

Implementing and Monitoring Indigenous Land Use Agreements in the Minerals Industry: The Western Cape Communities Co-existence Agreement

Peter Crooke, Bruce Harvey and Marcia Langton¹

Introduction

Native title legislation in Australia has instigated changes in the relationships between the mining industry and indigenous people by providing a context for negotiating Indigenous Land Use Agreements (ILUAs).² This chapter examines the context, formulation and early implementation of one such ILUA, the Western Cape Communities Co-existence Agreement (WCCCA),³ signed by Comalco Ltd, the Queensland Government and numerous Aboriginal parties on western Cape York, Australia, in March 2001.

The success in negotiating recent agreements has been followed by the realisation that their implementation requires special management attention, and greater awareness and resources by mining companies to their ongoing relationship with local Aboriginal people. In effect, much of the executive attention formerly paid to maintaining the development guarantee provided by government, requiring competency in legal affairs and public policy, must now be complemented by efforts in maintaining a local social mandate, requiring competence in managing and resolving social issues.

This chapter provides a case study on the first phase of monitoring and implementing the WCCCA. A recent study by the authors shows that progress in implementing this agreement involves democratisation of mining company-Aboriginal relationships and corporate culture change, having regard to various difficulties and challenges. These include, for example, implementing the WCCCA in an environment of high

Aboriginal expectation of company and employee respect for Aboriginal culture, Aboriginal demands for employment and training, and on Comalco's part, strict safety standards and sound human resource policies. There is mutual acceptance by the Aboriginal parties and by Comalco that, for successful implementation of the WCCCA, the company and other stakeholders are required to contribute to capacity-building, such as assistance with governance training, access to advice on administration and working with local Aboriginal institutions on community programs for better outcomes in education, health, environmental and cultural heritage protection.

The chapter discusses the implications of the WCCCA for the formulation of practical policies and procedures in a mining company working in a distinctive Aboriginal region to achieve these ends. Such policies and procedures may include communication and management strategies that distribute responsibilities both horizontally and vertically across the business and the local communities. Whilst the formulation and implementation of suitable policies and procedures are a necessary condition for this to occur, the authors observe that real achievement can only come through the development of a pervasive culture of social competency.

Primarily, this chapter draws upon interviews and observations collected during a review of the implementation of the WCCCA undertaken by the authors in late 2003 (Crooke et al 2003). In addition, the chapter draws upon the authors' observations, inferences and analysis over the past 10 years at Rio Tinto, other mine sites and nearby communities in northern Australia.

The chapter first provides background information on the people and communities of western Cape York, on the history of Comalco's mining operations there, and of native title in Australia. The chapter then examines the purpose of the WCCCA and summarises its contents, format and administration structure. Next, it examines the broader context in which the WCCCA exists, in particular the implications of globalisation for relationships between global corporations and local communities. This is followed by a review of the implementation of the WCCCA, highlighting the key efforts required for effective implementation. Finally, the chapter examines the implications these findings have for Comalco and the western Cape York indigenous community.

Background

The people of western Cape York

Western Cape York comprises the western portion of the large, remote and sparsely populated Cape York Peninsula of far north Queensland.

Since 1960, the township of Weipa, with a population of 2000 (mainly non-indigenous people), has become the regional centre. Seven kilometres to the south is Napranum, a town of 1000 people (whose residents are predominantly indigenous). Two hundred kilometres south by dirt road is Aurukun, another indigenous town of 1000 people. Mapoon (or Marpuna), a recently re-established township of about 350 people, is located at the former Aboriginal mission site, 80 kilometres to the north of Weipa (Western Cape York Peninsula Land Tenure Map).

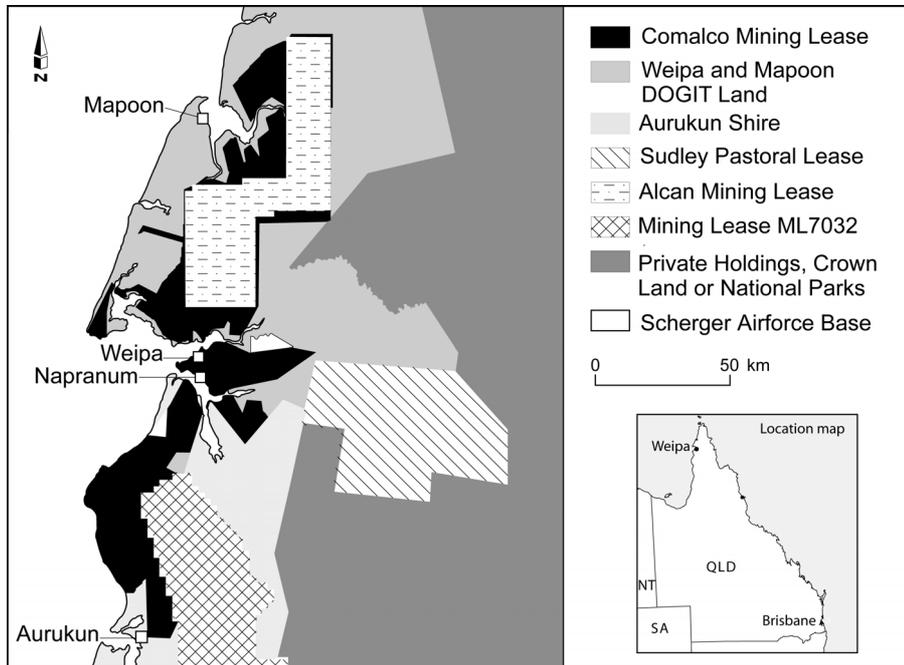
The indigenous peoples of western Cape York comprise 11 named customary land-owning entities (some of which are also language groups): the Alngith, Anathangayth, Ankamuthi, Peppan, Taepadhighi, Thanikwithi, Tjungundji, Warrangu, Wathayn, Wik and Wik-Way, and Yupungathi. Their traditions relating to land affiliation, political and economic life, religion, kinship, oral history and many other aspects of their social life, remain strong. Their connections with territorial and marine estates, in particular, are well documented by anthropologists (Sutton 1978, 1985; Martin 1993; von Sturmer 1978). Recent history includes contact with Dutch mariners in the 17th century, English mariners and traders since the early 19th century, and periods of residence on church missions since the early 20th century. In 1963, in a now notorious episode, the Queensland police forcibly relocated the residents of Mapoon mission to New Mapoon near the tip of Cape York. Their homes were destroyed – the stated reason being the rationalisation of missions in the region. This event had lasting implications for relations between the indigenous people and newcomers to the region.

