



THE UNIVERSITY OF
**WESTERN
AUSTRALIA**



Curtin University

CURTIN UNIVERSITY | UWA RESEARCH REPORT

Aboriginal Assets?

THE IMPACT OF MAJOR AGREEMENTS
ASSOCIATED WITH NATIVE TITLE IN
WESTERN AUSTRALIA

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Executive Summary

As the number and geographical reach of native title determinations and registered claims increases under the regime created by the *Native Title Act (NTA)* of 1993, the legal framework surrounding native title is becoming an increasingly integral component of the nation's statutory, governance and policy fabric. Areas over which native title has been determined, or are under application, now account for around 85 per cent of Western Australia's land mass. With the terms and conditions of access to so much of the State's land and resources affected, the efficacy of the native title system against economic and social objectives is of great importance. This is especially so for the Aboriginal custodians for whom cultural connection to those lands is also integral to their identity and wellbeing.

Agreements negotiated under the native title regime may, from a simple economic perspective, be seen as having the potential to address disadvantage faced by Aboriginal and Torres Strait Islander Australians and to promote Aboriginal economic independence. This applies particularly to regional Western Australia, where remote communities are often co-located with major resource developments. Understanding how such opportunities can best be harnessed to benefit Aboriginal people in the State is critical. However, evidence globally suggests leveraging benefits from resource wealth and the extractive industries is not always straightforward. Indeed in numerous cases resource wealth has led to diminished socio-economic and cultural outcomes for many of those most effected. This phenomenon is sometimes referred to as the 'resource curse'. In Australia, there is to date scant evidence regarding how effective the native title regime has been in providing lasting benefits from agreements related to native title claims and determinations.

This report addresses the question of how effective agreements arising from native title determinations are at meeting the needs and aspirations of Aboriginal peoples who have achieved, or are pursuing (through registered native title claims), legal recognition as native title holders¹. It is based on a review of relevant academic and 'grey' literature as well as case studies of the experiences of three Western Australian Aboriginal native title groups in their efforts to leverage agreements with government and industry to enhance their wellbeing and pursue their aspirations. The case studies focused on two existing Indigenous Land Use Agreements (ILUAs); the relatively young Yindjibarndi/Rio Tinto Iron Ore agreement (Pilbara region) and the much older Ord Final Agreement (Kimberley region); plus the early experiences of the Gooniyandi Aboriginal Corporation (Kimberley region) in navigating the native title framework and agreement making processes.

There is a significant gap in the literature regarding the use of assets and benefits received by Aboriginal native title groups, and the structures used to manage them. This research begins to address that deficit. Drawing on interviews with key

¹ Though the case studies reported on here all concern claims that have been determined, the focus of the report is equally relevant to claimant groups with accepted native title claims who have procedural rights to negotiate over developments occurring within their claim area.

stakeholders involved in stewarding assets associated with native title-related agreements, it provides insights into the arrangements for managing those benefits and assets, with a focus on the use of trusts. It also begins to explore how Aboriginal groups themselves evaluate the outcomes of agreements. Given the relatively small number of case studies included in the project, and the highly varied demographic, socio-cultural and economic contexts within which such agreements are developed, the findings cannot be used to draw broad comparative conclusions regarding the best models for asset management structures and governance arrangements, or to identify a standard set of best investment and development approaches. Rather, this study provides a preliminary set of comparative observations regarding the challenges and opportunities associated with managing and using assets derived from these agreements.

Agreement-making Process

Under the NTA (1993) any corporation, agency, or institution that intends to undertake an activity that will impact native title rights and interests, must negotiate to provide compensation for the loss of those rights or interests, with the relevant native title group if their claim has been registered or determined. Usually, this occurs through a form of agreement-making process. The various types of agreements can be grouped broadly under the two main processes by which they are arrived at: Future Act agreements (determined through the 'Right to Negotiate' (RTN) process) and Indigenous Land Use Agreements (ILUAs).

These two broad types of agreement, and their associated agreement-making processes, determine the nature of benefits accruing to native title groups from developments that impact native title rights and interests. While these agreements do not always stipulate how the agreed suite of compensation and benefits will be *managed and distributed* (practices that can heavily mediate the long-term outcomes of agreements), they do define the resourcing parameters within which native title holder groups can work to achieve their aspirations. Furthermore, agreement-making processes can often have a highly significant bearing on outcomes in terms of the extent to which they foster Aboriginal and Torres Strait Islander self-determination.

The research revealed that native title groups face a number of significant barriers in trying to leverage positive outcomes through the agreement-making process. Key among these are the weak bargaining position of native title groups inherent in the legislative framework, and the lack of capacity of many Prescribed Bodies Corporate (PBCs) and registered claimant groups to bargain, and manage their native title interests effectively. The bargaining power of native title groups is often limited, particularly through the RTN process, because of the entrenched disadvantage such groups face in entering negotiations, and because of procedural limitations in negotiating processes. Under the provision of Future Act agreements, for example, if agreement cannot be reached within six months, the dispute can be referred to arbitration: a process that historically does not favour the interests of native title

groups, thus reducing their initial bargaining position and potentially compromising the negotiation of benefits and conditions that are important to the native title groups.

Objectives of Agreements

The findings reveal a diversity of objectives among traditional custodian groups regarding agreement-making and, unsurprisingly, differing views regarding the outcomes achieved through those agreements. There is evidence of overarching aspirations among Aboriginal groups that the granting of native title should facilitate cultural continuity, and that agreement-making should therefore facilitate financial support for cultural preservation and access to country for the purposes of traditional activities such as hunting, fishing and ceremonial practices. Economic outcomes, such as employment enterprise development and the alleviation of poverty also featured as common objectives of agreement-making, often in the context of achieving self-determination and empowerment.

Managing Assets

Once agreements are finalised, native title groups are often poorly resourced and lack the expertise needed to leverage maximum benefits from them. Considerable time and resources can be engulfed in simply managing the administrative requirements of being native title holders. Consistent with the existing literature, the case studies revealed examples of PBC directors committing time over many years on an unpaid basis: a commitment that precludes alternative employment. Furthermore, the onerous requirements to manage native title business (such as negotiating agreements and assessing development applications) can detract from the strategic tasks of establishing long-term development plans that leverage agreement assets and robustly monitor outcomes.

There are also considerable challenges involved in the more fine-grained management of assets associated with native title agreements. Trusts are used extensively as a means to hold and manage assets arising from agreements. Identified challenges include managing tensions between balancing immediate needs and longer term investments, as well as developing appropriate and transparent protocols for distribution among potential beneficiaries. There are often additional tensions between cultural obligations and legal requirements in managing and distributing trust assets, as well as considerable variation regarding the most appropriate models for ensuring trust governance is robust and representative. Both the pros and cons of trusts were evident in the case studies, with some participants expressing appreciation that particular trust structures provided a buffer against competing demands and enabled funds to build up for longer-term, strategic investments. Others expressed frustration at the limitations imposed by particular trust management models. Overall, the findings indicate that while there are significant challenges associated with asset management, models of trust governance have improved considerably in the last decade.

Outcomes

The case studies report both positive and negative assessments of the outcomes of agreements. Generally, the Yindjibarndi interviewees were positive about the ILUA with Rio Tinto, while there was strong resentment among Muriuwung-Gajerrong interviewees regarding the Ord Final Agreement. The differences appear to be largely a result of differences in the processes adopted in reaching agreement, and the content of negotiations, rather than the subsequent management of associated assets. Neither of the established case study agreements identified formal processes for evaluating outcomes achieved from assets associated with the agreements. However, informal evaluation processes were frequent, with participants describing the cycle of feedback from members, and particularly Elders, as a crucial mechanism for assessing progress. In the case of Yindjibarndi, the agreement is still very recent, with few ventures having been established for long enough to quantify and track outcomes. In the case of MG Corporation, the challenges associated with accessing assets (particularly land) associated with the agreement were the primary focus of discussions. Inexperience in negotiating agreements and the absence of rigorous evaluations relating processes to outcomes suggest native title groups to date will have had limited capacity to assess and bargain for the best options for the future management of assets at the same time as they are negotiating for those assets.

In contrast to those large agreements, there have been no major economic developments on Gooniyandi-determined land over which to negotiate. However, the Gooniyandi Aboriginal Corporation has dealt with a constant stream of Future Act applications in which parties attempt to gain exploration licenses using the 'expedited procedure' that circumvents the requirement to negotiate with the PBC. Findings from the study foreshadow considerable complexities in determining the appropriate distribution of assets if and when major projects proceed, because of the more dissolved nature of the governance of Gooniyandi native title determination. In this case, there is an apparent misalignment between the level of representation at which native title determinations are made, and the level at which custodianship of land is traditionally recognised. While native title determinations and their associated PBCs often represent a number of Aboriginal and Torres Strait Islander peoples, responsibility and custodianship is often attributed to smaller language or family groups.

Conclusions and Recommendations

When considered as a means to achieving self-determination for Aboriginal and Torres Strait Islanders, as well as equality in socio-economic outcomes between Indigenous and non-Indigenous Australians, there are major shortcomings of the agreement making process established under the Native Title Act (1993). One of the chief limitations is that the native title process positions traditional custodians primarily as bound beneficiaries of the exploited resources on their land, rather than as having rights to govern and steward it in wholly self-determined ways.

The case study of the Yindjibarndi-Rio Tinto ILUA suggests agreement making can offer positive outcomes, but this is contingent on the industry partner adopting a strong commitment to the traditional custodians' aspirations and acting in good faith. For these and other reasons, native title agreements negotiated either as ILUAs or through the Future Act process, cannot be seen as a silver bullet to resolve Indigenous disadvantage in Western Australia.

While wholesale changes to the native title framework are unlikely, there is a need, at very least, to enhance the capacity of traditional custodians to leverage financial outcomes in line with their peoples' aspirations. Increased resourcing of PBCs and training for board members is a policy imperative in this vein. Likewise, targeted financial management, planning and governance training for trust and PBC directors is important to ensuring trusts contribute to the leveraging of benefits from agreements. Further recommendations are made for a clear statement of public service obligations such that these do not become entangled in, or reduced as a consequence of, negotiated benefits of agreements. Finally, there is a need for further case study research that collects views of a wider range of affected parties than was possible in this project and that monitors outcomes of agreements over time. There is also a critical need for the collection of baseline data and improved evaluation methods that can support critical assessment of agreements against the objectives and aspirations identified by traditional custodians.

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List of Abbreviations

ABS	Australian Bureau of Statistics
ATNS	Agreements, Treaties, and Negotiated Settlements (Project)
CALM	Conservation and Land Management
CATSI	Corporations (Aboriginal and Torres Strait Islander) Act 2000
CFT	Community Foundation Trust
COAG	Council of Australian Governments
FMG	Fortescue Metals Group
GAC	Gooniyandi Aboriginal Corporation
ILUA	Indigenous Land Use Agreement
KLC	Kimberley Land Council
LANTU	Land, Approval and Native Title Unit (WA Government agency)
MG	Muriuwung-Gajerrong
MG Corp	Yawooroong Muriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation
NAC	Ngarluma Aboriginal Corporation
NNTT	National Native Title Tribunal
NTA	Native Title Act 1993 (Cwth)
OFA	Ord Final Agreement
ORIC	Office of the Registrar of Indigenous Corporations
PBC	Prescribed Body Corporate
PM&C	Commonwealth Department of Prime Minister and Cabinet
RNTBC	Registered Native Title Body Corporate
RTN	Right to Negotiate
RTIO	Rio Tinto Iron Ore
TO	Traditional Owner
WMYAC	Wirlu Murra Yindjibarndi Aboriginal Corporation
WA	Western Australia
YAC	Yindjibarndi Aboriginal Corporation
YCCL	Yindjibarndi Community and Commercial Ltd

Acknowledgements

The research team would like to sincerely thank the three participating Prescribed Bodies Corporate. We recognise the value of both your time and expertise, and acknowledge that this project would not have proceeded without your generous involvement. Further thanks to Denis O'Donovan, John Acres and Lindsay Bridge at the Department of Regional Development who provided valuable and detailed feedback on the research and final report. We are grateful to Ian Murray and Joe Fardin from the UWA Faculty of Law who provided valuable feedback on an earlier draft. We are also grateful to Alistair Sisson for assistance with map preparation.

The project was funded by the Department of Regional Development, Western Australia. The findings and views expressed in the report, however, are those of the authors and should not be attributed to the Department or to those individuals.

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1

Introduction

1 Introduction

In the last 15 years in particular, there has been an acceleration and normalisation of agreement-making between Aboriginal and Torres Strait Islander parties, and State and commercial interests in relation to access to and use of lands and waters where native title has been, or is in the process of being legally determined. In Western Australia (WA), two key factors have contributed to the increasingly significant role of native title in the legal, political, economic and socio-cultural landscapes. The first is the emergence of a specific legislative framework built around the *Native Title Act (NTA)* (1993) and its amendments, which provides Indigenous Australians with a legal mechanism for pursuing their land and sea country rights. The second was a major resource boom that began in 2003 and fostered a proliferation and expansion of oil, gas, and mineral extraction projects in the State, and a consequent increasing interface between Indigenous interests/rights and public and commercial interests.

Securing rights over their customary homelands has long been recognised as a critical means for Aboriginal and Torres Strait Islander Australians to reclaim and rebuild cultural and economic wealth and wellbeing. This stems not only from the cultural and spiritual significance of those lands, but also from the practical necessities of securing a resource-base for economic prosperity. The mining industry has always featured prominently in this discourse, in part because many mining operations take place on or near Indigenous lands and in remote areas where opportunities for generating income and employment are otherwise limited (Langton & Longbottom 2012; O'Faircheallaigh 2010, 2013a).

A political push for Indigenous land rights gathered momentum in the early 1970s (Rowse 2002) and the legal environment changed dramatically with the High Court's 1992 Mabo judgement that overturned the legal fiction of *terra nullius*: the assumption that Australia was unoccupied at the time of British settlement. Following long-standing principles established in Common Law, the Mabo judgement meant that Aboriginal and Torres Strait Islander groups who could show a continuous connection to their customary lands since colonisation, held native title rights over those lands, provided the land had not subsequently been acquired through another Act of Parliament (Kildea 1998).

Today, native title claims (registered applications) and determinations cover approximately 85 per cent of the Western Australian landmass (see Figure 1). As Table 1 shows, the largest number of applications and positive determinations has been in the Kimberley region, followed by the Pilbara. The Central Desert region, however, has the highest success rate with native title determinations. Table 1 also shows that a high proportion of applications are not accepted by the National Native Title Tribunal (NNTT) and registered as claims, and even fewer have reached the stage of determination. For those that do make their way through the arduous legal process to the stage of determination, most determination outcomes find, at least partially, in favour of the claimants, ruling that native title has not been extinguished across part of, or all of the claim area. Though many native title determinations are extremely limited in their scope and powers (e.g. Rowse 2002; Tehan, 2003), it is clear that Aboriginal peoples across Western Australia are

continuing to invest in the process to, at the very least, leverage formal recognition that they are the original custodians of their traditional homelands.

When it comes to seeking resolution in respect of development and commercial projects with the potential to effect native title rights, the emphasis has begun to shift from litigation to agreement making. This shift has been broadly welcomed for the potential to develop better relationships between Indigenous groups and other parties, and to establish content and terms relevant to their specific needs. Amendments to the *NTA* (1993) enhanced the potential for resolution of native title land use matters through legally binding negotiated agreements. This change has attracted broad, if fragile, Indigenous, corporate, and bipartisan government support (O'Faircheallaigh 2008; Barnes 2013; Tehan, 2003).

TABLE 1. WA Native Title Applications and Determinations by Claim Region, to 2016

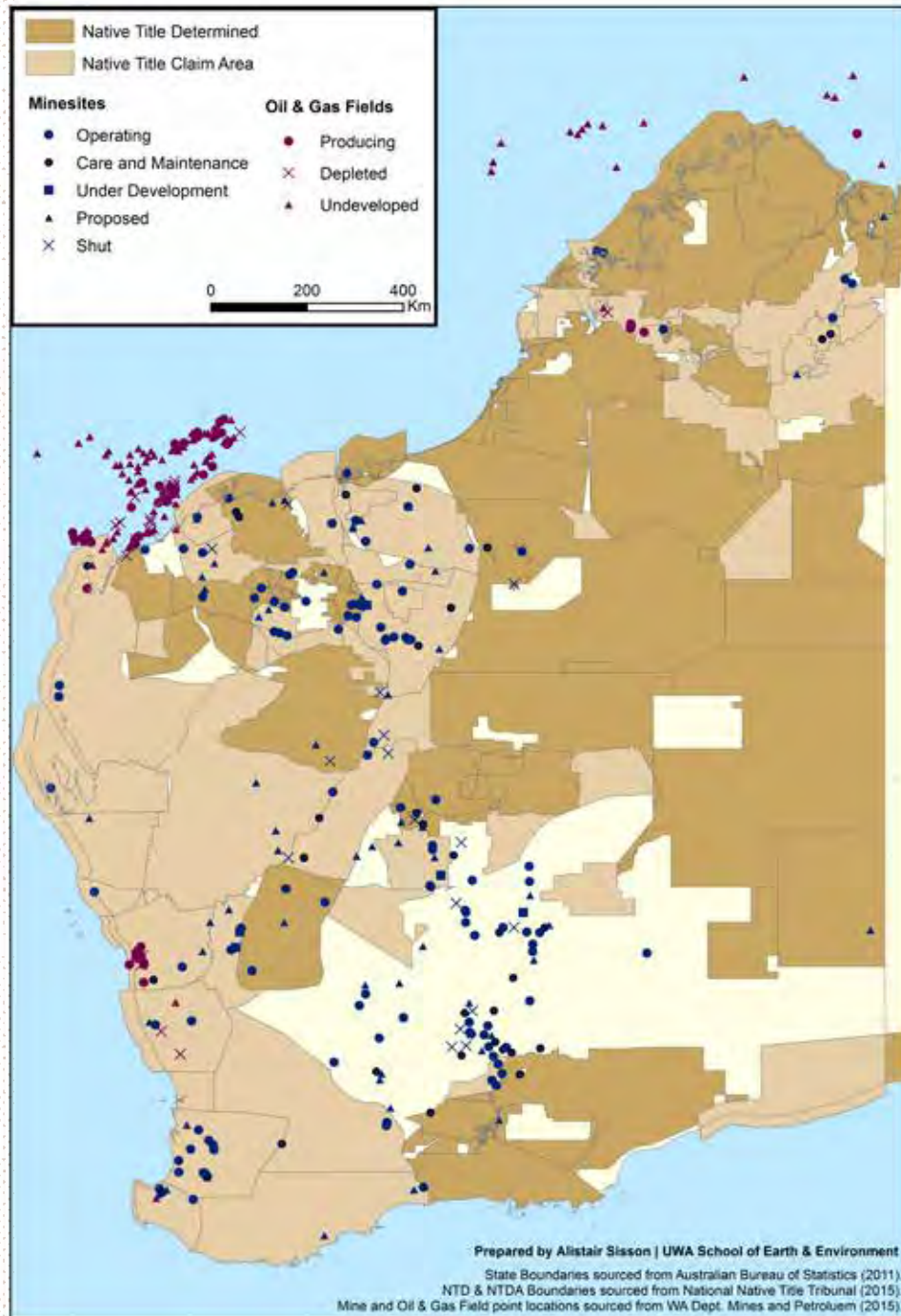
NT Claim Region	Applications	Accepted Applications	Determination Outcomes		
			Does Not Exist	Partial Existence	Full Recognition
Kimberley	180	67	0	23	8
Pilbara	125	34	0	12	4
Geraldton	93	12	1	3	0
Central Desert	132	22	0	5	12
Goldfields	102	5	1	1	1
South West	99	11	2	1	1

Sources: Native Title Applications, Registration Decisions and Determinations (NNTT, 5 August 2016)

Not all of the agreements emerging from registered native title claims and determinations involve financial compensation and royalty arrangements, and there remains considerable debate over the extent to which such financial assets represent real opportunities for Aboriginal and Torres Strait Islander communities to pursue their aspirations. One view is that the agreement-making framework may be delivering substantial levels of financial wealth to a range of Aboriginal corporations that can be leveraged to improve Indigenous wellbeing. Certainly, there appears to be evidence to support this thesis from particular Australian cases (e.g. the central Australian communities identified by Marshall 1994).

