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The power of local level agreements

Local level agreements between Aboriginal and Torres Strait Islander peoples and miners have helped create global opportunities

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Feature image: Comalco – Western Cape Communities Agreement signing,

Local level agreements (LLAs) are a governance innovation that emerged in the late 20th century. LLAs cater for resource development consents that intersect with the aspirations of land-connected indigenous peoples, particularly in Australia, Papua New Guinea and Canada. Broadly speaking, land-connected peoples are social groups with demonstrated multi-generational residential, spiritual and livelihood connections to definable geographic areas. LLAs are now evolving globally in a wide range of legal, cultural and industry settings, with more than 30 countries having laws that require, enable or encourage some form of LLA and international financial institutions recommending them as a condition of finance.

LLAs in different settings have different names, such as Community Development Agreements, Impact Benefit Agreements and Indigenous Land Use Agreements. Widely varying context means that LLAs can assume many forms. Where the political empowerment of indigenous peoples and the need for LLAs were once an existential challenge for natural resource developers, successful miners are now embracing them in sophisticated ways to create value, both for themselves and host communities. This article presents a perspective on their historical context in Australia and some lessons learned.

Historical context for local level agreements in Australia

For 20 years following the implementation of the *Aboriginal Land Rights (Northern Territory) Act 1976*, Australian miners campaigned against it, contributing to the abandonment of national land rights legislation along the way. Against this background, the High Court's 1992 decision in *Mabo and Others v Queensland (No 2)* ('Mabo') surprised the resources industry and initial opposition, while not unanimous, was widespread.

In response to Mabo, the federal government under Prime Minister Keating worked towards a legislated solution. Aboriginal and Torres Strait Islander leaders, state governments and industry bodies were prominent in discussions; however, mining associations seemed unwilling to reach accommodation with the government and Aboriginal and Torres Strait Islander peoples' interests, to the point where miners became isolated and lost influence in negotiations. By the time the *Native Title Act 1993* became law, the resources industry was alienated from government and many sectors of Australian society. A long journey of industry reconciliation with Aboriginal and Torres Strait Islander peoples commenced.

During the negotiation of Prime Minister Howard's Ten Point Plan and the amended Native Title Act legislation in 1996, the resources industry demonstrated it was changing, with enlightened miners focusing on Point Ten of the plan. The amended legislation had a provision that allowed for parties to reach their own accommodation by mutual agreement under contract law and have it ratified by government. In the post-Mabo world, the provision has been acknowledged as providing the most flexible and acceptable 'land rights' option, and the agreements reached are known as Indigenous Land Use Agreements (ILUAs). It was the introduction of the ILUA amendment that gave new impetus to enlightened operators within the resources industry, moving away from earlier animosity to embrace policies of reconciliation, negotiation and agreement making.

The hostility that prevailed between many Aboriginal and Torres Strait Islander groups and much of Australia's resources industry during this period is hinted at in the paragraphs above. With the benefit of hindsight, the Mabo legacy can be seen as part of a global phenomenon, and the new competency that emerged in Australia has proved to be world-leading.

In 2007, the *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly, representing the commitment of the UN's member states to recognise the importance of indigenous peoples' land connections worldwide. The declaration was more than 25 years in the making, parallel in time, intent and tortuousness to the land rights journey in Australia.

In 2011, the International Finance Corporation (IFC), one of the major organs of the World Bank Group, formalised Performance Standard 7 with specific provision that its clients recognise the 'free, prior and informed consent' (FPIC) of project-affected indigenous peoples. The IFC standards have been adopted by numerous other financial institutions, meaning commercially-funded resource projects must conform or lose access to loan financing. Hence, far from being an aberration, Mabo was at the forefront of an emerging global innovation in land rights and resource development consent. Like many innovations in history, early movers who find themselves in the right place at the right time can gain an important business advantage by responding in the right way.