History of mining at western Cape York

Bauxite was discovered near the present day Weipa town site in 1955. Comalco (then the Commonwealth Aluminium Corporation) was established in 1957 and the first commercial shipments of bauxite commenced in 1963. In 1965, the Queensland Government granted a mining lease covering 5500 square kilometres to Comalco. Today the lease area has reduced to 2500 square kilometres and has a term extending to 2041, with a right of further extension for another 21 years (Comalco Limited nd; Tiffen 2001).

Weipa was built as Comalco's company town and is largely populated by non-indigenous people who have relocated temporarily, for employment or other purposes. It is connected by a daily jet service to Cairns (700 kilometres to the south-east) and by 1100 kilometres of unsealed road that is usually impassable during the monsoonal wet season between December and April. Transport of bauxite out of Weipa, and supplies into the region, occurs via shipping and barge services through the waters of the Gulf of Carpentaria.

Western Cape York Peninsula Land Tenure



Native title in Australia

In Queensland and elsewhere in Australia, the history of British settlement involved little heed to the legal rights of indigenous people. In Queensland, from the late 19th century, Aboriginal reserves were set aside and indigenous people were removed to these reserves as European settlement encroached on their traditional lands. In 1965, the Queensland Government adopted a policy of assimilation. It established Aboriginal Councils to govern on reserves and to act as quasi-local government authorities. In 1982, Queensland legislated for deeds of grant in trust (DOGITs) of Crown land for Aboriginal Reserves, to be held in fee simple or freehold. Under the statutory arrangements for these land grants, amongst other things, the trustees of such land could enter into agreements with miners for revenue participation (by Aboriginal traditional owners) from mining on that land. All mineral rights within DOGIT lands remained with the State of Queensland (Tiffen 2001).

In 1992, after a decade of legal action by Murray Islanders in the Torres Strait north of Cape York, the High Court of Australia recognised native title at common law in *Mabo v Queensland (No 2)* (1992) 175 CLR 1

(*Mabo*). For indigenous Australians, the *Mabo* decision finally provided, after 200 years of European settlement, common law recognition of customary rights in land. However, these rights were subsequently defined (and limited) by statute in 1994, under the *Native Title Act 1993* (Cth) (*NTA*), and by the judicial outcomes in the many native title cases that have come before the Australian courts since then (Tehan 2003).

As a result of native title's 'most cautious and belated recognition', (Pearson 1993a, p 75), some 204 years after colonial settlement, some believed that the *Mabo* decision would have radical implications for the Australian land tenure system, and incorrectly, for land titles. The potential of *Mabo* extended beyond the concerns of the original litigants on a small island in the Torres Strait, to much of the Australian continent. This instigated heated debate and invective, and led to the adoption by several industries, including the mining industry, of a hostile position towards the decision and to the drafting of the *NTA* in the Federal Parliament (Goot & Rowse 1994). This legislation offered an alternative to case-by-case litigation to determine the legal impact of native title, especially on mining and pastoral interests not dealt with in the *Mabo* case.

The *NTA* was passed in the last session of parliament of 1993. It protected native title that was in existence at the time the *NTA* commenced in 1994, and to the extent that it may have been extinguished or reduced prior to 1994 by an invalid act under the *Racial Discrimination Act 1975* (Cth) (*RDA*). For native title that had been extinguished by a valid act before commencement of the *NTA*, there was no remedy (Australian Government Solicitor 1998). If government demonstrated a clear intention to extinguish native title and if provisions of the *RDA* had been followed, there was no claim that could be made for native title. For existing mining leases, s 238 of the *NTA* provided that a 'non-extinguishment' principle applied. That is, there is no extinguishment of native title, but while the mining lease is current, the underlying native title cannot be asserted against the holder of the mining title, and after the mining title expires, native title resumes to its fullest possible extent.

