, groundwater, surface water, wildlife and plant life.

The Superior Watershed Partnership leads the monitoring programme. It is responsible for verification monitoring and evaluating additional monitoring upon request from community members. All monitoring must comply with scientifically acceptable standards outlined in the agreement. The Partnership is also responsible for community engagement and sharing the data and results from the monitoring. Results are posted on the dedicated website, with a record of Eagle's performance against the compliance criteria set in the permits. The agreement is also publicly available online. Community forums and media releases are used to engage with the public and discuss the findings.

The Marquette County Community Foundation oversees the structure, ensuring that both the Eagle Mine and the Superior Watershed Partnership adhere to the terms of their agreement. The Foundation also serves as the funding mechanism for the programme and receives annual payments from the Eagle Mine. This arrangement creates an 'arm's length' relationship between Eagle Mine and the Superior Watershed Partnership, cementing the independence of the latter in the fulfillment of its monitoring role.

To execute their responsibilities transparently, the Marquette County Community Foundation created a committee of independent community members who volunteer their time to oversee the use of the funds and the parties' compliance with agreed standards, procedures and dispute resolution. The committee includes representatives from the environmental science sector, the mining sector, the community and the Foundation's own board of directors. There is also a seat on the committee reserved for the Keweenaw Bay Indian Community. The Superior Watershed Partnership conducted its first environmental monitoring in December 2012. Monitoring occurs quarterly, but the Partnership can conduct additional monitoring in response to public requests.

During negotiations with Lundin Mining in 2013, Rio Tinto and the community groups worked to ensure that the new owner would continue with the commitment to third-party monitoring.

To see the Community Environmental Monitoring Programme in action, please visit:  
<http://www.cempmonitoring.com/>

## 7. Report and communicate

“In our negotiating group, you get people say ‘oh you can have that area’ and I say no because I feel responsible. When it comes to that situation, especially in an Aboriginal group, the elders have a say and we work together. If something comes up in an area, we will sit down and talk about it. We need to talk because some companies will play the underhanded thing. They focus on someone in the group, someone weak to wear down. They were the bad old days. It doesn’t happen today. We used to always say ‘when you talk to us, you talk to everybody’. Kuruma Marthudunera is a group, not one person, and that’s the way it is.”

*Cyril Lockyer, Kuruma Marthudunera Elder (2014)*

Good communication and performance reporting are vital for agreements to succeed. Communication should be timely, culturally appropriate, informative and tailored for different audiences and purposes. Reporting is a more specific process, directed to those parties stipulated in the agreement and should happen routinely throughout the life of the agreement.

Both communicating and reporting need to start early and be resourced through negotiation, signing, implementation and monitoring processes. As agreements are implemented, reports should lay out concerns, challenges and potential improvements. Importantly, communication – both internal and external – and performance reporting need to be consistent; they should not inadvertently contradict each other.

Communication, when done well, is a valuable investment that can help build understanding across a broad range of stakeholder groups. It may cover:

- the scope of issues being addressed in the agreement;
- intentions, plans, activities and consequences of an agreement;
- roles, responsibilities and expectations of the company and other parties;
- agreement-related processes and outcomes; and
- timeframes and opportunities for broader stakeholder involvement.

Reporting serves different purposes. It's usually mandatory, with requirements to report to specific parties outlined in the agreement. This may include:

- reports to the agreement parties on progress, performance and achievements against agreement commitments;

- reports to regulatory or other third-parties on agreement performance as required by law;
- audit reports that specifically validate expenditure and other claimed achievements; and
- reporting of summary information by Rio Tinto under its various global reporting commitments.

Reporting and communication can take a variety of forms. Box 31 lists some of these while Box 32 provides an example of communication during the Tarong Coal Project Agreement process for the Tarong coal mine in Queensland, Australia (Rio Tinto interest now sold).

### **Box 31: Forms of communication with the community**

Communication can address community concerns and priorities, and explain company perspectives. Communicate clearly and regularly through varied formats, including:

- local media outlets;
- visuals such as maps, charts, photos, timelines and flowcharts;
- noticeboards;
- webpages and social media;
- meetings in easily accessible venues;
- public forums;
- targeted briefing sessions;
- regular segments on community radio; and
- agreement-specific newsletters.

### **Box 32: Communication during agreement-making**

The Tarong Coal Project Agreement process spanned more than two years. Initially, communication was informal, with Rio Tinto Coal Australia community practitioners visiting each of the 16 registered applicants on the Wakka Wakka claim. During these meetings, the company proposed that the agreement was to be in the best interests of the entire Aboriginal community, not just the registered claimant families. This was a key message that needed to be expressed early in the process.

A series of more formal meetings followed and the Bunya Working Group was set up with nominated representatives from the 16 different groups.

There was no hasty tabling of draft documents in the early stages. Rather, at the third or fourth meeting, communication procedures and engagement protocols were formalised in the Yerehme Agreement. *Yerehme* is a Wakka Wakka term expressing ‘opening the door’. Rio Tinto Coal Australia kept monitoring messages circulating within interested parties throughout the process to address any misunderstandings or concerns as they arose.

The company provided plain English, short-form versions of information with maps, charts, photographs and diagrams for the working group to explain proposals to the families, community and institutions they represented.

Communication tools included:

- meeting minutes between the company and the working group, which were circulated more broadly to the group of claimants being represented;
- early internal briefings for the managing director, senior management in the Planning and Project Development units and site personnel; and
- regular briefings to State government officials. Although not party to the negotiations, it was important to keep government informed about general matters concerning the project.

The signing of the Yerehme Agreement included a smoking ceremony and a country visit. This communicated a strong message of recognition and respect to Traditional Owners and the wider Aboriginal community.

Rio Tinto Coal Australia recognised that post-signing, communication levels dropped. The company then took steps to re-establish strong levels of communication. A key learning was that communication never stops. Not only is communication important during agreement negotiations, but post-agreement implementation, communication also requires constant attention, checking and rechecking for relevance and accuracy.

*Unpublished source: Rio Tinto, Community engagement and agreement-making: 3 RTCA case studies. Case study 1: The Meandu project.*

## **7.1 Reporting**

Rio Tinto reports on its Group-wide social performance in accordance with the Global Reporting Initiative (see Table 19). Other international codes that Rio Tinto is committed to report against include the International Council on Mining and Metals' (ICMM) Sustainable Development Principles, the UN Global Compact and the Extractive Industries Transparency Initiative (EITI).<sup>37</sup>

<sup>37</sup> ICMM (2003) *Sustainable development framework: 10 principles*. <http://www.icmm.com/our-work/sustainabledevelopmentframework/10-principles>

United Nations Global Compact (2015) *Mobilizing business action on the sustainable development goals*. <https://www.unglobalcompact.org/>

Extractive Industries Transparency Initiative (EITI) (2013) *Seeing results from natural resources*. <https://eiti.org/>

All of these codes direct attention to issues relevant to agreements, including:

- stakeholder engagement;
- human rights;
- environmental management;
- training and education; and
- social performance indicators.

Adherence to these global codes promotes transparency and certainty for agreement parties. It also reduces the likelihood of legal and political disputes. The global codes provide guidance on what should be reported at the local level.

**Table 19: Global Reporting Initiative principles on matters to report<sup>38</sup>**

Principle	Description of matters to report	Relevance to agreements
Inclusiveness	Report matters relevant to the expectations and interests of all people covered by the agreement, and others as agreed by the parties to the agreement. Establish communication avenues to the full constituency of land-connected people.	Clarifies the responsibilities, benefits gained and concessions made by each party. Provides transparency around the business case for the agreement and helps manage expectations.
Contextualised	Report the company's performance in relation to wider economic, environmental, cultural and social conditions and trends, locally and for prevailing market conditions.	Reports local and market context and ensures the host communities receive information on prevailing implementation conditions, particularly current constraints. This can strengthen relationships and assist with monitoring.
Materiality	Report performance that reflects the company's significant economic, environmental, cultural and social impacts, and matters that assist informed evaluations and decision-making. Focus the reporting on those topics that are material to the business and to the community.	Gives attention to matters that are critical to community and agreement goals. Concentrating on topics that are material to the community will make reports relevant, credible and user-friendly.
Completeness	Report the full scope of topics for the appropriate geographical areas and time periods. The range of aspects covered should include: <ul style="list-style-type: none"> <li>– performance achievement against goals in the preceding period, avoiding exaggeration;</li> <li>– committed future activities: their current state and the nature, extent, scope and projected timelines; and</li> <li>– likely social, economic and environmental implications of new activities in the region.</li> </ul>	Topics relevant to agreements include: <ul style="list-style-type: none"> <li>– the value of economic benefits/financial payments to all interest groups;</li> <li>– details on parameters agreed for establishing payment quantum (eg the quantity or value of ore or extent of ground disturbance);</li> <li>– details of specific provisions in the agreement and performance against these;</li> <li>– matters related to land management and access, environmental management, cultural heritage protection, employment, training and business development; and</li> <li>– implementation arrangements, including allocations to trust funds and their management.</li> </ul>

#### Agreed minimum reporting requirements

Minimum reporting requirements are often stipulated in agreements. These need to be mutually acceptable and agreed upfront. Preliminary memorandums of understanding, framework agreements and the procedural provisions of agreements can include such arrangements. They may specify how parties can release and disseminate information, and should clearly quarantine agreed confidential aspects. Table 20 provides examples of reporting elements about employment provisions in an agreement.

#### Balancing transparency and confidentiality

Rio Tinto strives to have agreement content and performance on public record, taking into consideration legal constraints and cultural sensitivities. Transparency supports accountability. However, where legally binding documents describe business arrangements between parties, commercial confidentiality and disclosure conventions may apply. There may be different matters to report to different groups. Some sensitive information may be shared between parties, including specific payments to recipients and commercially sensitive development plans. This information may not be appropriate to disclose publicly. Details such as the exact location and significance of cultural sites may need to be withheld.

<sup>38</sup> Global Reporting Initiative (2015) G4 sustainability reporting guidelines. Reporting principles and standard disclosures. <https://www.globalreporting.org/resourcelibrary/GRI-G4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>

In most cases, and particularly in a mining region where several companies are active, some plans may need to be commercial-in-confidence.

When publicly reporting or communicating financial benefits, restricting some details (eg specific financial payments) is legitimate by mutual agreement. However, the principles and arrangements governing benefits and payments should be widely known. This should include reporting of governance and institutional arrangements such as those outlined in section 5.6.

Agreement outcomes are usually reported publicly and are rarely the result of efforts and contributions by a single party or initiative. Reports should convey joint achievements rather than individual efforts.

The economic and development contribution to the community as a whole over time is the ultimate credential of an effective agreement.

Reporting should also occur even when definitive information is not available. Being open about uncertainties can avoid unrealistic expectations that can sour relationships. The open communication strategies associated with the Topnaar Relationship Agreement of the Pitchstone exploration project in Namibia (see Box 33) helped build positive relationships even though mining did not proceed.

**Table 20: Sample arrangements for reporting on employment provisions in an agreement**

Reporting arrangements	Who, what and when
Who prepares reports	HR and Employment and Training Committee
Topics of reports	<ul style="list-style-type: none"> <li>– Number of new recruits from target population groups</li> <li>– Composition of workforce</li> <li>– Progress of trainees</li> <li>– Staff turnover</li> <li>– Mentoring and professional development programmes</li> </ul>
Committees, bodies or groups to receive reports	<ul style="list-style-type: none"> <li>– Agreement Implementation Committee</li> <li>– Local employment agencies</li> <li>– Labour unions</li> <li>– Parties to the agreement</li> </ul>
Scheduling of reports	Annually

### **Box 33: Topnaar Relationship Agreement**

Rio Tinto Exploration entered into a joint venture agreement with Pitchstone Exploration Limited in September 2011 to undertake early-stage exploration in south western Namibia. This project covered an area known as the Kuiseb Delta where customary lands, recognised under the Namibian Customary Land Reform Act 2002 belong to the land-connected Topnaar people. To facilitate a dialogue around the exploration programme and establish a framework for a trusting community-company relationship, the Topnaar Relationship Agreement was reached between Rio Tinto Exploration and the Topnaar Traditional Authority prior to commencing field activities. The unpredictable nature of exploration means that a project might not progress if the geological potential is found to be low. It was therefore important for Rio Tinto to ensure communication about future prospects was clear and understood by the community. For this reason, there was a strong focus in the agreement on engaging and engagement mechanisms with the Topnaar people.

The Topnaar Relationship Agreement outlined the working relationship between Rio Tinto Exploration and the Topnaar Traditional Authority. It had a strong focus on mutual respect and two-way dialogue. The communication clause in the agreement had provisions for an Engagement Committee which was established to act as a forum for the two parties to communicate and resolve concerns, provide project and community updates and discuss opportunities for local employment. The Engagement Committee developed a communication plan that provided

parameters for preferred communication methods which would be culturally appropriate for the Topnaar community.

To enhance the communication and dialogue between the parties, all meetings were held in languages understood by the local community (Afrikaans and Nama). In addition, the agreement itself was not confidential and was made available for anyone to access and included plain language explanations of complex legal issues. Minutes from the Engagement Committee meetings were also made publicly available so everyone could understand what had been discussed and agreed during meetings.

