

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Editor: Penelope Moore

**February 1998
no. 6**

**Regional Agreements paper
no. 6**

The High Court Mabo decision in 1992 and the passing of the Commonwealth Native Title Act in 1993 mark a fundamental shift in the recognition of indigenous rights in Australia and how indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes. The recognition of native title by the common law is subject to the operation of Commonwealth and state laws and valid private rights. The management of the relationship between native title and statutory and common law rights may also be the subject of negotiated agreements.

The Yandicoogina agreement between Hamersley, Gumala and representatives of three Aboriginal language groups was the first regional land use agreement for a major resource project to be concluded since the Mabo decision. Covering some 26,000 square kilometres in the Central Pilbara, the Agreement was the culmination of 12 months of formal negotiations between the parties. Negotiations, which commenced outside the ambit of the Native Title Act, were concluded under the umbrella of the Act.

In this paper Dr Clive Senior examines the process adopted by Hamersley and Gumala which produced an Agreement that sets a new benchmark in mining and Aboriginal relations.

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THE YANDICOOGINA PROCESS: A MODEL FOR NEGOTIATING LAND USE AGREEMENTS

Clive Senior

Introduction

The Yandi Land Use Agreement was signed in March 1997 between Hamersley Iron Pty Limited, a wholly-owned subsidiary of Rio Tinto, and Gumala Aboriginal Corporation, representing the native title claimants of the land covered by Hamersley's Yandicoogina iron ore project. The formal negotiations lasted approximately nine months, but the preparatory part of the process took more than a year.

The Land Use Agreement primarily concerned Hamersley's Yandicoogina iron ore mine, located in the central Pilbara region of Western Australia, some 450kms inland by rail from the port of Dampier, from which the ore will eventually be shipped. It is the most remote of Hamersley's Pilbara mines. The initial project involves capital expenditure in the region of AUD\$700 million. Apart from construction of the mine and associated infrastructure, it includes construction of some 147kms of new rail spur to link up to Hamersley's existing rail network. The negotiations concerned only the new mine, infrastructure and rail spur. They did not extend to the transportation of ore along Hamersley's existing rail network, nor to the expansion of port facilities at Dampier, both of which had been previously validated by the Native Title Act.

The Land Use Agreement was concluded with an Aboriginal organisation representing the three groups on whose land the project was to be developed: the Niapiali, the Bunjima and the Innawonga.¹ Members of these three groups were widely dispersed throughout the Pilbara. The core claimants numbered some 200-300 adults, but if potential claimants through extended family links are counted then their numbers were probably in excess of 500. Many were living in the coastal towns of Hedland, Roebourne and Onslow hundreds of kilometres to the north, while others remained on or close to their traditional lands in relatively small settlements which had only recently been established. In this sense the Agreement reached far beyond the immediate locality of the project area. In its final form, it also governed exploration activities by Hamersley over the much larger area of Gumala's native title claim, covering some 26,000 square kilometres. Thus, although the initial impetus for the agreement came from the project, its implications were felt throughout the region.

The negotiations also had an impact on the region beyond the three groups which were directly involved in them. There was intense speculation about the negotiations among the Aboriginal population of the Pilbara and rumours were rife about the type of deals which might have been done. This in turn brought pressure to bear on other negotiations that were being conducted in the Pilbara between Aboriginal groups and resource companies. The Yandicoogina process, or what was perceived to be the Yandicoogina process, was frequently discussed and seen as a model for other negotiations.

Before Yandicoogina, Hamersley had opened five iron ore mines in the Pilbara. The last of these, Marandoo, opened in 1992 following a bitter dispute over Aboriginal heritage that delayed the project for two years. Following Marandoo, Hamersley made a concerted effort to repair its reputation in the region by improving community relations and initiating a successful Aboriginal training and employment program. No doubt this made Aboriginal people in the Pilbara better disposed towards Hamersley than they might otherwise have been. Ultimately, however, the three groups concerned had no strong objections to the project on environmental or heritage grounds. Although a minority may have opposed the mine, by and large it was seen as a unique opportunity to negotiate a favourable agreement that would confer substantial benefits on Aboriginal people in the region.

The purpose of this paper is not to describe the details of the Agreement, which are subject to confidentiality restrictions, but rather to describe the process by which agreement was reached and to pinpoint those factors that contributed to a successful outcome.