The development of case law subsequent to the *NTA* and its 1998 amendments has to date consistently affirmed a lack of native title in minerals (*Western Australia v Ward* [2002] HCA 28). In 1994, before much of the development described above, the Wik peoples of western Cape York lodged a native title claim that included the southern part of Comalco's mining lease. This opened up a potentially lengthy period of uncertainty for the mining operation. In 1996 the High Court of Australia determined that the granting of a pastoral lease would not necessarily extinguish native title, but that the rights of leaseholders and native titleholders must be determined on a case-by-case basis (*Wik Peoples v Queensland* (1996) 187 CLR 1). This led to yet another lengthy and vociferous debate about the land tenure implications of native title

(Brennan 1998; Hiley 1997; Tehan 2003). The gradual defining of native title by case law continues to this day.

The WCCCA

Definition and purpose of the WCCCA

In response to the common law recognition of native title, Comalco's parent company Rio Tinto developed a stated policy of active recognition and formal engagement with indigenous peoples in the areas of its operations. On this basis, and recognising its own circumstances at Weipa, Comalco signed in 1995 a Memorandum of Understanding with the Cape York Land Council (CYLC) in which it was agreed that discussion towards a comprehensive agreement would be undertaken. From a legal perspective, Comalco did not require an agreement with the traditional owners of western Cape York to continue mining at its mining leases in the vicinity of Weipa. Nevertheless, the company understood that reciprocal recognition of the interests of traditional owners and its own, in its mining areas, was well overdue and that it should endeavour to achieve this by agreement. The negotiation of this agreement in the face of many distractions took six years and the WCCCA was finally signed on 14 March 2001 (Tiffen 2001).

During the same period elsewhere in Australia, Rio Tinto reached numerous land access and mine development agreements with indigenous peoples. These agreements frequently took the form of common law contracts, with or without reference to the native title process, with subsequent retrospective registration as ILUAs. In the context of Rio Tinto's indigenous community agreement-making in Australia, the WCCCA exists as the most comprehensive to date.

Details of the WCCCA

The WCCCA provides for ongoing mutual recognition and partnership between indigenous peoples of western Cape York and Comalco. It involves the 11 traditional owner groups of the region, the four communities of Napranum, Aurukun, Mapoon and New Mapoon, the CYLC, the Queensland Government and Comalco. It was registered under the *NTA* as an ILUA in August 2001. Its key beneficial aspects are summarised below:

- Charitable Trust controlled by majority traditional owners, with community representatives, State, CYLC and Comalco as invitees;
- \$2.5 million Comalco annual contribution, \$1.5 million annual Queensland Government contribution (both contributions are indexed to mine revenue and the CPI);

- 60 per cent of annual funding to the Trust is placed in long-term secure investments;
- \$500,000 Employment and Training Budget managed by Comalco to run programs endorsed by the Coordinating Committee;
- \$150,000 Cultural Awareness Fund, allowance for bursaries, cultural heritage and ranger programs;
- All Comalco staff to complete a Cultural Awareness Course run by traditional owners; and
- Coordinating Committee (all parties) meets regularly to address issues regarding Comalco's activities and implementation of the WCCCA.

Regional development is intrinsic in the WCCCA. Community financial benefits are directed into a Western Cape Community Trust, governed in the majority by traditional owner representatives. The Trustees have stipulated that the majority of funds be placed in secure long-term investments to provide a sustaining economic base for all its beneficiaries and future generations. The balance of funds is for current expenditure, to be disbursed under caveats (for specific purposes) to northern, central and southern community groupings.

Comalco's obligations and contributions cover Trust funding, employment, training and youth education programs, business enterprise development, the surrender and return of rehabilitated lands to traditional owners, other land transfers, and help with outstation⁴ development and cultural recognition programs. The Queensland Government, as a party to the WCCCA, contributes to the benefit stream. In return for the above, Aboriginal traditional owners have agreed to support all of Comalco's current and future mining operations on its western Cape York lease area.

The Coordinating Committee - comprised of two representatives from each traditional owner group, a representative from each of the four community councils, and a representative from Comalco, the State Government and the CYLC - deals with matters arising from the WCCCA. Comalco consults with the Committee regarding its mining operations and matters of Aboriginal training and employment, business development, cultural heritage protection and cultural awareness. The Committee is also required to consult with relevant traditional owners on issues of land management, regeneration plans, environmental applications, and any review of the land access permit system.

It should be pointed out that the WCCCA is neither unique nor precedent-setting in the context of Rio Tinto's more recent global operations. In the last decade, direct dealing and the negotiation of impact benefit agreements with an emphasis on regional development and local indigenous peoples' economic participation have characterised Rio Tinto's exploration access and mine development approvals in places as diverse

as northern Canada, Papua New Guinea, the USA and Madagascar. The context of the WCCCA negotiations was also similar in many respects to the challenges of Rio Tinto's global operations in these diverse regions across the globe. The similarities with the Diavik case are remarkable (see Chapter 4 this volume).

The WCCCA and the broader context

The development of the WCCCA arose from Rio Tinto's response to native title in Australia. The key purposes of the WCCCA for Rio Tinto were to recognise the standing of indigenous people and to enhance Rio Tinto's security of access to bauxite reserves on western Cape York. The WCCCA exists within a broader context, one that is influenced by global and national trends and is linked to the aspirations and capabilities of the stakeholders.