The Pitchstone project ended after one exploration season without discovery of interest and Rio Tinto subsequently exited the joint venture. As per the agreement, in a face-to-face meeting, the Chief and community were informed of the results of the programme and the decision by Rio Tinto to exit the joint venture and conclude the agreement.

Despite not continuing for longer, the agreement-making process left a positive legacy. Chief Kooitjie of the Topnaar people said the process had empowered his community and given them tools and a model they could use to engage and make agreements with other mining companies in the future. The agreement-making process clearly acknowledged and recognised the local community's rights and interests and was integral to developing a mutually beneficial relationship.

## **7.2 How to report**

Information about the agreement should be reported and widely accessible to the host community, those with an interest in the agreement and all company personnel. Reporting can be improved by following a process that has been understood and agreed in advance. Some tips about how to report include:

- Ensuring reporting methods are culturally appropriate for local people (see section 4).
- Creating multiple forums to keep people informed and obtain their input.
- Providing opportunities to address different issues and interests.

- Using various forms of media, including visual material, written and verbal descriptions.
- Avoiding technical and legal jargon.
- Ensuring the information provided, received and acted on is accurate.

Global Reporting Initiative Principles provide guidelines regarding the quality of information for transparent reporting (see Table 21).

**Table 21: Global Reporting Initiative principles for the quality of information reported<sup>39</sup>**

Principles	Guidelines
Balance	Report both positive and negative projections and performance, and avoid selections or omissions that give a biased picture.
Comparability	Report information consistently so that performance trends over time are evident and performance can be compared to alternatives.
Accuracy	Reports can be quantitative or qualitative and should align with performance. This is where systematic monitoring and record-keeping are valuable. In the case of projections, give credible and plausible information based on best estimates and explanations of critical assumptions associated with alternative scenarios.
Reliability	Use transparent and reliable methods for gathering, recording, compiling, analysing and disclosing information.
Timeliness	Report the events or developments on a regular schedule and within a short interval so that up-to-date information is widely available.
Clarity	Provide information in a form that is understandable and accessible to a broad audience.

<sup>39</sup> Global Reporting Initiative (2015) G4 sustainability reporting guidelines. Reporting principles and standard disclosures. <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>

<sup>40</sup> An example of their reports can be viewed at <http://www.iti.gov.nt.ca/publications/gnwt-implementation-report-commitments-under-diavik-socio-economic-monitoring-agreement>

### Opportunities for joint reporting

Joint reporting is often appropriate and preferable to individual reporting. At Eagle Mine (interest now sold by Rio Tinto, see Case study 7), the company and its community partners jointly report environmental monitoring results through a ‘report card’ available to a broad audience. The Diavik Socioeconomic Monitoring Agreement is another example where the government, company and First Nations signatories to participation agreements (see Case study 8) work together under a joint agreement to monitor and report publicly on progress against targets. However, joint reporting should not be the only channel of communication. Rio Tinto must maintain its own channels to support broad dissemination of full, consistent and accurate information.

Public reporting by community and government parties can further enhance the credibility of the monitoring reports and boost confidence in agreement outcomes. At Diavik, the Government of the Northwest Territories, as a party to the agreement, reports twice a year on the status of its commitments under the agreement.<sup>40</sup>

Where other companies are operating in the region, public reporting may need to be coordinated to avoid confusion or information overload. Coordinated reporting can also help build an understanding of the cumulative impacts of the presence and activities of multiple companies.

Producing transparent, good quality, factual reports is difficult if sufficient resources are not allocated to monitoring and data collection. The quality of reports depends on systematic, well-designed and accurate record keeping. If performance details are not accurately recorded, or disappear into filing systems, good reporting becomes impossible.

### 7.3 Cross-cultural communication

Many of Rio Tinto's exploration and operational activities occur in places with differing communities and cultures. Having a good knowledge base and local expertise in cross-cultural communication is essential. Knowing how to adapt communication styles is part of cross-cultural awareness (see section 4.3). Rio Tinto increasingly provides tools like boxes, diagrams or other explanatory mechanisms to enhance understanding of the legal terms embedded in agreements. Plain-language boxes are used extensively in agreements, including the Pilbara Participation Agreements (see Case study 5), the Argyle Agreement (see Case study 2) and the internal working version of the Oyu Tolgoi-Umnugobi Cooperation Agreement (see Case study 3). Other general rules for cross-cultural communication include the following:

- Always use plain language to begin with, even before translation.
- Communicate issues and instructions clearly.
- Avoid using negatives in communications.
- Be aware of customary gender roles and how these may restrict or enable expression, particularly in public settings.
- Use agreed terminology and definitions.
- Only use the future tense for notice of upcoming events and meetings.
- Attune language and communication styles to those of the host communities.

Interpreters and translators should be used where people working on agreements do not speak or write the same language as the host community, or use dialects. Likewise, it's important to understand messages from host communities that may come in unconventional forms. In the Northern Territory, Australia, the Yolngu people's use of the Bark Petition to protest the use of their land for mining illustrates the value of building an understanding of community perspectives (see Case study 4). Symbolic acts can also convey positive messages before a formal agreement is signed. At Simandou in Guinea, where the intent is to form an agreement, the giving and slaughtering of buffalo was used to communicate the significance of the developing relationship between company and community.

Community perspectives should be valued and respected, and reflected in cross-cultural communications. This develops community members' trust that the company will act in good faith in disseminating information about the agreement and related progress. Some of the challenges and risks around language and cross-cultural perspectives are outlined in Box 34.

#### Box 34: The challenge of language and cross-cultural perspectives in negotiating agreements

The cross-cultural context can create particular problems. For example in Cape York (Queensland, Australia), many of the Cape York Land Council consultants and negotiators who are responsible for disseminating information, canvassing options and seeking approval for negotiating positions are non-Aboriginal. Almost all are unable to speak local Aboriginal languages. They seek to communicate information which can be highly technical for Aboriginal people who often have limited formal education and for whom English is frequently a second language and in some cases a third or fourth.

Aboriginal people must try to convey information and insights to non-Aboriginal consultants who lack the cultural and linguistic knowledge to readily absorb them. The potential for people to be speaking at cross purposes is obvious. More seriously, unless a concerted effort is made to ensure otherwise, there is a possibility that Aboriginal perspectives will be subsumed given that the overall context within which mining projects are conceived, promoted and evaluated is derived from the dominant non-Aboriginal society.

*Source: Extracted from O'Faircheallaigh (2000) Negotiating major project agreements: The 'Cape York Model'. AIATSIS Research Discussion Paper No. 11, Canberra. p. 19.*

### 7.4 Internal reporting and communication

Corporate and operational communication about agreements should be wide-ranging and engaging, not limited to monitoring and auditing processes. Internal communication needs to cover matters like broad intent and different functional accountabilities for implementation. Some forums can serve as joint briefing sessions to Rio Tinto personnel, contractors and members of the local community (who are sometimes the same). These sessions might include updates on project plans and agreement obligations.

Information about agreement intent, roles and responsibilities must be updated regularly to ensure that all personnel (particularly senior leaders) understand their role. This will help generate whole-of-business commitment, provide support and help secure resources for those directly involved in agreement processes.

Sharing information and experiences across different Rio Tinto businesses is encouraged. Historically, Rio Tinto's expertise in agreements related mainly to the Canadian and Australian contexts. Sharing this experience with colleagues in other jurisdictions (eg through site visits or peer exchanges) has expanded the company's global expertise. Negotiating the Oyu Tolgoi-Umnugobi Community Cooperation Agreement is an example of an agreement outside the Canadian and Australian context that leveraged off the company's collective information and experience.

## 7.5 External reporting and communication

External reporting and communication about agreements to local communities, agreement parties, government and the broader public should be proactive, ongoing and presented in ways that are easily understood. Reporting must also comply with any formal commitments made during the agreement-making process.

External communication should inform people about specific outcomes and progress towards realising agreement goals. Communication on this topic demonstrates and promotes Rio Tinto's conformance with *The way we work*.

### Checklist 5 will help identify how and what to report and communicate about agreements.

#### Checklist 5: Report and communicate

Is there regular, open communication between parties in the agreement process?	[ <a href="#">v</a> ]
Is agreement content of interest to a wide range of people in the host community?	[ <a href="#">v</a> ]
Is local communication conducted in culturally appropriate ways?	[ <a href="#">v</a> ]
Are communication arrangements and content consistent, internally and externally?	[ <a href="#">v</a> ]
Were community members involved in designing the agreement reporting framework?	[ <a href="#">v</a> ]
Are reports provided in easy-to-understand formats matched to the intended audience?	[ <a href="#">v</a> ]
Do reporting arrangements include accountability and transparency measures (including financial disclosure)?	[ <a href="#">v</a> ]
Have confidential aspects of reporting been mutually agreed?	[ <a href="#">v</a> ]
Does reporting include all material activities and outcomes, both positive and negative?	[ <a href="#">v</a> ]
Does reporting occur throughout the life of the agreement?	[ <a href="#">v</a> ]
Do agreement matters refer to the current business context, locally and more broadly?	[ <a href="#">v</a> ]
Does reporting include both qualitative and quantitative data?	[ <a href="#">v</a> ]

## Case study 8: Diavik, Canada

### Reporting and communication on socioeconomic and environmental performance



Diavik  
Northwest Territories, Canada

Diavik Diamond Mine is located on an island in the middle of Lac du Gras in the Northwest Territories in Northern Canada. The area is one of the world's most untouched and ecologically sensitive environments, home to bears, wolverine and migrating caribou. The pristine waters of Lac du Gras and the surrounding area are the traditional lands of five First Nations Aboriginal groups. In 1999, Diavik set a new bar for agreement-making by establishing five participation agreements with Aboriginal groups. Along with a socioeconomic monitoring agreement and an environmental monitoring agreement signed around the same time, this provided comprehensive monitoring and reporting structures that governed formal engagement with Aboriginal groups. In 2011, the participation agreements were due for renewal, prompting the company and the Aboriginal communities to review how their agreements were working, and how they wanted to move forward. Since then, protocols for reporting and communicating have been updated to better reflect the needs and expectations of all parties.

#### A history of comprehensive reporting

Rio Tinto, in partnership with Dominion Diamond Diavik Limited Partnership, began development of Diavik in the late 1990s. At the time, impact benefit agreements between mining companies and Aboriginal groups were standard practice in Canada. Diavik went even further, establishing five participation agreements with First Nations. The five First Nation signatories include the Tlicho First Nation, the Yellowknives Dene First Nation, the Lutsel K'e Dene First Nation, the North Slave Metis Alliance and the Kitikmeot Inuit. These life-of-mine agreements emphasised the opportunity for Aboriginal signatories to participate in and benefit from the business, rather than the more traditional impact-benefit compensation approach.

In addition, Diavik, the five First Nations, the Government of Canada and the Northwest Territories Government signed a socioeconomic monitoring agreement and an environmental agreement in 1999 and 2000.

While the participation agreements set broad commitments, the socioeconomic monitoring agreement established specific targets and reporting processes for Diavik's Aboriginal and Northern employment and business spend. ('Northern' is defined as Aboriginal persons or persons who primarily reside in the Northwest Territories of the West Kitikmeot Region or a company that legally carries on business in those areas.) It also included commitments to cultural and community wellbeing, and established the Diavik Project Communities Group Advisory Board, a formal mechanism for engagement between parties.

*Environment surrounding  
Diavik Diamond  
Mine, Northwest  
Territories Canada.*



The environmental agreement created an additional community-based board, the Environmental Monitoring Advisory Board, to review and comment on Diavik's environmental performance. The regulations placed necessary high standards and targets on the operation, and made it accountable through regular reporting.