Another view, consistent with Auty's (1993) more global 'resource curse' theory, is that for a range of institutional, political, cultural and socio-economic reasons, being co-located with substantial natural resource wealth rarely translates into positive outcomes for local communities (Langton and Mazel 2008). In a global context, for example, mineral wealth has been known to cause conflicts over royalties between groups, and a loss of capacity and skill to engage in traditional modes of production, including land/sea management, as well as hunting, harvesting, and cultivation practices (O'Faircheallaigh 2011). Further, the fluctuations in mining revenue can make it very difficult for communities who rely on them to effectively plan and invest

FIGURE 1. Native Title Claims and Determinations in WA, 2015



Note: Some of the claim areas above include freehold land, which is not subject to Native Title claims/determinations.

for their futures. As O'Fairchellaigh (2011: 9) notes this can lead to "a consequent failure to address underlying social, cultural and economic issues". He goes on to describe several additional ways in which the wealth generated by agreements can undermine the socio-cultural and economic fabric of particular communities and societies. Primary among these is the rent seeking practices of industry and/or government that can leave affected communities having to spend their revenues on basic services and infrastructure, tipping their scales from investment to consumption. It can also occur through the mismatch between the institutional requirements of agreements and the more fluid, complex and multilayered relationships of Aboriginal native title groups to their land, which "... can create significant problems in determining to whom, in what proportions, at what points in time, and over what periods mining revenues should flow" (O'Fairchellaigh (2011: 17). In the Pilbara, for example, Holcombe (2009) and Scambary (2013) found that while members of relevant language groups have been able to maintain knowledge and a sense of attachment to their traditional country, these delineations lack the precision required for consensual agreement over boundary definitions required by an externally imposed legal process, often causing deep internal divisions.

With the exception of these critical generalised observations, the focus of the literature to date has been on the nature of agreement-making rather than on the resulting outcomes of agreements, reflecting the relatively short history of agreement-making within the evolving native title framework (Bogan and Hicks 2006; O'Faircheallaigh 2013b). As yet, therefore, very little work has sought to track how native title agreements have been implemented to attempt to meet native title holder aspirations. This report presents findings from a study of the experiences of three Aboriginal native title groups in their efforts to effectively manage and leverage formal agreements with government and industry to pursue their aspirations. Specifically, the research sought to produce more fine-grained, if preliminary, evidence regarding the challenges and opportunities of Prescribed Bodies Corporate (PBCs) – entities established to manage native title affairs once a claim has been positively determined – in translating agreement assets into tangible positive outcomes through analysis of:

- the arrangements for managing the benefits and assets associated with negotiated agreements, with a focus on the use of trusts; and
- how Aboriginal groups themselves evaluate the outcomes of agreements against their aspirations.

Chapter 2 provides an overview of issues associated with the process of negotiating agreements identified in the existing literature, and how these can impact the ability of agreements to enable Aboriginal and Torres Strait Islander communities to achieve their aspirations. Chapter 3 describes the project methodology. Chapter 4 outlines different trust arrangements as mechanisms for implementing and managing major agreements associated with native title in WA, and the common challenges identified from the project findings in relation to their employment in these contexts. The following three chapters present each of the case studies – agreement-making with

the Goonyiandi Aboriginal Corporation (Kimberley); the Miriwung-Gajerrong and the Ord Final Agreement (Kimberley) and Yindjibarndi/RTIO ILUA (Pilbara) – to animate some of the challenges and opportunities described in the preceding chapters. The two concluding chapters present a discussion of comparative themes across the case studies, and a set of recommendations for the Department of Regional Development as it seeks to support positive outcomes from major agreements in the regions.

2

The Process of Agreement Making

2 The Process of Agreement Making

Under the NTA (1993) any corporation, agency, or institution that intends to undertake an activity that will impact native title rights and interests, must provide compensation for the loss of those rights or interests, to the relevant native title group if their claim has been registered with or determined by the NNTT. Usually, this provision occurs through a form of agreement-making process. There are various kinds of agreements that can be negotiated within the native title framework (Stewart 2010). This report groups them broadly under the two main processes by which they are arrived at:

1. Future Act agreements (sometimes referred to as 'Section 31' agreements), arrived at by a process referred to as the 'Right to Negotiate' (RTN). Included under this banner is:
 - a. State Deeds or Tripartite agreements – documents that confirm that agreement has been reached and the act can be done, and;
 - b. Ancillary agreements – usually confidential documents that detail the conditions of doing the act and the nature of consequent benefits and compensation provided. These may include specific details regarding land arrangements, levels of compensation, heritage protection arrangements etc.
2. Indigenous Land Use Agreements (ILUAs), arrived at voluntarily by the relevant partners. ILUAs may also be accompanied by an ancillary agreement that contains the confidential detail with respect to compensation and benefits.

The RTN applies specifically when a proposed 'future act' (e.g. granting of exploration or mining tenements, or compulsory acquisition of land for public works/infrastructure) is deemed by the State to have the potential to affect native title rights or interests (The Aurora Project 2012, Land, Approvals And Native Title Unit [LANTU] 2015). It allows the parties to negotiate regarding such matters as compensation. The NTA prescribes protocols and timeframes for the negotiation period, including that all parties must negotiate 'in good faith'. If an agreement cannot be reached within a period of six months, either party can request the NNTT arbitrate to determine whether the Future Act may proceed or not (Stewart 2015). However, caveats of arbitration (discussed in more detail later) have significant implications for the bargaining power of native title groups.

By contrast, an ILUA is a voluntary agreement between a native title group and others about the management and use of lands and waters. It can also address past and intermediate acts as well as multiple future acts. As such it is regarded as a more flexible and broadly defined process than the RTN procedure. Many ILUAs are highly significant in terms of the land area they cover, the commercial value of future acts they address, and/or the associated value of compensation packages they provide.

The RTN procedure is the most common type of agreement in WA. Since 1995, 22,297 Future Act Applications have been lodged in the State. 2922 Future Act Determination Applications were made to the NNTT seeking a determination. As of September 2015, in WA over 90 ILUAs in between Indigenous parties and the

State, and/or private interests have been registered with the NNTT. These ILUAs are not predominantly about mining, but mining activities often generate the largest agreements. The earliest dates from 2001, but it is notable that over one third of the total number were registered from the beginning of 2013 onwards (NNTT 2015). This level of activity suggests a growing degree of support for the process, which has been promoted as a foundation for building relationships and understanding between Aboriginal and other parties that are necessary for achieving mutually beneficial outcomes for all parties to the negotiation process (Barnes 2013; Bogan and Hicks 2006).

2.1 Procedural Issues with Negotiation

These two broad types of agreement, and their associated agreement-making processes, determine the nature of benefits accruing to native title groups from developments that impact native title rights and interests. It is important to note that these agreements do not always stipulate how the agreed suite of compensation and benefits will be *managed and distributed*: practices that can heavily mediate the long-term outcomes of agreements. Those conditions are often determined through subsequent structures and documents such as trust deeds (discussed later). Nevertheless, the agreements themselves do define the resourcing parameters within which native title holder groups can work to achieve their aspirations. Furthermore, as Agius et al (2004) note, the *procedural* and *emotional* components of negotiation (e.g. attentiveness to issues of representation, timeframes, and power dynamics in negotiation) can often have a highly significant bearing on outcomes. Understanding these *processes* of negotiation is therefore one vital component of being able to evaluate the ability of agreements to produce positive outcomes.

ILUAs provide scope for more broad and flexible arrangements than Future Act agreements negotiated through the RTN and are less likely to set Aboriginal interests up against those of industry and government. They are entered into in order to establish and meet the needs of all parties equally. By contrast, the RTN process (the most common in WA) is inherently reactive in nature and positions Indigenous interests as an obstacle in the pursuit of economic development opportunities on the part of industry, government, or both. Furthermore, experts have argued that the RTN inherently places Aboriginal organisations into a weak bargaining position in the agreement-making process due to the fact that arbitration, which typically favours industry, looms as an option if agreement is not reached within the six-month negotiating period (see, for example, Strelein 2015).

The latest available data from the NNTT indicates that, since the introduction of the RTN process, there have been numerous cases where a negotiated agreement was not reached, triggering referral to the NNTT for arbitration. Of the 94 cases over which the Tribunal has arbitrated to decision about a future act, in all but 3 cases, the Tribunal ruled that the act could proceed (National Native Title Tribunal 2016). Importantly, arbitration decisions do not extend to the content of negotiations. They only determine whether the proposed act may proceed or not. The data indicates

then that 97% of the NNTT's arbitrated decisions have ruled that the development can proceed without the consent of the relevant Native Title group, and on the basis of whatever compensation/benefits the proponent deems appropriate.

A compounding factor in weakening the bargaining position of native title groups in the negotiating process is the low threshold for demonstrating that negotiations are 'in good faith', as required by the NTA. There has been growing concern nationally about the extent to which industry has sought to negotiate 'in good faith' through the RTN to reach a negotiated outcome when it is highly likely that an arbitrated outcome would rule in their favour. These concerns were reflected in the proposed 2012 Native Title Amendment Bill². It sought to require that the Future Act proponent must demonstrate that they had met an introduced set of requirements to prove they had negotiated in 'good faith'. It also proposed to extend the mandatory negotiating period from six, to eight months. In its submission to the inquiry examining proposed changes to the NTA, the Minerals Council of Australia (2012) presented statistics from the NNTT that it argued demonstrated that the RTN process did focus on negotiated (rather than arbitrated) outcomes. Namely:

- That more than 98.5% of mining tenements granted between January 2000 and October 2012 were negotiated (not arbitrated) outcomes;
- There had only been 31 challenges to 'good faith' process in negotiation and only three of these challenges found that negotiations had not been in good faith;
- The average negotiation period is 39 months, well beyond the obligatory 6-month period, suggesting that industry invests heavily in negotiation processes before resorting to arbitration.

These data, however, do not necessarily assuage concerns regarding the weak bargaining position of native title groups in the RTN process. As O'Faircheallaigh (2016) argues, native title groups are more likely to try to reach agreement before arbitration (aligning with the first point above), precisely because the arbitration process is unlikely to fall in their favour. Similarly, the second claim above could be indicative of the known low threshold for demonstrating 'good faith' negotiations and further proof that it is difficult for native title groups to have such rulings determined in their favour. O'Faircheallaigh concludes that:

"Aboriginal parties are under considerable pressure to settle during the Right to Negotiate period, while mining companies are under no such pressure, knowing that if they do not achieve an agreement that suits them, they can go to the Tribunal and obtain the interests they need to proceed with their project" (O'Faircheallaigh 2016: 92).

2 Ultimately, the proposed Native Title Amendment Bill lapsed at the dissolution of the 43rd Federal Parliament.

Though the process of negotiating agreements appears to have improved significantly since some of the earliest agreements were signed several decades ago, and the consequent potential for positive outcomes is greater, several challenges remain. Four key procedural issues with the negotiation of agreements are outlined briefly below.

2.1.1 Entrenched Disadvantage

Some research suggests that the state and mining companies have significantly underestimated the impact of the deeply entrenched position of disadvantage from which many Aboriginal parties enter into processes of negotiation (e.g. Stewart et al 2015; Taylor 2009). Scambary (2013), for example, argues that waves of colonisation, settlement, pastoral development and now the NTA have carried with them acute and specific challenges to Aboriginal identities, boundaries and wellbeing that have direct implications for agreement-making. Historical alienation from (and marginalisation within) mainstream legal institutional frameworks – such as those within which native title negotiations take place – and exclusion from mainstream education and health systems has direct implications for contemporary capacity, confidence and alacrity in entering into negotiations.

2.1.2 Restricted Negotiation Rights

Limited land tenure conferred by native title restricts the potential for traditional custodians to leverage their land for the purposes of economic development and self-government. Native title holders do not 'own' the land as such. Instead, native title can infer a range of other rights such as those related to access, use, and the right to negotiate about developments on it (O'Faircheallaigh 2015). As stated in the introduction, securing rights over their customary homelands has been recognised as a critical means for Aboriginal and Torres Strait Islander Australians to nurture cultural and economic wellbeing. However, agreement-making processes as they have evolved, are much more focused on securing financial benefits *from* country, than on securing rights *over* country. This is a critical distinction as it relates directly to Aboriginal and Torres Strait Islander definitions of wellbeing and self-empowerment. Weir (2011: 14), for example, notes a difficulty experienced by the Karajarri in the West Kimberley in "interpreting how the Federal Court recognition [of native title] relates to activities, as some of their traditional activities are recognised as native title rights and interests and other activities are excluded". Current approaches to agreement-making generally position land as a means to an economic end, not as a valuable end in itself as many Aboriginal and Torres Strait Islander peoples would conceptualise it. This leads to a third procedural issue with negotiation.

2.1.3 Divergent Perspectives

There are often divergent understandings between parties regarding why agreements are negotiated, what they hope to achieve, and what success would look like. If all parties assume uniformity of purpose, these divergences may never be articulated, leaving the negotiating parties working at veiled cross purposes, and potentially undermining the process. Where such differences are articulated, they may simply complicate the process of reaching agreement.

A central concern of commercial parties and the State government when entering into or initiating agreement negotiations, is to secure stable and effective access to specific resource bases and facilitate specific forms of development or land management. However, the aims of differently positioned Indigenous parties may be diverse, concealed, and/or difficult to measure (Taylor 2009). For example, in their survey of traditional custodians Balsamo and Calma (2007) found a degree of ambivalence about what constitutes a desirable outcome with regard to agreement-making amongst native title groups. Their study found that less than 13 per cent of respondents identified economic development as a first priority. Instead, emphasis was placed on land access, residence, land and sea management and cultural heritage (Taylor 2009: 58).

Levitus (2009) draws attention to an important ideological shift in agreement making between the pre- and post-NTA eras. He argues that the focus of agreement making prior to the NTA was on promoting self-determination for Aboriginal populations. Since the NTA, he suggests, the focus has narrowed to a more explicitly economic developmental approach focused on capacity building and Aboriginal integration into the mainstream economy. As O'Faircheallaigh (2011) notes on a global scale, this approach can harmfully position societies that have not been fully absorbed into the market economy as 'backward, deficient, or disjointed'.

2.1.4 The Capacity of Aboriginal organisations to manage negotiations

A fourth procedural issue with negotiation relates to the capacity of Aboriginal organisations and the resources available to them given the excessive demands placed on those organisations by the legislative framework, and exacerbated by the complexity of the agreement making process (Jackson 1996, Langton 2015). Jackson (1996), for example, provides an insight into the challenges facing traditional custodians immediately following the introduction of the *NTA* (1993) in Broome. After what she saw as years of marginalisation of Aboriginal peoples in land use decisions in the area, and in which economic development was given priority over Aboriginal interests, native title seemed to offer the potential to address the power imbalance in decision-making. However, the pace of development in Broome combined with the Future Act and RTN process established by the *NTA* (1993) led to the local claimant group being swamped by proposals covering over 60 projects. This required extensive meetings both within the group itself and with a range of stakeholders. These meetings were held in work time and for many members also imposed a

substantial travel burden, meaning it was untenable for members of the working group to also hold a job. However, representatives of the working group received no wages or attendance fees for their contributions (Jackson 1996: 30-32). Jackson's prognosis was that the mediation process, with its tight deadlines and the contrast in bargaining positions and resources available to the Aboriginal and non-Aboriginal interests, offered little hope for equitable outcomes.

As each of the case studies discussed in this report demonstrate, the issues of complexity and under-resourcing continue to impact upon the capacity of PBCs and registered claimant groups in many jurisdictions to implement and manage agreements. There is certainly significant potential for the State Government in Western Australia to work more closely with PBCs on identifying potential avenues for providing meaningful support to them. This support might include resourcing targeted training initiatives, and/or long-term administrative funding as these PBCs establish and maintain their native title management processes and develop and implement their strategic plans for pursuing their members' aspirations. The potential for such partnership is discussed further in the final recommendations chapter of the report.

3

Methodology

3 Methodology

A descriptive case-study methodology (Yin 2003) was adopted for this study. Here, the 'cases' were *agreements* emerging from native title, and the *experiences* of PBCs in managing and leveraging those agreements. The case study approach was selected because an understanding of contextual conditions surrounding agreement management was vital to understanding the experiences of management and implementation. Three agreements in distinct localities were analysed. The criteria used to identify potential case study agreements were:

1. Geographical diversity – the study should, as far as possible, include cases from multiple geographical regions (Kimberley, Pilbara, Goldfields, Midwest and Southwest)
2. Agreement 'type' diversity – the study should include both government and industry agreements at various stages of development/implementation
3. Participant willingness to be involved in the research.