The effects of globalisation have influenced the interactions between mining companies and local communities worldwide. In the past decade, globalisation has seen the emergence of a 'tri-polar' world, one in which government, business and community each hold greater responsibility than in the past for negotiating outcomes for themselves (Harvey 2004). The transactional relationships between business and communities are increasingly direct and unmediated by government authorities. While central government may remain a mandate provider and regulator, communities and local governance bodies now frequently represent themselves (or are represented through public fora, delegate bodies or the agency of non-government organisations (NGOs)) when dealing with corporations. Thus corporate entities are now commonly expected to develop direct formal relationships with local communities and local governments, and are increasingly enabled to do so.

Widespread pressure for corporate responsibility also influences how mining companies and local communities interact. Increasing scrutiny of mining company performance in the areas of social and environmental impacts by regulators, the media, NGOs and civil society, demands the development of direct relationships between mining companies and local communities. The communication technologies that are driving globalisation provide the mining company with accurate information about local and global conditions, and local people with information about the company and what is happening elsewhere, thereby enabling effective responses to community-driven aspirations in relation to social and environmental impacts.

At a national level in Australia, the emergence of ILUAs reflects these globalisation and governance trends. The new context requires mining companies to build and maintain distinctively local relationships based on internal capabilities such as the ability to handle and resolve social issues and foster regional development. These capabilities go far beyond those

that were historically applied to social or environmental impact problems, where the aim was to influence public opinion rather than to find a solution to an identified problem. What is now required is the ability to work with people and communities proactively and transparently to resolve underlying issues.

The new context brought about by globalisation also requires mining companies and local indigenous communities to focus on mutual benefit and obligation, and hence to establish direct formal relationships with one another. Thus, ILUAs have arisen in Australia in response to native title legislation and the desire of mining companies to access mineral resources on indigenous land with certainty and security of future access. Without the technical competencies of the mining company, the ore would remain in the ground or be mined less profitably, thus the economic benefit opportunity would be diminished. However, to obtain the agreement of stakeholders, such as the traditional owners of western Cape York, the mining company needs to convince them that the share of proceeds will be beneficial. This behoves the company to put together a set of relational contracts that maximises the value of the venture for all parties. Such an agreement would typically involve agreed and defined payments to local communities within a total package of regional and community capacity development, including mainstream economic participation. A focus on mutual benefit and obligation, and a commitment to sustainable development, is essential for establishing such agreements.

Within Australia, the need for genuine regional development has promoted a shift towards self-governance for local indigenous communities. Escalated service delivery managed from afar through existing state structures can arguably exacerbate the potential for dependency. While increased exogenous provision of social services can temporarily relieve want, it is as transient as most mining operations and fails to create an enduring basis for regional development. Similarly, one-off cash payments to individuals – paid as mitigation for impact on family land connection – are unlikely to generate a sustaining basis for intergenerational community development. The authors contend that a critical factor in attaining sustained regional development is to administer responsible allocation of the increased resources through self-governance based on accountable community leadership by those empowered by customary authority.

The government must also examine the effectiveness of its contribution to achieving sustainable regional development. The negotiation of an ILUA should result in the mining company being responsible for generating the value-adding enterprise activity and the relevant government being responsible for ensuring that there is a sustainable basis (that is, infrastructure and services) for delivering a net benefit to the regional economy. However, a temptation is for the government to offset its service responsibilities rather than build on the

synergies generated to leverage enhanced regional development. Governments need to ensure they play an active role in working with all stakeholders in seriously evaluating the allocation of resources to make sure sustainable opportunities for regional development are nurtured. One means is through redirecting a share of the royalties generated by the growth of the mining enterprise toward self-governing development of regional infrastructure and services.

Finally, it is interesting to note that the corporate sector can play a pivotal role in promoting sustainable regional development. While the underlying motivating trend at a national jurisdictional level is the formal recognition of indigenous land connection, the local facilitating response has actually frequently emerged from the corporate sector.

This chapter will now specifically explore the implementation of the WCCCA, and assess the requirements for the effective rolling-out of an ILUA in Australia.

Implementation of the WCCCA – the review

Purpose, scope and methodology

At Comalco's behest, in the period from September to December 2003, the authors undertook a review of the progress thus far in implementing the WCCCA. The purpose of the review was to assess the progress on the key activities prescribed in the WCCCA, to review the implementation processes, identify and examine any issues which were impeding effective implementation, and to identify and recommend any actions needed to ensure that the reasonable aspirations of the stakeholders could be met.

The review was instigated largely in response to frustration expressed by some parties to the Agreement – including people holding positions on the WCCCA Main Trust and the Coordinating Committee – regarding its slow implementation. Beyond this, Comalco initiated the review as a means of assessing its formal community relations vehicle at Weipa.

The review covered the assessment of Comalco's performance in the following areas:

- Complying with the obligations set out for Comalco in the WCCCA;
- Employing appropriate processes, including the interface with stakeholders, for implementing its obligations under the WCCCA;
- Providing assistance to the WCCCA Trusts and the Coordinating Committee (to achieve their WCCCA objectives);
- Developing the Weipa apprenticeship and traineeship schemes, and providing employment opportunities for local apprentices;

- Achieving employment targets for local Aboriginal people;
- Reporting to signatories, local communities and other stakeholders on matters relating to the implementation of the WCCCA; and
- Reaching a satisfactory level of implementation, including the provision of specific recommendations to enhance the WCCCA outcomes.