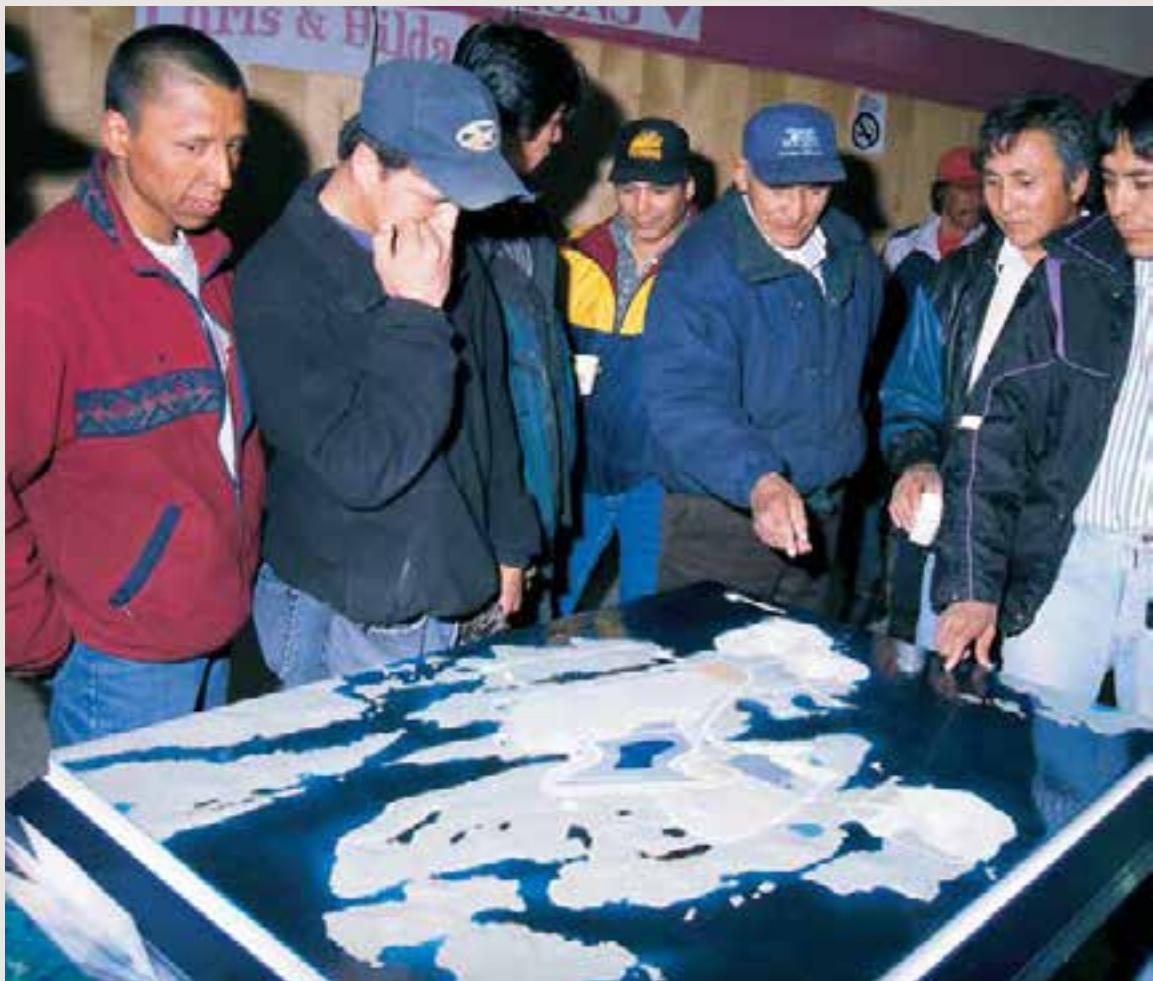
### Changing needs

The socioeconomic monitoring agreement is a government-mandated agreement. The standard agreement format, targets and reporting arrangements have not changed since 1999. As required by the socioeconomic monitoring agreement, from 1999 to 2012, Diavik issued reports containing detailed information on the mine's socioeconomic contribution. This included how much Diavik spent with local

business and how many people had been hired from each of the nine individual Aboriginal communities across the five First Nations. Overall, Diavik performed well against the targets. However, it became clear that communities were less concerned about the larger percentages and more interested in the specific impact.

Diavik also found that the formal reports, while an excellent source of statistical information, were not widely read or a primary source of information for the communities. Other more informal channels developed over time had created a web of relationships and diverse opportunities to learn about and discuss Diavik's performance. The Diavik Project Communities Group Advisory Board struggled to function and was challenged in communicating back to each Aboriginal community effectively.

*Community consultation  
at Diavik.*



### **Renewals and an opportunity for change**

During discussions about renewing the participation agreements, both parties realised that they had not paid much attention to the agreements post-signing. There was no formal review of how the relationship was working in accordance with the principles and commitments in the agreements. Despite the best intentions, the agreements themselves had been sitting idle. The renewal process became an opportunity to revisit their core purpose and find ways to improve outcomes.

Discussions held in relevant local languages enabled the negotiating teams to listen to and take into account the views of each First Nation group and by the end of 2014, all five participation agreements had been renewed. The socioeconomic monitoring agreement continued as a life-of-mine agreement required by the Northwest Territories Government with the same targets. While the structure of the agreements remained the same, changes were made in both types of agreements around reporting and communication.

Firstly, everyone agreed to dissolve the Communities Group Advisory Board. Instead, the participation agreements used the funding to establish liaison positions dedicated to supporting the relationships and agreements between the company and each of the nine communities.

Secondly, in three of the five participation agreements, the parties agreed to establish Implementation Committees as a formal mechanism for reviewing the status of each agreement and providing updates. The community liaison officer sits on the Implementation Committee and helps coordinate the development of annual work plans around key issues such as training, employment and business spend. How each committee works depends on the interests of each Aboriginal group. Two of the three committees are formal and structured, while the third has a more streamlined approach with fewer meetings.

Finally, it was agreed that Diavik need only publish performance on the socioeconomic monitoring agreement targets once a year and could modify the format. The 2014 report contains more stories about Aboriginal participation and fewer statistics. This is one of the most popular posts to date in Diavik's social media strategy. Many people have reported to the Communities manager that they had read it for the first time.

Diavik and the five First Nations are reviewing the past performance and structure of the Environmental Monitoring Advisory Board. The challenge is to make highly technical information accessible to community members, while providing opportunities for discussion and recommendations. Diavik and the Aboriginal groups have found ways to integrate community participation into the mine's environmental management. This also involves a Traditional Knowledge Panel that involves elders in environmental studies and planning, and community members participating in environmental monitoring programmes.

### Lessons learned

Good reporting and communication is a mixture of structured mechanisms and informal interactions. Structured mechanisms are important as they provide the data and space to engage with and review the overall relationship. Informal interactions form the web of daily engagements that build relationships when the community participates in the business and the business participates in the community. In Diavik's case, the most formal mechanisms are probably the least important given the depth and diversity of their existing relationships.

The experience has reinforced that agreements are 'living' documents that need to be revisited and worked on at regular intervals to ensure their effectiveness. Communications and reporting require adaptation to community circumstances and expectations that change over time. By taking away more formal boards, Diavik and its Aboriginal partners have moved from engagement with a larger, integrated group to reporting and communicating according to the needs and interests of each party. The intent is to widen understanding of issues and benefits at the grassroots level across all the communities.

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*April Pigalak and Travis Liske from a community associated with the Diavik Diamond Mine in Canada contribute their traditional knowledge in addressing fish palatability as part of a water monitoring programme.*



## Case study 9: Kelian, Indonesia

### Implementing a mine closure agreement by consensus decision-making



Kelian  
East Kalimantan, Indonesia

Pictured opposite: Kelian wetlands play a vital part in the closure process.

Kelian Equatorial Mining operated a large gold mine in the West Kutai District of East Kalimantan, Indonesia. Initiating production in 1992, the mine operated for 12 years until the ore reserves were exhausted. Kelian Equatorial Mining was, at that time, 90 per cent owned by Rio Tinto. Agreed closure activities were negotiated with the local community and the government over three years between 2000 and 2002. These were documented in 2003 with the Kelian Mine Closure Plan. Despite significant external challenges, the enduring focus on culturally appropriate decision-making and clear communication has enabled the post-closure activities and governance arrangements to be completed in an orderly manner.

Kelian food security programme.



#### Preparing for mine closure

The Kelian Mine carried out commercial production from 1992 until 2004. This spanned a disruptive period in Indonesia due to the overthrow of the Suharto government and the significant political transformation that followed with the devolution of responsibility to district authorities.

Following an initial meeting in 1999 to introduce the concept of closure, a mine closure steering committee and four working groups were formally established in 2000 in collaboration with the Indonesian Government and local community organisations. The steering committee and working groups included representatives from Kelian Equatorial Mining, Rio Tinto, the surrounding community, and the district, provincial and central governments. The working group representatives were selected for their technical expertise; while the steering group representatives were appointed in their role as decision-makers. The steering group was co-chaired by the president director of Kelian Equatorial Mining and the head of the district government. Quarterly meetings began in 2000, assisted by independent facilitators.

#### The agreement-making framework

A charter for the steering committee and working groups was developed during the initial meetings which set out the decision-making approach. It was agreed that key decisions on all aspects of mine closure were to be made by consensus, according to Indonesian custom. The charter also set out procedures for how to resolve any conflicts and mechanisms for communicating decisions to local communities.



Dayak Kenyah 'tribe' performing a traditional Datun dance. Dayak Kenyah are one of four main Dayak groups (Tunjung, Benuaq, Bahau and Kenyah) located in the region of Kelian.



The process required the working groups to meet and develop a range of options across four themes – environment, community, permanent structures and financial arrangements. These were then presented for consideration at each quarterly steering committee meeting. Decisions were either signed off by all committee members, or if a decision could not be reached by consensus, the working groups were tasked with reconsidering the options and presenting them at the next meeting. At the end of each meeting, agreed decisions were prepared as a bilingual (English/Indonesian) communiqué. Each communiqué was physically signed by all steering committee members and distributed to villages surrounding the mine.

### Implementing the mine closure plan

The Kelian Mine Closure Plan (2003) is the final agreement which summarised all the decisions reached during this process and documented in the communiqués. Its overall goal was to implement an orderly closure, ensure the sustainability of community programmes and to protect the surrounding environment in perpetuity.

The Kelian Mine Closure Plan is a publicly available document which details rehabilitation and decommissioning activities, post-closure land uses, sustainable community programmes, the relinquishment strategy and long-term governance and financial arrangements. The plan also details the agreement-making processes for the planning, approval and implementation phases of closure. The agreed closure works and activity schedules are provided for the mining areas, processing facilities, permanent infrastructure (tailings storage facility, acid waste rock dam and dumps), community programmes and employee redundancy programmes. Closure standards which determine relinquishment of lease are specified and the post-closure monitoring programmes are documented. It also describes the relevant regulations and permits.

The Plan was developed in accordance with conditions specified in the 1985 Contract of Work, background data and approved designs documented in the 1990 environmental impact assessment, Draft Indonesian Mine Closure Regulations and the Rio Tinto 1998 closure planning guidelines. The mining, processing and supporting facilities as at 2000 were documented and compared with the post-closure conditions predicted as at 2008.

*The Kelian mine pit post mine closure, 2007.*



### Testing the agreement-making process

One of the key areas which tested the steering committee charter processes and closure criteria was the agreement on the Kelian tailings storage facility, known as the Namuk Tailings Dam. Built in 1991, the dam was designed and approved as a water retaining facility which would constantly overflow into the Kelian River. At closure, the dam would form a lake with a surface area of 455 hectares. Two spillways located on the south eastern side of the tailings dam were designed to discharge water through a valley into a sediment pond and then into the Kelian River.

During the closure consultation process the permanent structure working group presented a number of options to the steering committee, including relocating the tailings to the pit and re-processing them to extract residual gold. Initially, the steering group could not reach a consensus decision on the appropriate long-term solution for the dam. The working group subsequently appointed independent dam engineers to undertake reviews and develop further options. Eventually, after several special meetings, consensus was reached that Namuk Tailings Dam should remain as a lake with a number of upgrade works to ensure its long-term integrity. This included re-profiling the downstream face of the embankment to reduce the slope; installing rock armour on the dam surrounds to prevent damage from artisanal miners attempting to breach the dam wall to access the remaining tailings; upgrading the existing spillway; and constructing a second emergency spillway.

As with all other decisions, these details were included in bilingual communiqués and signed by all members of the steering committee. Hard copies of these communiqués were distributed to all villages surrounding the mine and posted on village notice boards. Electronic versions of the communiqué were posted on the Kelian website.

After more than ten years of post-closure activity, the former mine site is close to being relinquished. All rehabilitation has been completed and agreed completion criteria have been achieved. Despite the negotiation of this mine closure agreement during a time of political upheaval, the focus on culturally appropriate decision-making and clear communication of outcomes has enabled the closure activities to be completed and agreement goals to be reached. The site has now achieved all agreed completion targets and is in the process of being relinquished to government authorities.



# Appendices

Appendix A: Rio Tinto policies, guidance and international standards relevant to agreement-making	142
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*Pictured left: Richards Bay, KwaZulu-Natal, South Africa. Members of the local community weeding one of their plots. They are assisted at many levels by Richards Bay Minerals (RBM), which provides agricultural expertise, training and elementary business education. The plots are located a few kilometres from the RBM smelter site. Local communities are shareholders in RBM through its sale of shares to a consortium of black community and business groups.*

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# Appendix A

Rio Tinto policies, guidance and international standards relevant to agreement-making

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\*Available publicly on  
[www.riotinto.com](http://www.riotinto.com) under  
About us>Corporate governance> Policies, standards & guidance.

Full documents available to Rio Tinto employees on the Group-wide intranet:

## **Group-wide**

- *The way we work\**
- Human rights policy\*
- Sustainable development policy\*
- Human rights guidance
- New country entry procedure
- Closure standard

## **Communities and social performance**

- Health, Safety, Environment and Communities policy\*
- Our approach to communities and social performance\*
- Communities and Social Performance standard
- Communities and Social Performance planning guidance
- Community agreements guidance
- Community complaints, disputes and grievance guidance
- Community consultation and engagement guidance
- Community initiatives and activities guidance
- Community trust, funds and foundations guidance
- Compensation and benefits for land access guidance
- Cultural heritage management guidance
- Resettlement guidance
- Social risk analysis guidance
- Social and economic knowledge base guidance
- *Why cultural heritage matters: A resource guide for integrating cultural heritage management into Communities work at Rio Tinto\**
- *Why gender matters: A resource guide for integrating gender into Communities work at Rio Tinto\**
- *Why human rights matter: A resource guide for integrating human rights into Communities and Social Performance work at Rio Tinto\**

## Appendix B

### General elements included in agreements

<sup>41</sup> Compiled by Steven Kennett, Research Associate, Canadian Institute of Resources Law. From Keeping (1998) (ed.) *Thinking about benefits agreements: An analytical framework*. Northern Mineral Program Working Paper No. 4, Canadian Arctic Resources Committee (CARC).