Once ethical approval was obtained for the research from the relevant research institutions, potential case-study agreements were purposively identified according to criteria 1 and 2 above, and relevant PBCs contacted to gauge their interest in, and capacity to be involved in, the project. However, the research team deliberately declined to contact PBCs that were known to have recently been inundated by requests to participate in other research projects, in order to reduce potential research fatigue for organisations that are commonly overstretched and under-resourced to begin with. Two PBCs additional to those represented in the case studies in this report expressed an interest in participating in the research. However, they were ultimately unable to, ironically because of resourcing challenges associated with implementing and managing agreements. Agreement was secured with the Gooniyandi Aboriginal Corporation, the MG Corporation and the Yindjibarndi Aboriginal Corporation to participate in the research.

3.1 Case Study Agreements

The Gooniyandi case was included because it is in the early stages of negotiating the agreement making progress. Indeed, in this case, the focus is on the Gooniyandi Aboriginal Corporation (GAC) PBC because no major agreements have yet been negotiated with the Gooniyandi as a result of their recent native title determination. This case study adds a temporal window into the very early stages of preparing for agreement-making and some of the particular resourcing challenges associated with this stage that have implications for later agreement management and implementation. Hence we canvas the traditional custodians' overall experience with native title and the early context for negotiating agreements, rather than focussing upon a specific agreement, as in the other two case studies.

The Ord Final Agreement (OFA) is included in the study as an example of a major and complex agreement between (primarily) the state (here the Government of

Western Australia) and MG Corporation, located in the East Kimberley. This is a well-known agreement that provides an opportunity to assess long-term outcomes and impacts, with the OFA having been in place for over 10 years and much of the flow of compensation now ended. The case study also contrasts with the vast bulk of the existing literature that has concentrated on agreements with mining companies or in relation to mining ventures.

Finally, the ILUA between the Yindjibarndi Aboriginal Corporation (YAC) and Rio Tinto Iron Ore (RTIO) adds a Pilbara-based industry agreement to the analysis. Given the number of native title agreements in the Pilbara, this was a critical region for inclusion in the study. Furthermore, the Yindjibarndi/RTIO ILUA provides an opportunity to examine the experience of managing agreements for groups that have more long-term experience with navigating the native title process, and have prior experience with agreement-making. Though the Yindjibarndi/RTIO ILUA was only signed in 2013, the Yindjibarndi were granted native title rights almost a decade before the Goonyiandi. This provides an interesting temporal point of comparison.

3.2 Methods and Participants

Consistent with case-study methodology (Baxter and Jack 2008), multiple data sources were employed for this project. The two primary methods included:

1. Audits and content analysis of publicly available documents and data regarding the relevant agreements (e.g. from the NNTT and Agreements, Treaties and Negotiated Settlements (ATNS) databases, and strategic and reporting documents released by the relevant PBCs).
2. Face-to-face semi-structured interviews with 18 key stakeholders. In each location, additional informal discussions were held with key community members and leaders that served as important points of triangulation, but were not explicitly included in the data analysis phase.

Because the research was interested in the management and implementation of agreements (particularly through trust structures), interviews were focussed on those directly involved in the management and implementation of the case study agreements. This included trust and PBC board members, PBC officers, and elders. Table 2 shows the distribution of participants across the three case-study agreements.

TABLE 2. Interview Participants

	Aboriginal	Non-Aboriginal	Total
Goonyiandi	2 (male); 4 (female)	1 (male)	7
MG	3 (male)	-	3
Yindjibarndi	3 (male); 4 (female)	1 (male)	8
Total	16	2	18

Interview questions related to three key themes consistent with the overarching research aim:

1. The use of assets from agreements (primarily financial assets and land) – this explored how Aboriginal people were leveraging benefits from agreements, including their objectives and aspirations, the process for deciding upon those objectives and the use of assets, and what outcomes were being achieved and how these were monitored.
2. The management of those assets – the governance and accounting structures, level of discretion and any impediments to their effective use.
3. The role of government in both processes – canvassing views on the actual role played by government and the role respondents would like to see the government play.

The interview schedules are attached in the Appendix. Each interview was digitally audio-recorded and later transcribed for analysis and a copy returned to the participants who requested one. General comparative themes were discussed by the research teams following transcriptions. Each researcher responsible for individual case studies subsequently analysed the transcripts both deductively (using the interview themes) and inductively and developed the case study analysis. Finally, each case study analysis (including findings from the audits, content analysis and interviews) was returned to the relevant participants in each location for cross-checking and accuracy.

As the relatively small number of participants in each case study demonstrates, this was a small-scale, exploratory study. The aim of the report, and indeed of these case study narratives is to illuminate potential patterns and issues that deserve further consideration, rather than presenting conclusive, representative accounts. Nevertheless, when placed within the context of the broader literature, some conclusions can be drawn regarding the extent to which these findings align with or challenge existing understandings regarding the process and outcomes of agreements from native title for Aboriginal people.

4

The Content and Management of Agreements

4 The Content and Management of Agreements

The content of negotiations has been a relatively underexplored component of the literature on native title agreement making. The generally low levels of public disclosure regarding information (particularly payments) associated with native title agreements presents a major challenge in this regard (Stewart et al. 2015). As Tehan (2003), notes, however, a lack of public disclosure does not preclude a candid and cooperative relationship between the parties to the agreement.

In general terms, agreements can include financial and infrastructural investment benefits, business opportunities (such as preferred provider arrangements), employment and community development opportunities, and co-management / protection of environmental and cultural heritage. ILUAs, for example, depending on their scale and complexity, typically detail monetary and non-monetary compensation packages for disruption by future acts and native title extinguishment, prescribe the timing and methods of disbursement, and the implementing corporate structures. There is considerable variation in the proportion of funds that are tied to specific purposes, and level of autonomy the implementing Indigenous corporation can exercise over internal allocation of funds.

Below, we turn our attention more narrowly to the question of trusts and the role they play in mediating tangible outcomes from agreements between traditional owners and the State and/or industry. We are not primarily concerned here with current specific legal and financial debates about the taxation aspects of trust architecture. These are well canvassed elsewhere by legal professionals and scholars (see e.g. Murray and Wright 2015; Murray 2013; Stewart et al 2012; Steward 2010). Instead, our focus is on broader questions of governance and management.

4.1 Trust Deed Development

Though there have been instances in Australia where agreements have been entered without any specific financial architecture, the most common approach for managing the flow of financial assets associated with major agreements is through trusts. The development of the trust deed is critical to the future management and use of financial assets as this document sets out the terms by which the funds that flow to native title holders will be managed. Commonly, trust deeds are developed through a negotiating process between the lawyers representing each major party to the agreement. Here, the state and/or industry negotiating parties can exercise considerable control regarding the way that assets will henceforth be managed and distributed.

Mining companies have variously adopted approaches at either extreme of the spectrum. In the infamous case of Groote Eylandt Aboriginal Trust (one of Australia's oldest and wealthiest), for example, almost no conditions were placed around the management and disbursement of funds. At the other extreme are agreements such as the Argyle Diamonds ILUA in the East Kimberley, which was structured to ensure the company (Argyle Diamonds Limited) controlled all financial benefits and how they were distributed to beneficiaries (Levitus, 2009). In the case of Argyle, which reflects

broader general trends, there has been a shift in thinking by the company toward more community-controlled trusts. Both extremes invite controversy and discord. Indeed over time, as more agreements have been entered into, and the effects of different governance arrangements are borne out, there seems to be a greater level of convergence toward a middle ground in the development of trust deeds that enables native title groups to be more self-determining with their funds, but within certain structures. Three common governance approaches often adopted in the Trust Deed development phase are outlined in Box 1 below.

Despite the move toward more centrist approaches, there remain important avenues for contributors (such as mining companies and governments) to exert considerable control over the management and disbursement of funds. They may demand the adoption of one of the below-mentioned governance structures, preventing PBCs from having sole control over asset management. They may require that trust companies report annually to the contributing parties (usually mining or government). They may insist on the inclusion of a charitable trust in the fund management architecture since there are considerable legal controls governing the management of these trusts.

BOX 1. Common Trust Governance Options for Aboriginal Organisations

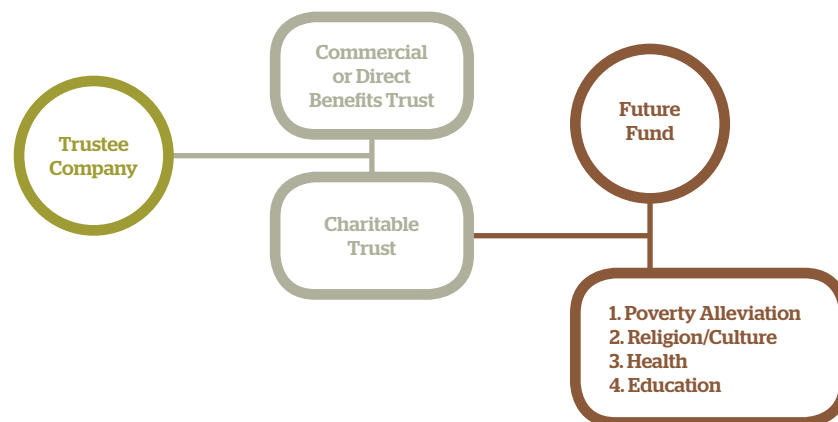
1. **Professional Trusteeship** - a professional investment fund manager is appointed as the Trustee and manages the investment. Native title groups will usually form a Trustee Advisory Council (TAC) to provide direction to the Trustee about how the funds should be managed and dispersed. The trust deed should specify that the professional trustee is obligated to heed the requests and recommendations of the beneficiaries. These arrangements can be highly collaborative. The professional trustee should meet with the beneficiaries to discuss budgets, strategies, annual plans, benefit payment programs etc. However, these arrangements can be costly, and can also be perceived as deep colonising: non-Aboriginal people making decisions about funds that rightfully belong to Aboriginal people.
2. **Independent Directors** - Because of the sensitivities regarding perceived control of resources, a compromise position that many mining companies are adopting in the Trust Deed development stage is to support organisations having their own Trust company that is Trustee, but requiring the appointment of a certain number of independent directors from a pool of pre-approved experts, in addition to member-elected directors.

3. **Advisory Trustee** - a third option sometimes stipulated in trust deeds is the appointment of an advisory trustee that works alongside the Aboriginal trustee company. Unlike independent directors, the advisory trustee does not have a vote on decisions made regarding the management of the Trust. However, the advisory trustee's advice must be sought before the Aboriginal trustee company makes a decision and the advisory trustee may be able to implement a dispute resolution procedure, seek court directions, or ultimately notify a stakeholder with power to remove the Aboriginal trustee company if the advisory trustee considers that the Aboriginal trustee company's decisions are in breach of the law. The role of the advisory trustee is to ensure that the actions and decisions of the directors adhere to the conditions of the trust deed and the legal requirements of various trust structures. They provide advice and guidance to directors regarding how they can achieve their goals, legally.

4.2 Types of Trusts

Most native title groups structure their financial assets into three domains: charitable activities; commercial activities; and future needs. The two most common types of trusts established to manage these assets are 'charitable' trusts, and 'direct benefit' or 'commercial' trusts (Figure 2 shows a common structure). The proportion of royalties that is deposited into each trust type is negotiated upfront. Generally speaking, more funds are dispersed to the charitable trust than the commercial or direct benefits trust (often the split is in the vicinity of 2:1). Particular laws and regulations govern the management and use of funds in each type of trust structure.

FIGURE 2. Common Trust Structure



4.2.1 Charitable Trusts

Charitable trusts are a favoured architecture type by many mining companies for several reasons:

1. They have numerous stipulations regarding how funds can be dispersed. Charitable trusts must exist for charitable purposes and those purposes are constrained, broadly,³ to:
 - a. *the relief of poverty, sickness or old age* (e.g. to support the provision of food vouchers or emergency bill payment for households experiencing significant hardship, and funding travel for medical treatment for patients and their families);
 - b. *the advancement of education* (e.g. to provide education scholarships);
 - c. *the advancement of religion and certain other purposes beneficial to the community* (e.g. to support ceremonial activities, language programs, educational trips to country, law business, funerals and sorry camps).

Funds can also be used for broader activities that align with these goals and benefit the community. For example, while it is difficult to simply distribute funds from charitable trusts to individuals to start businesses, it is easier to provide funds to businesses to train and employ community members, or to undertake any of the aforementioned activities.

2. They provide for a Future Fund. Given that most major agreements (particularly mining agreements) have a limited life, parties to agreements are increasingly recognising the need to protect an income stream beyond the cessation of agreement royalties. Future Funds are designed for this purpose. Some trust deeds stipulate Future Funds as a requirement of charitable trust arrangements. PBCs will determine a particular proportion (often between 20-50%) of funds deposited into the charitable trust to be set aside in a Future Fund that is not accessed until particular conditions are met (usually either a particular time period or capital goal is reached). Typically, these funds are invested with the expectation that in the future, income generation from these investments will replace royalty payments. Levitus (2009: 73) argues that this is "an important but under-utilised way in which mining companies can contribute to the preconditions for long-term remote-area Indigenous development that is not ancillary to the mining operation itself."
3. Investment income is not subject to tax. This means that invested funds receive sizable dividend imputation credits. Essentially, there is an increase of roughly 30% on dividend returns for invested funds.

³ Slightly different requirements as to charitable purposes arise at common law (which is relevant to the creation of the trust) and for Federal purposes under the *Charities Act 2013* (Cth) (which is relevant to a range of federal matters, such as tax concessions).

4.2.2 Direct Benefit Trusts

In some cases, direct benefit trusts are used solely as a mechanism for distributing royalty payments to beneficiaries. In other cases, they are established to support commercial enterprises and businesses that benefit beneficiaries. Here, capacity building, wealth generation, and employment are key foci. Commercial activities can involve the establishment of companies that provide services to mining companies (such as cleaning, gardening), joint ventures with government or industry in property development or conservation activities, the establishment or nurturing of art industries, tourism ventures, or the development/purchase of other businesses.

4.3 Challenges of Trust Governance: Buckets and Boabs

As we have seen, many aspects of trust governance are determined by the stipulations of the trust deed. This process, and who drives it, is then critical to the extent to which beneficiaries are able to leverage financial assets to meet their future aspirations. Unless the trust deed stipulates the establishment of a professional trustee, Indigenous members of the trust company board are usually appointed on an annual basis through an election process amongst members of the native title holder group. The board is then responsible for managing what one participant referred to as 'buckets'. They must assess what proportion of revenues are allocated to the various activities permitted under their trust arrangements. That is, while the trust structures described above dictate what money within each part of the trust architecture can be used for, it is the role of the board to determine how payments within each of the parts of the trust structure can be channeled into their priorities and programs (buckets). These buckets often include:



There are complex, and highly context-specific deliberations involved in determining how funds should be apportioned to the various 'buckets'. Dollar amounts also vary dramatically between agreements according to both the number of members (beneficiaries) the agreement services, and the monetary value of the agreement. The best resourced PBCs are obviously those with the fewest members and the highest royalty revenues.

How boards engage with the broader group of beneficiaries to make these decisions also varies. In some instances, boards are required to bring major decisions before

all members at a meeting before voting on outcomes. In other cases, members are involved in the establishment of future plans and strategic plans and the board oversees their implementation.

There is a range of challenges associated with 'managing buckets'. Five in particular were identified in this research project:

1. Balancing immediate and future need (consumption vs investment)
2. Equity amongst members
3. Corruption and self-interest
4. Governance tensions for board members
5. Self-determination and confusion

These are discussed in more detail below.

4.3.1 Balancing Immediate and Future Need

A key tension inherent in the design and purpose of agreements, and also identified in other studies (see e.g. Scambary 2013) is that between present and future needs of the beneficiaries. What proportion of funds associated with agreements, for example, should be set aside for asset investment and future use, and what proportion should be directed towards immediate community needs? This question moves beyond simply deciding what proportion of funds is invested into a Future Fund. In contexts where a disproportionate number of beneficiaries live in poverty, it speaks to more complex tensions regarding the pressing, immediate needs in relation to poverty alleviation now, versus the imperative to create jobs and build infrastructure that will sustain the community into the future.

Sometimes an extra layer of support is vital for struggling families and used to alleviate serious hardship. However, direct benefit payments can also be particularly problematic. As one participant explained, beneficiaries already receiving income support from the government can spend their State entitlements on addictive problems such as alcohol, drugs, gambling, and/or cigarettes, with the expectation that they can apply to the trust for funds for essentials such as bills, food etc. The consequence can be increased dependency:

"So what can happen, and we see it happen all the time, is that the trust becomes this second tier of welfare that 'It is okay to spend the government's money because I know that I will be able to get this money' and the trust is the first choice. It is not the last resort. It is the first resort, and that can be a real problem." **Non-Aboriginal participant No. 1**

More broadly, for communities that do struggle with disproportionately high rates of serious addiction to alcohol, drugs, gambling, cigarettes, or a combination of these, the pull to spend resources addressing these immediate and complex challenges is extremely strong, and can be accentuated by cultural obligations. Resolving this tension between meeting immediate and future needs is highly complex. Social investment approaches to addressing welfare dependency may offer potential models for government policy to alleviate this tension. Such approaches reinvest in Aboriginal groups who implement measures to address poverty, substance abuse, incarceration and other problems which impact upon government welfare payments and other budgets.

4.3.2 Equity Amongst Members

Though the proportional division of funds into particular 'buckets' is agreed on by the board, the disbursement of funds within those buckets can be quite complex and challenging. For example, in relation to emergency relief (poverty alleviation), typical applications to trusts are for food vouchers, assistance with transport to accompany a sick relative to receive medical attention, and bill payment (gas, electricity, vehicle repair). Boards must determine whether the provision of such funds is indexed, for example, according to member income levels, or applied to members according to certain other threshold criteria. As another example, many elders emphasise the importance of education and ensuring there are adequate funds in that 'bucket'. However, providing scholarships for a child to study in Perth at boarding school can cost up to \$50 000 / year. If the annual education budget is only \$300 000 difficult decisions must be made to determine which six students are awarded those scholarships, or what level of scholarship support will be provided to students based on a set of criteria. In making these decisions, the development and application of a set of transparent standards and rules is critical. Nevertheless, the decision-making processes can place great pressure on board members who live in the communities with affected beneficiaries.

