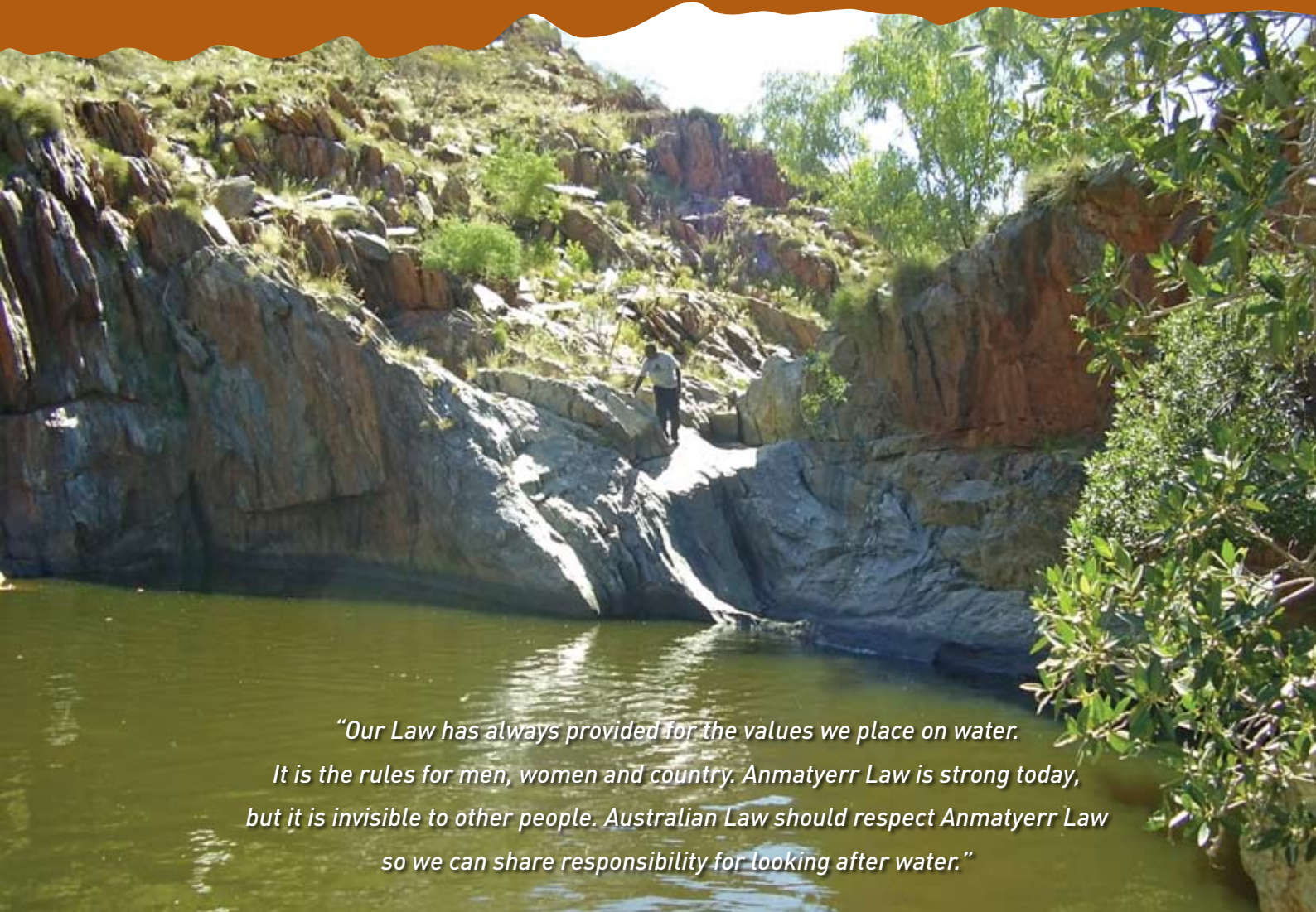




Australian Government  
Land & Water Australia

FINAL REPORT

# An Agreement Approach that Recognises Customary Law in Water Management



*"Our Law has always provided for the values we place on water.  
It is the rules for men, women and country. Anmatyerr Law is strong today,  
but it is invisible to other people. Australian Law should respect Anmatyerr Law  
so we can share responsibility for looking after water."*

Quote workshopped by Anmatyerr people and the Water Project Team

By Professor Donna Craig, Dale Hancock, Dr Naomi Rea, Dr Collins Gipey,  
Eric Penangk, Josie Nabangardi and Tony Scrutton

Anmatyerr co-researchers and cultural supervisors:  
Eric Penangk, Tony Scrutton, April Campbell (supervision)





**COVER PHOTO:** Anna's Reservoir Conservation Reserve (Mer Ngwurla), a permanent waterhole in Central Australia near Alice Springs, Northern Territory.