<sup>42</sup> O'Faircheallaigh (2004) *Evaluating agreements between Indigenous peoples and resource developers*. In Langton, Tehan, Palmer and Shain (eds) *Honour among nations? Treaties and agreements with Indigenous people*. pp. 303-328.

Agreements between mining companies and their host communities offer mutual benefits. The company gains land access and the community receives payments of a compensatory nature and a range of other benefits.

While every agreement is unique, the following table provides a list of general elements that could be included in a comprehensive agreement.

**Not all of the elements will appear in every agreement and this list is not exhaustive or exclusive. Some of the elements may be covered in schedules to the agreement rather than the agreement itself.**

This list is based on four sources of information, including the Rio Tinto Community agreements guidance (Appendix 3)<sup>41</sup>, Rio Tinto agreements that have been implemented, a book chapter by Ciaran O'Faircheallaigh<sup>42</sup> that outlines the eight critical components of agreements and input from Professor Marcia Langton. As a result, many of the descriptions relate to examples from Australia, however, parallels can be drawn in other international contexts.

Contents	Description
<b>Introductory provisions</b>	
Purpose and intent	Outlines the main purpose of the agreement (usually to gain access to land). Agreements may also seek to refresh a relationship or establish an effective ongoing working relationship. It is possible that there are multiple purposes.
Definitions	Provides meaning to legal terms used. Definitions are usually at the front or the end of the agreement.
Parties and specification of beneficiaries	Includes a list of all individual parties to the agreement. For example, if the agreement is between a Rio Tinto site and Traditional Owners, each Traditional Owner may be listed individually.
Reconciliation	Enables the parties to recognise what has happened before and commit to working together to make a new future.
Recognition of land claims, and First Nations and Aboriginal rights	Recognises if the host community is Indigenous to that area and are the people of that land. The agreement can also express its support for a native title claim, if relevant to the host community. Provides for the Indigenous peoples to recognise that the company is operating according to the formal law of that country/state.
Term of the agreement	States the timeframe that the agreement is valid for. For example, the agreement might expire when production ceases or exploration comes to an end.
Agreement area	Shows the land areas the agreement applies to. This can be a confidential part of the agreement.
Indigenous support for the project	Confirms that the parties agree and states clearly that they support the project and will not hinder its development; or object to government approvals or permits. It might include provisions for rules that will apply to host community undertaking artisanal mining in the areas around the official mining designated land. It sometimes includes reference to future acts or potential support for extension of some company activities. Indigenous support for the project can preclude some areas where consent for the project is not given (eg regarding significant heritage sites or for other cultural reasons).
Coming into effect of the agreement	Includes commencement date or conditions to be met to initiate the agreement.
Description of the project	Outlines the nature and extent of activities proposed including sequence of project phases. It could also outline possibilities for project expansion, other projects or related activities.

Contents	Description
<b>Financial provisions and equity participation</b>	
Payments	Provides a clear declaration of the payments of a compensatory nature to which the community (or communities) are entitled. It details conditions of these payments (eg frequency, consideration of inflation increases or other matters).
Provisions for payments of a compensatory nature	Outlines the conditions of payments of a compensatory nature. For example, the host community might not be able to claim compensation for past actions and activities that occurred before the agreement. It also outlines how payments will be calculated and applied with regard to any negative impacts.
Suspension of payments	States the conditions that warrant suspension of payments of a compensatory nature. For example, deliberately causing the mining operation to halt for a time.
Management of payments	Provides a clear outline of how payments and benefits are distributed among parties to the agreement, where the money is deposited and how it is managed.
Tax implications	Explains the types of tax that must be paid to governments and what tax is able to be claimed by the site.
Equity interest or joint venture arrangements	Outlines any equity or joint venture provisions. Where communities do opt for this type of relationship, the agreement will articulate the risk associated with equity shares in project and how that is apportioned.
Expenses for administration, management and implementation	Outlines how the administration, management and implementation of the agreement will be paid for.
Other finance-related provisions	Specifies provisions about funds, calculating and disbursing benefits, adjustments for inflation, security deposits and reimbursement of negotiation expenses or oversight expenses. These matters may be subject of clauses in the agreement or more likely in the schedules to the agreement.
<b>Employment and training</b>	
General employment goals	Acknowledges the employment opportunities and benefits the project will bring to the host community. Some agreements include a goal to have a minimum proportion of the workforce as Aboriginal or from the host community; and a commitment to support this through hiring priorities or an employment preference policy.
Identification of employment opportunities and labour supply	Specifies areas of the business or project that would provide direct employment opportunities for the host community (eg a particular project stage). It also outlines how the company will identify and advise the target group of these opportunities.
Recruitment and hiring	Explains that the site may give priority of employment to Aboriginal or local people from the host community but the employee candidate must also meet the requirements for the position and be able to complete the work. It states that the company retains the right to set minimum recruitment requirements.
Hiring priorities	Outlines the approach that the site will take to determine employment preferences. For example, local Aboriginal or Indigenous people will be employed first, followed by other local community members, then country nationals. This is often conditional on applicants having required skills, training and expertise.
Contracting and subcontracting	Specifies that the site, where possible, will require contractors and sub-contractors to comply with the employment and training goals, and commitments made in the agreement.

Contents	Description
<b>Employment and training continued</b>	
On-the-job and other training	States that training programmes will be established to up-skill participants from the host community. This might be to maximise project-related employment or provide training for skills unrelated to mining or the project. The goal will be to enhance employability among the host community. It may also outline induction programs for new employees who might not have worked on a mine before.
Apprenticeship programmes	Specifies how many and what types of apprenticeships will be sponsored or gives more general commitments to offering apprenticeships.
Transport	Outlines the transport arrangements for employees. For example, that transport will be provided from specified towns near to the site and whether this time is included as part of their shift, or in their own time.
Language of work	Specifies which language will be the dominant language at the work site (eg where multiple local languages spoken in the community). The site can also commit to ensuring that all Human Resources personnel will be able to communicate in at least one Aboriginal or other local language from the region. The site also commits to language interpreters at community meetings, and encouraging the use of local languages on site.
Cross-cultural issues	Commits to funding cross-cultural training programmes (also sometimes referred to as cultural awareness training programmes) and providing them to all new employees and contractors. It may include specific provisions for managers or other senior staff to have additional training (eg go on a 'bush trip' with local Aboriginal people).
Aboriginal employment coordinator	Designates that one Rio Tinto employee will be someone who is familiar with the cultural and social practices of the communities and will be employed to liaise between the site, the Aboriginal employees and the host communities.
Labour force development plan	Outlines how the site plans to grow or maintain a minimum proportion of local workers and to assist their career development by gradually increasing their skills. This will mean shifting some local employees out of entry-level positions. This could relate to educational and scholarship programmes and/or employment-related community outreach, which could be managed by a committee for employment. This might be linked to project phases, such as construction moving into operation.
Community consultation and information	Specifies processes for engaging the wider community in local employment planning and strategies.
Employee evaluation and advancement	Specifies regular performance appraisal processes and associated professional development provisions.
Conditions of work	Specifies what employees can expect in terms of shift lengths, roster patterns, labour relations, accommodation arrangements, catering and recreation provisions on site.
Employee support	Specifies counselling, mentoring and other forms of employee support provided by the site.
Traditional economic and cultural activities	Notes special arrangements to facilitate continuation of traditional economic and cultural activities such as special leave provisions.
Monitoring and reporting	Commits the site and community to collect data on employment and training, and report information to each other.

Contents	Description
<b>Economic development and business opportunities</b>	
General provisions regarding contracting and business opportunities	Commits the site to establishing and enforcing contracting and local procurement policies. In some agreements, there is a goal to have a minimum proportion of the contractors to be Aboriginal or from the host community. This should align with the procurement policy. The procurement policy should be publicly available.
Identification of businesses and business opportunities	Commits the site to implementing a systematic way of identifying businesses with relevant skills. The site also identifies project requisites at all stages that should be targeted to local suppliers.
Preferences for Aboriginal businesses	States how the site will prioritise procurement bids. For example, Aboriginal businesses, followed by other local businesses and then national and all other businesses.
Competitive bid criteria	Outlines the assessment criteria for bids. These usually include cost competitiveness, quality, timely delivery, safety and environmental standards and the degree of Aboriginal or host community content.
Assistance for local business development	Outlines commitments to help develop local businesses, such as referral to or establishing support services, providing technical support and identifying opportunities to apply for seed funding.
Right of first refusal on equipment and property	Maintains the site's right to refuse contracts based on quality or lack of equipment, or other terms when the bidder fails to meet the competitive bidding criteria.
Committee for economic and business development	Establishes a committee, advisory board or taskforce to assist the site to identify relevant businesses and/or business opportunities; and also track the progress of business development and contracting. Management and other support can be facilitated through this group.
Other procedures for contracting goods and services	Outlines additional provisions for securing goods and services on a competitive basis; and for packaging or 'unbundling' contracts to help local business be more competitive in applying for contracts. These can also be contained in schedules or policies instead of the agreement.
Monitoring and reporting	Acknowledges that the site is able to collect data relating to contracting and local procurement. It also states the commitments required from the host community about collecting data or reporting information back to the site.
<b>Social, cultural and community support</b>	
Gender equity	Affirms that there should be gender equity in all aspects of the agreement (eg parties to the agreement, employment and training provisions, any survey teams required). A statement about gender equity should be made.
Local laws and customs	Outlines the role of senior elders, including how they are engaged and how this engagement is different from other community members. This could either be an overall statement or identified in specific schedules or roles.
Social and community assistance - counselling	Provides counselling services in some cases for career advice, during the business development process and at mine closure for a broader group than just employees.
Land access	Outlines provisions and processes to allow Aboriginal elders to be able to access their traditional land, which might require them to travel through the mine site. There will also be areas where non-mine employees are not allowed to enter. The agreement will include maps to show these places and protocols to ensure safe passage.
Community projects and physical infrastructure	Specifies any non-site related projects and infrastructure that may be provided or contributed towards such as roads, water supply or community facilities.
Aboriginal cultural and economic activities	Specifies support and recognition of Aboriginal culture and traditional economy with any involvement of site in related activities.

Contents	Description
<b>Cultural heritage management</b>	
Heritage protection and mapping designated areas	Explains the work that will be done to make sure cultural heritage sites are not damaged and are managed appropriately. This should include a detailed outline of the survey methods and who will be included in the survey team. The team should include a balance of archeologists, anthropologists, representatives from the Aboriginal elders and site staff, and have gender equity. Cultural heritage surveys consider tangible and intangible culture. The budget allocated to surveys and who pays for them is stated here. This section also states the requirements around cultural heritage impact assessment, decision-making and approvals, avoidance, mitigation and/or protection. It outlines what ceremonies can be held at the project site. This level of detail could be included in a schedule or a management plan.
<b>Environmental protection</b>	
General provisions regarding environmental compliance	Details environmental impacts, environmental management planning, projected completion criteria and environmental legacy.
Specific environmental protection and monitoring provisions	Outlines environmental management regimes and any commitments to local community involvement in monitoring, rehabilitation or environmental management. This can also include assessment of the project before it has commenced. For example, through participation or consultation in the environmental impact assessment and approval processes of the project.
<b>Other substantive and procedural provisions</b>	
Amendment and renegotiation of the agreement	Specifies the conditions under which changes to the agreement can be made (eg only if the parties agree to it in writing). It also specifies processes to follow to amend or renegotiate the agreement.
Confidentiality and release of information	Clarifies which parts of the agreement are confidential and which can be publicly disclosed; and includes acknowledgement from all parties about the specific sensitive information contained in the agreement. This clause should outline protocols for releasing information.
Implementation	Notes that protocols for implementing the agreement can be described throughout the agreement (eg after each section) or as a separate schedule that brings all components of implementation together. It will outline which party is responsible for each section.
Dispute resolution	Explains the process for raising concerns with the site and settling disputes. It could be agreed by the parties that they try and fix the dispute themselves before inviting a mediator or an arbitrator to help. Settling disputes in court is the last option.
Closure and decommissioning	Outlines how the agreement will be carried out when the project ends or operation closes. It describes the process for agreement on matters such as transfer, removal or decommissioning of infrastructure, rehabilitation of the environment, and other long-term considerations. It may describe commitments around post-closure activities (including by subsequent owners) to the agreement obligations and to following the rules of the agreement. It may also define elements of the agreement with fixed duration linked to closure or project end.