4.3.3 Governance Tensions for Board Members

Typically, respected elders and community leaders are appointed by native title groups to fill board positions on trusts. While these individuals may be highly respected for their community leadership and cultural knowledge, they may have more limited financial experience or expertise filling board positions. Furthermore, sometimes the cultural requirements of being a member of a native title group, and the governance requirements of being a board member of a registered trust can create particular challenges. There are often, for example, cultural requirements to care for immediate kin and show respect and support for elders. Sometimes, these requirements are expressed in requests from beneficiaries for trust funds to be dispersed in ways that contravene their purpose. This can create considerable angst for Aboriginal trustee companies and trust advisory councils who can be placed under considerable pressure to meet cultural demands, and risk bearing significant

shame if they do not. Sometimes, in these situations, a professional trustee can be useful. They can veto particular unjustifiable requests and the advisory council can save face by truthfully reporting that they tried to uphold the cultural wishes. However, this also has the potential to increase displeasure amongst the wider group of beneficiaries about the role of the professional trustee.

Scale of representation can also be a challenge for Aboriginal board members. Whilst culturally, their first obligation might be to their immediate clan and kin, legally, they are obligated as board members to serve the entire community equally. This tension can be extremely difficult to navigate.

4.3.4 Corruption and Self Interest

One participant, with experience in a range of agreement management contexts, explained that corruption and self-interest can emerge as challenges in relation to trust management in two primary ways. The first is misuse of funds by board members and beneficiaries. Sometimes, as in the case of Groote Eylandt, alleged forms of corruption are exposed and receive considerable media coverage. The second, and often less visible form of corruption identified by this participant, was the almost predatory practices of some non-Aboriginal organisations and individuals who serve as consultants and/or service providers to PBCs and trusts, charging exorbitant fees and producing very little in the way of tangible outcomes or useful advice and counsel. These consultancy fees can run into the hundreds of thousands on an annual basis and represent a sizable proportion of the expenditure of trust funds.

4.3.5 Deep Colonising Practices and Self Determination

Professional Trustee arrangements are sometimes perceived as appropriating Indigenous rights to manage and control their own assets. Though professional trusteeships should function in the same way many other professional services do – where clients instruct their lawyer or accountant on how to manage their affairs – they also have the appearance of being ‘deep colonising’ (Rose 1999). That is, they can appear to be empowering Indigenous people while at the same time withholding the right to be truly self-governing in respect of the resources that are rightfully theirs. Given over 200 years of colonial history that has seen such practices dominant in public policy and private practice, this is a particular sensitivity for many native title groups:

“And I’ve seen it on a number of occasions you know, in different groups, probably two or three groups, where they say, ‘No, we want to have our own control. We don’t want to have those whitefellas looking after our money,’ and all that stuff, and no matter how much you say ‘But you will still have control’ you can’t break through.” **Male, Non-Aboriginal Participant No. 1**

Exacerbating this sensitivity, he felt, is the reality that there are very few practicing Aboriginal accountants and financial planners who could adopt these roles, and very few Aboriginal students studying business, accounting, commerce, finance and law at tertiary institutions. With time, many of the trusts in operation today will grow considerably in size in terms of the financial assets they hold and manage. It seems imperative, therefore, that the next generation of Aboriginal financial managers is trained now, in order to ensure that Indigenous experts can assist in managing those large asset bases into the future.

4.4 Non-Fiduciary Challenges

In addition to the immense complexities involved in managing financial assets associated with major agreements (e.g. through trusts, as discussed above), the literature identifies a range of challenges involved in managing agreements more broadly. One, as described in Section 2.1.4 above, is the highly complex operating environments for PBCs, and their limited structural capacity (and resources) to effect change on behalf of their constituents. As noted, the NTA (1993) requires that a PBC be established once a native title claim has been positively determined, and there are now over 100 PBCs in operation nationally. While this reflects gains in terms of the number of native title claims, it comes at the cost of "... complex legal requirements, including detailed contractual obligations, onerous reporting deadlines, and a wide range of other compliance requirements. PBCs then, are required to manage existing agreements and plan for the future, whilst negotiating any additional agreements and engaging with any relevant Section 29 notices⁴ under the NTA. All too often, these obligations overwhelm small and under-resourced units." (Langton 2015: 171). There is considerable agreement that PBCs charged with managing the terms and obligations of the agreement for the benefit of the traditional custodians and other Indigenous parties operate in an externally defined and unnecessarily complex environment that demands a high level of administrative capacity (Levitus 2009, McLean 2012).

Compounding these complexities is the reality that organisational regimes developing under the NTA (1993) to implement the terms of agreements, overlay existing organisational networks ensuing from earlier policy settings. In many parts of remote Australia, Aboriginal community councils had been established during the 1980s and 1990s to govern communities established under federal legislation from the 1970s and 1980s. These councils effectively became local governments. As a consequence, the recognition of specific rights for traditional owners under native title cuts across and disrupts communities once conceived of for policy and programme purposes as discrete administrative units having single and homogenous Indigenous identities. Weir (2007; 2011), for example, notes this

⁴ This is a common term used under the Future Act agreement process, for the required notification made when a company or government agency wishes to undertake an act that may impact native title rights.

tension amongst the Karajarri people in the large north-west WA community of Bidyadanga. She points out that this change obliges community councils and PBCs to identify and preferably agree on their governance roles in relation to each other, and then articulate such distinctions to other parties.

Despite these immense challenges facing PBCs, State, Territory and Federal governments have no explicit policy to provide funding mechanisms for PBCs (Weir 2011), exposing them to potential failure. In the case of the Karajarri, for example, resolution came in 2007 when the State initiated an agreement-making process ahead of plans to build certain community infrastructure, resulting in several ILUAs. One of these ILUAs provided for the administrative support previously lacking (Weir 2011). However inadequate provision for dedicated funds for administration and operational costs is an ongoing concern preventing a number from fulfilling statutory obligations. Underlying all these challenges, traditional custodians also carry the expectations that the arduous native title registration process, and the achievement of native title recognition, will deliver real benefits for their people. These multiple and competing demands can significantly wear on the ability of PBCs to effectively manage and implement agreements. We turn now to presenting more detailed accounts from each of the three case study PBCs that participated in this study.

5

CASE STUDY 1

Agreement Making with Gooniyandi Aboriginal Corporation

5 Case Study 1: Agreement Making with Gooniyandi Aboriginal Corporation

The Gooniyandi people are estimated to number approximately 1200 and live in and around the Fitzroy Valley in the Kimberley region of WA. Formal recognition of the Gooniyandi native title over their traditional lands was determined in June of 2013. Those traditional lands comprise of approximately 11,209 square kilometres of land and water in the Kimberley to the east and south of Fitzroy Crossing. Seven pastoral leases were noted as being wholly or partly within the claimant area: Fossils Downs, GoGo, Mt Pierre Station, Bohemia Downs, Emmanuel, Louisa Downs and Larrawa. The Gooniyandi Aboriginal Corporation (GAC) is the PBC created in the claims process to manage Gooniyandi native title rights and interests. The GAC has 12 Directors representing 19 different communities located upon Gooniyandi determined land. ILUAs negotiated with the pastoral stations provided for access to traditional lands and sacred sites, but no monetary compensation.

5.1 Objectives and Aspirations of Native Title Recognition

For the Gooniyandi, recognition of native title over their traditional lands was seen as a way of achieving greater control over their future, economic independence and ensuring the survival of their culture:

“... the old people they told their stories and all about country and where they belong ... it was mainly about getting all that information together so that we can be recognised as Gooniyandi people ... If the mining company applies for a lease they have to come though us ... protecting the county and the stories and the sacred sites.” **Female, Aboriginal Participant No. 2**

“For Gooniyandi people, from hearing from people, it has given them a sense of ownership over country that is recognised by the Australian Government. So they always knew it was their country, but it has given them a surety that the Australian Government recognises them as the traditional owners.” **Male, Non-Aboriginal Participant No. 2**

When asked what native title recognition meant to the Gooniyandi people, none of the respondents alluded to the prospect of substantial financial gains. Rather, prospects for financial gains were expressed in terms of opportunities for employment and enterprise development for Gooniyandi people to address poverty. Through a process of consultation with the community the GAC developed a vision statement for the organisation. The key components of this vision relate to:

- independent governance - the establishment of their own office premises, with Gooniyandi staff and sound governance practices. This is to also provide a cultural centre – ‘a place where you are keeping Gooniyandi culture, language and everything alive.’;
- wealth creation through employment and business development;
- “to protect and preserve the rich and proud history of the Gooniyandi people in order to benefit future generations” (GAC, 2015)

The vision was developed from consultation with directors and cultural advisors, and when taken to the board and Annual General meetings the establishment of the office and cultural centre stood out as the priority projects:

"... Gooniyandi want to become independent. So there is a strong focus that Gooniyandi want to stand on their own two feet, be empowered, keep all their own information, and start making decisions on their own. ... You can just hear it." **Male, Non-Aboriginal Participant No. 2**

5.2 Process and Content of Agreement

Given the recent determination, participants spoke more about their struggle for the initial native title recognition over their land than about subsequent agreements. Gooniyandi people commenced filing applications for native title with the Federal Court from 1997. In August of 2000 the Federal Court granted applicants leave for existing applications to be amended and combined into a single application which was given the name Gooniyandi Combined #2. Gooniyandi people worked intensively with support of the Kimberley Land Council (KLC) and anthropologists to establish the membership of the native title claim group, the boundaries of the claim and the people's unbroken connection to that land through the existence of traditional laws and custom, as required for a determination. An Elder interviewed spoke of initially being reluctant to be involved in the native title claim, but it was impressed upon him by the KLC and the anthropologist that it was 'their last chance' for another 10 years to get it right, presumably in reference to the Gooniyandi Combined #2 application. Hence he and others felt obliged to tell of their ancestors' connection to the country:

"So the old people got together ... I mean, our elders, we can't say 'no, they weren't there'" **Male, Aboriginal Participant No. 6**

Ultimately elders worked extensively with the anthropologist to document the sites and stories of the 'old people' as well as attending court in Perth. The determination in 2013 thus ended a battle for recognition of traditional lands that had been going on for at least 13 years.

Participants spoke of the high demands of many years of work, initially towards native title recognition and since for the ongoing management and operation of GAC. Some of the people involved in these processes have families with significant needs, and are not located in Fitzroy Crossing where GAC meetings are held. While some support from the KLC was acknowledged in the form of training and travel allowance, many GAC people have travelled and engaged in GAC business with no funding support, until this year when some funding through the Indigenous Advancement Strategy was obtained:

"We done it on our own money, on our own pocket money, those sort of trips ... two years of voluntary work. I didn't get paid, so that was out of our own pockets." **Female, Aboriginal Participant No. 2**

The NNTT's register of ILUAs records five separate ILUAs between Gooniyandi and pastoral stations: Fossil Downs, Margaret River, Christmas Creek, Gogo station and Lawarra. Since native title does not extinguish pastoral leases, these ILUAs were negotiated to provide access to traditional lands for hunting, fishing and gathering and for cultural purposes. None involved financial compensation. Participants indicated that negotiation of these agreements was made easier by the fact that in most cases Gooniyandi people had close relationships with the holders of the pastoral leases. Three of the stations are Indigenous owned and Gogo Station is managed by a Gooniyandi Elder.

The register also records 28 Future Act determinations, as summarised in Table 3 below. Most of these relate to decisions about whether or not the WA government could grant exploration licenses on Gooniyandi land using the expedited or 'fast tracking' procedure.

TABLE 3. Future Act Determinations – Gooniyandi Combined #2

Future Act Matter	Outcome
Objections to Expedited Procedure	
Objection overturned (expedite procedure applies)	11
Objection upheld (expedited procedure does not apply)	11
Future Act Decisions	
Consent agreement – Future Act can be done	5
Non-consent agreement – Future Act can be done	1
Non-consent – Future Act cannot be done	0
Total	28

Source: National Native Title Tribunal Registry:
<http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx>

Agreements through the Future Acts process have been negotiated to enable exploration licenses to be granted, including with Kallenia Mines; Cullen Exploration Pty Ltd; Bernfried Gunter Franz Wasse; Fox Resources; Budside Pty Ltd and Pobelo Pty Ltd. In each case agreement was reached without the need to proceed with arbitration at the NNTT. The full terms and conditions of those agreements are not available through the NNTT registry, but interviewees indicated that they have provided for some degree of compensation that was paid into a trust managed by the KLC, the Kimberley Sustainable Development Trust.

The GAC adopted an innovative approach to negotiating agreements. They advertised for law firms to provide expressions of interest in representing Gooniyandi people, and based on submissions and interviews selected three law firms as preferred providers. Individual family groups now negotiate over acts affecting their families' lands, choosing one of the three law firms to represent them. These agreements are then lodged through GAC. While this approach seems to be broadly successful, and GAC board members have received some training from KLC and in

governance from the Office of the Registrar of Indigenous Corporations, limitations to Gooniyandi people's capacity to negotiate the agreement making process and to secure good outcomes were evident in the interviews. Participants spoke of the difficulties for 'the old people' to understand what ILUAs meant and acknowledged that they themselves were only starting to understand Future Acts:

"So, understanding the ILUA, Indigenous Land Use Agreement, document for the people was very hard at first, but it came from our own people what they wanted out of the ILUA" ... "Yeah, we are just starting to understand parts of that Future Act." **Female, Aboriginal Participant No. 2**

5.3 Outcomes and Monitoring

Through ILUAs Gooniyandi have secured access to traditional lands and sacred sites that they may otherwise be denied through exclusive pastoral leases, and financial compensation through Future Act agreements with mining companies. Although the exact details of compensation were not disclosed, it was clear from the interviewees and the GAC's very limited resourcing that the amounts were modest. Funds from those Future Act negotiations have been invested in a trust held on behalf of the GAC by the KLC and have contributed to the establishment of the GAC office on Gooniyandi land, and supported the salary of the operations manager. The office is quite basic, consisting of two transportable 'dongas' on a concrete foundation and without connection to mains power or water.

There is no formal process or framework in place for evaluating the outcomes of ILUAs or Future Act agreements against the broader objectives of the GAC. The operations manager, however, has a working list of specific achievable actions or steps aligned with the corporation's vision and mission and he and the Acting CEO provide the Board with updates on progress. Others spoke of more informal assessment of how things have changed as a result of native title:

"I'm getting a lot of good feedback from the elders to say 'Look, it is finally happening'. They are the ones watching. We sort of work closely with the elders ... so the monitoring is amongst us, the people itself, was a good feedback and positive. ... And eye contact, sitting there looking at the person's body language and you know that they are happy. You can see the, 'Oh this is good. It is finally happening' you know." **Female, Aboriginal Participant No. 1**

"... that office is going to be used as a cultural hub, as a hub for Gooniyandi people to hold meetings. ... that office site which the funds are used for has meant more in terms of when people go there they know that that is their place. And I see, especially with the old people who have wanted for so long to have a place of their own, it is just like one old man it brought tears to his eyes when he saw the office going up. It is not a flash office or anything. It is just a place that is theirs." **Male, Non-Aboriginal Participant No. 2**

Some board members were more guarded about the outcomes of the earlier agreements with mining companies, alluding to the initial limited understanding and bargaining power of the traditional owners. Referring to agreements negotiated between mining companies and the Garnduwa Gooniyandi Corporation, the body managing negotiations in conjunction with the KLC prior to the native title determination, one participant recounted:

“... they did the contract with the elders before when they got them to sign, but I don't think it was a good contract that they got the old people to sign because we didn't get enough money, not good money.... You see, they would go back to the old people and ask them for things and then they would just get the old people to sign off on those things without them understanding what it was. So that's why we didn't get a good deal and they made a big hole and wrecked the place and everything.” **Female, Aboriginal Participant No. 2**

How funds are distributed was identified as a looming issue and a potential threat. One participant identified dealing with infighting as one of the hardest parts of the process for her personally.

“We know money is the root of all evil and it does make people have infights. Their own family even fight over it, you know, so we had to make them realise that this has got to come into a business and from a business it has got to be for the future of our kids.” **Female, Aboriginal Participant No. 1**

The Gooniyandi determined area was determined from affidavits and evidence from a large number of people from different family groups. So while the boundaries of each group's country are well known, native title is set up to fund the PBC and not to directly benefit traditional owners for acts on their particular land. Some perceive this arrangement as problematic:

“And TOs don't want that. It is quite clear that TOs, they have got their own communities. They have got their own projects they want to see running on their community. They want to assist the PBC, but they also want to be able to do their stuff as well.” **Male, Non-Aboriginal Participant No. 2**

Another challenge identified in the post-native title environment was moving on from the 'courtroom arguing about the laws and the precedents' to making potential projects happen, which requires relationship building and solid business planning in place of the adversarial and legalistic mindset. Here red-tape was identified as a barrier, with government departments reluctant to make decisions or set precedents, and 'middle-men' benefitting where Gooniyandi weren't. Such limitations were also noted in reference to assets held in Aboriginal Lands Trusts more generally:

“How are we going to turn that into something which communities can use to generate income? ... You need practical people to come in and design packages that will be tailored for each community so that you can wear

people off Aboriginal lands trusts and put the assets with people that can actually turn it into dollars. You are never going to do that when you are dealing with bureaucracy.” **Male, Non-Aboriginal Participant No. 2**

These comments point to the need for more flexible approaches by industry and government to deal individually with communities according to their specific circumstances and aspirations. Delays in compensation agreements for past acts, such as old mine sites and government infrastructure were another example:

“You know, people are waiting for the lawyers to work out the problem and design a solution, and the government departments who will never make a decision about anything, whereas you need practical people to go in there”

Male, Non-Aboriginal Participant No. 2

One participant also alluded to issues arising from access to pastoral station land. Where people once needed the pastoralists’ permission to enter that land, he felt that in some case they were not treating that access with adequate responsibility – failing to close gates, damaging fences, littering and taking ‘killers’ (cattle) without consent.