To obtain data for the review, oral submissions were sought and obtained from a wide range of local stakeholders, including traditional owners, Coordinating Committee members, Trustees, community councils, Comalco Weipa employees, the CYLC and Weipa residents. The responses were collated into categories and analysed.

Review findings

The review showed that good progress had been made in implementing the Agreement in the areas of employment and training, cultural heritage protection, the initial set up of governance and administration systems, and internal company support for local indigenous businesses. However, it was revealed that there was a general lack of knowledge, and hence understanding, among Comalco employees and community members, of the content and intent of the Agreement.

This lack of understanding was manifest in the following areas:

- Poor communication of the WCCCA's history, purpose and contents;
- Lack of a comprehensive plan to implement the WCCCA (with targets, resource planning and timelines);
- Poor understanding on the part of Comalco leadership of the need to assume personal and line accountability for implementing the WCCCA;
- Lack of a clear definition of team member responsibilities and a lack of managerial accountability within Comalco's Communities and Human Resources areas;
- Delay in formalising a site-specific Aboriginal Relations Policy;
- Need for greater collaboration between Comalco, government and community institutions regarding cultural heritage protection and the development and operation of permit systems;
- Lack of support and capacity beyond Comalco for local indigenous business development;
- General lack of appreciation of the need for, and the WCCCA's role in, the development of a robust Western Cape economy; and
- Weakness within the WCCCA trusts in terms of ongoing governance and administrative capacity.

All of the above issues have been, or are now being, addressed by Comalco.

The authors' study of the implementation of the WCCCA, along with our observations of other ILUAs and indigenous community agreements in Australia, have identified common issues relating to the effective implementation of such agreements. In order to explore these, this chapter will now focus on three key themes (which effectively encompass all the issues listed above) identified during the review of the implementation of the WCCCA. The key themes are: company leadership in implementing the agreement; development of a robust regional economy; and local governance and administration.

Company leadership in implementing the WCCCA

In common with observations from other mines and indigenous community agreements in Australia, for instance at the Century Mine and the Gulf Area Agreement⁵ (Trigger 1997; Martin 1998; Martin, Hondros & Scambary 2004; Hondros 2003), line managers at Weipa have been slow to recognise their accountability to implement the WCCCA. The authors found that there is a tendency for line managers and employees to pass responsibility to the Communities and Human Resources Departments, rather than for each operational manager to take responsibility for the implementation provisions of the WCCCA relevant to their own work area. This lack of comprehensive embracement is starkly apparent to the broader community and leads to scepticism from other stakeholders about the company's overall commitment.

The authors contend that good leadership, as in all things, is fundamental to achieving the successful implementation of an agreement. It is also critical that each work area understands its specific responsibilities. This requires clarification of policy, cascaded accountabilities based on genuine understanding, a plan, and a set of guidelines specific to work area responsibilities. On this basis, an embedded monitoring and review process could be established and all site manager meetings, for instance, could then include a standing agenda item to regularly assess their work area progress on implementing the WCCCA. Leadership incentives may be as diverse as providing recognition and reward for work area achievements - based on measurable outcomes - in implementing an agreement. Other initiatives may be as simple as the periodic convening of site management meetings in neighbouring communities, setting aside time for formal and informal engagement with traditional owners and community leaders.

The development of a robust western Cape York economy

Currently, all stakeholders poorly understand the underlying demographic trend on Cape York, and its societal consequences. Studies commissioned by Rio Tinto (Taylor & Bell 2001) show that indigenous participation in the Western Cape economy is not keeping pace with population growth nor the economic opportunities offered by improved regional access and mining operation ramp-up. Comalco, like all companies operating in a primary, capital intensive industry with a small overall workforce, cannot meet the employment needs of Cape York's young, rapidly growing population. The development of secondary and tertiary enterprises on western Cape York - both stand-alone enterprises and ones with linkages to Comalco's operations - is therefore essential for comprehensive, sustainable economic development and social stability in the region.

Severe impediments remain for the local indigenous community to achieve full participation in mainstream economic activity. For instance, while there is evidence of greater emphasis and support from Comalco for local indigenous people to contract with Comalco, the current ability of regional indigenous organisations to compete successfully for many Comalco contracts is limited. One reason is that Comalco is obliged to apply consistent standards of safety, cost and performance across its contracted activities. Regrettably, a number of contracts awarded to regional indigenous organisations have been terminated due to lack of performance in one or other of these areas.