An outline of the Yandicoogina Process

The Yandicoogina process may be divided into a series of stages, each with its own distinct characteristics. Although on occasion the stages overlapped, the process generally followed a clear progression, moving to the next stage only after the previous stage had been completed.

The five stages of the process are:

- **Stage One: The Decision to Negotiate;**
- **Stage Two: Social Mapping and External Consultation;**
- **Stage Three: Facilitation and the Emergence of a Representative Aboriginal Organisation;**
- **Stage Four: Formal Negotiation;**
- **Stage Five: Finalisation.**

The above stages do not include an earlier process of consultation that lasted for two to three years while the company conducted assessment drilling and evaluated alternative rail corridors. This process involved consultation with key elders and the conduct of anthropological surveys.

Key characteristics are described at the start of each stage, followed by a more detailed description of the process. Stages one and two were unilateral in character involving only Hamersley, while Stages three, four and five were bilateral, involving both sides.

Stage One: The Decision to Negotiate

- *Early planning;*
- *Internal collection and analysis of information;*
- *Development of an appropriate corporate culture;*
- *Active support of senior management.*

A resources company has a number of alternatives open to it when considering development of a project. It can pursue a legal adversarial approach through the National Native Title Tribunal and the courts, it can enter into negotiations, or it can do neither of these things and wait to see whether legislative or judicial changes clarify or enhance its position. A number of factors impel companies towards the negotiation option including timing, expediency and corporate policy.

The Yandicoogina project was emerging for consideration in 1994-95, following the introduction of the native title legislation. As noted above, there had already been a degree of consultation by Hamersley with the potential native title claimants. Ethnographic surveys of the mine site and a proposed railway corridor had been conducted and Hamersley executives had discussed the location of the proposed rail spur with Aboriginal elders.² As a result of these discussions the company decided to abandon its preferred route in favour of an alternative route suggested by one of the elders, because of the potential heritage problems involved. Heritage issues associated with the Yandicoogina process raised a number of difficult issues and are worthy of separate consideration. However, space constraints prevents further consideration of heritage issues here.

In March 1995, the corporate culture of CRA (Hamersley's parent company prior to the merger with RTZ which produced Rio Tinto) was undergoing a considerable change. Leon Davis, its Chief Executive Officer, saw in the Native Title Act an opportunity to shift group policy towards a more constructive resolution of disputes. There was also support from senior management at Hamersley. A new managing director of development had been appointed in June 1994. He had assumed specific responsibility for Yandicoogina and was able to put a high priority on pushing the process through. Throughout 1994-95 a great deal of executive time was devoted to the native title issue and to developing a more constructive and consistent approach to dealing with it than in the past.

In Hamersley itself an information-gathering process on native title and related issues was under way. This was followed by identification of the key issues and an analysis of the options available. It was this internal process of planning and evaluation that led to the threshold decision to negotiate over the mine. That decision in turn raised a number of difficult questions. Who would negotiations be with? What would they cover? How should a settlement package be structured? What Aboriginal structures needed to be in place? Above all, how could a process be developed that demonstrably had integrity and credibility?

Stage Two: Social Mapping and External Consultation

- *Widespread consultation on how to proceed from a broad spectrum of opinion;*
- *Initial establishment of contact with communities and potential native title claimants concerning the project.*

This stage of the process had three main objectives from Hamersley's point of view: (i) to canvas the views of a wide range of informed people as to how a negotiated settlement might proceed and what form it should take; (ii) to get to know the main players in the region, to understand their motivations and aspirations and to attempt to gain some feeling for the dynamics of Aboriginal politics (social mapping); and (iii) to use the consultation process to create a positive climate in which negotiations could flourish.

This stage coincided with the first public announcement of the mine and the release of the Consultative Environmental Review. It was crucial for Hamersley to be seen to be discussing the project as soon as it came into the public arena to avoid an information gap in which speculation and misinformation about the project could flourish. This was the stage when Hamersley 'externalised' all of the internal planning that had gone into the previous stage. This stage lasted for little more than three months, from October 1995 to January 1996, but it was a period of the most intense activity.

It was important that Hamersley delivered the message itself, rather than allowing it to be disseminated 'second hand' through public announcements or consultants. To liaise successfully with Aboriginal people requires a certain mix of skills that are not always readily available in mining companies. Hamersley was fortunate in this respect. It also had an established presence in the region with the Aboriginal community through its employment and training program. However, attempts to foster relations by Hamersley did not meet with universal success or approval and certain individuals remained suspicious of the company and continued to be negative about the project.