5.4 The Role of Trusts

Money coming from the Future Act agreements has been placed into the Kimberley Sustainable Development Trust, a charitable trust managed by the KLC and thus quarantined to be used for the outcomes noted above – establishing an office on Gooniyandi land and creating the Operations Manager position. Respondents were largely positive about the decision to establish the trust and how it was currently working. It was acknowledged that the trust had allowed funds to build up for strategic purposes and helped to shield the GAC directors from pressures associated the infighting between family groups as noted above.

“It was a good process and a good system, yeah. It was a good move ... to come up with the idea to quarantine the money. So, yeah, once it was locked in it sort of built up to a certain amount and we could afford to create a position, get some money to get the office building up and going.” ... “It has only been quarantined for the office and certain donations that were given to people.” **Female, Aboriginal Participant No. 2**

“Oh yeah, that trust money we do have control. We just tell them. Like, last year our directors decided to say, ‘How much is left there?’ And if people come to us and we have to decide if it is a yes or no, you know, if that money is important to give out.” **Female, Aboriginal Participant No. 1**

However, a desire for Gooniyandi to eventually manage their financial affairs independently of third parties was also strongly evident.

"I think it has worked well up to a point, and I think they have done a really good job in a tough environment, but again, you know, it's got to change ... if groups are really going to become empowered, then you are going to need to change that so that people have control over their assets." **Male, Non-Aboriginal Participant No. 2**

5.5 Summary

For the Gooniyandi people, securing recognition of native title over their traditional lands has been a major step forward in their aspirations for self-governance, economic independence and the maintenance of Gooniyandi culture. It has been achieved through years of unpaid dedication by a number of traditional owners and elders with limited resources. However, the support of the KLC has clearly been critical and this includes the management of the Kimberley Sustainable Development Trust. Proceeds from Future Act agreements have so far been used effectively in pursuit of the traditional owners' aspirations. It is yet to be seen whether the hopes for employment and enterprise development can be leveraged from the native title regime. An in-principle agreement had been forged with Gogo station to explore such opportunities for Gooniyandi people in the pastoral industry, but few other specific opportunities were discussed.⁵ The GAC's navigation of the agreement making process will continue to be critical. In this regard, the outlook is for an organisation on a very steep learning curve and facing significant challenges, and for the foreseeable future those challenges will continue to have to be met from a very limited resource base.

⁵ Since the completion of the draft report, the State Government has announced an agreement to convert 8,986 hectares on Gogo Station to a freehold lease as part of an ILUA between Gogo station and the GAC, that aims to promote pastoral economic developments.

6

CASE STUDY 2

The Miriuwung- Gajerrong and the Ord Final Agreement

6 Case Study 2: The Miriung-Gajerrong and the Ord Final Agreement

The Ord River Plains in the East Kimberley of Western Australian and extending into the Northern Territory are traditional lands of a number of Aboriginal peoples: the Miriung (including Yirralalem, Ngamoowalem, Wiram, Yardanggarlm, Nganalam and Mandangala), Gajerrong, Doolboong, Wardenybeng and Gija. In reference to the main common languages for the groups, these are commonly referred to as the Miriung-Gajerrong people. An application for recognition of native title for the Miriung-Gajerrong people was first filed in 1994 (McLean 2012: 344). In 1998, the Muriung-Gajerrong, along with the Balangarra peoples of Boorroongoong (Lacrosse Island), were awarded native title by the Federal Court over around 7,900 square kilometres of lands identified as their traditional country. The native title matters are managed by the Yawooroong Miriung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation, known as MG Corporation (NNTT 2016, Meyers 2000, Sullivan 2013). Prior to this, the Muriung-Gajerrong people had experienced substantial displacement from their traditional lands without any recompense, including with the flooding of country and significant sites with the original damming of the Ord River to create Lake Argyle for the Ord River Irrigation Scheme (Head 1999, Sullivan 2013). Genealogical reviews undertaken on behalf of MG Corporation have identified at least 3,178 Miriung-Gajerrong traditional owners (MG Corp 2015).

That initial determination was appealed and, following mediation, a consent determination was made in 2003 (MG (No. 1)) and a further consent determination over areas not covered in the original claim was achieved in 2006 (MG (No. 4)). As the native title determined area includes areas identified for the expansion of the irrigation network of the Ord River Irrigation Scheme, commonly known as Ord Stage 2 (Head 1999), the Western Australian and Northern Territory governments moved to negotiate an ILUA with the native title holders to facilitate the proposed development: the 'Ord Final Agreement' (OFA). The Ord River Irrigation Scheme commenced in the 1960s and involved the damming of the Ord River to create Lake Argyle, thereby facilitating irrigated agricultural developments. By native title law the separate MG No. 1 and No. 4 determinations necessitated the creation of two registered native title prescribed body corporates; and these were established with identical membership and constitutions nominating MG Corporation to manage the entitlements and benefits of the Ord Final Agreement (Sullivan 2013).

The parties to the OFA include the WA State Government, KLC, two pastoral companies, the Ord River District Cooperative, the MG No. 4 claimants, and MG Corporation as the named PBC. This case study focuses on the OFA. The agreement provided for 10 years of funding to get the administration of MG Corporation established. The interview respondents made clear that the understanding on the part of the MG people was that the agreement would lead to the release of lands for agricultural development, which in turn would facilitate business development and partnerships connected to the farmlands and enable MG Corporation to become self-sustaining once the funding for administration ended.

MG Corporation has a management committee consisting of 6 Directors (including a chair and deputy chair) who report to a broader management committee, which includes one representative of each of the 16 individual Miriung-Gajerrong

Dawangs (areas of land identified with individual family groups). Operating alongside these bodies is an appointed chief executive officer who heads the administrative and operational functions (MG Corporation 2015, Sullivan 2013).

6.1 Objectives and Aspirations

As stated in their 2014-15 Annual Report, "MG Corporation's mission is to build a strong economic and social base for MG people while protecting and enhancing MG culture and heritage." (MG Corp 2015: 3). In interviews, the participants strongly emphasised that the key benefit native title holders sought from the OFA was a sustainable economic base to generate business, employment and income for Muriuwung-Gajerrong people and to fund the activities of the Corporation into the future.

"When we first signed that agreement back in 2005 ... there were a lot of, you know, aspirations and there were a lot of Aboriginal people with a lot of good gut feeling, you know, a lot of good binji. We can see at last how the agreement was presented and explained to us mob there were a lot of opportunities in hand, and with the Ord Final Agreement there were a lot of benefits in there, too, as well, as part of that Aboriginal Development Package, you know, for employment and training and job opportunities. ... there were also opportunities for MG people to start up their own business." **Male, Aboriginal Participant No. 2**

These sentiments are reinforced by previous research on the OFA noting that securing an income stream to sustain the Corporation was identified as a priority very early on in the strategic planning process due to the limited horizon of funding provided in the negotiated agreement (Sullivan 2013: 193). Economic development is in turn seen as a step to addressing poverty, social issues and disempowerment. One participant related this to traditional custodians' desire for ongoing connection to country:

"... we have a lot of people that would like to be able, somewhere along the way, to set up our own places, too, out bush and in the community. Out bush we could take our children and we can live, too, as well away from the hustle and bustle in town, and maybe have connection to our significant areas and our cultural sites. We could look after our homelands and maybe get away from all these bloody social problems in town, you know, all the alcohol and drugs and all this type of stuff, one day." **Male, Aboriginal Participant No. 2**

6.2 Process and Content of Agreement

While several private interests were also parties to the OFA, it is primarily an agreement between the MG people and the State of Western Australia. Negotiations were initiated in September of 2003 by the WA Government which sought to

"compulsorily acquire 65,000 hectares of land for the development of Ord Stage 2" (Office of Native Title, nd.). Both the existing literature and the case study interviews indicated that the negotiations were complex and protracted and could be characterised as adversarial in nature given the historical pathway leading to them: the prior acts of dispossession of the Muriuwung-Gajerrong people of their lands without compensation and the State's contestation of the original native title claim and subsequent appeals against it in the High Court. It took nearly 10 years and 'protracted negotiations at great expense' for the State Government to 'concede that the area was held under native title' (Sullivan 2013: 187). From this background, the traditional custodians were steadfast in expecting some redress for past actions to be incorporated into any agreement:

"... to fix the impacts of the past development ... for the development of the Ord Stage 1 and people getting moved off their country and all that, and the flooding of the dam. ... The MG people would not discuss Ord Stage 2 until that was addressed." **Male, Aboriginal Participant No. 8**

As a result of this stance, the KLC undertook an Aboriginal Social and Economic Impact Assessment documenting the economic and social disadvantage faced by the MG people as a consequence of past developments (Kimberley Land Council, 2004). The eventual OFA included a range of agreements on land use that provided for the development of farmland; conservation areas and environmental buffers around those; irrigation farmland on the Ord River; other development purposes such as tourism and residential uses; and for government purposes around Kununurra (Office of Native Title nd.).

The agreement required that the Muriuwung-Gajerrong people relinquish native title rights over a substantial proportion of their land. In return, a benefits package was negotiated, reportedly worth approximately \$57 million dollars (see McLean 2012; Sullivan 2013, Office of Native Title nd.). This included:

- \$381,000 establishment costs for MG Corporation and \$24 million over 10 years for its operation (\$750,000 per annum for administration of the corporation and \$250,000 per annum to fund an Economic Development Unit). The role of the Economic Development Unit was to enhance capabilities and facilitate opportunities for MG people to generate enterprises and employment, rather than direct investment in development activities. Assets associated with the Economic Development Unit are held in the MG Developments Trust overseen by three MG Directors and one Independent Director nominated by MG Corporation (<http://mgcorp.com.au/what-we-do/mg-development-trust>).
- \$14 million in cash over 10 years to an investment trust with charitable status, the Community Foundation Trust, administered by MG Corporation through a subsidiary that adopts the 'Independent Directors' model described in Chapter 3 (with independent directors appointed by the WA Government).

- \$11 million for the Ord Enhancement Scheme as compensation for impacts associated with Ord Stage 1. This was to implement recommendations of the Aboriginal Social and Economic Impact Assessment. These funds were paid to the Kimberley Development Commission which in turn set up an Ord Enhancement Scheme Management Committee consisting of seven MG Corporation representatives and one appointed by the Kimberley Development Committee to oversee the scheme (Sullivan 2013: 190).
- Land valued at \$15 million transferred to MG Corporation, including 19 community living areas and a 50,000 hectare area known as Yardungarrl on the WA-NT border containing eight communities.

Freehold titles for six conservation areas were created by the WA government and transferred to MG Corporation on the condition that these titles were leased back to the government. Land assets, including the living areas, conservation areas and buffer zones, are held in the 'Dawang Lands Trust'. Funding was included for joint management of the conservation areas with Conservation and Land Management (CALM) and the Water and Rivers Commission. MG Corporation were also to have priority in selecting irrigated lots worth up to 7.5 per cent of the value of the new farm areas, with 5 percent transferred to the Corporation without payment as part of the agreement and the remaining 2.5 percent to be purchased at market value. Participants spoke of the arduous process of negotiating the package:

"We had 26 people around the table, and five of us were very vocal and the rest were sort of the elders listening. And, like I said, it took a few years but there are 14 drafts, right, because the State would send it to us, we would go through it and send it back to the State, and then often they would change something else ... and we would look at it and say, 'No, that's not what we agreed on' so we would do the changes and send it back to them. So this went on for 14 drafts, and I am talking about a document this thick [holds up one hand with thumb and forefinger spread wide apart]." **Male,**

Aboriginal Participant No. 8

In light of the Muriuwung-Gajerrong peoples' struggle for native title recognition and their insistence that compensation for previous injustices be included before moving forward with the Ord Final Agreement, the relinquishing of native title rights as part of that Agreement was clearly a very substantial compromise for the traditional custodians to make. In a speech following the conclusion of the agreement, Helen Gerrard, traditional custodian and then chair of the Ord Enhancement Scheme stated:

"We have surrendered our Native Title and that has been very hard for us; that is our major contribution to the agreement. We now need to have the ongoing commitment from the State to ensure that all parties implement the letter and spirit of the Agreement, and especially to make us a true partner in the development of the region." **cited in McLean 2012: 346**

6.3 Outcomes and Monitoring

Ten years on from the signing of the agreement, there are starkly differing views among the small sample of participants in this project as to the overall outcomes attributable to the agreement. One participant was generally positive about the outcomes from the agreement and pointed to several benefits. For example, MG Corporation has been able to develop office facilities in Kununurra, and there was the perception that following the agreement jobs and training in construction were more readily available and incomes were higher.

“... there were a lot of benefits in there, too, as well, as part of that Aboriginal Development Package, you know, for employment and training and job opportunities. Some were a land swap agreement and there were also opportunities for MG people to start up their own business.” **Male, Aboriginal Participant No. 2**

Jobs through the Rangers program and scholarships through the ‘Goomig’ (Aboriginal Development Program) were noted. Under the conditions of the OFA, commercial developers on new farmland must negotiate Aboriginal Development Programs with MG Corporation. Another important development has been a Heads of Agreement signed between MG Corporation and a Chinese company (KAI) for agricultural development of the Knox Plain area, which triggered the requirement to establish an Aboriginal Development Program (MG Corp 2014-1015 Annual Report).

“... the State went away and put out expressions of tenders for Knox Creek. So the Chinese were the preferred proponent. And we actually came to an agreement with KAI about the Aboriginal Development Package that they are going to provide to us as part of Knox Creek. And part of that development package is for them to clear out two blocks of land that is on Goomig so we can start making money on them.” **Male, Aboriginal Participant No. 8**

However, despite these benefits, two participants strongly believed that the State government had failed to honour the spirit of the OFA in delaying the release of land for new farming developments as anticipated. They expressed frustration at the minimal benefits that traditional owners have been able to leverage from the agreement. These pessimistic accounts are more aligned with existing assessments from the literature. This includes a paper by McLean (2012) based on her doctoral research which involved extensive field research in the Ord Valley, and work by Sullivan (2013), a former senior anthropologist for the KLC, based on his knowledge of the case and interviews conducted in 2007 with MG Board of Directors and with a solicitor who worked on the native title claim and later as an adviser to MG Corporation.

On the face of it the agreement provides for a substantial package of benefits. However, the \$11 million Ord Enhancement Scheme, included as compensation and to implement the recommendations of the Aboriginal Social and Economic Impact Assessment equates to less than \$3,500 per beneficiary. With the overall package

of benefits estimated to be worth \$57 million, this translates to around \$20,000 per beneficiary. However, because the agreement provides for benefits in a complex range of forms and with extensive limitations, including dictating governance structures, assigning a monetary value to those negotiated outcomes is highly problematic.

"That's what I'm saying, all those benefits that came from the Ord Agreement had conditions put to them, right, and the conditions were never favourable to what MG wanted to do, right, because we had to comply with them for the first 10 years. And now they are out of the picture we still can't change the deeds to go down the path we want to." **Male,**

Aboriginal Participant No. 8

The \$750,000 per annum for the administration of MG Corporation is sufficient to sustain only a minimal number of operating staff relative to the task of administering such a complex agreement, particularly given the high costs typically involved in attracting qualified staff to the remote north of WA. That funding, along with the annual \$1 million payments to the Community Foundation Trust have now ended. As noted, the traditional owners had recognised early on the need to secure alternative income streams, but that potential has been curtailed by a series of delays in the Ord Stage 2 development.

"There were supposed to be certain lands which were to be released for economic developments. The OFA gave the MG people or the MG Corporation 10 years to 'make yourself self-sustaining'. Ten years have gone. The lands which were economically viable, we still haven't got, and the State keeps telling us 'when it is convenient' for them." **Male, Aboriginal**

Participant No. 1

"The intention was for a lot of benefits to roll out, but in actual fact nothing has really rolled out at all because of the slowness of the promised land releases and all that for us to become economically viable." **Male, Aboriginal**

Participant No. 8

Sullivan's (2013) assessment of the Ord Final Agreement similarly noted that MG Corporation had been 'pinning its hopes' on the release of land for development, and "... that the announcement to suspend Ord Stage Two was made, without any prior consultation with the organisation as the priority holder of new land releases, was a symptom of the Western Australian Government's inability to come to terms with the new status of native title holders in the region. There was apparently no consideration of the impact that decision would have on the ability of native title holders to benefit from the OFA. They felt that after signing the agreement, the Western Australian Government simply walked away" (Sullivan 2013: 204). The resentment Sullivan referred to then was still evident in interviews for this project:

"Today, I think there is a lot of frustration. I know myself having to deal with it there is a lot of anger out there. People to an extent blame the

MG Corporation. ...10 years down the track the MG people don't own any businesses. They don't have any major infrastructure and personally I think the MG people have gone backwards to an extent, as in social development, because, you know, in the past you had the pastoral operations where a lot of people worked in. They had the main roads where a lot of people worked in, the shire where a lot of people worked in." **Male, Aboriginal Participant No. 1**

"I think that people thought that the objective of the OFA was that if there were lands which could be developed and would help MG people get into business and other activities, the government would negotiate in good faith. ... the government has been quite clear that if it didn't suit them, then it wouldn't be considered, and that the timetable was based on their need, not the community's need." **Male, Aboriginal Participant No. 1**

Even in the potentially productive agreement with Chinese company KAI for agricultural development, the WA Government was described as frustrating rather than promoting economic advancement:

"But that has all come to a standstill until the State and KAI sort out Knox Creek. ... the Aboriginal Development Package is valued at about \$8.3m – we can't even have the benefit of that until the next stage starts rolling out, and whilst Knox Creek is still held up there is nothing coming into the corporation." **Male, Aboriginal Participant No. 8**

It was difficult to talk of monitoring outcomes associated with the Agreement or how benefits were distributed, given the participants' belief, in general, that major components of the agreement had not in fact been enacted. There is a clear acknowledgement that major social problems persist for the Muriuwung-Gajerrong people, including poverty, inadequate housing, homelessness, and those associated with alcohol and violence. However, outcomes across a range of programs are provided in MG Corporation's reporting, including the performance of the various trusts, scholarships and ranger program. So, identifiable benefits have arisen and continue to flow from the OFA. However, because these fall far short of what was anticipated and of what interviewees believed had been negotiated, two of the three interviewees tended to focus on that shortfall rather than elaborating on any positive outcomes.

6.3.1 The Role of Trusts

As detailed above, substantial components of the benefits package are administered through trusts, including the Community Foundation Trust (CFT), the Developments Trust and the Community Lands Trust. Participants appreciated the benefits of Trusts as a means to reduce the potential for conflicts over how funds should be distributed and allowed for longer term planning.