Contents	Description
<b>Other substantive and procedural provisions continued</b>	
Transfer, novation and assignment	Outlines procedures for transfer, assignment or novation. (Novation refers to the substitution of a new contract for a previous contract or the substitution of a new party for a previous party in a contract. Assignment refers to the process of assigning the rights and obligations from one party (the transferor) to another (the transferee). The terms are often used together but mean slightly different things.) It generally includes statements to the effect that the company will warrant that a proposed transferee/assignee is capable of performing the obligations under the agreement, and that the assignee will perform the obligations of the company in line with the agreement. Some agreements include an appendix with a pro-forma deed of assignment and novation that the parties agree to enter into before any assignment becomes effective.
Communications protocol and information sharing	Includes a statement on how parties will communicate during the agreement implementation on day-to-day matters and also larger issues.
Easy interpretation of the agreement	Summarises each section of the agreement in plain language for all parties to clearly understand responsibilities.
Governing law and jurisdiction	Includes a statement about how this agreement fits with the local, regional/state and national legislation. It also outlines what happens if the government makes changes to the law that directly impact the implementation of the agreement.
Committees or boards	Notes that the agreement parties might nominate one or more committees, taskforces or boards to have certain responsibilities to carry out or oversee part of the agreement. It includes detailed processes for their establishment, responsibilities, powers and meeting arrangements can be described in the management plan or as an annex or schedule to the agreement.
Enforceability and remedies	Specifies grievance mechanisms, process for addressing breaches of the agreement and process for revisions or redress after these grievances or breaches.
Monitoring of agreement implementation	Specifies the arrangements for routine monitoring of the agreement during implementation including responsibilities, budgeting and reporting requirements.
Formal evaluation of the agreement	Outlines protocols for formal evaluation of the agreement at agreed intervals (eg annually) and includes responsibilities, budgeting and reporting requirements.
Review of the agreement	Outlines review schedule. Reviews occur at less frequent intervals than evaluations (eg every five years) and provide the opportunity to adjust the agreement to reflect changed circumstances. They might not result in renegotiation. The agreement outlines protocols for carrying out the reviews.
Warranties	Provides for each signatory to the agreement to state that they are the right people to be making the agreement with and no one has been left out.
Signatures	Includes provision for all parties to provide their signature.

For further examples of common contents of good practice agreements, please refer to the following agreements on the ATNS website (<http://www.atns.net.au/>):

Argyle Diamonds Indigenous Land Use Agreement and Argyle Diamond Mine Participation Agreement: Management Plan Agreement  
Diavik Diamonds Project Socioeconomic Monitoring Agreement

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**List of acronyms for Background reader**

- AIATSIS** Australian Institute of Aboriginal and Torres Strait Islander Studies
- ATNS** Agreements, Treaties and Negotiated Settlements
- CSRM** Centre for Social Responsibility in Mining
- FPIC** Free, Prior, and Informed Consent
- ICMM** International Council on Mining and Metals
- IFC** International Finance Corporation
- IPRA** Indigenous Peoples Rights Act
- ILO** International Labour Organisation
- LNG** Liquefied Natural Gas
- PNG** Papua New Guinea
- THPAIED** The Harvard Project on American Indian Economic Development
- UNDP** United Nations Development Programme
- UNDROP** United Nations of the Declaration on the Rights of Indigenous Peoples

## Introduction

This Background reader is designed to enhance practitioners' knowledge and understanding of agreement-making and implementation in the global mining industry. It aims to demonstrate why this is an important area of performance for Rio Tinto and other companies; document key learnings about successes, challenges and limitations; and identify key resources that practitioners can draw on to guide and improve practice. It also draws on examples from Rio Tinto and other companies' agreements and operations. The Background reader is structured as follows:

**Part A** defines basic concepts, provides an historical overview of the growth and evolution of agreements in the mining industry, and identifies key drivers and likely future trends.

**Part B** explores the business case for entering into agreements and improving how they are developed and implemented. This section also addresses risks associated with agreement-making from the perspective of both companies and communities.

**Part C** focuses on the implementation and impact of agreements, and the factors that shape these outcomes.

The Background reader defines community agreements as written agreements between companies, community bodies and possibly third-parties (eg regional and national governments) which are intended to create enforceable obligations for all parties. Depending on the jurisdiction, companies may be required by law to enter into these agreements or may opt to do so under contract law.

The term community body refers to an organisation, association or local governance institution which represents the collective interests of a group of people who either live in, or are connected to, a defined geographical area (eg a tribe, a Native Title representative body, a landowner association or a local-level government). Enforceable means that there is the potential to seek recourse to the courts or to another third-party (eg an independent arbitrator) if a party does not honour its commitments under the agreement. It also means that there are consequences for non-compliance (eg specific performance, damages, termination of the agreement and/or withdrawal of approvals).

Agreements which meet these criteria have many names (see Box 35) and differ substantially in scope, structure and content. To avoid confusion, the generic term community agreement is used in this Background reader, unless referring to a specific agreement, or class of agreement, with another name. The primary focus will be on agreements in the mining industry, with some references to the oil and gas sector where useful.

### Box 35: Community agreement terminology

- community development agreement
- Indigenous land use agreement (australia)
- Partnering or partnership agreement
- Landowner agreement
- Shared responsibilities agreement
- Community joint venture agreement
- Empowerment agreement
- Impact and benefit agreement (canada)
- Mining continuation agreement (papua new guinea)
- Benefits sharing agreement
- Social responsibility agreement
- Participation agreement
- Socioeconomic monitoring agreement
- Local-level agreement
- Consent agreement
- Environmental agreement

*Source: based on ERM (Environmental Resources Management) (2010) Mining community development agreements, Final Report for the World Bank. Washington DC: ERM. <http://www.sdsq.org/wp-content/uploads/2011/06/CDA-Report-FINAL.pdf>*

## Part A: Setting the context

### **History of community agreements in the mining industry**

Agreements between host governments and project developers (usually described as investment agreements or mining agreements) have a long history in the global mining industry. Community agreements, on the other hand, are a relatively recent development, with most being negotiated only in the last 15-20 years. Even now, agreement-making is a common practice only in a small number of jurisdictions, with companies and governments mostly relying on other means to engage with impacted communities. These include:

- social impact management plans;
- community development programmes;
- community funds;
- community engagement plans;
- advisory committees; and
- non-binding memorandums of understanding.

However, for a variety of reasons, this situation is changing and the drivers for companies to enter into community agreements are becoming stronger.

Agreement-making is most fully developed in Canada and Australia. These are both countries where the legal environment, to varying degrees, requires or encourages companies to negotiate with Indigenous peoples.

In Canada, a recent study was only able to identify 13 benefit agreements that were signed before 1990 (NADC, 2013). In Australia, outside of the Northern Territory, community agreements of any type were also rare prior to the 1990s. By contrast, in the past two decades, agreement-making has become a widespread practice in both countries. There are now several hundred agreements in place between Indigenous communities and resource companies in Canada and Australia, with much of this growth occurring during the post-2005 resource boom years.

In Australia, the most comprehensive source of information on agreements is the Agreements, Treaties and Negotiated Settlements (ATNS) database, which covers the period from 1976 through to mid-2015. ATNS records a total of 320 agreements between Indigenous groups, and mining and resource companies, of which 228 have been made since 2000 and 143 since 2004. Similarly, according to the Natural Resources Canada database (2014), there were a total of 371 local-level mining agreements in 2013, of which 180 had been entered into post-2004.

In Papua New Guinea (PNG), multi-party agreements between Traditional Owners, resource companies and multiple levels of government have also become the norm, at least for larger projects. Examples of community agreements from other countries include:

- The 2008 Goro Nickel Agreement in New Caledonia, which was reached between Inco, a Canadian corporation, and the local Indigenous (Kanak) people at a time when there was no formal legal recognition of the rights of the Kanak people over their land.
- The 2008 Ahafo Social Responsibility Agreement between the Ahafo Mine Local Community and Newmont Ghana Gold Ltd.
- The 2012 agreement establishing the Eagle Mine Community Environmental Monitoring Programme at Eagle Mine in Michigan, owned until recently by Rio Tinto (see Case study 7).
- The 2013 agreement between Newmont's Surgold project in Suriname and the Pamaka tribal group in which the parties signed a memorandum of understanding to create and manage a range of programmes. This included a community development fund, grievance resolution system and participatory monitoring committee, as well as provisions for promoting safety and environmental stewardship, local employment and procurement.
- Rio Tinto's 2015 agreement with local governments in the impact areas associated with the Oyu Tolgoi project in Mongolia (see Case study 3).

In response to a mixture of government and judicial requirements, and community pressure, community agreements are also becoming more prevalent in Latin America, particularly where Indigenous communities are likely to be impacted. Furthermore, several resource-rich developing nations have recently enacted laws requiring companies to enter into some type of binding agreement with local communities. Countries where this has occurred include Nigeria, Kenya, Mozambique, Sierra Leone, Guinea, South Sudan and Mongolia. The growth in these laws is an indication that governments are becoming more prescriptive about the social performance obligations of companies.

The effect of these changes is that mining companies are increasingly working in places where they will be required, expected or encouraged to enter into binding community agreements. Community agreements are now part of the reality of doing business. This is the case both for companies venturing into new geographies and for those seeking to access new resources on or near Indigenous lands in mature mining economies.

## Mapping the agreements landscape

Community agreements vary widely in terms of the type and number of parties, the legal and political context, their content and how they are used in practice. They range from minimalist documents containing just a few clauses through to complex, multi-layered agreements that run to hundreds of pages.

Some agreements have a narrow focus on compensation and direct economic benefits (eg employment). Others are framed around sustainable development and economic empowerment, and are focused more on delivering long-term benefits to impacted communities. Some pay little attention to implementation and governance arrangements; others make this a major focus. Most agreements are bi-lateral agreements between a mining project and a single tribe or community, but there are also examples of regional-level agreements which have multiple communities as signatories (eg liquefied natural gas projects in Canada such as Pacific NorthWest LNG), and multi-sector agreements involving one or more levels of government as parties (as in Papua New Guinea).

In Australia and Canada, there has been a shift from being solely concerned with land access and compensation arrangements, to more comprehensive agreements that, to varying degrees, seek to perform all of the functions shown in Box 36. There is now a greater focus in these countries on governance arrangements and on using agreements as vehicles to deliver a broader range of development outcomes, beyond direct financial transfers and employment. For example, under the Inuvialuit Land Claim Settlement in the Canadian Arctic, impact and benefit agreements (termed cooperation agreements) exist within a broader co-management framework and therefore complement planning priorities and long-term community goals.

In both countries, this shift to more comprehensive agreements has largely occurred organically through a bottom-up approach of innovation, local adaptation and transfer of learnings, as opposed to top-down prescription through legislation or regulation. In fact, the Australian *Native Title Act 1993*, which is the source of most agreements in Australia, says nothing about what negotiated agreements must (or must not) contain. That legislation focuses instead on the need to negotiate in good faith with the intent of reaching an agreement.

Historically, community agreements have often been used to enable or facilitate access to land on which mineral resources are located. However, an increasing number of agreements are being negotiated in situations where access has already been established and the agreement is not linked to project approval (eg local-level agreements in Guinea, Mongolia, Liberia and Nigeria). There are also examples in Australia of significant agreements being negotiated after projects have been approved. The Western Cape Communities Coexistence Agreement 2001, Argyle Participation Agreement 2004 and Pilbara Iron Ore Participation Agreement 2011 all related to pre-existing mining operations which had been approved under State special agreements legislation.

### Box 36: Functions of community agreements

Agreements can serve one or more of five broad functions:

1. Facilitate or enable company access to mineral resources on land under traditional community ownership or control (eg agreements between Aboriginal communities and mining companies in Australia and Canada).
2. Provide compensation to groups and communities who have been impacted, or have the potential to be impacted, by mining developments (eg agreements with resettled or displaced communities).
3. Minimise and mitigate the potential environmental and social impacts of mining projects and address community concerns (eg agreements to establish joint or participatory environmental monitoring programmes).
4. Provide mechanisms for delivering development benefits, including benefits that can persist after mining ends, to areas in a mine's sphere of influence (eg community development agreements as promoted by the World Bank).
5. Establish a governance framework for facilitating engagement between mining companies, potentially impacted communities and, in some cases, governments (eg agreements that set up consultation structures, implementation mechanisms and dispute resolution processes).

## Key drivers

The most important reason for the increase in agreement-making in the mining industry globally over the last two decades has been the greater recognition of Indigenous rights in national and international law, and global discourse. This will continue to be a significant driver for community agreements in the coming decades.

Heightened levels of conflict around mining developments have also encouraged some companies – and communities – to seek to enter into agreements as a way of resolving and/or avoiding conflict. Another contributing factor has been efforts by governments and multilateral actors (eg the World Bank) to promote or require agreements as a means of getting companies to commit to deliver development benefits to impacted communities. This section will explore these three key drivers in more detail.

## Indigenous rights

To understand how increased Indigenous rights have influenced agreement-making, it's necessary to understand the history and current position in different contexts. This section briefly describes legal and political developments in Australia, Canada and the United States; discusses the current and potential impact of the International Labour Organisation Convention 169 (ILO 169) for signatory countries (primarily in Latin America); and explores the implications of the increasing recognition of the principle of Free, Prior, and Informed Consent (FPIC) in international law and practice.