The company recognised the need to consult with all interest groups and not just those who were likely to be receptive. Everyone who should have been brought into the process at this stage was consulted. No doubt suspicion following Marandoo still persisted, but personal contact helped to establish lines of communication and to foster understanding. It seems likely that the contact established at this stage of the process, and in particular the personal recognition accorded to particular individuals by some of the company's top executives, was instrumental in minimising opposition to the project at a later stage, especially from those members of the Aboriginal community who might have been expected to oppose it. For example, the company made a point of establishing personal relations with Aboriginal leaders who had a history of opposition to previous projects and who had most reason to mistrust Hamersley. Once contact had been established, the company kept these individuals informed about the progress of the project and sought their views about how best to proceed. In this way potential opponents of the project were already in possession of considerable information about both the project and the process before stage three commenced. Having had personal contact with the company executives involved, these leaders were less inclined to adopt entrenched or extreme positions when the next stage began.

At this stage of the process Hamersley's approach to consultation was to listen and gather feedback about the project and the wishes and aspirations of Aboriginal people. Of course Hamersley was also expected to provide information about the project, but in doing so it was concerned to dampen down any unrealistic expectations in order to pave the way for constructive negotiations. Hamersley acknowledged that it may not always have got things right in the past, but intended to do so this time with the help and advice of Aboriginal people.

Other structured interviews were also conducted at this time with relevant individuals and organisations. In total approximately 50 interviews were conducted in this three-month period, including interviews with the Native Title Tribunal, with leading politicians and bureaucrats in relevant government departments, with the Aboriginal Legal Service, with local land councils, and with many others with appropriate knowledge and experience. The thrust of the interviews was to expand the list of persons to consult, to clarify the issues and to seek advice as to how to proceed. It was important that the process that was eventually adopted should be seen by all to be fair and defensible.

The consultations revealed a wealth of information about which individuals had to be involved in negotiations over the project. Apart from establishing personal contact with the relevant Aboriginal people, the company had also gained an understanding of their attachments to land, of personal motivating factors and of family relationships and disputes, all of which added up to more than a passing understanding of the shifting and unpredictable nature of Aboriginal politics in the Pilbara.

It was also important at this time to provide information about the project and the approach being adopted by the company to those whose support might be needed later, including the Western Australian government, the Native Title Tribunal and the media. The process had to be open. If people were consulted and kept informed of the project and the consultative process, they were less likely to listen to uninformed criticism.

At the end of this stage, the direction in which negotiations might proceed was beginning to crystallise. The company had a good idea who negotiations should be with, what they

might cover and how they might be arranged. However, the next phase involved empowering Aboriginal people to conduct their own meetings and to make their own decisions as to how to proceed. If the process was to have integrity, Aboriginal people needed access to funding and to their own advisers. The company could not control the next stage of the process and it therefore carried a certain element of risk. One company executive likened the next stage to 'letting the tiger out of the bag and hanging onto the tail'.

It was time for the company to step back a little and see what course events would take. But the process still needed to be driven and in order to do this Hamersley appointed an independent facilitator.

Stage Three: Facilitation and the emergence of a representative Aboriginal organisation

- *Appointment of an independent facilitator to drive the process;*
- *Notification of all potentially interested parties;*
- *Consultation with elders as a starting point;*
- *Provision of adequate funding for community meetings;*
- *Appointment of appropriate advisers and consultants;*
- *Emergence of an Aboriginal organisation with capacity to represent and bind its members;*
- *Continued access to company personnel to provide immediate information about the project and to respond to questions;*
- *Company support for Aboriginal self-determination.*

The role of facilitator required an independent person who was acceptable to both the Aboriginal side and Hamersley to advance the process. It was also envisaged that once the facilitation phase of the process was complete the facilitator would act as the mediator in the subsequent negotiations, providing of course that he or she still enjoyed the support of both sides.

As a result of the consultation stage the company was able to provide the facilitator with a comprehensive brief on the politics of the area and on the individuals involved. It was agreed that the initial approach to the Bunjima, Niapaili and Innawonga should be made through the elders. Apart from being culturally appropriate, if the process were to have any chance of success it had to have the imprimatur and continuing support of the elders. The elders had been consulted and informed during the consultative stage of the process and were therefore expecting an approach from the facilitator.