"I think it is good that trusts are protected, because unfortunately when you have got people who are so poor, you know, having \$15m in a bank account sounds like a huge amount. Well, it is a huge amount of money, but when you are looking at 3,000 people it wouldn't go far. So how do you protect that capital ... So there is that immediate grab mentality, which I fully understand. So how do you protect that, but how do you utilise these monies to make sure that it benefits a future generation, not just the current generation?" **Male, Aboriginal Participant No. 1**

The tax exemptions that came with the charitable status of the CFT was noted, but whether this justified the restriction on how the money could be used was questioned:

"You can only do, like you are saying, charitable – a lot of us are looking at it that way, 'Be damned! Tax us for the money and we'll spend it how we want', because at the end of the day, the money doesn't belong to the government." **Male, Aboriginal Participant No. 8**

Within the confines of the charitable trust fund structure, education of the younger generation was identified as an important avenue for leveraging Trust funds for the future. They have also been used to support a range of scholarships as well as more immediate needs.

"...we have the CFT money. ... And we tried to give a small amount of money to the sixteen Dawang, you know, but no cash. It wasn't cash. It was only in a purchase order format where they could buy furniture and some goods, television and beds and all this type of stuff for their home. And there was also if they lived out on the outstation community they could have a small vehicle maybe, you know, to get in and out of town, and maybe a generator." **Male, Aboriginal Participant No. 2**

In addition to the usual limitations on how charitable trusts can be used, the OFA is prescriptive with respect to how it is to be managed. It stipulates the external appointment of an independent director nominated by the State, and that funds are held in low- or medium-risk investments. This arrangement was viewed as producing suboptimal returns:

"I'm not a financier, but to me having \$14m in 10 years and only making \$3m, I don't personally think that is a great outcome. You know, even in today's society – what is it at two or three per cent interest rates? – you would be getting more than the pittance that we are getting at the moment with the investment portfolio." **Male, Aboriginal Participant No. 1**

Participants indicated that having independent representatives on the Trust Board increased the focus on longer term outcomes, but at the expense of the immediate needs that the other directors are under pressure to deliver. A suggested solution was to set trusts up with 'sunset clauses', to initially leverage the governance advantages and longer term perspectives, and hand greater control to traditional custodians as management arrangements mature.

6.4 Shortfall of the Agreement

While a strong sentiment that the WA Government has failed to act in good faith was evident, limitations of the negotiated agreement were also noted as a major contributor to the poor outcomes. With a caveat to having the benefit of hindsight, one respondent describes the negotiated agreement in the following terms:

"If you look at the OFA as a document, it is one of the worst agreements that I have ever come across. It gives all power and authority to the State Government, basically forces the MG people to do lots of things, and it didn't really set up an equal partnership between the MG people and the State. The State ... had all the rights and no responsibilities." **Male, Aboriginal Participant No. 1**

The Agreement document seems to confirm this view. A clause appears in relation to each of the land-related benefits to the effect of "Nothing in this deed obliges the State to proceed with the development ... or to provide funding or support to a Proponent in respect of the development". The same participant went on to explain:

"All the way through it basically says that 'the MG people give up native title in return for', and then in the next breath 'but cannot object'. ... generally the majority of land which has been transferred over has been conservation land which we still haven't even got title to, but it is like freehold to the MG Corporation, but then with the next tick of the pen it leases back at peppercorn rental to the State Government to run national parks." **Male, Aboriginal Participant No. 1**

Despite the arduous drafting process, there remained details in the final agreement with implications that some of the native title holders did not fully understand. This continues to irk them. For example, one of the stipulations of the agreement was the granting of freehold of the conservation areas to MG Corporation that would be immediately leased back to the government for \$1. While the importance of the conservation areas that "the old people fought for" was acknowledged, other unwanted and unfavourable obligations were associated with this deal:

"We always assumed that that buffer area was going to be part of the conservation area, but after everything was signed off and everything, 'No, that buffer area goes back to you as freehold; now you pay your rates on it.' Well, we don't want it. Put it into the park or give us areas that we can actually develop. ... \$1. That is in the Ord Agreement. It is our conservation area, freehold, and we lease it back to the State in joint management with MG. The State is controlling it for 200 years. So, I'm saying we got all that land back. We got the buffer area back, but it is no good to us." **Male, Aboriginal Participant No. 8**

6.5 Summary

After the long and arduous journey of native title claims, appeals and then negotiation of the OFA ILUA, the Muriuwung-Gajerrong people have been left with greatly curtailed control over the land ruled to be their traditional country and seemingly little in the way of the benefits of employment, enterprise development and economic independence that they set out to achieve through the agreement. While initial impressions may be of a sizeable compensation package, and indeed benefits have accrued in a variety of forms, there is a perception that they have given up much for relatively little. This perspective is most evident in sentiments expressed by people in the senior management of MG Corporation that, with the benefit of hindsight, they would do things very differently if given the chance over again to negotiate the agreement. The OFA appears to have done little to address poverty and other social problems that remain entrenched among many of the Muriuwung-Gajerrong people. It seems ironic now to look back on concerns that through native title the traditional owners would hold up economic development of the Ord River:

"The Mabo/Wik issues need to be rationalised so that job creating developments can proceed all over the Kimberley, in particular Stage Two of the Ord River Irrigation Scheme' ... 'There are major development issues just sitting and waiting to go ahead, but due to Native Title, they are at a standstill', Senator Eggleston said." *The Kimberley Echo* 17 July 1997, cited in Head (1999: 154)

The use of Trusts to manage negotiated benefits has had both benefits and drawbacks, and in this case the initial conditions negotiated were the far greater issue. One of the key issues appears to have been that the legal process has not been able to capture what the Muriuwung-Gajerrong traditional custodians imagined as desired outcomes from the agreement. The fact that the Ord Final Agreement was one of the earliest, largest and most complex ILUAs negotiated in Western Australia was almost certainly a contributing factor. Another appears to have been contrasting understandings, one process oriented and one outcomes oriented, of what it meant to negotiate in good faith. While there is talk of a new agreement being negotiated, things appear to remain at a standstill:

"...we are saying no 'You need to fix the first ILUA. You haven't complied with that.' And the funny thing is they [The WA government] just said, 'Oh, we'll just include it in the new one'. Once bitten, twice shy! You know, we negotiated in good faith. I don't think that will ever happen again." **Male, Aboriginal Participant No. 8**

7

CASE STUDY 3

The Yindjibarndi/ RTIO ILUA

7 Case Study 3: The Yindjibarndi/RTIO ILUA

The Yindjibarndi people, from the Pilbara region of Western Australia, were among the first groups to seek native title recognition under the NTA (1993), lodging a joint application with the Ngarluma people in 1994. The claim area of 25,000 square kilometres comprised Ngarluma land on the coastal plains of Roebourne and adjacent waters, and in the south, the northern half of Yindjibarndi ancestral lands. Each group identified secondary claims over certain sites primarily claimed by the other.

The Yindjibarndi are estimated to number around 1500, the majority of whom live on Ngarluma country in or near Roebourne as a result of historical state policy, missionary activity, and the spatial and labour requirements of introduced industry; namely, pastoralism, pearling, and eventually, from the 1960s, mining. The remainder live elsewhere in the Pilbara, and to a lesser degree in other parts of the State and country. The community of Ngurrawaana some 70 kilometres south of Roebourne is the only permanent Yindjibarndi settlement on Yindjibarndi ancestral lands.

Post WWII Indigenous policy and contraction of the pastoral workforce, forced increasing numbers of Yindjibarndi and other Pilbara language groups into ration camps. The largest was the Roebourne Native Reserve. Its closure in the 1970s precipitated relocation primarily into a confined state housing 'village' in Roebourne bringing Ngarluma, Yindjibarndi, Bunjima, and Kurruma people from the reserve into unprecedented daily proximity. Combined with recent access to alcohol and virtual exclusion from the mining industry, the consequences were by all accounts, disastrous (Edmunds, 2012; Langton, 2010; Rijavec, 1995, 2010). Socio-economic indicators recorded at the 2011 census point to persistent Indigenous disadvantage in the area. This is especially acute in the town of Roebourne where just over 60% of the total population identified as Indigenous and unemployment rates amongst this population subset were 26% (Australian Bureau of Statistics 2012).

After nine years of litigation, the Federal Court determined the Ngarluma and Yindjibarndi People held non-exclusive native title rights over parts of the claim area. The court allowed for the registration of more than one PBC over the claim area (NNTT, 2004). The Yindjibarndi Aboriginal Corporation (YAC) and Ngarluma Aboriginal Corporation (NAC), as the authorised PBCs, now each hold and manage the native title rights in the Native Title Area on behalf of the Yindjibarndi and Ngarluma peoples respectively and share Trusteeship over part of the area. YAC also represent the Yindjibarndi in a second claim (claim #1) that is yet to be determined.

Prior to Native Title determination, the registered Ngarluma /Yindjibarndi claim became the basis for several agreements driven by oil and gas interests in the Burrup Peninsula (e.g. Edmunds 2012; Guest, 2009; ATNS, 2005). From these, various ventures were established to grow Aboriginal employment and educational opportunities, and to support cultural activities and enterprises. Investments and major projects included the Roebourne General Store, Roebourne Tyre Service, the Roebourne Cultural Complex, management of an employment programme, and the establishment of the Juluwarlu Aboriginal Corporation Ltd that formed in 1998 to record the stories of elders, and now sits under the YAC umbrella.

Another agreement, regarding compulsory acquisition of land (under the right to negotiate process) included in its outcomes joint management of a new conservation area (Murujuga National Park) on the Burrup; and employment, training, contracting and education provisions.

There is also some evidence that these agreements have been costly for Yindjibarndi people. Edmunds (2012), for example, notes the profound influence of complex new layers of Aboriginal corporate governance and power distributions on service provision, and the tumult of constantly renegotiated social relations in Roebourne. Other internal frictions have been born out of agreement negotiation processes. The well documented (YAC, 2011, 2015) dispute between YAC and Fortescue Metals Group mining company (FMG) concerning exploration, mining and infrastructure related to the Solomon Mine Project on the Yindjibarndi Native Title Area and Yindjibarndi #1 Claim Area exemplifies the critical socio-cultural costs that can accrue in the contexts of native title and agreement negotiations.

Significant divisions have emerged amongst the Yindjibarndi people over the last six years as a result of divergent views about the best approach to take in negotiating agreement benefits with FMG. In 2010 a small group of registered YAC members formed the Wirlu Murra Yindjibarndi Aboriginal Corporation (WMYAC), which reportedly entered into a work contract and a capped compensation deal with FMG similar to that rejected by YAC and also provided Aboriginal Heritage Surveys relating to the claim area to the objection of YAC. Members of WMYAC have challenged the leadership of YAC and the membership of the Applicant to the Yindjibarndi #1 native title claim (NNTT, 2014; YAC, 2011). In July 2015 the Federal Court overturned a vote to change YAC leadership that had passed at a meeting held in June that year, reportedly with organisational input from FMG (Burrell, 2015). On a further WMYAC challenge, the Supreme Court of Western Australia, in early 2016, found that YAC Directors had been elected in December 2015 by invalid process. Between January and April 2016 YAC was placed under the temporary administration pending a meeting convened by the Office of the Registrar of Indigenous Corporations (ORIC) on April 19, 2016 to elect a new YAC board. That vote restored the leadership status quo with no WMYAC members being elected (McLennan, 2016; ORIC, 2016).

The emotional and material toll of these struggles is implicated in a number of reflections and assessments that follow. It is also important to note that the interviews for this project were conducted during the period when YAC was under temporary administration and preparing for the meeting called by ORIC to elect a new board of directors. Clearly these circumstances influenced which aspects of native title agreement making and implementation were at the fore for the interviewees.

This case study concerns Yindjibarndi experience and assessments of the implementation of the Yindjibarndi People and Rio Tinto Iron Ore (RTIO) Indigenous Land Use Agreement, initiated under the NTA in 2013. The signatories to the Yindjibarndi/RTIO ILUA are Hamersley Iron and Robe River Co Pty Ltd for RTIO, YAC and the applicant members for the Yindjibarndi #1 claimant group. RTIO as yet has no mines on Yindjibarndi land. The Yindjibarndi/RTIO ILUA provides for the construction

and operation of a railway line across Yindjibarndi country to transport ore from existing RTIO mine sites to the coastal port of Dampier, and for RTIO to engage in further future acts "including exploration, infrastructure and mining on land in which the Yindjibarndi have received a determination or where their claim is still in progress" (Rio Tinto, 2013).

An examination of the Yindjibarndi/RTIO ILUA from the Yindjibarndi perspective is instructive for several reasons. First YAC has achieved a high public profile through its proactive approach to negotiating native title processes for its constituency. Second, the case highlights the delicate balance PBCs/RNTBC boards and individual directors must negotiate between political tensions inherent in native title processes and agreements. These include overlapping or competing interests, affiliations and loyalties within and between different claim groups and tensions between immediate and future needs of the constituency. Finally, operational structures and strategies provide one model for integrating contractual arrangements and obligations formed under contemporary native title agreements with those from earlier policy regimes.

7.1 Objectives and Aspirations

When asked what the Yindjibarndi/RTIO ILUA means for the Yindjibarndi People, interviewees expressed considerable optimism. The ILUA was characterised variously as:

- an apparent departure from past injustices relating to Yindjibarndi land and native title matters ('It [the ILUA] has lifted us up');
- a marker of societal and industry recognition that Indigenous native title has economic as well as spiritual, cultural and symbolic values;
- a boost to Yindjibarndi capacity to alleviate current levels of Yindjibarndi deprivation and impoverishment; and
- a basis for Yindjibarndi people to implement a Yindjibarndi vision for the future.

These elements are present in the following extended quote from one elder:

"It's the best deal that we've done, in signing the ILUA. ... I grew up in the old reserve back in the day, the 1960s... when you seen the struggle from that time, ... you wake up and find you want to do something for your community and help the people in making it better... Now, if you [are] going to take something from the country, you need to pay for it, in a way, [such as] iron ore, ...[that], disturb sacred ground, sacred sites, ... now days you know, when that companies [use the land] ... then we should benefit through the... land. And it's ours. It's been there with us for thousands of years. The benefits that we receive [through the ILUA trust]...[are] going to looking after ours." **Male, Aboriginal Participant No. 4**

The final point speaks to a strong sense of Yindjibarndi autonomy over the management of benefits received: something reinforced frequently throughout interviews. Yet the ILUA embodies contrary impulses that shape the hard reality of finding a place for Aboriginal people to thrive within contemporary society. Though the narrowly defined native title rights on which it rests preclude power of veto over proposed mining development on Yindjibarndi land, the agreement represents 'opportunity' regarding Yindjibarndi employment and training and protection of Yindjibarndi heritage. Yet there are fundamental differences between the core business of mining companies and Yindjibarndi ways of being:

"[A]s Indigenous people we don't have anything in common with industry-pastoralists, developers, institutions that exploit our country. It has impact economic[ally] and socially and to the core of our culture [and] religious beliefs." **Male, Aboriginal Participant No. 3**

This participant explained that a pragmatic approach to equitable relationship building with mining companies is therefore crucial:

"[W]e try and say, '... look, this is happening'. It is obviously out of our control. [W]e try... to work with it and build a relationship to make sure that certain sites and areas and places in our country have been protected, and we can only do that by having a positive dialogue with industry ... and making them understand that, ... you have to make sure that these things around it are protected.' So, that's, at the end of the day, the key to this whole... is forming that relationship." **Male, Aboriginal Participant No. 3**

However, in his view, the potential for irrevocable damage combined with the finite nature of resource extraction requires vigilant management:

"The agreement shouldn't gag us or tie our hands behind our backs ... We should still have the freedom to make these companies accountable when they are not fulfilling their duties... [while] mining our country." **Male, Aboriginal Participant No. 3**

7.2 Process, Content and Structure of Agreement

Unsurprisingly then, YAC took a proactive approach to ensuring that the Yindjibarndi/RTIO ILUA serves the interests of the Yindjibarndi group. Negotiations with RTIO representatives were informed by a '3C' project model that the group adopted to focus its investment and activities in three areas: community, culture and commercial. Detail of the model was refined through a workshop held in Roebourne in May 2011 free of external advisors and open to all Yindjibarndi (YAC, 2011). One participant explained:

"We had workshops with all our Yindjibarndi members. ... We sat down and we just shared all our ideas what we want to happen with the future...."

[W]e had community here, we had culture, and then everyone just ... split up. I think there were about 25 to 30 in a group, so this group would talk about community for a couple of hours and then go to the next one. It all depends on how much time they needed ... the next team, the commercial ... because we all know what we need and we want our kids to be working in good paid jobs ... You know, we want the kids to have knowledge of our culture and speak Yindjibarndi language." **Female, Aboriginal Participant No. 5**

A consistent theme of interviews was that broad engagement in the negotiation process had built a community of support for the ILUA's objectives.

7.2.1 Trust Structure

The Yindjibarndi/RTIO ILUA stipulated the implementation of an Advisory Trustee model. This required the appointment of a Board comprised of Traditional Owners elected by the Yindjibarndi people, as well as the appointment of two independent directors to sit on the Board of the Yindjibarndi Community and Commercial Ltd (YCCL). YCCL serves as Trustee of two Trusts that were established as part of the agreement:

1. The Yindjibarndi People Community Trust. This is a charitable trust within which 50 per cent of incoming revenue is deposited into a Future Fund and set aside.
2. The Yindjibarndi Commercial Trust. With the help of a commercial lawyer, YAC established a direct benefit trust structure that was not primarily about providing cash payments to beneficiaries but rather focused on the establishment of sustainable commercial activities.

Across the portfolios of the 3C model the main areas of investment (or 'buckets') are:

1. **Commercial Activities**
 - Yurra Pty Ltd – this is a joint venture company developed from the Commercial Trust to provide contract services (e.g. cleaning and gardening) to mining companies in the region.
 - Victoria Hotel Redevelopment – an emerging joint venture with the State and Federal Governments to purchase and refurbish the Victoria Hotel in Roebourne as a service and accommodation hub for tourists, community visitors, government and industry representatives.