***Indigenous Law and cultural traditions remain strong and active in many parts of Australia.***

***This project demonstrates a way for local Indigenous groups and other stakeholders to agree on the management of significant places and local issues with the aim of improving cultural and natural heritage and Indigenous futures.***

## **Disclaimer**

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# An Agreement Approach that Recognises Customary Law in Water Management

Research project number NTU23 of the  
Social and Institutional Research Program  
of Land & Water Australia.

Project completed December 2008.

Principal Investigator:  
Professor Donna Craig, Macquarie University

# An Agreement Approach that Recognises Customary Law in Water Management

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## Related Publications

- ▶ The fact sheet from this project, *An Agreement Approach that Recognises Customary Law in Water Management* is available on the Land & Water Australia website at [www.lwa.gov.au](http://www.lwa.gov.au)

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The next generation of Anmatyerr traditional owners and managers working towards culturally-based employment in natural resource management.



# 1 Background

The language name for Anna's Reservoir Conservation Reserve is Mer Ngwurla, which refers to the skin name for this place under the Anmatyerr system of law that comes from the land.

All places, people, plants and animals belong to this skinship system.

Mer Ngwurla is immensely important to Anmatyerr people as a place that includes sacred sites, open or free places for all people to use for recreation and a place of cultural heritage from the distant and recent past.

The name Anna's Reservoir came from McDouall Stuart. The Barrow Creek Pastoral Company attempted to build a homestead there in 1884 because of the permanent water. This rock hole was one of the few places with good water along the stock and exploration routes north of Alice Springs. The settlement failed because Anmatyerr people drove the new settlers away.

The detailed story of this contact period is not well known, however the remains of the stone buildings and other artefacts are testament to the history and stories of this largely unknown waterhole. Mer Ngwurla is of similar importance to Anmatyerr people as the Opera House is to the people of Sydney. It provides a place on their traditional lands where people can relax, camp, share stories and teach children. Those with traditional manager responsibilities also need to visit and care for Mer Ngwurla for cultural purposes. Swimming and good drinking water are important for health and well-being in this hot, dry and dusty environment.

Being able to get there is of primary importance for any user of Mer Ngwurla. The reserve is about an hour's drive by dirt road, some of which requires a four-wheel drive. Access is made difficult by the road being impassable at times and because it passes through areas of pastoral station heavily used by the pastoral enterprise. The road is susceptible to erosion because of its situation at the base of foothills. It passes by a major bore and watering point and through a number of fenced paddocks. Access issues affect everyone who wants to visit this place including the pastoralists, Anmatyerr people, parks and wildlife rangers who visit perhaps twice a year, other locals, individual tourists and tourist companies. Anmatyerr aspirations for Mer Ngwurla rely on access through the pastoral station. An agreement for the use of, and access to, Mer Ngwurla that respects and incorporates customary governance, therefore, includes the wider country around this site.



Anna's Reservoir Conservation Reserve is a permanent water hole in the Reynolds Ranges approximately 150km northeast of Alice Springs on Aileron Station. Its language name is Mer Ngwurla.

(Map from Anna's Reservoir Conservation Reserve Draft Plan of Management / Conservation Management Plan November 2002)



Mer Ngwurla (Anna's Reservoir Conservation Reserve) is one of the smaller Northern Territory parks and reserves that was not listed on the schedules for new agreements under the *Parks and Reserves (Framework for the Future) Act 2003* (Northern Territory). Indigenous land use agreements for scheduled parks result in parties consenting to the granting of a park as Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth)* as well as future development of the park in compliance with the Act. Between 2002 and 2005, 31 agreements were negotiated under this legislation, settling native title issues, tenure disputes and joint management. These agreements followed the High Court's decision in the case of *Western Australia v Ward* (HCA 2002), which found that the Keep River National Park had not been properly established. Each agreement is registered with the national Native Title Tribunal on the Register of Indigenous land use agreements. The agreements are always signed by one of the land councils as the major representative bodies in the Northern Territory and the Northern Territory Government.