The elders were keen to advance to the negotiation stage and were already considering a number of issues, including organisation, advisers the composition of a negotiating team and funding arrangements. The elders were impatient to get things moving and took a number of decisions immediately. For example, because it was seen as important to have legal advice at the earliest opportunity, the elders, with the advice and assistance of the facilitator, compiled a list of six potential legal advisers and then proceeded to make a selection on their own.

The elders' view of negotiation was that it was something to be disposed of as quickly as possible, so that benefits could be obtained without delay. The fact that they did not

universally appreciate the necessity for broad-based consultation proved to be an issue of continuing tension throughout the process. Certain elders saw negotiations over the project as their own cultural preserve because they were invested with primary responsibility for cultural and land matters. However, while their high standing in Aboriginal society was undoubted, it was also apparent that the skills required to achieve a successful outcome in complex negotiations – a good education, knowledge of Western ways and business practices, patience and a long-term view – were qualities more commonly demonstrated by the younger, less traditional and better-educated members of the Aboriginal community. The elders were forced to accept that even though the project caused them no particular heritage or cultural concerns they could not proceed in such an important matter without more widespread discussion and general community backing. The process had to ‘flow down’ through them to all members of their groups. The elders wanted to remain in control of the process, but as it developed they became increasingly frustrated at their inability to participate at the level that their status warranted.

A series of community meetings had to be financed. Hamersley faced a dilemma. Although it wanted to distance itself from funding arrangements in order not to appear controlling or paternalistic, it also wanted to ensure that funding was not misapplied. Funding proved a contentious issue. In the early stages, before the groups had formally settled upon any representative Aboriginal organisation, funding was arranged through a trustee. However, once an Aboriginal organisation (Gumala) was in place, arrangements were made for it to receive funds direct and to administer them itself. For funding to be successful in these circumstances two conditions are necessary: the company must develop an understanding of the time and expense involved in negotiating with Aboriginal groups in remote areas, and the Aboriginal group concerned must show reasonable restraint and responsibility in its use of funds. In fact no ‘sitting fees’ were paid for attendance at meetings, although expenses were paid or reimbursed.

It had been decided from the outset that an inclusive policy should be pursued in determining who should be involved in negotiations. This would ensure that all those who believed that they should be involved would have a chance to become involved. It would also preempt later challenges by Aboriginal people claiming they had not been consulted. A notice of meeting was therefore prepared by the facilitator and circulated to all Aboriginal communities and organisations. Land councils were given formal notice and advertisements were placed in the local papers. However, written notices alone could not be guaranteed to reach the right people. Three Aboriginal consultants were each retained for a week to spread notice of the meeting by word of mouth throughout the region, with each having responsibility for a particular area.

There was no single Aboriginal organisation in the Pilbara that commanded the necessary support to handle negotiations on behalf of the three groups. There were two land councils based at Roebourne and Port Hedland which were accorded representative body status for the West and East Pilbara respectively. Both of these land councils had their supporters and advocates among the three groups. However, the project cut across the boundary between the land councils and was therefore not exclusively within the jurisdiction of either. The real difficulty, however, was that the Niapiali, the Bunjima and the Innawonga tended to view the land councils with suspicion for historical and political reasons. The three groups had a strong desire to exclude both land councils from taking a formal role in negotiations and sought an alternative structure that would enable them to

retain control of their own business. Despite this, members of the groups who had close associations with the land councils continued to participate in the Yandicoogina process.

Three major bush meetings were held in quick succession over a period of just three weeks. Confirmation of the appointment of the lawyer chosen by the elders was one of the first decisions taken, but not before some criticism had been voiced about the individual and the selection process. Company personnel attended all of the bush meetings on invitation to provide information on the project. Their presence made a considerable contribution to the process, enabling them to inform, to address misinformation, to socialize during breaks and to watch the process develop (albeit from a distance). The company presentations were helped considerably by the use of maps and aerial photographs. There was also a visit to the mine site where the initial mining and infrastructure areas were pegged on the ground. Although all this was very useful, the meetings during this stage were essentially Aboriginal meetings to decide Aboriginal business and the company representatives only attended on invitation for short periods of time. The mood of these bush meetings was extremely volatile and there was no telling where they would lead: the tiger had indeed been let out of the bag.