2. Cultural Activities

- Juluwarlu Aboriginal Corporation – a language and culture centre that has operated since 1998 to record and archive important cultural knowledge held by elders and other community members.
- ... Art communities – Cheeditha and Ngurrawaana
- ... Cultural mapping
- ... Building Healthy Nannas program (support for elders)
- ... Men's law and culture

3. Community Activities

- Ngaarda Media – TV and Radio production and broadcasting, promoting Aboriginal culture issues and enterprise, licenced to service a catchment including Roebourne/Wickam/Pt Samson and Karratha/Dampier.

4. Native Title Management

- Funding the administration of YAC to manage the range of activities obligatory to holding native title
- Funding members to attend native title meetings (usually between 2-4 per year)

5. Immediate Benefits

- A small emergency relief fund for members experiencing severe or acute economic hardship.

The YCCL Board is tasked with ensuring that funding for each of these 'buckets' is matched appropriately to income, and is apportioned from each of the two Trusts in accordance with their underpinning legislative requirements. The YCCL Board holds annual meetings where YAC presents an annual business plan with detailed financials, which the Trust scrutinises for soundness and appropriateness. This includes the budgets for projects and activities under each of the components managed by Juluwarlu, Yurra and Ngaarda, as well as its own budget as native title-holder. Expenditure is monitored through quarterly trust meetings. Participants highlighted that the value of having independent directors and member-elected directors on the YCCL's Board is that it has ensured the compliant application of the trusts to achieve self-determined Yindjibarndi project aspirations and objectives.

7.2.2 Identifying Beneficiaries

To limit the draw on Trust funds to intended beneficiaries, contributing companies such as Rio require that the Trustee maintain an up-to-date list of all registered members. However, according to one participant, the onerousness of the task results in uneven compliance. One of the challenges is that past disruptions including the removal of children from family can result in disputed or uncertain identity. Nevertheless, YAC has a policy in place to address the challenges:

"[We] have a policy within YAC that they go through a channel of elders, directors, [who]... will refer it to Juluwarlu because [Juluwarlu] have the family tree database to find out the connection if they don't know this person. Most elders in the committee would know who these people are, who their family is. Usually they don't come to us. They just accept their membership. But when it is people that got taken away and some elders can't remember because it has been too far back, so we just give them the extra information which refreshes their memory and they say, 'Yeah, oh yeah, I remember these elders.'" **Female, Aboriginal Participant No. 5**

While some participants understood that the benefits of the Yindjibarndi/RTIO ILUA apply to all Yindjibarndi people, others believed that benefits are limited to Yindjibarndi people registered as members of YAC. This is significant. Identity extends well beyond establishing interest in Yindjibarndi Trusts to the fundamental issue of 'finding roots regarding family and culture'. The delicate and emotionally charged process of identifying beneficiaries exacerbates the heavy burden of administrative obligations on scarce resources.

Following the most recent court challenge on YAC leadership, ORIC, under the CATSI Act issued YAC with a compliance order for a backlog of membership applications to be processed within a stipulated timeframe, highlighting further vulnerabilities for sparsely resourced organisations (ORIC, 2016b).

7.3 Outcomes and Monitoring

Participants were asked to expand on the values and benefits provided through the investments and programs noted above. One expressed a view that all components of the 3C model were, despite varying circumstances and challenges, sufficiently robust. For example, Juluwarlu's wealth of experience, strong vision and track record, established on 'an oily rag' prior to the ILUA, had positioned it well to continue its core business with greater ease and responsiveness under the YAC umbrella, by combining Trust fund support with external grants. Juluwarlu's initiation of the Building Healthy Nannas program with YAC support arose from the intense involvement with elders central to the organisation's archival work. It also recognises the intergenerational and hence long-term consequences of alleviating social crises:

"[B]ecause... it is 24/7 elders, and elders come with a lot of other issues... An Indigenous elder I know from the small community, he looks after his kids and his grandkids and her great grandkids, and all that comes with a lot of problems; housing, health, schooling ... even though we are doing work on Juluwarlu core business, which is documenting their knowledge, they all come, 'Oh, I'm a bit tired because my grandson had this big bill with Homeswest. I don't know what to do...'" **Female, Aboriginal Participant No. 5**

Trust funds have also helped to sustain other cultural and customary obligations:

"Like, they can buy a four-wheel drive, or hire a four-wheel drive, hire a bus, take people out on country, ... to buy fuel, food and... take kids out in the country and teach them stuff out there...Yeah, they did go out bush, out to Millstream, and they have been out to Woodbrook for the Law ceremonies."

Female, Aboriginal Participant No. 4

The broadcasting of cultural material also has multiple functions. Ngaarda radio is valued for communicating culture and maintaining family and kin ties; also building skill development, training and employment opportunities:

"... we want to put a strong Yindjibarndi voice through our radio ... and the message is going out whether it is talked about in language or in English way... it goes right up to the Kimberley ... and on a Thursday or a Friday it goes all around Australia...It is really good because we can say hello to our families and they hear us..."

Female, Aboriginal Participant No. 3

During rapid social change and adversarial relations, media also has a potent political function documenting accurate records for evidence as well as posterity:

"[Ngaarda radio] do recording... when YAC goes to a meeting or a forum, we always got to have someone with a set of cameras to record our meetings. Everything is all recorded and timed ... so that way we know who attended that meeting and what did people say and all that. That's very important."

Female, Aboriginal Participant No. 3

Anticipated outcomes, from the recent production of a documentary film on 'birthing in country' as part of a collaborative programme with the Fiona Stanley Hospital and Murdoch University, are similarly multifaceted. To date the work of Juluwarlu has responded to a deep Yindjibarndi need; however there is now potential for its commercial element to be tapped.

Yurra Pty Ltd, is a joint venture established in 2013 in the nearby mining town of Wickham, that provides contract services (e.g. cleaning, gardening) that can employ a lower-skilled workforce. It has an ambitious agenda to become a thriving, self-sustaining business producing its own capital and wealth to put back into the community, and assisting young people to get training and employment. Inevitably, several participants emphasised the greater employment potential of agreements such as the Yindjibarndi /RTIO ILUA over the rejected FMG package. While both emphasise the importance of training and employment, YAC members argue that royalty payments included in the Yindjibarndi/RTIO ILUA facilitate the development of a more diverse portfolio when compared with more focused employment packages (such as those included in the FMG package):

"We want to get out of the government system, get off the welfare, try and create our jobs... using these sort of deals with Rio, doing our own stuff."

We don't want to work in the mine all our life, and that's not the Yindjibarndi thing. We see a lot of our ... young people... they can get all good jobs but they are not really comfortable working in the mine. ... We[re] trying to provide something that's close to home, job, steady job..." **Male, Aboriginal Participant No. 4**

Further, mine focused employment packages bypass the problem of disengaged youth. One participant noted that jobs and training proposed by FMG are 'good for young people' but many of their youth have inadequate education. Hence Yurra's Pty Ltd focus on being able to provide employment opportunities for those without sufficient technical skills for mine employment.

YAC has also supported training and employment programmes in small Yindjibarndi communities including a ranger program at Ngurrawaana that is concerned with pest eradication and other aspects of maintaining country. The broad goal is to recognise different preferences and capabilities within the Yindjibarndi community and facilitate choice:

"... people that want to do work out on country with culture, ...[and] other people who are happy to go mainstream, ... [W]e are trying... to appeal to those diverse... people, ... So we are not limited to one thing and we try and bring everything in and do everything together." **Male, Aboriginal Participant No. 3**

Consistent with documented levels of local socio-economic disadvantage, older participants nominated access to emergency relief through YAC as another major benefit, despite the small budget allocated to this purpose. Several referred to their own draw on elder assistance for rental, food, electricity and water bills. One referred to the needs of the younger generation.

"You know just to help people out in their struggles, ... and that sort of thing... when they cut people, cut off electricity or water that sort of thing and can help them get back on track. You know, help people, they're not alone. ..." **Male, Aboriginal Participant No. 4**

The tension for Trustees in balancing immediate and future needs was certainly present in the Yindjibarndi case. However, these needs were not necessarily conceived as competing. Participants reflected on ways in which immediate poverty relief, combined with appropriate supports, can be crucial to longer term rehabilitation.

7.3.1 Monitoring Outcomes

Several participants commented on the assessment of projects, indicating that formal and informal project review mechanisms function in tandem. Regarding the specifically cultural materials Juluwarlu produces, one participant noted that their workflow is itself evidence of successful project completion. For this reason being under YAC has been rewarding:

"... we've got to do applications and explain what the project is all about, and at the end of the project we do reporting ... but because the members of the Trust and the members of Yindjibarndi are liaising and working within Juluwarlu anyway ... all of them know when we do our reporting to them ... 'Yeah, we did that. I was involved in that field trip you are talking about.'"

Female, Aboriginal Participant No. 5

The YAC Board and executive adopt a mentoring approach to new project applications and development, providing counsel, revisiting plans together where proponents have made miscalculations in scale and timeframes.

7.3.2 Limitations of Native Title

Participants were asked about any negative effects for Yindjibarndi people or communities arising from the ILUA. The greatest concern related to external factors negatively impacting capacity to maximise the ILUA's full potential or to realise a similar agreement with FMG. The range of issues included weak native title; the demands on the YAC human and financial resources from obligations in the native title process to demonstrate exclusive native title on the Yindjibarndi #1 claim, defend against mining actions undertaken under the RTN process but considered by YAC to be unreasonable, and defend against YAC leadership challenges:

"The only negative thing is our own people [who are] fighting against us, taking us to law, the courts, and that's the only negative thing." **Male,**

Aboriginal Participant No. 4

According to one participant, the rift has caused distress across families. It was also represented as a weakening of the human resource available to pursue a united Yindjibarndi agenda:

"I think if we were all together, if we didn't have court cases and things like that, defending all our against our own people, we could have done a lot better to look after the trust." **Female, Aboriginal Participant No. 5**

7.4 The Role of Government

Regardless of their position within YAC, participants agreed that management of the Trust is effective and outside the realm of government. Indeed there was a common view that government assistance with management would undermine the developmental potential of the Trust:

"...I think the Trust is a very well thought through structure that doesn't allow any individual to be silly ... But the main thing is to grow the self-determination part of it as well to say, 'Well, we can manage this for ourselves. We don't need anyone else coming and managing it for us.'

I don't see any role whatsoever government playing in that area." **Male, Aboriginal Participant No. 3**

That did not mean, however, that Yindjibarndi saw no role for government:

"There is a role for government to support YAC in its objectives: 'assisting us with our three C model of driving, social reforms and supporting those projects and things that we are doing now'. This could include joint funding ventures: 'one of the things that I would like to see government do actually is to recognise what the corporation is contributing [to] itself... and then matching it dollar for dollar basically'." **Male, Aboriginal Participant No. 3**

The purchase of the Victoria Hotel in Roebourne earmarked for a future refurbishment as commercial and community space jointly funded by the Yindjibarndi Trust the Federal, National Stronger Regions Fund and the Pilbara Development Commission's Economic Diversification Fund serves as an example of possible government partnership where it aligns with the Yindjibarndi's 3C vision.

Further potential for government support related to local community and commercial developments that offer real alternatives to welfare dependency. These included:

- Departments/agencies assisting with the challenges of implementing certain aspects of social reform by sharing relevant accumulated expertise and knowledge;
- Making grants of freehold land available to Aboriginal people as commercial sites to grow successful businesses;
- Facilitating Aboriginal capacity to integrate their enterprises into wider markets and external trade;
- Agencies recognising and supporting community/YAC initiatives that have a demonstrated potential to work; more specifically to recognise what YAC itself is contributing to, and to match it dollar for dollar;
- Agencies developing a clear brief that outlines the type and scope of support (and programs) they can offer – for distribution to PBCs to avoid duplication of service;
- Identification of Aboriginal leaders who are demonstrating a capacity to represent and negotiate on behalf their people in commercial environments and provision of support for them in their work.

7.5 Summary

Guest (2009) has argued that agreement making has expanded the concept of Aboriginal autonomy, authority and jurisdiction beyond narrowly defined statutory native title. This exploratory case study of the implementation of the Yindjibarndi/RTIO ILUA by YAC for the Yindjibarndi people seems to offer support to this view. The socio-political context is fraught with challenges: to leadership; to desired levels of access to, and right to protect and be compensated for ancestral land; and from the entrenched disadvantage of their own people. Keys to successful processes and outcomes already ensuing from the Yindjibarndi/RTIO ILUA include: strong Yindjibarndi leadership; strong commitment to Yindjibarndi autonomy and self determination drawing on traditional and western knowledge and expertise; astute staffing appointments; commitment to developing a commercial foundation for long term sustainability of Yindjibarndi culture and community in a contemporary society and a post-mining economy; and, a respect and appreciation for the partnership arrangement offered by RTIO.

8

Discussion

8 Discussion

The Mabo decision and the *NTA* (1993) fundamentally reshaped the legal framework relating to native title in Australia. There remains a highly contested and important debate about the degree to which this legal framework represents a just, or indeed useful mechanism through which Aboriginal and Torres Strait Islander peoples can have their rights to their customary territories properly realised. One of the corollaries of this debate is a secondary and perhaps subordinate question about the aspirations of traditional custodians in relation to what they hope to achieve from native title agreements. This question has received limited attention in the relevant literature.

It cannot be taken that the negotiated outcomes of agreements necessarily reflect traditional priorities and aspirations, given the relative bargaining positions and preconceived assumptions of government and the mining industry that agreements should deliver economic development. These state and industry objectives are evidenced by the desire for agreements to contain conditions that can be demonstrably met using mainstream statistical measures, such as money and jobs. A diversity of objectives was identified in the case studies. The PBCs charged with managing native title interests had a strong commitment to preservation of their culture as an overarching aspiration, supported by access to traditional lands for hunting, fishing, landcare and ceremony. The Gooniyandi Aboriginal Corporation negotiated ILUAs with pastoral interests purely to provide access to sacred sites and traditional activities such as hunting and fishing, and the Yindjibarndi/RTIO ILUA provided for significant investment in cultural activities under their '3C' model. In the case of the OFA, the MG people also negotiated for investment in the Community Foundation Trust in what they saw as reparation for past injustices and as a condition to moving forward in negotiations.

It is clear that there are substantial impediments to traditional custodians and native title claimants leveraging wellbeing through the agreement process. A key factor is the weak bargaining position from which many Aboriginal interests enter the process, largely attributable to the threat of impending arbitration in the absence of an agreement being settled. Traditional custodians do not have the right to independently steward and govern their lands, just the right to access it and negotiate about agreements on it. A further important factor that comes out strongly from the project is the burden placed on PBCs and registered native title applicant groups, due to the many competing demands placed on them and the level of administrative and legal complexity. This applies to both the negotiation and implementation/management of agreements.

Native Title Representative Bodies play an important role in assisting PBCs in the bargaining process and in the subsequent discharge of their duties. Although the role of Native Title Representative Bodies was not a specific focus in this research, the role of the Kimberley Land Council was highlighted in the case studies of both the Ord Final Agreement and Gooniyandi Aboriginal Corporation. In the former, the KLC undertook the Aboriginal Social and Economic Impact Assessment that laid the basis for compensation included as part of the OFA. The KLC was also acknowledged as playing an important role in achieving the initial Gooniyandi native

title determination; in pre-determination negotiations of agreements; and post-determination in managing the charitable trust and providing some resourcing and training. However, there was also clear sentiment expressed that PBCs sought to achieve independence from such Native Title Representative Bodies and to develop the capacity to manage their own affairs.

For MG Corporation and the Yindjibarndi PBCs, their native title determined areas include major economic developments and proposed developments, which have provided benefits to support salaried executive positions and administrative support. In contrast, the Gooniyandi case study provided a good example of the under-resourcing issue highlighted in the existing literature. In all case studies, participants discussed instances where individuals had invested many years of commitment in unpaid positions and in trying personal circumstances. Even in the absence of any substantive development project, there is an onerous workload associated with a procession of Future Act matters and other legal and administrative requirements of running a PBC. With the Gooniyandi Aboriginal Corporation already having been involved in 22 objections to expedited procedures for exploration licenses, upheld in half of those cases, it seems such PBCs need to be vigilant and pro-active to adequately protect their native title interests and prevent other parties from circumventing the agreement-making process. Given that the NTA (1993) necessarily creates these PBCs and hence the roles and responsibilities associated with their management, and that the demands of fulfilling those roles largely preclude other employment, it seems unreasonable that such positions are not publicly funded at least subject to means testing of the PBCs. It is hard to think of a comparable example in which positions created by the country's institutional framework are expected to be fulfilled on an unpaid basis.

An additional dimension relates to the expertise of traditional custodians to execute those functions. To maximise opportunities through the bargaining process and then to effectively manage assets gained through agreements requires a sophisticated level of legal and financial expertise. Again this will impact differentially upon PBCs according to their financial means to employ staff or engage consultants to provide legal and financial advice. While the Gooniyandi have been provided legal support and management of the Kimberley Sustainable Development Trust by the KLC, and board members had received some training from the KLC and ORIC, there was an acknowledgement that they were on a steep learning curve and some had limited understanding of ILUAs and Future Acts. Even where PBCs contract legal and financial advice, a degree of competence is required to ensure that advice is sound and to exercise the duty of care expected of a director or board member.

The research highlighted a number of challenges associated with effectively managing financial assets held in trust. Over time, there is evidence of improvements to the establishment and negotiation of Agreements and assets held in trust. However, a range of challenges remain with the process of developing trust deeds and formulating appropriate financial management models. Chief among these is the continued power differentials that can result in the parties who are providing benefits/compensation having more influence over the final agreed arrangements.

There are also a range of challenges associated with the management and allocation of financial resources flowing from agreements. The five central challenges identified in this research project were:

1. Tension between balancing investment in pressing immediate needs (consumption) and investing in future wealth creation to replace agreement revenues once they cease.
2. Difficult judgments that need to be made regarding whether all beneficiaries are entitled to the same levels of support and resources, or whether income thresholds and other considerations are applied when distributing benefits.
3. Tensions between cultural and legal requirements in terms of managing financial assets - Aboriginal board members of trustee companies and trust advisory councils can be placed under considerable pressure to steward resources in particular ways that run contrary to the legal requirements of the trust architecture. Questions of the scale of representation can also be a challenge for Aboriginal board members. Whilst culturally, their first obligation might be to their immediate clan and kin, legally, they are obligated as board members to serve the entire community equally. This tension can be extremely difficult to navigate.
4. Concerns relating to corruption and self-interest, amongst Aboriginal representatives and directors associated with trusts, but also amongst non-Aboriginal consultants who are engaged for particular strategic exercises, but can charge exorbitant prices and deliver very little.
5. The perception that Aboriginal people continue to lack the administrative freedom to be truly self-determining in how they manage assets associated with major agreements. Sometimes, particularly institutional structures (such as professional trusteeships) that are intended to be empowering, can appear to restrict the rights of native title holders to govern the resources that are lawfully theirs.