## Canada

The process to address Aboriginal rights to lands and resources in Canada exists within a dynamic relationship with many actors on many levels. The *Constitution Act* of 1982 recognises and affirms the “existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.” This has paved the way for court challenges on the nature of the relationship between the Crown and Aboriginal peoples, and the possibility of modern land claim agreements.

In a series of decisions, the Supreme Court of Canada has held that the Crown has a duty to consult and, where appropriate, accommodate the interests of Aboriginal people when it is considering engaging in conduct that might adversely impact potential or established Aboriginal or treaty rights. This covers decisions by government to grant mining exploration leases or approve new projects.

The courts have emphasised that consultation in such cases involves more than just an exchange of views or information. It extends to “such measures as mitigating the negative aspects of justifiable infringements on existing aboriginal and treaty rights and attempting negotiated solutions, where appropriate” (Isaac and Knox, 2005:438-9).

Legally, the duty to consult and accommodate applies only to government, not to companies. However, the Canadian courts have acknowledged that it may be possible for government to delegate procedural aspects of consultation to corporations. This happens a lot in practice. If a company cannot demonstrate that it has consulted, there is a risk that the Crown will refuse to issue or will revoke permits if they are challenged by Aboriginal peoples. This has encouraged some companies to proactively negotiate impact and benefit agreements to demonstrate that there has been adequate consultation with Aboriginal groups (see Gibson and O'Faircheallaigh, 2015:30). Overall, mining industry associations are also now actively promoting good practice agreement-making and encouraging increased Indigenous economic participation in the industry in Canada.

While in most cases agreements between mining companies and Aboriginal communities are negotiated on a voluntary basis, there are also some limited circumstances where they are legally required, such as under comprehensive land claim agreements between government and Aboriginal groups. For example, Article 26 of the Nunavut Land Claims Agreement between the Tunngavik Federation of Nunavut, the Government of Canada and the Government of the Northwest Territories specifies that an Inuit Impact and Benefit Agreement is required for any major development in the Nunavut Settlement Area that might positively or negatively impact Inuit. Other provinces in Canada, such as Ontario, Newfoundland and Labrador, have developed consultation guidelines to offer greater direction and clarity around mining activities. Most mining projects in Northern Canada are also subject to some form of environmental assessment legislation, under which environmental assessment is co-managed between Aboriginal and territory governments. However, some argue that recent federal legislative and regulatory reforms in Canada have reduced Aboriginal peoples’ capacity to participate in resource development review processes (see Gibson 2012).

### Australia

In Australia, the law gives limited, but important, rights to the Traditional Owners of land on which resource development is proposed or takes place. The first significant legislative measure was the passage by the federal parliament of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. This law gave Aboriginal peoples living on traditional lands in the Northern Territory – an area covering approximately 600,000 square km (or 50 per cent of the Territory) – an effective right to veto mining exploration on these lands.

For the rest of Australia, apart from a few narrowly-framed state-level statutes, there was no formal recognition of Aboriginal rights in relation to mining access until the landmark case of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 (*Mabo*), which acknowledged the existence of common law Native Title; and the subsequent passage of the *Native Title Act 1993* which provided for a statutory right to negotiate (Langton and Webster, 2012). A further important development was the passage of the *Native Title Amendment Act 1998 (Cth)* which introduced the concept of an Indigenous land use agreement. This is a flexible and voluntary process under which Native Title claimants and companies can reach a legally binding agreement on a wide range of matters, including approval of future activities and multiple projects (Langton and Webster, 2012).

The content of determined Native Title varies. Primarily it depends on the rights claimed, the strength of proven traditional connection to and use of the country concerned, and the content and longevity of any inconsistent interests granted by the Crown. Overall, Native Title is considered as a fragile title by many legal practitioners, as Traditional Owners do not own the subsurface rights, may not have a right of exclusive use and have no right of veto over development. However, Traditional Owners do have a legally recognised right to negotiate over future uses of their traditional lands.

Many exploration and mining leases are likely to include some land that is potentially subject to Native Title, even if this is only a small area. If the parties cannot reach agreement, the matter can be referred to a tribunal for final resolution, but in practice the great majority of claims involving resource projects are settled by negotiations ending in an agreement. The legislation obliges parties to use their best endeavours to negotiate an agreement (as opposed to requiring that agreement must be reached as the relevant milestone). Provided a mining company can demonstrate to the arbitrator that they have used their best endeavours to negotiate in good faith, even if that failed to yield an agreement, the statutory obligations on the company would have been discharged and the relevant tenure can be granted. Nonetheless, companies have generally

been keen to avoid going to arbitration because of the delays and additional cost, as well as the likelihood of causing long-term damage to relationships.

The introduction of the *Native Title Act* in 1993 was strongly opposed by most of the Australian mining industry. Since then, the industry has largely accepted and, in some instances, adopted forceful advocacy for redressing Indigenous disadvantage and discrimination. Rio Tinto has been an important player in driving this shift in approach (see the How to guide Introduction).

Agreement-making with Indigenous peoples is now an embedded practice, such that companies may often opt to go down that path even in situations where an agreement may not be legally required. State-level cultural heritage protection legislation adopted over the last two decades in Australia has created further drivers for companies to improve relations with Indigenous groups as companies seek the assistance of Indigenous groups with heritage survey and identification.

### US

American tribes in the Lower 48 United States are regarded at law as sovereign governments; they are subject to US federal law but operate under their own constitutions, administering their own judicial and regulatory regimes. This means they have extensive control of both surface and subsurface resources, including the right to refuse development. This legal status potentially gives tribes a strong hand when it comes to negotiating with mining companies.

As sovereign governments, tribes can negotiate and sign contracts with developers as they see fit. The situation is more complex in relation to 'off reservation' developments, but according to the Report of the Harvard Project on American Indian Economic Development (THPAIED) in such cases tribes "can still exert considerable influence under US law, given, for example, treaty rights to natural resource access" (THPAIED, 2014:56). At the same time, the Report observes that many tribes, while supportive of development, are inexperienced in dealing with major resource companies, which has often resulted in damaged relationships between tribal representatives and developers.

The Report argues that greater use of impact and benefit agreements, along the lines that have developed in Canada and Australia, could have many advantages. These include the potential to improve relationships between parties, fill regulatory gaps, encourage wider participation, address mining concerns on non-reservation lands, address tribal aspirations not captured in standard contracts and introduce innovative cultural/environmental monitoring institutions. If these views gain traction, in the future there will be more pressure – and opportunities – for mining companies operating in the US to enter into agreements with tribal groups which go beyond straightforward commercial contracts.

### *Latin America and ILO 169*

A significant step in strengthening Indigenous rights globally was the adoption in 1989 of ILO Convention No. 169 (ILO 169) on Indigenous and Tribal Peoples. This is a legally binding treaty which may become part of national law when ratified by individual countries. The Convention recognises a number of Indigenous rights including land access, health, education and employment conditions and is the most significant international treaty on Indigenous rights.

A key provision of ILO 169 is Article 6, which requires states to:

“... consult with Indigenous peoples in good faith, with the objective of achieving their agreement or consent through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”

In the mining context, this potentially includes granting exploration licences or a project approval by government agencies or the passage of legislation to open up an area of land occupied or used by Indigenous peoples for resource development.

To date, ILO 169 has been ratified by 22 countries, mostly in Latin America. It has not, however, been ratified by Australia or Canada, where most agreements with Indigenous peoples have been made. Most of the ratifying countries have been slow to pass enabling legislation or otherwise give practical effect to the Convention, but momentum has increased. For example, in 2011, Peru passed a Law of Prior Consultation of Indigenous Peoples, although the law has been restricted in its operation. (After the legislation was enacted, the Peruvian Government sought to limit the law by asserting that traditional landholders living in the Andes were not Indigenous, despite the Government's own Vice Ministry of Inter-Cultural Affairs identifying four Andean groups – Quechua, Aymara, Uro and Jaqaru – as Indigenous.)

Countries such as Bolivia, Colombia and Chile are also strengthening prior consultation requirements, either through court decisions, legislation, regulation or a combination of these. In Chile, recent court decisions have blocked some mining projects because government agencies or companies have followed inadequate consultation processes.

ILO 169 deals with the responsibilities of governments, not companies. The issue of when, and whether, companies should become involved in the Prior Consultation process is still being argued. Some believe that delegating the consultation process to the private sector violates the fundamental principle of state responsibility.

In Peru, government has sought to manage the consultation largely by itself (with limited success) and there has been little direct engagement with companies. However, if the experience of Canada and Australia is any guide, over the longer term the increased focus on Indigenous rights will increase the incentives for mining companies in Latin America to engage with Indigenous communities at an early stage and to enter into agreements where the opportunity arises, even if this is not formally required by national law.

### *Free, Prior, and Informed Consent (FPIC)*

Another important development for Indigenous rights has been the adoption by the United Nations of the Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. This is a non-binding declaration which is supported by most countries in the world. UNDRIP “sets out rights that countries should aspire to recognize, guarantee and implement in relation to Indigenous peoples” and “establishes a framework for discussion and dialogue between Indigenous Peoples and States”. Of particular relevance to the mining sector is Article 32 (2) which specifies that:

"States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

To date, the Philippines is the only mining country to have passed comprehensive FPIC legislation, predating the adoption of UNDRIP by some ten years. The Indigenous Peoples Rights Act (IPRA) of 1997 (Republic of the Philippines, 1997) was modelled on the then draft UN Declaration. It requires that prior to the grant of any licence, lease or entering into any production sharing agreement for the exploration or use of natural resources affecting the interests of the concerned Indigenous peoples, the support of these groups must be demonstrated by obtaining their FPIC for the project. The implementation of this law has been much criticised, including by Indigenous organisations and advocacy groups, who argue that Indigenous peoples' rights have been poorly protected in practice. Meanwhile industry has asserted that the law has curtailed investment.

Although FPIC is rarely required by domestic law, mining companies around the world are coming under increasing pressure from international bodies, Indigenous organisations, civil society and other private enterprise groups to endorse the principle of FPIC and to follow FPIC-compliant processes when seeking to access and develop projects on Indigenous lands.

As an indication of how much the debate has shifted in recent years, several influential bodies, including the International Finance Corporation (IFC), the Equator Principles, the United Nations Development Programme (UNDP) and the International Council on Mining and Metals (ICMM) have each endorsed varying interpretations of FPIC. The Inter-American Court of Human Rights has also made decisions which are broadly supportive of the principle of FPIC.

The 2012 IFC Environmental and Social Performance Standards, which function as a de facto good practice benchmark for the resources sector, require clients to engage in a process of informed consultation and participation with Indigenous communities who may be affected by a project, and to secure their FPIC under certain defined circumstances, through good faith negotiation (see IFC Guidelines in Box 37).

#### **Box 37: International Finance Corporation 2012 Performance Standard on Indigenous Peoples**

IFC Performance Standard 7 recognizes that Indigenous Peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population. In many cases, their economic, social, and legal status limits their capacity to defend their rights to, and interests in, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. Indigenous Peoples are particularly vulnerable if their lands and resources are transformed, encroached upon, or significantly degraded. Their languages, cultures, religions, spiritual beliefs, and institutions may also come under threat. As a consequence, Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development than non-Indigenous communities. This vulnerability may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases.

The accompanying Guidance Note 7. states that projects are required to implement and achieve Free, Prior, and Informed Consent (FPIC) with the Affected Communities of Indigenous Peoples with regard to project design, implementation and expected outcomes if they are associated with any of the potentially adverse impacts identified below:

- Impacts on lands and natural resources subject to traditional ownership or under customary use;
- Relocation of Indigenous Peoples from lands and natural resources subject to traditional ownership or under customary use;
- Significant impacts on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples lives, including natural areas with cultural and/or spiritual value such as sacred groves, sacred bodies of water and waterways, sacred trees, and sacred rocks; or
- Use of cultural heritage, including knowledge, innovations or practices of Indigenous Peoples for commercial purposes.

*Source IFC (2012) Guidance note 7: Indigenous peoples. [http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated\\_GN7-2012.pdf?MOD=AJPERES p.1, 10](http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES p.1, 10).*

The latest version of the Equator Principles (June 2013), the leading financial industry benchmark for determining, assessing and managing environmental and social risk in projects, closely aligns with IFC Performance Standard 7. The UNDP has also recently issued Social and Environmental Standards specifying that project activities that may adversely affect the existence, value, use or enjoyment of Indigenous lands, resources or territories shall not be conducted unless agreement has been achieved through the FPIC process.

Of particular relevance to the mining industry is the revised Position Statement on Indigenous Peoples and Mining issued by the ICMM in May 2013. Among other things, the Statement commits member companies to engage with potentially impacted Indigenous peoples through a process of good faith negotiation, with the focus on reaching agreement on the basis for which a project (or changes to a project) should proceed. From May 2015, member companies have been expected to comply with these commitments for all new projects and significant revisions to existing projects.