One of the main decisions to be made at these early meetings was how the three tribal groups should organise themselves and, in particular, whether they would choose to negotiate together or independently. Although mining had been going on in the Pilbara for over 30 years no one had ever before consulted Aboriginal people about it, let alone invited them to negotiate over a project. Eventually it was decided that the Niapaili, Bunjima and Innawonga would join together for the purpose of negotiations under a new Aboriginal corporation to be known as Gumala, the Bunjima word for 'all together'. Gumala was constituted with a governing committee of 18, each of the three groups electing six representatives to serve on the committee. This show of unity was by no means a foregone conclusion. It was decided upon because it was perceived that the advantages of the greater strength that would be gained from presenting a united front in negotiations with the company outweighed the disadvantages of three separate negotiations.

Following the initial bush meetings, Gumala had much to do to prepare for the negotiations. It required the services of a community planning and management consultant who could help it to clarify the aspirations of its members in order to prepare its negotiating position. Given the geographical spread of the Gumala members, the different needs of elders from other members of the community, and the differences between those living in the communities and those living in the towns, this was no easy task. The facilitator had a role to play in the selection of the consultant and was able to provide Gumala's lawyer with a list of persons to include in the selection process.

Gumala also needed to obtain independent commercial advice on the project to prepare for negotiations. The advice of Gumala's lawyer was critical here. As a legal practitioner with many years' experience of the resources industry, he was able to recommend a suitable consultant with the specialised knowledge required. Hamersley's commitment to resourcing Gumala to enable it to negotiate on an equal footing had been honoured to the full. At this stage Hamersley might well have had some misgivings about the process as it was developing, wondering whether the principle of equality had got out of control. However, Hamersley did nothing to try to attempt to influence Gumala's choice of

advisers. The restraint shown by Hamersley was possible because it was clear about the requirement for the process to be conducted with the utmost integrity.

The Gumala negotiating team, which was chosen by Gumala's governing committee, consisted of 10 members, three of whom were women. It met for the first time less than a week before formal negotiations started. There was scarcely time for training or discussion on how to conduct negotiations, but it is doubtful if any amount of training could have prepared the team for what was to come. However, some members had relevant experience, including experience in union negotiations, in working for mining companies and in ATSIC administration.

One concern with the process at this stage was to ensure the continuing support of the elders. The reality was that as Gumala emerged through a series of meetings, the position of the elders diminished. Although they were still accorded formal respect, it was difficult for them to follow the new concepts, the 'high' language and the pace of discussions. Some of the key elders felt that the process, which had originated with them, had been hijacked by the better-educated younger members of the community. Nor could they see much progress. Other more pressing matters were vying for their attention.

It was important to address the issue of the alienation of the elders. Without their support no agreement could be reached. Hamersley had to depend to a large extent on Gumala to ensure that there was continual feedback to elders and that they continued to feel part of the process. Of course some family groups were better at providing feedback than others, but by and large Gumala showed itself aware of the need to inform and obtain instructions at the grassroots level. Hamersley was also well aware of the situation and did what it could by ensuring that the earlier relations it had established with the elders were maintained through personal contact and regular visits to the communities.

The frustration of the elders presented a serious problem which under other circumstances might have been used to divide Gumala and to defeat the whole process. Without the support of key elders no agreement could have been reached. That the elders' frustrations were not exploited is a reflection on the integrity of the process, on the cohesion of Gumala and on the refusal by Hamersley to act in an opportunistic fashion for short-term gains.

In retrospect more could have been done to ensure the continued involvement and support of the elders. Elders from the different groups were unaccustomed to spending time together and perhaps they should have been given more opportunities to do so in situations that were not specifically project-oriented. Had a council of elders been formed to deal with heritage and cultural issues, the elders would have had a better-defined status and a more specific purpose within the process.

Stage Four: Formal Negotiations

- *Establishing the ground rules with a protocol;*
- *Ensuring a reasonable equality of bargaining power;*
- *Structuring the negotiations in the form of a mediation;*
- *Safeguarding privacy and controlling access to the media;*
- *Systematising the process of reporting back to the wider Aboriginal community;*

- *Maintaining the momentum of negotiations and keeping lines of communication open;*
- *Adopting a ‘stepped’ approach to agreement, with the sequential signing of documents.*

A ‘protocol’ drafted by the mediator had been circulating among the parties before the first negotiation session. The purpose of this four-page document was not only to set the ground rules for the negotiations, but also to set the tone. The mediator’s task was made easier by the goodwill that had already been generated by Hamersley’s employment and training scheme, its community assistance program and the relationships which had developed during the consultation stage of the process. Also, both sides came to the negotiating table wanting to reach agreement (even if their expectations of the terms they hoped to obtain did not coincide).