Under the auspices of the WCCCA, the authors posit that a positive response to the requirement for sustainable economic development may include links with State Government programs, local and national NGO partnership programs, and business development programs. Links could be established between these programs (and partnerships) and the WCCCA Trusts and the Coordinating Committee. These links could support a business development function based in the WCCCA office. The authors suggest that the role of this function could include:

- Establishing safety systems and developing specific capabilities for small businesses to enable them to work on the mining leases;
- Assisting both potential indigenous Comalco employees and contracting businesses (with local indigenous ownership), to comply with Comalco's contracting and procurement guidelines, through assistance with setting up small business systems;
- Being directly involved in, and providing advice, assistance and Board membership to local education and training facilities and developments;
- Proactively assessing, facilitating and providing mentor support for entrepreneurial business development which extends beyond direct involvement with current mine operations - in particular,

SETTLING WITH INDIGENOUS PEOPLE

those ventures which require access to current or surrendered mine lease areas;

- Working closely with third parties, including government, to develop local service and supply models, in such areas as: local economic modelling; procurement; health and safety; and environmental and community partnerships; and
- Exerting dedicated effort to engage, through State and federal government programs, small business assistance support for western Cape York.

Comalco is considering establishing this business development function in the near future.

Local governance and administration

Immediately after the WCCCA was signed, Comalco made good progress in establishing the WCCCA Trusts, the Coordinating Committee, the relevant support structures, and in appointing an able secretariat. The recommendations made by Comalco staff for selection criteria for Trustees, and the selection by traditional owner groups of Trustees and Coordinating Committee members, proved highly successful overall. Trust Directors were selected by traditional processes within each traditional owner group, where it was recognised that younger generations of traditional owners were sometimes better placed to assume such roles. Those selected have demonstrated diligence in exercising responsibility in the directorship role, representation has remained stable and attendance records strong. Directors have adopted a considered approach to the allocation of Trust funds. Representation on the Coordinating Committee has been more fluid, with a core of traditional owners and Community Council representatives in regular attendance and other traditional owner groups alternating representatives depending on the issues and agenda availability. However while Comalco provided subsequent development and support for Trust Directors, it was under-resourced and presented too theoretically for local consumption.

There is good collaboration between the Coordinating Committee and Comalco in managing the ongoing operational matters that arise from the WCCCA obligations. Comalco's communication and consultation processes are working satisfactorily and Comalco is meeting its obligations under the WCCCA. However, the lack of governance and administrative experience of the WCCCA Trusts and the Coordinating Committee is a major issue, which has led to significant delays in the disbursement of benefits, poor communication between stakeholders and inefficient administration practices. It is apparent that, if left unattended, this will continue to build frustration and concern about the effectiveness of the WCCCA main trust and the regional sub-trusts in delivering the

outcomes envisaged by the Agreement – even to the extent that it will fuel perceptions that the WCCCA itself is deficient.

The authors observed a general lack of resources within the WCCCA secretariat to provide the guidance and advice sought by Trustees and stakeholders to the Trusts. Comprehensive independent mentor support and guidance for WCCCA Trustees is required over time, not short theoretical courses. The authors believe this issue is fundamental to the successful operation of all benefit receiving Trusts – it needs to be addressed as a regional development issue of national importance.

The authors also believe that the WCCCA Trusts and Trustees have a prime accountability to build the capacity of local indigenous people, communities and organisations so that they may lead the development of a robust economy in western Cape York. The Trustees' capacity to achieve this goal must be nurtured by Comalco's leadership, in collaboration with other stakeholders such as State Government agencies, not-for-profit organisations and local government. Specific initiatives may include:

- Initiating workshops on leadership and entrepreneurial skills for Trust and Coordinating Committee members, traditional owners and local community members;
- Encouraging Trustees, traditional owners and local community members to seek expert advice on business planning; assessing commercial opportunities; operating joint ventures as options for commercial and business development (where appropriate); and establishing sound financial arrangements for investments in enterprises and regional development opportunities;
- Providing assistance to Trustees, traditional owners, local community members, personnel from local business hubs and members of other regional entities, to identify the need for expert advice and assistance, regarding regional development opportunities;
- Selecting an experienced business person or civic professional (perhaps recently retired) to fill a role as an independent main trust director, who could achieve broader support for emerging local Aboriginal business activities by enhancing business linkages at a State and national level.

The review of the implementation of the WCCCA and the observations by the authors of other ILUAs have revealed that there are key areas which require attention in order for such agreements to be implemented effectively. Focused and diligent leadership on behalf of the mining company is essential to ensure that the company is working toward implementing the agreement from *all* levels of the organisation. Local community businesses need support and assistance to develop their capacities and skills so that they may effectively participate in the regional mainstream economy – this is critical for the development of a robust

regional economy. Additionally, there is a need for mining companies to assist in developing leadership capacity within the local community for management of the trusts and for developing self-governance.

Implications for mining companies

The key findings from the review have fundamental implications for all mining companies that are parties to ILUAs.

Viewed in the light of both the broader context and direct observation of the issues involved with implementing the WCCCA, it can be seen that for Comalco's leadership and management, things have changed substantially. In effect, the executive attention formerly paid to maintaining the certainty of mining tenure issued by the Queensland Government – which required competency in legal affairs and public policy – must now be complemented by skills in handling and resolving social issues and fostering regional development. This has required a rapid shift in workplace competencies for all employees, but particularly for managerial staff. Complex cross-cultural communication is now required to fulfil a wide range of workplace and civic responsibilities. These include recruitment and retention of indigenous employees, participation in trust governance, participation in the affairs of the community organisations involved in the Agreement, business interactions with those contracting with Comalco for services, protection of cultural heritage, and protection of the environmental value of the mine lease areas and of Weipa township.