In summary, while the definition and scope of FPIC is still contested, momentum is growing for companies to be able to demonstrate that their processes are focused on reaching agreement with affected Indigenous peoples before developing resources on their lands; and that these agreements were freely entered into. These expectations apply regardless of whether national laws recognise Indigenous rights or otherwise require companies to engage with communities prior to commencing mining activities on or near their lands.

### *Agreements as a response to conflict*

The level of conflict associated with resource projects has increased significantly around the world in the last decade (ICMM, 2015). Conflicts associated with new and existing mining projects can be a major cause of cost and delay to companies (Davis and Franks, 2014) and can lead to loss of life and property. These conflicts are often linked to a vacuum of governance, corruption and concern about the detrimental impacts on local communities, including fears over land dispossession and threats to traditional livelihoods.

Mining companies and governments have tried various strategies to reduce and manage mining-related conflict, with limited success. For companies, these strategies have included strengthening community relations management systems, changing corporate culture, adopting new models of engagement and, in some cases, negotiating agreements with impacted communities.

A good example of a community agreement being developed as a response to conflict is the Goro Nickel project in New Caledonia (see Box 38). Other examples include:

- The agreement reached between BHP Billiton and communities surrounding the Tintaya Copper Mine in the highlands of Peru in 2004 after three years of often difficult dialogue and negotiation (Rangan et al, 2006).
- The global Memorandum of Understanding negotiated between Chevron and communities and state governments in Nigeria's Niger delta. An explicit goal of this agreement was to improve engagement with impacted communities and to deal with a legacy of severely strained relations between local communities, oil companies and the Nigerian government (Hoben et al, 2012).
- The Community Environmental Monitoring Programme negotiated between Eagle Mine and the Superior Watershed Partnership in Michigan, US in 2012. Key drivers for this agreement were to improve relations with the local community (sections of which had been strongly opposed to the mine), overcome high levels of distrust and reduce future transactional costs (Plastrik, 2013). See Case study 7.

**Box 38: The Goro Nickel project agreement in New Caledonia**

When the Goro project was being developed, there was no official recognition of Indigenous rights in New Caledonia. After years of blockades, protest and protracted legal battles, the parties (local Kanak groups and the Canadian company, INCO) entered into protracted negotiations with a view to resolving the conflict and finding a compromise that would satisfy Kanak demands.

The outcome of this process was a comprehensive agreement which, among other things, explicitly recognised the special rights of the Kanaks as Indigenous peoples, contained a substantial benefits and compensation package, and created a variety of innovative participatory mechanisms.

Despite the company's objectives and good intentions, whether the agreement has been effective as a mechanism for mediating conflict is open to question. The Goro Mine continues to be surrounded by controversy and was the site of a major riot in 2014.

Source: Zalcberg (2011) *The Kanak Indigenous peoples of New Caledonia: Decolonisation and self-determination in practice. In French, Statehood and self-determination: Reconciling tradition and modernity in international law.* p.398.

The World Bank, in particular, has been very active in promoting community development agreements as a means of securing company and government commitment, obtaining community buy-in and support, and better aligning what communities want and need with what companies and governments provide. To this end, the World Bank has commissioned several studies into community development agreements (including drafting a model agreement) and has actively advocated for their increased use, including for non-Indigenous populations. Similarly, ICMM, has stated that, "community development agreements, derived through good-faith negotiations, have the potential to help support the achievement of socioeconomic development outcomes" (ICMM, 2012:155).

Several countries have also recently enacted laws requiring companies to negotiate community development agreements with impacted communities to ensure that local communities derive greater benefit from mining developments. Meanwhile, the increasing focus in jurisdictions such as Canada and Australia is to use agreements as a means to deliver broader development outcomes to Indigenous communities.

*Agreements as development delivery mechanisms*

There is a growing expectation in many emerging mining economies that the mining sector should contribute positively to long-term local development. However, the ability of governments and companies to meet these expectations is uncertain. The economic distortions that can occur at the national level when countries rely heavily on income from mining, the misuse of resource revenue and the negative local impacts of some mining projects (eg local price inflation and conflict among groups) can all be cause for concern.

Over the last 20 years, these concerns have prompted a search for new ways of delivering tangible development benefits to communities affected by mining. At the project level, proposed mechanisms include community agreements, social/community investment programmes, development forums, community-controlled trusts, development funds and foundations.

## Part B: The business case for agreements

As discussed, there are several important external drivers for companies to enter into binding agreements with local communities, particularly if development is taking place on or near Indigenous lands. However, the business case for agreements is not just about responding to external requirements and other imperatives (push factors); it is also about how companies can use agreements to their strategic advantage (pull factors). The mix between push and pull factors will vary, depending on whether the situation is one where:

- The legal framework has created an environment conducive to agreement-making with Indigenous groups (eg Canada, Australia and the United States).
- There are generalised legislative requirements for companies to enter into community agreements (eg Guinea and Mongolia).
- The law does not require agreements.

In the first two situations, the rationale for having some type of agreement is relatively straightforward, and the business case discussion needs to be focused on whether there is a benefit for companies to go beyond the minimum required by the law. The third situation still applies in much of the world. The business case for agreements in these cases is much more context specific, for reasons discussed below.

### **Jurisdictions where there is some form of legal recognition of Indigenous rights**

In Canada, Australia and the US, companies that are unable to secure an agreement with the relevant Indigenous groups in a timely manner risk significant costs and delays, and in some cases may not be able to access the resource at all. For example, there are many cases in Northern Canada of resource development projects on Indigenous lands being held up because of community conflict and disapproval (Prno and Slocumbe 2012: 35).

In these jurisdictions, a compliance-driven approach is unlikely to serve companies well. On the other hand, going beyond the minimum requirement can reduce costs and potentially provide a competitive advantage:

- Well-designed and implemented agreements reduce transaction costs by providing greater legal certainty and by defining 'rules of engagement' for dealing with disagreements and disputes, reducing the likelihood of future legal and political challenges.
- Companies that have a poor reputation for how they deal with Indigenous peoples will find it more difficult to secure access to new resources and new geographies than those companies that can demonstrate a successful track record of agreement-making and implementation.
- It's in the long-term interests of companies, and the mining industry as a whole, to be able to demonstrate to communities, governments and others that mining can deliver long-term benefits to Indigenous communities. Well-designed agreements are one of the key ways of achieving this.
- Agreements can help companies meet obligations under cultural heritage laws and have the potential to contribute to improved environmental management practices (eg by drawing on Indigenous environmental knowledge and involving local people in environmental management).

Even where there is no supporting legal architecture at the national or regional level that enables or encourages agreement-making with Indigenous peoples, it's still good business for companies to enter into agreements with such groups. Failure to respond to the Indigenous rights agenda will make it harder and more expensive for companies to develop projects; and heighten the risk of significant reputational damage, litigation and conflict.

### Jurisdictions where agreements are mandatory

In countries where there is a general legislative requirement for mining projects to have some form of community agreement, there is a clear legal case for compliance. Companies need to consider whether there is also a long-term business advantage in going beyond compliance in such cases. To some extent this will depend on the company's circumstances and the stage of the project. However, there can be long-term benefits for companies if they approach this as a strategic opportunity, rather than simply a requirement of government.

Mostly, companies operating in countries where community agreements are mandatory have adopted a minimalist, compliance-based approach. A notable exception is the 2015 Oyu Tolgoi Cooperation Agreement negotiated by Rio Tinto in Mongolia. The agreement is more complex and comprehensive than any other agreements previously negotiated in Mongolia, and goes far beyond what is required under Mongolian law. From Rio Tinto's perspective, there were many long-term business benefits. These included securing a social licence to operate in the South Gobi,

stabilising relations with local-level government, promoting the reputation of the company as a responsible developer and establishing a governance framework which will hopefully reduce future transaction costs (see Case study 3).

### Agreements neither required or expected

Where Indigenous peoples rights are not impacted, and there is no other legal imperative or incentive for companies to enter into agreements, the business case for community agreements will depend on the individual context. There is now broad recognition in the industry that companies that fail to pay regard to their social licence to operate will find it increasingly difficult to obtain access to new resources and to mine without interruption. However, securing and maintaining a social licence doesn't necessarily require a formal agreement with a community. In some circumstances, this may actually be counter-productive. The decision on whether to seek a binding community agreement needs to be informed by a realistic understanding of the benefits, costs and risks of going down this path. Factors that need to be taken into account in making this decision are summarised in Table 22.

**Table 22: Benefits, costs and risks of community agreements from a company perspective**

Potential benefits:	Potential costs and risks:
<ul style="list-style-type: none"><li>- An opportunity to create dialogue, build trust, exchange information and explore other issues.</li><li>- A mechanism for holding parties to their commitments, leading to greater certainty and consistency.</li><li>- A structured framework for community engagement, which can reduce reliance on individuals to sustain the relationship.</li><li>- A mechanism to set up reciprocal obligations, which can help build a sense of shared responsibility.</li><li>- An opportunity to reduce transaction and operating costs over the longer term.</li></ul>	<ul style="list-style-type: none"><li>- The time and cost required to set up and implement an agreement, particularly where a community has no prior experience or capacity in agreement-making.</li><li>- A lack of community interest in having and complying with an agreement.</li><li>- Unintended and unwanted changes to community power dynamics.</li><li>- The risk of excluding and marginalising some community members – minorities and women in particular.</li><li>- The loss of flexibility and adaptability.</li><li>- The risk that the agreement will not be enforceable and will lack legitimacy.</li></ul>

Circumstances where there may be strategic benefit for a company to voluntarily seek a binding agreement with a local community include situations where:

1. Local communities have the capacity to disrupt or delay resource development and are predisposed to do so. In Mongolia, for example, while local-level governments don't have the power to issue mining or exploration permits (which is done by the central government) they can withhold or delay the issue of water and land use permits (eg for mine-related infrastructure). This has led to situations where local governments have used (or misused) these powers to pressure companies into providing more local benefits. In these situations, an agreement with local government may help to establish ground rules and provide more certainty.
2. There is a legacy of conflict and mistrust, and the company needs to take proactive steps to demonstrate good faith and overcome scepticism that it will not honour commitments (eg as Rio Tinto was prepared to do at Eagle Mine in the United States see Case study 7).
3. Where other governance structures and processes for mediating relations between the company and community either don't work well or don't exist (eg the Tintaya copper mine in Peru).
4. There is potential to bring government into a three-way arrangement to secure additional resources for the area and to better coordinate programmes and service delivery (eg as practiced in Papua New Guinea).

Each situation needs to be considered according to its own context; there is no simple recipe to follow. However, whatever the situation, companies need to be clear about what they are hoping to achieve from an agreement; and then consider what other mechanisms might be available to achieve the same or similar outcomes. For example, issues of conflict and mistrust might be addressed instead by entering into a non-binding memorandum of understanding, setting up a consultative process such as a dialogue table, changing the way in which the company communicates with the community, creating a complaints mechanism and dispute resolution process and/or modifying local hiring and procurement practices where these are a source of tension.

In working through the advantages and disadvantages of these different responses, companies must seek to understand what is likely to be acceptable from the community's perspective. This requires engagement and dialogue between all parties. If a company decides to go down the path of negotiating a binding agreement, they must commit to doing it well. Otherwise it's very unlikely that any potential benefits will be realised.

### The community perspective

Communities and their representatives also need to be aware of balancing costs and benefits when determining whether to seek (or respond to a request for) an agreement. Often there are other strategies available to Indigenous groups to achieve desired outcomes, such as litigation, protest and political lobbying (O'Faircheallaigh, 2008:79-80). The Harvard Project on American Indian Economic Development, while generally advocating for impact and benefit agreements, cautions on their use, particularly in relation to the risk of closing off access to other options. For example, impact and benefit agreements can contractually prevent signatories from objecting to the issuing of government permits and licences for the development project, and pursuing legal avenues (eg claims) that would normally be available to them. This reinforces the importance of companies being able to see situations from other parties' perspectives, and to understand their drivers and constraints. Agreements only work if they meet the needs of all parties. This means that agreements, and agreement-making processes, need to be designed so that communities see a favourable cost-benefit trade-off.

## Part C: Agreements in practice: implementation, outcomes and impacts

This final section focuses on the broader question of how agreements are implemented, and the impacts and outcomes which flow from them – intended, unintended, positive, negative, direct or indirect. Understanding and addressing these issues is important if agreements are to be made more effective. It's also fundamental to the debate over the merits or otherwise of agreements (O'Faircheallaigh and Ali, 2008:68).

### Implementation and governance

Much of the published literature on community agreements focuses on the negotiation process, or the content of the agreement, rather than what happens once an agreement is in place. However, there is a growing recognition that how an agreement is implemented and governed is critical to its success. The implementation of an agreement is as important as the content of the agreement, yet historically has received relatively little attention. Fortunately, this is beginning to change as described in a number of useful case studies (see Box 39).

Collectively, these studies have identified significant recurring challenges in maintaining focus following the signing of an agreement. Contributing factors have included:

- lack of company support and buy-in;
- under-resourcing of the implementation, monitoring and review functions;
- poorly-designed governance structures, including a cultural mismatch between the entities created by agreements and how communities have traditionally been organised;
- instability and lack of capacity in Indigenous organisations; and
- lack of government support and alignment.