In setting the tone, the protocol established the basic principles underlying the mediation: (i) that since the parties had to coexist in the Pilbara for the foreseeable future, they should explore outcomes that could provide long-term benefits and security for both; and (ii) that the negotiations should be conducted in good faith to build upon the mutual trust and goodwill that had already been established. Hamersley was particularly concerned that failure to reach an agreement should not jeopardise the work it had already undertaken to promote relations with Aboriginal people in the Pilbara.

The commitment to negotiate in good faith was not just a hollow sentiment. In the protocol the parties agreed to inform and consult each other before taking certain action. Thus, Gumala agreed not to make a native title claim without first informing Hamersley, while Hamersley in turn agreed not to trigger the right to negotiate provisions of the Native Title Act, or to make any applications under Aboriginal heritage legislation, without first notifying and consulting with Gumala.

Another important aspect of the negotiations was that they were conducted in private, beyond the scrutiny of the media. All public announcements were made either through the mediator or by a joint press release. There were no breaches of privacy which, given the numbers of people involved and the interest in the negotiations, was no small achievement. The negotiations were also subject to strict confidentiality provisions contained in a separate deed attached to the protocol. Anyone attending a negotiation session was required to sign a separate confidentiality agreement.

Much is often made of the power imbalances that exist in negotiations between resource companies and Aboriginal people. In this case many of those imbalances had already been addressed earlier by the process. As the two sides came together at the start of negotiations, Hamersley was represented by two executives and by two lawyers, who were under instructions to keep a low profile, their main role being to observe and to advise.

In contrast, Gumala’s negotiating team consisted of ten elected Aboriginal representatives, a commercial lawyer experienced in negotiations who adopted a more active role than Hamersley’s lawyers, and a consultant with many years of experience in Aboriginal affairs. To balance Hamersley’s vast resources and detailed information about the project, Gumala had the services of an industry consultant with specialist knowledge of the economics of the iron ore industry who was able to provide a realistic appraisal of

the economics of the project. It was not a one-sided contest by any means. Gumala's advisers had been selected by Gumala on the advice of the facilitator and their own lawyer, without any interference by Hamersley. The process demonstrates that a mining company determined to approach negotiations in good faith can, given sufficient time and resources, go a long way to addressing inherent power imbalances.

The negotiations were conducted in the form of a mediation. The mediator was required to oversee negotiations and give a structure to proceedings. His role also involved helping the parties to isolate issues, developing options for resolving those issues and attempting to assist the parties to reach a mutually satisfactory agreement which, as far as possible, accommodated both their interests. He would not have been able to fulfil this role without the respect of both parties and their confidence in his neutrality.

Mediation proved particularly appropriate for the Yandicoogina negotiations, which required mutual understanding and a solution that assured long-term coexistence. By attempting to identify forward-looking interests and by encouraging open discussion of options, it was possible to foster an appreciation of the other party's viewpoint and to encourage creativity through a mutual problem-solving approach. This process also helped defuse the feelings of antagonism that sometimes arise when parties fall back on defending well-worn and firmly entrenched positions.

It was the task of the mediator to control the discussions in a number of structured ways. Once issues had been identified, the less controversial ones could be tackled first. This helped to increase the confidence of the parties and to familiarise them both with each other and with the process. The very act of signing off on particular issues gave a feeling of direction and achievement and helped the parties develop a relationship of trust. In this context, the Yandi agreement may be seen as a series of staged agreements commencing with the protocol, progressing through an agreement on the conduct of heritage surveys and a memorandum of understanding, and culminating in the final land use agreement and the tripartite agreement with the State government.

The presence of a mediator also meant that there was an independent person to defuse tension and emotion. This could be done by calling a break, or by holding private sessions with a party. There were more private sessions with Gumala than with Hamersley. Elders usually attended sessions and they naturally needed breaks so that matters could be explained to them in the relevant Aboriginal language. This also suited Gumala's negotiating team because, like most Aboriginal people, they were used to taking time out for private discussion of issues.