Viewed in this light, Mabo taught Australian miners how to make LLAs with land-connected groups around the world, which in turn gave them a valuable competitive business advantage. This does not suggest that industry is universally good at making LLAs, nor that all LLAs outcomes are beneficial for both resource developers and land-connected indigenous groups. In many instances around the world, implementation has fallen short of the spirit of intent and benefits promised to indigenous groups have failed to materialise. Frequently this is due to expedient, naïve or fraudulent assumptions by mining companies; however, just as frequently social progress and societal stability have suffered because of poor governance and unethical behaviour by community leaders. This is particularly the case in locations that do not have the same degree of regulatory oversight that is present in Australia.

While much emotive and political commentary has been written, it is likely that it will be

cold-eyed business analysis of empirical experience that will lead to better LLA outcomes for all parties. Such analysis is rare, or it gravitates toward arguments about good faith and resourcing shortfall. What is needed is a clearer and objective understanding of good LLA formulation and governance.

Local level agreement purpose, content and other considerations

LLAs can be extremely varied; they can range from simple non-binding memoranda to complex multi-faceted contracts that run to hundreds of pages covering many areas of mutual concern and commitment. Irrespective of their length and complexity, LLAs should provide well-defined, mutually agreed terms that set out who the LLA parties are, their credentials, a clear description of what the LLA is intended to achieve and how success will be defined.

The content of LLAs can include agreement on what constitutes 'local'; governance and audit provisions for joint and delegated management bodies; complaints and dispute resolution procedures; criteria to measure agreed commitments; agreement on joint relationships with other parties (such as governments); the establishment of dedicated trusts to receive funds for purposes specified in the LLA; and much more.

Another theme of many LLAs is agreed use of land and resources, with consideration of formalised compensation for loss of property and amenities; land and natural resource access and rent provisions (such as for water and forests); joint security and land access protocols; environmental co-management arrangements; shared access to essential infrastructure (such as roads, harbours, airports); and consideration of post-closure beneficial land ownership and use.

Agreeing how to foster the close integration of the mining enterprise and local economic participation is important. Examples include training and employment options and targets for local people, commitments to engaging with local supply chains and business development, potential business equity or subsidiary provisions and agreement to work together to lobby governments and other agencies. Context-specific obligations might arise, such as contributions to local civic services and initiatives aimed at maintaining cultural heritage practices.

Whatever the contents of LLAs, certain principles have proven to be essential for success. The first is that LLAs should centre on mine-proximal – most often land-connected – social groups and their representatives, rather than state or national governments. This does not mean that governmental authorities cannot be involved. In common law situations, this is usually as a procedural 'umpire'; in administrative law situations, it is usually as a primary party representing local people. Irrespective of governmental presence, it is important that there is an institutionalised relationship between parties – that is, a structured relationship between a local social group and the miner, rather than something agreed between certain individuals.

Some business principles are also key to LLA success. For instance, there must be a 'value exchange' – clear evidence of mutual obligation and agreement that all parties will commit to shared objectives. There should be clear statements of support for the resource development, describing the process by which that support is given and the terms of that support, and there should be developer commitments, such as respectful employee behaviours and material contributions to local development. Expected outcomes should be clearly described, with measurable performance indicators and consequences for non-performance.

Procedure is paramount

The process of reaching agreement is as important as the LLA itself. The approach to making LLAs needs to be different to the tactics applied in negotiating agreements between commercial enterprises, which can be adversarial – aimed at securing short-term transactional advantage rather than a long-term relationship. In contrast, LLAs need to adopt a more reciprocal and incremental approach to build trust between the parties, confidence in the process, a long-term relationship and the institutional capability of all parties.