The agreement negotiated as part of this research project is not an authorised area agreement under the *Native Title Act 1993* and therefore demonstrates how parks not on the schedule, and other non-reserve places, can have management arrangements resolved quickly and externally. This option is particularly valuable for situations which governments do not consider a high priority and which would rarely get the funding or attention needed. In a local setting and for local interests, agreements for such places can have far reaching benefits and make a big difference to individuals, families and communities. This type of agreement can be signed by any willing party (eg pastoralists, commercial interests, traditional owners and managers), including, but not requiring, government and representative bodies. It therefore has greater potential scope for matters to be discussed and emphasises the local context as a strong basis for workable outcomes.



Mer Ywerternt is a large permanent swamp of special cultural significance and with historical heritage.



## 2 Project objectives

### Anmatyerr regional research initiatives 2004–2008

The Anmatyerr water project ran from 2004-2008 with a collaborative team of Anmatyerr researchers, supervisors and participants and social and environmental scientists from universities and government. A number of projects were undertaken within this research initiative, focusing on cultural water provisions in water allocation plans, equitable governance of water resources, culturally-based livelihoods, training pathways, Indigenous water rights, and gender and water management.

Overall aims included: traineeships to record, store and convey knowledge in appropriate formats (with full prior informed consent) and demonstrate to the wider community the depth of understanding and connections to water at the heart of Indigenous culture; working closely with government to find ways for values and rights to be provided for in water plans and recognised and incorporated into government structures and processes that may include legislative reform, long-term employment and other livelihood opportunities; and determining Indigenous rights through examining international and domestic law and management processes and precedents set down through negotiated agreements to assist in finding mechanisms to achieve better outcomes.

The project on 'An agreement-based approach to customary law governance in water management' involved implementing some of the frameworks developed in the other Anmatyerr regional projects for a watercourse with significant cultural, environmental and historic values. The explicit emphasis was on recognition of customary law in natural resource management and customary law institutions through a negotiated agreement.

The objective of this project was to develop a bi-cultural approach for governance of water through the use of an agreement that reflects both western and customary laws and protocols for managing natural resources, especially water. This required the building of skills and partnerships pertaining to research, knowledge, and



cultural and natural resource management that is an investment and foundation for further positive outcomes. In the Anmatyerr region, Indigenous people express a wish for more equity between what they refer to as 'top law' and 'bottom law'. Living with two systems of law can often disempower marginalised peoples and undervalue the importance of customary law and traditional knowledge. The objective of entering into a benefit-sharing process to manage this site uses a two-way approach based on mutual respect for knowledge, laws and governance.

Protocols and guidelines to govern cross-cultural research and the access and use of natural resources needed to be established in the region. There had been little prior development, other than water resource use for small scale agriculture and grape farms nearby, until a recent proposal for rare earth and uranium mines. The community's desire to take a leadership role in the protection and management of their Mer Ngwurla, made capacity building in water resource issues, negotiation and agreement making a very urgent priority for the Anmatyerr people.

Mer Ngwurla is a key water resource and a conservation reserve scheduled for joint management arrangements. The use of an Indigenous land use agreement was considered but an in-principle agreement was eventually preferred by Anmatyerr and the other parties. This private, not legally binding contract could deal with broader issues, remain locally driven and avoid the more lengthy and costly bureaucratic negotiations of more formal legal agreements. It could also emphasise benefit sharing and livelihood opportunities in natural resource management.

Negotiated agreements are critically important for the recognition of customary law in natural resource management. They are now accepted and rapidly growing in number in Australia (particularly as Indigenous land use agreements under the *Native Title Act*). This project provides a case study on how in-principle agreements can be negotiated on a local scale and include customary law and customary law institutions. This form of legal recognition is a crucial strategy advocated by Indigenous peoples around the world as one of the most practical and effective forms of protecting traditional knowledge.

The significance and context of the wider initiative and the specific projects are:

- ▶ long-term participatory action research, on a regional scale, that is directed by Aboriginal partners but also links with government and other key stakeholders, such as pastoralists
- ▶ a broad focus on social, environmental, cultural and legal issues and institutions to gain greater understanding and recognition of Indigenous cultural values in water
- ▶ training and capacity-building components for all parties that will have long-term benefits to the Anmatyerr region beyond the project
- ▶ an up-to-date and comprehensive study of the legislative and policy aspects of Indigenous rights and interests in inland water (Commonwealth and Northern Territory jurisdictions)
- ▶ research into Australian and comparative approaches to improving policy, legislation and negotiated agreements for the recognition of Indigenous cultural values in water.