It would be wrong to give the impression that the negotiations ran smoothly. There was a history of bad blood and continuing distrust of Hamersley over Marandoo. Gumala's negotiating team contained a number of forceful individuals and sessions were often tense, culminating in flashpoints and – eventually – the temporary abandonment of negotiations.

Six mediation sessions in total were held in the Pilbara in the three months between July and August 1996: two in Tom Price and four in Dampier. Hamersley always acquiesced in the selection of the venue. The meetings were held in lecture rooms or training rooms which were light and airy and where visual aids were available. Meetings were intensive affairs, usually lasting for two full days. Momentum was maintained by ensuring that

there were no more than two or three weeks between meetings. Proceedings were flexible to accommodate the needs of the parties, especially Gumala. Sessions were rearranged to allow attendance at funerals, and elders who wanted to see how things were progressing were encouraged to attend. Members of Gumala's negotiating team and others who attended negotiation meetings did so without receiving any payment other than reimbursement of expenses.

The interest-based approach of the mediation tended to lead to some frustration and impatience among Gumala at first. Having developed an initial position paper that was delivered to Hamersley prior to negotiations, Gumala was committed to a position-based bargaining approach. This led them to see attempts to explore options and to explain reasons for the adoption of their position on a particular issue as either evasive or delaying. Not surprisingly, it took some time to appreciate that negotiation involved compromise and the exploration of alternatives, rather than simply adopting and sticking to established positions.

When the mediation sessions were in progress, the parties mixed socially at mealtimes and at the end of the day, although there was a clear rule that discussion of negotiation issues was avoided at such times. As the process continued, a feeling of mutual respect gradually developed as individuals were able to share the common experience of participating in negotiations. It is also true to say that as the process continued individuals, having devoted so much time and energy to the negotiations, became increasingly committed to the notion of a successful outcome.

At the end of August 1996, following the sixth mediation meeting, negotiations ceased due to deadlock. The importance of maintaining momentum had always been recognised and the parties therefore agreed to keep lines of communication open. Gumala therefore sent representatives to Perth to meet with Hamersley to continue to explore options and to see if the deadlock could be broken. At least six of these exploratory sessions were held in Perth.

Eventually the deadlock was broken and agreement reached in principle. It had always been accepted that any agreement that was reached would need to be fully explained and ratified by a general meeting of Gumala. Indeed, throughout the process the Gumala negotiating team had regularly reported back to the 18-person Gumala committee, which had in turn called general meetings of all members of Gumala to explain progress or to seek approval. This need to keep its members fully informed emanated from Gumala itself and was an essential part of the Aboriginal decision-making process. At times Hamersley seemed to be frustrated by it, particularly given the expense associated with general meetings when there was little progress to report. However, general meetings played an essential role in ensuring that information was disseminated in an appropriate way, that contentious issues were aired, that the bulk of members did not feel alienated from the negotiation process and that Gumala as an organisation held together. A general meeting of Gumala was held and the agreement reached with Hamersley was formally approved.

There still remained much work to be done to finalise the agreement, and a number of details still had to be worked out. It was thought appropriate, however, to mark the progress that had been made with a memorandum of understanding. A brief ceremony was held and a joint press release circulated.

Stage Five: Finalisation

- *Incorporation of the validatory processes of the Native Title Act;*
- *Reporting on progress to government to ensure its cooperation in the process;*
- *Continuation of Aboriginal representation and feedback throughout the drafting process;*
- *Establishment of a process to obtain informed consent from Aboriginal signatories;*
- *Completion of the process in a symbolic manner.*

Any attempt to develop a legally binding agreement as negotiations progressed would only have bogged negotiations down in drafting detail. However, a formal legally binding agreement now had to be prepared, the memorandum of understanding having not addressed all issues in sufficient detail. For example, details of taxation implications and trust arrangements remained to be worked out. Also, as with any drafting process, reducing the agreement to a legal format raised new issues not previously addressed. The lawyers came into their own at this stage of the process, but elected representatives from Gumala's negotiating team remained involved.