It can be useful to reach 'stepping stone' agreements along the way. These can include initial non-binding memoranda of understanding or agreements about process, followed by interim agreements, before proceeding to a comprehensive LLA. Interim agreements are a useful way to prototype longer-term, substantive agreements. In most situations, it is useful to start by agreeing on principles, process and the definition of roles and responsibilities. Then the focus can shift to subject-specific areas where early agreement is most likely, before tackling more onerous obligations. The final LLAs can be comprehensive and record the resolution of all areas of mutual interest between a business and a local group, as well as resourcing and institutional arrangements for the parties' ongoing relationship.

In the longer term, LLAs need to be flexible and allow for the reality of inter-generational social flux and changes in business context. Flexibility needs to be simultaneously balanced against a business's need for certainty for the life of its operations. One way to achieve this is to structure a comprehensive LLA in components. The

overarching, 'umbrella' component includes only those core elements that will remain constant. This can be supported by a suite of schedules that represent stand-alone management plans, each capable of being independently updated by agreement of the parties as required. Examples of possible management schedules include training and employment; local service and supply; culture heritage management; environmental co-management; security, law and order; and civic and social infrastructure. The advantage of this arrangement is that operational components of LLAs can be reviewed, while leaving core financial, legal and governance elements absolute.

Learning from failure

While many LLAs have successfully created governance conditions that support stable and predictable local societies, some have unfortunately failed to achieve this. LLAs generally fail when agreement making has been approached expediently as a commercial transaction, to be completed as quickly as possible without much thought to implementation and governance.

Successful LLAs require an understanding of governance imperatives. First, balanced representation, where there is an insistence that representatives from various community subgroups, such as women, youth, elders and spiritual leaders are all present on governance committees. Second, an emphasis on cultural fit in which governance arrangements have enough customary resonance to ensure self-regulating behaviour. Third, LLAs should be broad-spectrum and not overly focused on cash benefactions (even when these are present). Fourth, checks and balances need to be in place. This might include various subbodies with devolved responsibilities for different aspects of an LLA, having specified powers and a mutual ability to keep each other in check. Finally, formal custodial and independent provisions, such as a custodial trustee and fiscal fiduciary arrangements, are also desirable. Collectively, these measures provide for power separation akin to well-balanced government and company governance, where executive functions are separate to, and counselled by, leaders at board level.

Future local level agreement practice

Mineral resource developers can no longer rely solely on government decree for social consent and the long-term operational certainty they need. LLA-making is spreading and evolving rapidly, as developers and governments realise it addresses social consent, satisfies local aspiration and mobilises the power of self-managed destiny. Properly constituted LLAs demonstrate FPIC and social licence, while promoting the devolved ability of local peoples to govern their own lives. The direction of LLA innovation will, pragmatically, be governed by experiment and some LLAs will be more successful than others. Experience suggests that placing the principle of procedural and distributional fairness ahead of prescribing content is best for developing sustainable LLAs. This is how the native title regime in Australia and Te Tiriti o Waitangi processes in New Zealand operate under the common law.

Unfortunately, much global LLA experimentation is going in the other direction. A recurring tendency among many governments and international agencies is to mistakenly work from the idea that their regulatory role is to dictate LLA terms and content by prescription and templates. This approach effectively re-appropriates the local empowerment that LLAs

promote.

Instead, regulation and policy makers should focus on ensuring procedural equity, allowing the LLA parties to reach their own accommodation relevant to circumstance. Procedural equity means government and financial institutes should act as umpires, seeking to achieve power balance by ensuring all parties have equal access to advice, legal representation and resources. Achieving power balance is the key to successful LLAs. Creating a transparent, fair playing field also generates conditions for self-moderating societal stability.

LLAs and the appropriate procedures for making them will continue to open up worldwide opportunity for mineral resource developers, contingent on their own open-mindedness and growing competence. Notably, LLAs are no longer just the realm of miners and indigenous peoples – other industry sectors, including in urban settings, are adopting the approach. Land-connected social groups more broadly are asking for LLAs, and Australian miners who are competent in making and implementing them are gaining a competitive advantage. The legacy of Mabo has led to the Australian resources industry working more constructively with land–connected people everywhere.