### 3 Governance, customary law and natural resource management

To be governable is to be a site for the exercise of power by diverse actors including governments (and associated corporations), business, media, research institutes, individuals, social movements, networks of non-government organisations and Indigenous people's organisations, and the global capital market. Governance embodies the relationships between these actors and can be defined as the practices, mechanisms and institutions (ie procedures, norms, principles, rules, knowledge/power networks and discourses, both formal and informal) that influence and regulate conduct.

Customary governance comprises those sets of rules, established through the process of socialisation, that enable members of a community to distinguish acceptable from unacceptable behaviour and includes conventions and usages adhered to and followed by people through generations (IUCN 2003). 'Law' means a body of rules that a society recognises as binding. As customary governance is binding within Indigenous society, it is broadly referred to as customary law. When a society accepts as legitimate more than one system of rules with different sources, and in contradiction with each other, the society is said to have a polycentric, pluralistic legal system. Much more research and discussion is required on the rights of local communities, Indigenous and tribal peoples in the context of environmental law and governance. Recognising customary law in the sustainable use and management of resources provides some important and potentially empowering strategies for Indigenous people.

The primary emphasis in most Anglo-American jurisdictions of research, policy and laws relates to the recognition of customary laws in the criminal justice system and in the context of property rights, but as Australia has no treaty rights or legal recognition of Indigenous sovereignty, resolution of resource and environmental matters is not straight forward. However, the reality that customary law can co-exist with the dominant legal system was powerfully and successfully upheld in the Australian High Court in the Wik case (ALRC 1986). Unfortunately, subsequent cases and statutory amendments cut short this positive and promising moment in Australian legal history.

The opportunities and problems associated with recognising customary law, in the particular context of natural resource management, is a poorly developed area. One of the greatest challenges posed for greater Indigenous involvement in natural resource management is how to give it meaning in a legal framework of narrowly defined rights-based discourse. To accept the incompatibility of customary law in natural resource management is to accept as valid the denial to Indigenous and tribal peoples of fundamental human rights. The approach to be taken was aptly stated by the Australian Law Reform Commission (ALRC 1986):

*The need for consistency with fundamental values of non-discrimination, equality and other basic human rights does not preclude the recognition of Aboriginal customary laws. On the contrary, these values themselves support appropriate forms of recognition of the cultural identity of Aboriginal people.*

Kirby (HCA 2002) was in accord with the ALRC when he stated:

*the ambiguity of the statutory concepts of native title rights and interests required the courts to prefer an interpretation that upholds fundamental human rights...*



In the broader context of property rights in natural resources, Indigenous rights are often regarded as second-order rights to be assessed through broad policy objectives after others have been guaranteed or assigned their more concrete rights. A more appropriate minimal approach would be to try to identify the range of options for statutory provisions to better recognise customary arrangements for effectively contributing to the economic livelihoods of Indigenous peoples and integrated natural resource management strategies required to achieve sustainable development. This approach is usually advocated in jurisdictions such as Australia. More appropriate responses involve the recognition of customary law in pluralist legal systems. Most simply, legal pluralism can be understood as a situation where two or more forms of law operate within one society. Indigenous aspirations for self determination may be accommodated in a pluralist manner or may challenge the legitimacy of the dominant legal system.

Examples of innovative approaches to legal pluralism in environmental governance include an excellent study on customary law governance in natural resource management in Northern Pakistan (IUCN 2003):

*.... customary law in the Northern Areas is a sophisticated system with many of the same mechanisms – permits, user fees, administrative and criminal penalties for unauthorized use – and institutions – including rangers or wardens and judges – that characterize statutory regimes. There are many opportunities for reforming statutory laws governing natural resources in Northern Areas to converge with elements of customary law, thus adding greater legitimacy and efficacy to the State's efforts towards conservation of natural resources in the region.*

Also, Jaraith and Smyth (2003) describe how governance approaches of protected areas are developing:

*It highlights laws and policies that aim for equitable and just outcomes for stakeholders concerned with protected areas, whilst also recognizing important conservation values in and around those areas. It aims to reform laws that exclude local populations from protected areas, and the adoption of policies that integrate environmental, economic and social considerations in protected area management.*