Until this stage the whole process had been conducted outside the Native Title Act. Once agreement had been reached it was necessary to adopt certain procedures within the Act to provide Hamersley with the legislative certainty that it required for the project. However, there was an enforced delay because the State could not give notice of its intention to issue tenements for the project under section 29 of the Native Title Act until the State Agreement authorising the grant of the tenements had been ratified by parliament. At one stage it seemed doubtful whether the agreement with the State would be ratified before parliament was prorogued. However, the agreement was ratified and in early December 1996, with the concurrence of Gumala, notices of intent to grant leases over the project area were issued under section 29 of the Act. There then followed a two-month waiting period to see if any native title claimants (other than Gumala) emerged. Provided that they did not, the grant of the project leases would be valid once Hamersley, Gumala and the State government agreed in writing that the leases could be granted (Tripartite Agreement) and lodged a copy of the Tripartite Agreement with the Native Title Tribunal. In fact no other native title claimants did emerge and this was the statutory validation process that was followed.

At this time it was essential for Hamersley to keep the State government fully informed regarding the progress of the negotiations. Ultimately government support was essential to make the agreement work and Hamersley was obviously concerned that any refusal or delay by government, for example in executing the Tripartite Agreement, could jeopardise the whole process.

It was important that informed agreement was obtained from all signatories to the Land Use Agreement and a procedure was put in place to ensure that this happened. There was already widespread familiarity with the terms of the Land Use Agreement because of the continual feedback that had been given by the Gumala committee to the broader membership while negotiations were taking place. The Gumala chairperson and lawyer spent three weeks touring the Pilbara armed with copies of the Land Use Agreement, together with a short summary, to explain the agreement to individuals and small groups. They stressed the long-term significance of the Land Use Agreement and discouraged

people from signing it unless they really understood it. There was a high level of interest and discussion as a result of these personal visits.

This stage produced some anxious moments. Contested boundary disputes within Gumala that had not been adequately addressed in the earlier stages resurfaced. At one point there was a real threat that key individuals would withdraw their support for the agreement for reasons that had nothing to do with the actual terms that had been reached. Eventually, however, these issues were put aside for the greater good and the execution of the Land Use Agreement by Gumala received formal approval at a well-attended general meeting.

The Land Use Agreement was signed by approximately 100 individuals. These included not only all of the registered native title claimants, but also those individuals who had been identified by a genealogical study carried out for Gumala as being most closely related to certain key ancestors. Because of indemnities given by Gumala in the Agreement, it was seen to be in Gumala's as well as Hamersley's best interests to do everything possible to ensure that all potential native title claimants were bound by the Agreement.

With the signing of the Land Use Agreement and the lodgment of the Tripartite Agreement the process was effectively complete. However, some symbolic event was needed to round off the process properly and acknowledge the successful outcome that had been achieved. A barbecue held outside Tom Price was attended by hundreds of people, including all the key Gumala members and their families. Hamersley employees and their families from Perth and the Pilbara towns were also there in force and there was music, speeches and an exchange of gifts. A sense of achievement, satisfaction and a genuine feeling of goodwill prevailed.

Conclusion

The Yandicoogina process demonstrates what can be achieved given detailed planning and a willingness to negotiate in good faith on both sides. The process can no doubt be criticised as being expensive and time-consuming, taking almost two years to complete. However, it does not necessarily compare unfavourably with the time and expense that alternative approaches might have involved. Most important, the Land Use Agreement was one reached between the parties themselves without outside intervention. It is submitted that the process has the potential to set a new Australian benchmark in mining and Aboriginal relations.

¹ The orthography for the Aboriginal groups referred to in this paper follows that used during the negotiations and in the Land Use Agreement itself. It differs from other orthographies, for example the Karijini National Park Management Plan, which uses Panyjima (Bumjima) and Yinhawangka (Innawonga).

² The term 'elder' is used in this paper to refer to individuals who were generally recognised by their own group as deserving the description and the respect which it confers. The term is capable of different meanings depending on the context in which it is used. When used here in connection with ethnographic studies it usually refers to males with special knowledge of and responsibilities for a particular area. Although little difficulty was encountered in deciding who was an elder during the negotiation process, once agreement had been reached it became necessary for

Gumala to define the term for certain purposes of the Agreement. This raised a number of difficult issues. Was there an age at which the status of 'elder' was automatically conferred and if so what was it? Could a person without traditional knowledge be an elder? Could a person who had been long absent from his or her traditional lands properly be described as an elder and did it make any difference that the person had been forcibly removed?

ISSN 1329 - 8135

ISBN 0 85575 3277

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