Both positive and negative sentiments towards trusts were expressed in the case study interviews relating to these points. Participants appreciated that the various trust structures provided the directors a buffer against those competing demands and enabled funds to build up for longer-term, strategic investments. On the other hand, representatives from MG Corporation in particular expressed frustrations at the limitations imposed upon their discretion to use assets as they see fit. A related and looming challenge as the native title framework matures is the misalignment between the level of representation at which native title determinations are made, and the level at which custodianship is traditionally recognised. Aspects of this issue arose in each of the case studies. The Gooniyandi acknowledge that individual family groups want to negotiate over acts impacting upon their particular country, and this is accommodated by the system of family groups choosing from a short-list of native title lawyers to act on behalf of the PBC. For the Yindjibarndi, there have been rifts

and challenges to the PBC leadership. For the MG peoples the appropriate level of authority over lands is the Dawang. This was accommodated initially by the inclusion of 2 representatives of each the 16 separate Dawang groups on the management committee. However, this structure proved too cumbersome, and was reduced to 1 representative per Dawang.

As Morgan and Drew (2010) note, to date little assessment has been made of the welfare, education and cultural programmes that are funded and administered under the administering corporate structures. In each of the case studies respondents could point to outcomes that aligned with some of the stated objectives. Predictably, this was more common in relation to mainstream economic outcomes and the standard reporting obligations (such as annual reports) for PBCs and trust funds, but extended to anecdotal stories of positive outcomes. However, no evidence of structured, comprehensive evaluations against the various PBC's objectives was provided. Differing views were apparent across, but also within the case studies. Yindjibarndi interviewees were generally positive about the Yindjibarndi/RTIO ILUA. In contrast, one MG interviewee was quite positive about the outcomes from the OFA, while the others were uncompromising in their view that the agreement had delivered far less than was expected. Mixed sentiments regarding previous agreements were also offered in the interviews with Gooniyandi representatives. If there is any single determining factor that can be distinguished to explain these contrasting perceptions, it is perhaps the general acknowledgement that Rio Tinto negotiated in what was felt to be a spirit of 'good faith' with the Yindjibarndi people.

One of the critical challenges in assessing progress and outcomes associated with particular agreements, identified in the literature but not specifically in the findings from this study, is a lack of comprehensive baseline demographic data (Taylor et al. 2012). Taylor et al (2012) contend that the vast array of generic data the Australian Bureau of Statistics (ABS) now collects 'on something called "the indigenous population"' has limited application in the context of native title, arguing that there is a need for increased Indigenous organisational capacity to undertake all aspects of relevant local data collection, retrieval and application that has become increasingly critical as Indigenous rights agendas shift from restitution to the management and implementation of benefits. The key problem, Taylor (2009) notes, is that the ABS classifies data spatially while native title holder groups, in the main, require data that are classified culturally. Inherent tensions embodied in the differently informed sets of understandings and objectives that agreements attempt to reconcile (Bogan and Hicks 2006) and in the disparate capacities to enact obligations (Bauman et al. 2013) further colour questions of appropriate assessment. Recent research to develop culturally specific measures of wellbeing for Indigenous peoples (Yap & Yu, 2016) may provide a way forward to addressing some of these limitations to the evaluation of the outcomes of agreements.

8.1 Study Limitations

There were a number of limitations to the present study. The first, and perhaps most significant, was that participants included only those in management/directorship positions in relation to either PBCs or trusts. This was simply an issue of project scope and resourcing. It did not in any way reflect an attempt by any of the case study PBCs to limit a broader set of voices from participating. Missing entirely from the dataset then, is any sense of the experiences and perspectives of the broader community of beneficiaries associated with each of these PBC, in relation to the process and outcomes of agreements associated with their native title determinations. Reinforcing the point made above about the lack of baseline data, there are few other indicators to draw upon that could either reinforce or contest the views put forward in the qualitative interviews. There is a need for further research with case study PBCs that can capture that broader cross section of beneficiaries in order to develop a more comprehensive understanding of aspirations and satisfaction with both agreement making processes and outcomes, as well as agreement implementation and asset management.

It is not possible to generalise findings from just three case-studies, although much of what was imparted in the interviews aligns with issues raised in the existing literature. These partial stories from the Gooniyandi Aboriginal Corporation, MG Corporation and the Yindjibarndi Aboriginal Corporation provide valuable insights into the experiences of Aboriginal and Torres Strait Islander peoples under the evolving native title regime, and the various mechanisms and processes that shape those experiences. Participant perspectives offer important insights for the interpretation and recognition of wider patterns across the literature, and for policy. In addition to the narrow scope of the interview subjects, the case studies provide assessments at a particular point of time, albeit recognising that interviewees can and do provide perspectives on development over time. Not only is the broader native title framework still evolving – one could justifiably say still in a stage of implementation – but the case studies provide clear evidence of an important process of maturation of traditional custodians in their engagement with native title and of the PBCs created to represent their interests. There is hence a critical need for research that follows developments of PBCs and of individual agreements and their outcomes over time.

8.2 Conclusions

When considered as a means to achieving self-determination for Indigenous Australians and equality in socio-economic outcomes between Indigenous and non-Indigenous Australians, there are major shortcomings of the agreement making process established under the Native Title Act (1993). Objectives of cultural maintenance, including access to sacred sites for ceremony and to traditional lands for hunting and fishing, feature among key objectives of agreement-making for traditional custodians, along with economic development goals relating to employment, enterprise development and alleviation of poverty. These latter objectives are often aligned with aspirations for independence and empowerment.

However, native title bestows upon traditional custodians a restricted set of rights in relation to their lands. Furthermore, the entities established by a native title claim registration/determination to represent the interests of traditional custodians are often under-resourced and lacking in capacity to negotiate and leverage benefits from that custodianship.

For these and other reasons, ILUAs and Future Act agreements cannot be seen as a silver bullet to resolve Indigenous disadvantage in regional Western Australia. However, even in the most narrow sense of potential economic benefits, there is a need to enhance the capacity of traditional custodians to leverage outcomes in line with their peoples' aspirations. Increased resourcing of PBCs and registered claimant groups, and training for board members is a desirable and realistically achievable policy change. Trusts play an important role in the management of assets secured through agreements. They provide both advantages and disadvantages to traditional custodians, but overall they appear to be used to the advantage of PBCs. Increased financial and legal literacy for PBC directors is again important to ensuring trusts contribute to the leveraging of benefits from agreements, and the benefits of trusts are most apparent for newly established PBCs.

9

Policy
Recommendations:
The Role of
Government

9 Policy Recommendations: The Role of Government

The State Government naturally featured more prominently in the MG Corporation case study than it did in either of the other two case study narratives. However, this related to the State Government's role as one of the parties to the agreement rather than a role in shaping the legal and administrative framework surrounding agreements. None of the case studies indicated that there was a direct role for government to play in assisting with the management of Trusts. Furthermore there seemed to be consensus that it was important for native title groups to determine their aspirations and priorities independently and that if and when these might entail potential Joint Venture arrangements with the State Government, it should always be at the initiation of the traditional custodians.

Nevertheless, certain recommendations emerged from the case studies – either directly from participants, or via extrapolation on the part of the research team when analysing the data in conjunction with their knowledge of the existing literature.

1. **Resourcing PBCs.** Given that the legal system requires that a PBC be established once a native title determination has been made, public funding, subject to relevant accountability measures, should be provided to employ at least a CEO/Director and a degree of administrative support. Such funding should be guaranteed and additional to the funds that can be applied for under the Federal Department of Prime Minister and Cabinet's (PM&C) recently announced grants to support PBC capacity building endeavours. Considering the typical costs per positive outcome of other measures to increase Indigenous employment, and the rates of welfare dependency in regional and remote communities, there is likely to be minimal budgetary impact from making such roles salaried positions, and obvious benefits from the positive signals of valuing these important functions through salaries commensurate with the demands of such positions in terms of time commitment and required expertise. The level of support could potentially be means tested according to the resources of the PBC (though generally in public life the salaries of executives increase, not decrease, in line with the size of the budget they are charged with administering). As the NTA (1993) is an Act of the Commonwealth, we acknowledge that such a measure would most appropriately be instigated at the Commonwealth level, although funding may be on a jurisdictional basis. We recommend that the WA Government promote such a reform through the Council of Australian Governments or other appropriate forums as an important means to promoting the efficacy of the native title regime.
2. **Governance capacity building.** Though the ORIC, individual land councils, and now PM&C provide a range of grants and/or training packages for Indigenous organisations, two areas were identified during the research for which little training support seemed to be available. The first was in the form of mentoring support and targeted training for Aboriginal and Torres Strait Islander PBC CEOs. One participant noted the lack of Aboriginal PBC CEOs in Western Australia. This dearth of Aboriginal leadership can contribute to the perception (and in some cases reality) that the process of native title

recognition and management simply reinforces Aboriginal disempowerment in terms of their ability to be self-governing. The second are for Aboriginal Trustee Board and Advisory Council members. As noted above, there are a range of unique and specific challenges associated with managing Trusts and targeted training for these individuals is needed in relation to managing those challenges (e.g. regarding the specificities of the purpose, conditions and legal requirements associated with different Trust arrangements etc). One case study participant suggested that the governance of Trusts could be structured to adapt over time, giving greater control to traditional custodians as they matured. Such structures could potentially also be linked to accreditation gained by the traditional custodian representatives on Trust governing boards.

We further recommend that the WA government, in conjunction with the business and law faculties of the Western Australian universities, assess the viability of developing a tertiary accredited course in the field of Indigenous native title and benefits management covering key areas required in the administration of PBCs, including native title law, trust law, relevant corporations law, financial management, governance principals, administration, and program evaluation.

3. **Level of service delivery.** It is critical that universal service obligations (particularly in relation to health, housing and education) continue to be met by each appropriate state government department and that the same level of service is provided to native title and non-native title holders. In order for agreements emerging from native title to be meaningfully employed to serve the aspirations and priorities of traditional custodians, it is imperative that royalty and/or compensation payments are not being funnelled to provide programs and activities that every Australian citizen is entitled to by law. Rather, they should compliment and augment these services in strategically and culturally appropriate ways. One participant advised that it would be useful for the State to develop a register of government services that each citizen is entitled to, in order to assist PBCs in their strategic planning so that they do not duplicate services.
4. **Scholarships for Aboriginal and Torres Strait Islander finance students.** One participant noted the need for a larger cohort of Aboriginal and Torres Strait Islander tertiary students enrolled in accounting and finance degrees to ensure that in future the management of Trusts associated with major agreements rests to a greater degree, regardless of the Trust governance structure, with Aboriginal people. There may be a role of the State to support a quota of scholarships for Aboriginal tertiary students in these fields with particular pathways for internships with firms who offer professional trust management services.
5. **Evaluation and monitoring.** Through its input into the National Indigenous Reform Agenda and COAG's ongoing monitoring of the 'Closing the Gap' targets, the WA Government promotes consideration of the development

of a framework and associated data collection to support a systematic and ongoing evaluation of the efficacy of the Native Title framework with respect to meeting the needs and aspirations of Aboriginal and Torres Strait Islander Australians.

6. **Financial Protection.** A 2013 Corporations and Markets Advisory Committee (CAMAC) report and (stalled) inquiry indicated the need for a greater level of control over the level of advisory fees charged regarding the administration of charitable trusts. We recommend the establishment of either a specific public trustee office to service PBCs as a low-cost and low-risk option to draw upon for the management of trusts and to provide advice; and/or establish and maintain a register of suitably qualified consultants which PBCs can draw upon and which are bound by a code of conduct and recommended schedule of fees for different services. This may occur at either the national or the state level.
7. **Further research.** This exploratory study has demonstrated that the links between Indigenous aspirations and the management and use of assets arising from native title agreement making, are not well understood. Indeed there is a paucity of research evidence that examines even the more narrow question of how structures adopted to manage native title resources and benefits function, and the kinds of outcomes they produce. Of particular importance here, are the perspectives of both those involved in asset/resource management, and the broader community of beneficiaries. Research that more fully explores these links and perspectives is of vital significance to identifying pathways for native title agreement-making to most effectively support Aboriginal and Torres Strait Islander aspirations. The WA Government could play a leading role in supporting such endeavours. Under this broad conceptual banner there are a number of potential projects that could be developed. These may include:
 - a. Action research projects that track with PBCs as they move from agreement negotiation into strategic planning and the management and use of assets in order to determine the strengths, weaknesses and opportunities associated with each of these phases in concert. Such projects may be jointly funded by a combination of the WA Department of Regional Development and other relevant agencies, the PBCs with a contribution from their agreements, and/or other research funding sources such as the Australian Research Council (most probably through its Linkage scheme).
 - b. Projects that assess and further refine the framework developed in this report with respect to the potential challenges associated with asset management, and which models (particularly in terms of governance) may work best in which situations. This would require a large, multiple case study approach that is well resourced and takes in views from a wider range of stakeholders than was possible in this study, including, in particular, input from industry or government partners of PBCs in agreements, Native Title Representative Bodies

(such as the Kimberley Land Council) and representatives of Trustee Boards and advisory councils. Effective communication of research outcomes could provide critical strategic direction and advice to PBCs and native title groups as they navigate these complex administrative, legal and socio-cultural landscapes.

- c. Projects that situate new research regarding agreement-making from native title within the established literature regarding the practices of Aboriginal organisations in generating enterprise development in culturally aligned ways.

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APPENDIX

Interview Schedules

Interview Guide for Aboriginal Corporations/Trusts

Preamble: The aim of this research is to try to understand how Aboriginal Corporations are using assets from Indigenous Land Use Agreements or Native title Settlements to improve the lives of their people and communities. We'd like to ask about the funds that [Name of Organisation] received from the [Name of ILUA/Native Title] agreement. In particular, we'd like to ask you a little bit about your role, and the overall significance of the agreement, some questions about how the assets are/ could be used, a couple questions about how the assets are managed, and finally, what role government does, can, and should play in this process.

Part 1: Background

1. Could you describe your role at [name of organisation] and how long you've been in this position?
2. What does this settlement/agreement mean for the [Tribal Group] people?

Part 2: Asset Uses

3. What do/will the assets allow [Organisation] to achieve? What do you consider to be the main goals?
4. How were these objectives decided upon? Was there discussion or disagreement on how to use the funds?
5. Are there any mechanisms in place to measure and monitor progress towards these goals/objectives? If so, describe them.
6. How are/were beneficiaries defined and identified?
7. What projects or activities have been generated out of the agreement so far?
8. What have been the main benefits to the [Tribal Group's] people so far?
 - a. Can you provide any specific examples of investments or projects where things have worked well?
9. Have there been any negative effects for your people or communities from the agreement? Maybe problems created by the processes, or cases where the money has not been put to good use?
10. What do you see as the main aspirations of your people now? Has the [Name of ILUA/Native Title] agreement fund been used to help [Tribal Group] move toward these aspirations, or will it help them to do so in the future?

Part 3: Asset Management

11. How are the funds related to the [name of ILUA or Native Title settlement] managed?
 - a. What is the process for deciding how they are invested or spent?
 - b. What governance and accounting structures are in place to manage these investments and spending?
 - c. Do you feel the [Tribal Group] have enough discretion over how the assets are managed and used?

Part 4: Role of Government

12. Are there any government agencies or other external organisations involved in managing the assets?
 - a. How did they come to be involved?
 - b. Has this been helpful or has it made things difficult? Explain
 - c. What role would you like to see the government play in managing the Trust or helping you to manage the trust?
13. Overall do you think the Government has been helpful or made it more difficult for you to achieve what you want to achieve? Explain.
14. What role could/should the government play in supporting you to achieve what you would like to achieve?

Thank you for your time and participation. If there are any publicly available documents or reports covering the issues that we have discussed, we would be grateful for copies.

Interview Guide for Legal and Government Representatives

Preamble: The aim of this research is to try to understand how Aboriginal Corporations are using assets from Agreements or native title settlements to improve the lives of their people and communities. In this interview, we'd like to focus on the [Name of ILUA/Native Title] agreement, but would welcome your insights on any other agreement-making processes you've been involved in with Aboriginal Corporations. In particular, we'd like to ask you a little bit about your role, some questions about the genesis and development of the agreement, a couple of questions about how the assets are managed (particularly through Trusts), and finally, what role government does, can, and should play in this process.

Part 1: Background to Agreement

1. Could you describe your role at [name of organisation] and how long you've been in this position?
2. What role has your agency played in the development and/or implementation of this agreement?
3. What were the strengths of the agreement-making process, specifically in relation to the management of funds (e.g through the establishment of Trusts) from your perspective?
4. What were its limitations?
5. What does/will the agreement, and subsequent Trusts structures (where relevant) allow [Aboriginal Corporation] to achieve?
6. From your observations, what have been the main benefits to the [Tribal Group's] people so far?
 - a. Can you provide any specific examples of investments or projects where things have worked well?
7. Have there been any negative effects for communities from the agreement? Maybe problems created by the processes, or cases where the money has not been put to good use?

Part 3: Asset Management

8. How are the funds related to the [name of ILUA or Native Title settlement] managed?
 - a. What is the process for deciding how they are invested or spent?
 - b. Do you feel the [Tribal Group] have enough discretion over how the assets are managed and used?

Part 4: Role of Government

9. Are there any government agencies or other external organisations involved in managing the assets?
 - a. How did they come to be involved?
 - b. Has this been helpful or has it made things difficult? Explain.
 - c. What role would you like to see the government play in managing the Trust or helping [Aboriginal Corporation] to manage the trust?
10. Overall do you think the Government has been helpful or made it more difficult for [Aboriginal Corporation] to achieve what it wants to achieve? Explain.

Thank you for your time and participation. If there are any publicly available documents or reports covering the issues that we have discussed, we would be grateful for copies.

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ISBN: 978-1 925083-57-6
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