These authors note that it is increasingly being realised that many governments do not have the capacity and resources for effective management of protected areas (increasing in number and size as the principles of biodiversity conservation are applied). The *IUCN Management Categories of Protected Areas*, adopted in 1994, accommodates protected area management by Indigenous peoples or local communities (community conserved areas) and in Australia legal recognition of this approach is exemplified in Indigenous protected areas and joint management of reserves and parks by Indigenous groups and governments. Nevertheless, Jaraith and Smyth (2003) suggest that this form of 'public' management may not be sought by Indigenous and local communities. Indigenous governance of natural resources, such as water, extends well beyond protected areas and particularly includes contemporary approaches to livelihood creation and poverty alleviation (Craig 2008).

## 4 An agreement approach for customary law governance of water

The following factors and considerations were significant with regard to the particular circumstances and aspirations of Anmatyerr participants.

**Agreements that recognise customary law in water management** need to meet the rights and responsibilities of traditional owners and managers to manage water places and assert native title rights and interests and other rights (at common law and pursuant to Northern Territory and Commonwealth legislation) over land and water. The Anmatyerr wishes concerning Mer Ngwurla provide the opportunity to put into practice the relatively recent wealth of natural resource management recommendations about research protocols, traditional knowledge management and Indigenous engagement and rights. Such rights are protected under Commonwealth legislation such as the *Aboriginal Land Rights (Northern Territory) Act 1976*; the *Native Title Amendment Act 1998*; *The Native Title (Indigenous Land Use Agreements) Regulations 1999*; the *Native Title Act*; and in the Northern Territory, the *Northern Territory Aboriginal Sacred Sites Act March 2006*; the *Northern Territory Joint Management Act 2006*; and the *Northern Territory Indigenous Economic Development Strategy* (NT Government 2005).

*The National Water Quality Management Strategy* (2000) states that native title legislation, as well as Commonwealth and state cultural heritage legislation, provide for recognition of Aboriginal interests in water. *The National Water Initiative* (2004) updates this position, increasing the profile of Aboriginal rights, aspirations and involvement in water management. The provisions of the initiative require the consideration of, and accounting for, allocations to native title holders as far as reasonably possible under the Commonwealth *Native Title Act*. Sections 52–54 aim for water planning processes to provide for Indigenous access to water and inclusion of Aboriginal social, spiritual and customary objectives and relevant strategies where possible. Under the guidelines for water planning processes (Schedule E, *Intergovernmental Agreement on a National Water Initiative*), all uses and users of water should include Aboriginal interests.

*The Commonwealth – State and Territory Intergovernmental Agreement on a National Water Initiative* (NT Government 2006) includes guidelines for water-planning processes that include consideration of Indigenous water use. The agreement commits jurisdictions to achieve better outcomes for Indigenous Australians, such as greater opportunities and helping families and individuals become more self-sufficient.

*Overarching Agreement on Indigenous Affairs between the Commonwealth of Australia and the Northern Territory of Australia 2005–2010* (April 2005) and the *National Framework of Principles for Delivering Services to Indigenous Australians* (2004) – provide the following principles that can be adopted in governance of water agreements between Indigenous groups and other parties:

- ▶ sharing responsibility
- ▶ cooperative approaches
- ▶ addressing Indigenous disadvantage
- ▶ building partnerships based on shared responsibilities and mutual obligations
- ▶ Indigenous participation at all levels
- ▶ flexible approaches
- ▶ provision of adequate resources to support local and regional capacity
- ▶ reducing bureaucratic red tape

- demonstrating improved access for Indigenous people
- maintaining a focus on regional areas and local communities and outcomes
- identifying and working together on priority issues
- engagement with corporate, non-government and philanthropic sectors
- coordinated, flexible approaches that avoid duplication of services and programs
- fostering opportunities for Indigenous delivered services
- maximising the effectiveness of action at the local and regional level
- services taking account of local circumstances
- informed by appropriate consultations with local representatives
- sharing information and experience about what is working and what is not
- best practice in delivery of services to Indigenous groups
- focusing on and tackling agreed priority areas
- functional and resilient families and communities
- economic participation and development.

*The Northern Territory Law Reform Commission* (2003) inquiry into Aboriginal customary law provides support for customary governance agreements and recommends:

*Aboriginal communities should be assisted by government to develop law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method in dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community.*

In summary, such plans or agreements that recognise customary law in water management can be specifically tailored for places and resources that:

- fall outside the planning frameworks of Australian governments
- are relatively small and out of sight
- have little iconic or socio-economic value to other interest groups
- are managed under customary laws
- could make a major local difference in social, environmental and economic terms.