Companies need to assist local indigenous communities to acquire new capabilities. For instance, the new emphasis on local governance has brought great responsibility to the indigenous peoples of western Cape York, presenting them with challenges for which they have not been prepared by recent history. To ensure the successful implementation of ILUAs, companies must support communities in the shift to self-governance. The company's contribution must extend to general community capacity-building through assistance with governance training, and advice on administration and business development.

The authors believe that companies must deepen their level of host community involvement. In order that they are effectively involved with local communities, contribute to local capacity-building and generally fulfil their obligations under a land use agreement, companies need to become involved with local institutions working on community wellness programs. Community wellness may not be a concept that sits comfortably with mining executives, as it includes confronting issues such as governance deficit, alcohol abuse, domestic violence, child welfare, inter-community conflict, family breakdown and general health and lifestyle awareness. These are all well beyond the realm of a miner's professional training. However, these issues require attention on a whole-

of-community basis – they are issues that can no longer be dismissed as residing with ‘them, not us’. For companies, this requires a real shift in mindset and a deepening in the level of involvement in the life of the community. Similar conclusions have been drawn by Senior (1998) with respect to the negotiation process of the Yandicoogina Land Use Agreement between Hamersely Iron Pty Ltd and Gumala Aboriginal Corporation in the Central Pilbara signed in 1997.⁶

An environment of mutual understanding and respect between communities and mining companies is essential. In remote resource-rich regions such as western Cape York, where arguably the two greatest societal influences are the mine and the local indigenous people, respective futures are inexorably entwined and the need for mutual respect is paramount. Hence, for instance, the indigenous community’s high expectations of the company and its employees to respect local culture and lore must be matched with reciprocal and equal respect for the strict safety standards, the cost and productivity targets set by international competition and the employment policies of the company.

All of these elements – development of new capabilities, deepening of community involvement, increased mutual respect and understanding – must occur at an operational level, they cannot be left solely to senior management, community leaders, community specialists or designated liaison roles. Communication of the need to take responsibility, and communication regarding the distribution and execution of these responsibilities, must take place in a complete and integrated manner within and across both the company and the community, at all levels.

The emergence of ILUAs in Australia has presented significant changes for both mining companies and indigenous local communities. However, the magnitude and depth of the required changes has been underestimated, and remained little understood until the implementation phase of these agreements.

Conclusion

The negotiation of the WCCCA arose from Rio Tinto’s response to native title in Australia – in turn reflecting local governance demands in a broader globalisation context – and the negotiation of other land use agreements have followed a similar pattern. The key purpose of the WCCCA – for Comalco and Rio Tinto – was to recognise the standing and enhance the economic opportunity of indigenous people on western Cape York, and hence to enhance Rio Tinto’s security of access to the region’s bauxite reserves.

In the Australian context, the WCCCA established a benchmark in its comprehensive coverage of terms in a social contract between a mining enterprise, neighbouring indigenous community stakeholders and a State government. Its operational infrastructure is based on mutual obligation,

regular consultation and community self-governance of a revenue stream directed toward promoting regional development sustainable over generations.

The WCCCA exists within a broader context, one that is influenced by global and national trends and is linked to the aspirations, intentions and capabilities of local stakeholders. The context in which such agreements have emerged, and the agreements themselves, have necessitated a shift in responsibilities, capabilities and focus for mining companies and neighbouring communities. Whilst this is understood going into negotiations, the magnitude of the shift has been generally underestimated by both communities and mining companies.

The findings from the WCCCA implementation review reveal that all parties to an agreement must embrace cross-cultural learning, the development of new capabilities and a mutual understanding and respect that infiltrates all levels of the company and the local community. Companies must adopt a deeper and more comprehensive level of community involvement than in the past and contribute to the future capacity-building of the indigenous community. Where once executive attention in the mining company was primarily focused on maintaining the certainty of mining tenure issued by the relevant central government, much of this attention must now be redirected towards embedded involvement in the local community and the region's economic development.

It is evident that the changes required in mining companies and local indigenous communities represent significant shifts, over generations, for both entities. The degree of societal change necessary for success to prevail requires considerable time, persistence, patience and understanding from all sides.

For the company, whilst the formulation and implementation of suitable policies and procedure are necessary conditions for this to occur, real achievement can only come through developing a pervasive culture of social competency.

References

- Australian Government Solicitor 1998, 'The Making of the Native Title Act', in *Native Title – Legislation with Commentary by the Australian Government Solicitor*, 2nd edn, Australian Government Solicitor, Canberra.
- Brennan, F 1998, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners*, University of New South Wales, Sydney.
- Comalco Limited nd, *Weipa*, viewed 6 January 2006, <<http://www.comalco.com/freedom.aspx?pid=204>>.
- Crooke, P, Harvey, B, Langton, M & Suchet-Pearson, S 2003, *Western Cape Communities Co-existence Agreement Implementation Progress Review – Summary Report*, Unpublished Comalco report, Brisbane.
- Goot, M & Rowse, T 1994, *Make a Better Offer: The Politics of Mabo*, Pluto Press, Sydney.