While there is broad acceptance about what needs to be done to address these issues, translating these lessons into practice is an ongoing challenge and the risks continue to be underestimated.

### Agreement impacts and outcomes

One aspect of agreements that has received even less attention than implementation is impact. That is, the difference that agreements make to communities and to the quality of company-community relations. Measuring impact is a resource intensive and time consuming activity that also presents a number of methodological challenges. The most notable findings emerging from research are discussed below.

### Economic and social development

In Australia there have been significant increases over the last decade in the level of Indigenous economic participation in the mining industry, particularly in the area of employment. This can be attributed, in part, to the need of companies to meet their obligations under existing agreements, and a broader strategic desire to build positive relationships and facilitate the making of new agreements. Similar findings have been reported for Canada. The results are more mixed with regards to the extent of the flow-on, positive effects of direct economic participation in mining to the local and regional economy; and the level of improvement in underlying social conditions in impacted communities.

A recent report for the Minerals Council of Australia concluded that:

“[d]espite sustained improvements in economic participation for Indigenous communities, high levels of disadvantage remain a troubling concern (even among those located near mining projects)” (Langton, 2015:8).

A series of studies undertaken by CSRM for the MMG-owned Century Mine in far north west Queensland reinforce these conclusions (see Box 40).

**Box 39: Case studies of agreements**

**Australia**

Barnes, R. (2014). *Building an implementation framework for agreements with Aboriginal landowners: A case study of The Granites Mine*. MPhil Thesis. The University of Queensland. <https://www.csrm.uq.edu.au/publications/building-an-implementation-framework-for-agreements-with-aboriginal-landowners-a-case-study-of-the-granites-mine>

Crooke, P., Harvey, B. and Langton, M. (2006). Implementing and monitoring Indigenous land use agreements in the minerals industry: The Western Cape Communities Co-existence Agreement. In M. Langton, M. Tehan, L. Palmer, K. Shain and O. Mazel (eds) *Settling with Indigenous people: Modern treaty and agreement-making*. pp. 95-112. Sydney: The Federation Press.

Doohan, K., Langton, M. L. and Mazel, O. (2012) From paternalism to partnership: The Good Neighbour Agreement and the Argyle Diamond Mine Indigenous Land Use Agreement in Western Australia. In M. Langton and J. Longbottom (eds) *Community futures, legal architecture: Foundations for Indigenous peoples in the global mining boom*. London: Routledge. pp.231-250.

O'Faircheallaigh, C. (2000) *Negotiating major project agreements: The 'Cape York Model'*. Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) Research Discussion Paper No. 11, Canberra. p. 11. <http://aiatsis.gov.au/publications/products/negotiating-major-project-agreements-cape-york-model>

Scambray, B. (2013) My country, mine country: Indigenous people, mining and development contestation in remote Australia. CAEPR Monograph No. 33, ANU, Canberra. <http://press.anu.edu.au?p=223641>

**Canada**

Noble, B., and Fidler, C. (2011) Advancing Indigenous community-corporate agreements: Lessons from practice in the Canadian mining sector. *Oil, Gas and Energy Law Journal*. 4.

Noble, B. and Birk, J. (2011) Comfort monitoring? Environmental assessment follow-up under community-industry negotiated environmental agreements. *Environmental Impact Assessment Review*. 31(1): 17-24.

Caine, K. J. and Krogman, N. (2010) Powerful or just plain power-full? A power analysis of Impact and Benefit Agreements in Canada's north. *Organization and Environment*, 23(1): 77-98.

Palmer, L. and Tehan, M. (2006) Shared citizenship and self-government in Canada: A case study of James Bay and Nunavik (Northern Quebec). In M. Langton, M. Tehan, L. Palmer, K. Shain and O. Mazel (eds) *Settling with Indigenous people: Modern treaty and agreement-making*. pp. 19-53. Sydney: The Federation Press.

Prno, J. 2007. *Assessing the effectiveness of impact and benefit agreements from the perspective of their Aboriginal signatories*. MA Thesis. Department of Geography, University of Guelph. <http://www.collectionscanada.gc.ca/obj/thesescanada/vol2/002/MR33902.PDF>

In Canada, impact and benefit agreements are widely recognised as an important tool to improve socioeconomic conditions in communities, and especially income levels. This has been realised in many instances, although research has also revealed related issues. Increased family stress, substance abuse and crime, and mental health impacts such as depression can be associated with increased incomes and rotational work schedules. For example, in Canada, an evaluation conducted by the territorial government of the impact of the Diavik, Ekati and Snap Lake Diamond mines, each of which is covered by a comprehensive impact and benefit agreement,

revealed positive impacts on jobs, wages, incomes and education levels. However, development has also brought with it some social negatives, such as an increase in suicides and family violence (GNWT, 2013).

In the case of PNG, the 2014 UNDP Human Development report, *From Wealth to Wellbeing: Translating Resource Revenue into Sustainable Human Development* notes that large mining operations have transformed communities that had previously operated at the fringe of the cash economy into major regional economic centres. A significant part of this transformation is related to the compensation

#### **Box 40: Development outcomes from the Century Mine Gulf Communities Agreement**

Century Mine is located in a remote part of far North West Queensland. The mine was developed on traditional Aboriginal lands and is covered by a comprehensive Native Title Agreement, the Gulf Communities Agreement (GCA), which was reached between the company that originally developed the mine (Pasminco), four Traditional Owner groups and the Queensland State Government in 1997.

Largely as a result of the GCA, comparatively high levels of Indigenous employment (15-20 per cent of the total workforce) have been maintained across the life of the mine. There has also been a limited amount of local business development. However, there is little evidence that economic and social conditions in communities in the region improved significantly over the period of the life of the mine, at least relative to comparable non-mining communities. Reasons for this include:

- weak economic multipliers and a lack of other economic opportunities in the area;

- a legacy of welfare dependency and disadvantage;
- weak and dysfunctional local governance structures;
- lack of tangible company support for broader development initiatives (eg in education and health, or governance capacity building);
- limited involvement of the State and Federal governments in addressing the development challenges of the region;
- absence of a private housing market, which meant that there were few incentives for people to invest in the communities;
- the propensity for many local people who found work at the mine to move themselves and their families out of the region to larger towns on the coast, and spend and invest there, rather than locally (facilitated by Century being a fly-in fly-out operation).

Source: Everingham, Barnes and Brereton (2013) *Gulf Communities Agreement 2008–2013. 15-year review*. CSRM, The University of Queensland. <https://www.csrn.uq.edu.au/publications/gulf-communities-agreement-15-year-review>

and benefit packages (now labelled benefit sharing agreements) negotiated at the Development Forum. However, the report concludes that these significant revenue streams do little to promote sustainable improvements for local communities; and increased economic flows are actually the source of many social and cultural problems that arise from these mining operations (2014:39).

The experience of Papua New Guinea, Australia, and to a lesser extent Canada, indicates that community agreements by themselves will rarely have a transformative impact on development outcomes for impacted communities and regions. However, this should not be read as evidence of failure. Agreements clearly can and do have positive economic and social impacts. The issue is how far those impacts extend into the wider community and how sustainable they are. The apparently modest successes to date also have to be viewed against the difficult social, economic and governance problems and constraints that often manifest in remote mining regions.

#### **Community governance and power dynamics**

On the upside, agreements can provide a mechanism for formalising local governance arrangements and give Indigenous peoples opportunities for real participation, often for the first time, which can in turn strengthen the economic and social fabric of Indigenous communities (Langton et al, 2006). However, in other circumstances, agreements and mining projects more broadly can have very disruptive effects on community power dynamics and cohesion. Before agreements were settled in many remote areas, there were often no local governance institutions recognised by external parties. By inserting new structures, processes and resources, agreements may trigger significant changes in governance arrangements, power dynamics and relationships within a community. In PNG, the process of determining impacted landowners (and therefore working out who is eligible for compensation, who can be represented in the development forum and benefit agreement negotiations) has been a significant cause of community tension (Banks 2008:29). In Canada, questions have been raised about whether impact and benefit agreements may perpetuate injustices in the long-term if resources are not equitably distributed between and across generations (Fidler and Hitch, 2009).

## Gender impacts

Agreements and agreement-making processes also have the potential to change gender relations in a community, but not necessarily in a positive way. For example, in Bougainville and Lihir in PNG, women were excluded from formal mining agreement processes despite being the traditional land owners (Macintyre, 2003). This significantly changed the power position of women in those communities and contributed to a situation where the benefits of agreements (particularly direct compensation) flowed disproportionately to men. A recent study of the gender dimensions of community agreements, which included case studies of agreements in Australia, PNG and Laos, also concluded that contextual, organisational and industry related factors have often combined to exacerbate gender inequality; and that the rights, needs and priorities of women are often excluded (Keenan and Kemp, 2014).

Examples of where gender issues have been better handled include the engagement and negotiation processes for the Argyle Participation Agreement in Western Australia, which were structured to facilitate the involvement of women (Doohan, 2006) and the negotiation of the Voisey's Bay Agreement in Canada (O'Faircheallaigh, 2012b). Negotiations over the continuation of the Ok Tedi mine in PNG have been described as "internationally ground-breaking for having secured enhanced rights for women in legally enforceable mining agreements, even in a context of severe gender inequality" (Menzies and Harley 2012:11).

The risk of adverse gender impacts will be reduced if people involved in agreement-making (particularly from the company side) are alert to these risks, and take proactive steps to mitigate them. This includes ensuring that there is an informed understanding of gender dynamics in the impacted communities and that women are effectively represented in both the negotiation and implementation process. These issues are addressed at length in the Rio Tinto guide, *Why gender matters: A resource guide for integrating gender considerations into Communities work at Rio Tinto*.

## Cultural protection and identity

Historically, mining has often had disruptive effects on identity and cultural heritage. This has ranged from the destruction of artefacts and sacred sites, disturbance of landscapes and landscape features that are of spiritual significance to local Indigenous peoples; to the erosion of traditional languages and cultural practices as a result of the rapid social changes brought on by large-scale mining developments (Bryant et al, 2011).

Well-designed and implemented agreements can provide a mechanism for mitigating and managing these impacts. Beyond this, they can provide a framework for engaging with communities about ways to protect and strengthen their cultural heritage, both tangible and intangible. For example, while mining has had significant adverse impacts on cultural heritage in Lihir in PNG, it has also resulted in long-term and well-resourced cultural heritage programmes that "would be beyond the reach of most Melanesian communities" (Bainton et al, 2011:84). These initiatives have included funding a programme to record traditional music and stories on Lihir and adjoining islands.

In Australia, some agreements have directly or indirectly contributed to protecting or strengthening cultural heritage and identity through:

- acknowledging the status of signatory groups as Traditional Owners and custodians of the land;
- incorporating cultural heritage management plans;
- establishing cultural heritage and environmental management committees that include Traditional Owner representatives;
- allocating funding and in-kind support for cultural protection initiatives and ceremonies, such as the re-invigoration of the *manthe* smoke ceremony at Argyle Diamond Mine; and
- committing to undertake cross-cultural training with mining company workforces to increase cultural awareness and understanding (Parmenter, 2015).

Guidance on how companies can improve their performance in this area can be found in the Rio Tinto guide, *Why cultural heritage matters: A resource guide for integrating cultural heritage management into Communities work at Rio Tinto*.

## Conclusion

The growing practice of agreement-making in Australia and Canada has broadly improved relations between the mining industry and Indigenous communities. In both countries, the mining industry has moved from a position of opposition and anxiety about the effects of the recognition of Indigenous rights on investment; to a position of acceptance and, in some cases, positive advocacy. Less has been documented about agreement-making and implementation outside Canada and Australia, but here too there are some positive stories to tell (Langton, 2015).

As Professor Marcia Langton has observed in relation to Australia, Indigenous peoples have been brought to the table. It has also been acknowledged that the relevant parties must be active participants in settling the terms of agreements to ensure their long-term sustainability and to provide certainty to the industry. Indigenous leaders, for their part, have become increasingly willing to engage with companies, as well as government, on ways to use agreements to deliver better economic and social outcomes for their communities.

At the same time, it's clear that not all agreements have been successful in achieving their objectives and in meeting the expectations of the parties, particularly regarding socioeconomic development. In some cases, agreements have exacerbated tensions in communities and left some groups (especially women) worse off. Often this has been due to poor processes, design flaws and implementation failure, but even well-designed and implemented agreements may not deliver what was hoped for. This is because there are many other factors in the external environment, outside the control of the agreement, which can also influence outcomes (eg geographical remoteness, weak governance institutions and entrenched socio-cultural practices).

It's important for all involved to be realistic about what can be achieved from community agreements; and to invest in building a body of knowledge about what works and what doesn't to better understand the factors that shape agreement outcomes and impacts.



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Pictured left: 2007: An aerial view of the town of Beyla. Located close to Canga East and Ouelaba, Beyla is the heart of Beyla Prefecture, which has a population of approximately 188,000. An hour by road from Canga East, the town is the site of a Simandou Project airstrip. In addition the company operates a community office in Beyla, providing a forum to address the concerns of the local community.

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