- Harvey, BE 2004, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation', in M Langton, M Tehan, L Palmer & K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne, pp 237-51.
- Hiley, G (ed) 1997, *The Wik Case: Issues and Implications*, Butterworths, Sydney.
- Hondros, J 2003, 'Overview of the Implementation of the Century Mine Gulf Communities Agreement', paper presented at the Rio Tinto Community Development Workshop, Beechworth, 8-9 December.
- Law Book Company Limited 1993, *Essays on the Mabo Decision*, Law Book Company, Sydney.
- Martin, D 1993, 'Autonomy and Relatedness: An Ethnography of the Wik People of Western Cape York Peninsula' PhD thesis, Australian National University, Canberra.
- 1998, 'Deal of the Century? - A Case Study from the Pasminco Century Project', *Indigenous Law Bulletin*, vol 1, no 11, pp 4-7.
- Martin, D, Hondros, J & Scambary, B 2004, 'Enhancing Indigenous Social Sustainability through Agreements with Resource Developers', paper presented at the Minerals Council of Australia's Annual Sustainable Development Conference, Melbourne, 25-9 October, viewed 6 January 2005 <http://www.minerals.org.au/_data/assets/pdf_file/6039/8B-1MartinDavid.pdf>.
- Pearson, N 1993a, '204 Years of Invisible Title', in MA Stephenson & S Ratnapala (eds), *Mabo: A Judicial Revolution*, University of Queensland Press, Brisbane, pp 75-95.
- Senior, C 1998, 'The Yandicoogina Process: A Model for Negotiating Land Use Agreements', *Land, Rights, Laws: Issues of Native Title*, Regional Agreements Paper, no 6, viewed 23 January 2006, <<http://ntru.aiatsis.gov.au/ra/RAIP6.pdf>>.
- Sutton, P 1978, 'Wik: Aboriginal Society Territory and Language at Cape Keerweer, Cape York Peninsula, Australia', PhD thesis, University of Queensland, Brisbane.
- 1985, *Suggestion for a Bicameral System*, *Anthropological Forum*, vol 5, no 3, pp 395-9.
- Taylor, J & Bell, M 2001, *Revised Indigenous Population Estimates for Cape York Peninsula*, internal report, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra and Queensland Centre for Population Research, The University of Queensland, Brisbane.
- Tehan, M 2003, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*', *Melbourne University Law Review*, vol 27, no 2, pp 523-71.
- Tiffen, N 2001, 'Legal Environment Influencing the Negotiation, Form and Content of the Western Cape Communities Coexistence Agreement between the Peoples and Communities of Western Cape York, Comalco, the Cape York Land Council and the Queensland Government', PhD thesis, University of Melbourne, Melbourne.
- Trigger, D 1997, 'Reflections on Century Mine: Preliminary Thoughts on the Politics of Indigenous Responses', in Smith, D & Finlayson, J (eds) *Fighting over Country: Anthropological Perspectives*, Research Monograph No 12, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, pp 110-28.
- Von Sturmer, JR 1978, 'The Wik Region: Economy, Territoriality and Totemism in Western Cape York Peninsula, North Queensland', PhD thesis, University of Queensland, Brisbane.

Cases

Mabo v Queensland (No 2) (1992) 175 CLR 1.
Western Australia v Ward [2002] HCA 28.
Wik Peoples v Queensland (1996) 187 CLR 1.

Legislation

Native Title Act 1993 (Cth).
Racial Discrimination Act 1975 (Cth).

Agreements

'Comalco Indigenous Land Use Agreement' (ILUA) (24 August 2001), ATNS Database, viewed 20 January 2006, <<http://www.atns.net.au/biogs/A000088b.htm>>.
'Gulf Communities Agreement' (September 1997), ATNS Database, viewed 20 January 2006, <<http://www.atns.net.au/biogs/A000081b.htm>>.
'Yandicoogina Land Use Agreement' (March 1997), see ATNS Database, viewed 20 January 2006, <<http://www.atns.net.au/biogs/A000875b.htm>>.

Notes

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- 2 An ILUA is a voluntary agreement between a native title group and others about the use and management of land and waters. Under the *Native Title Act 1993 (Cth) (NTA)*, an ILUA registered with the National Native Title Tribunal is legally binding on the people who are party to the agreement and all native title holders for that area even if they were not involved in the agreement. The ILUA provisions, included as part of the 1998 amendments to the *NTA*, accord flexibility in that agreements can be negotiated to suit particular circumstances. They can be made separately from a formal native title process, but may also be a step towards or part of a native title determination. Note that elsewhere in the world similar agreements are commonly referred to generically as Impact Benefit Agreements.
- 3 Note that the WCCCA is also known as the Comalco Indigenous Land Use Agreement (24 August 2001), for further details, see ATNS Database at <<http://www.atns.net.au/biogs/A000088b.htm>>.
- 4 Outstations developed when indigenous groups, led by senior traditional owners, left the large government settlements from the 1970s onwards to create smaller family-based residential communities with the aspiration of providing a more traditional lifestyle for the members of their customary group. There are hundreds of such outstations, most on land with a form of Aboriginal title and many are occupied seasonally.
- 5 Also known as the Gulf Communities Agreement (September 1997), for details see ATNS Database at <<http://www.atns.net.au/biogs/A000081b.htm>>.
- 6 For details on the Yandicoogina Land Use Agreement, see ATNS Database at <<http://www.atns.net.au/biogs/A000875b.htm>>.