These circumstances would enable agreements to recognise customary governance more fully than formal agreements through native title and other legislation. They can involve voluntary best-practice approaches, contractual approaches and flexible and evolving arrangements. Importantly, they can secure the right for Indigenous people to be involved in environmental management and monitoring, protection of significant areas, employment and training. Local and active resident parties can move forward through private conservation agreements that create their own local best-practice management of water resources.

Agreements that empower active land owners and managers can more quickly and efficiently improve management of water resources compared with local groups relying on third parties or governments and solely utilising formal agreement opportunities.

Local alliances capitalise on goodwill and can progress multiple outcomes.

Local agreements can empower alliances into greater self-sufficiency and position themselves into stronger networks.



# 5 Negotiated agreements – comparative experiences

Initially the researchers carried out research and analysis to provide the parties with examples of other regional approaches and negotiated agreements that recognise Indigenous customary law governance of natural resources (including fresh water). Canada, in particular the Yukon comprehensive land claim agreements, was used for examples that could be considered and adapted for Mer Ngwurla and, potentially, for the governance of the Anmatyerr region.

Shortly after the commencement of this project the Northern Territory Government announced that the regional council for the Anmatyerr region was to be dissolved and replaced by a (predominantly non-Indigenous) council based in Tennant Creek that would service a large shire consisting of several previous council regions. It also became apparent, after the commencement of the project, that several large mines were being proposed in the region, which could affect the water resources and livelihood options for Anmatyerr communities. The mine proposal had a significant impact on the Anmatyerr researchers as it became a new focus of some concern and uncertainty and was proceeding rapidly. It became clear that fragmented agreement approaches would not be adequate in this context. The Canadian agreement model was a useful starting point as it uses a regional approach that concerns Indigenous integrated resource rights (crucial to water resources) and provides new governance institutions and approaches in relation to them.

## Canadian constitutional and legal framework

In 1973 the Canadian Supreme Court recognised the native title rights of the Indigenous peoples of Canada. The court declared that native title existed at common law, irrespective of any formal recognition by the Canadian Government. It includes rights to fish, hunt and trap on traditional lands. These rights are collective, as they are based on communal occupation of the land, but also individual, as members of tribes have personal rights to harvesting resources.

Following this case, the Canadian Government developed a *Comprehensive Claims Policy* to negotiate comprehensive regional agreements. The initial 'trigger' for this negotiation of claims was the recognition of unextinguished native title (similar to the Australian situation after the Mabo case. The *James Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement* (1978) were finalised before the commencement of the new Canadian Constitution (the *Constitution Act*, 1982). These agreements were enacted under federal legislation.

The *Constitution Act* (1982) provided a new legal framework for Canadian regional agreements (past, present and future):

- 1 The existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognised and affirmed.
- 2 In this Act, 'Aboriginal peoples of Canada' include the Indian, Inuit and Metis peoples of Canada.
- 3 For greater certainty, in subsection (1) 'treaty rights' includes those that now exist by way of land claims agreements or may be so acquired.

Section 25 of the *Canadian Charter of Rights and Freedoms* (part of the *Constitution Act*, 1982) protects 'Aboriginal, treaty and other rights' from being diminished by other guarantees in the charter (for example, the prohibition against racial discrimination).

Section 52(1) of the *Constitution Act* (1982) provides that any law that is inconsistent with a provision of the constitution is, to the extent of the inconsistency, of no force or effect. This provision establishes the constitution as the supreme law of the land. Changes to existing Indigenous rights require the consent of the Indigenous peoples concerned or an amendment to the constitution. The Canadian Government can enact legislation regulating the use of Indigenous rights (e.g. requiring an Indigenous person to fish under licence) according to the Sparrow case. Therefore, negotiated regional agreements which provide for the maintenance, rather than the extinguishment, of native title rights are constitutionally protected.

## Canadian comprehensive land claim agreements

At the heart of the Canadian agreements is the idea that they should be both regional and comprehensive. This means that the agreements are much more than a land tenure settlement for native land claims. It is Indigenous people's unique relationship to the land and the sea which is the basis for their political and legal claims. The agreements are designed to provide a legal framework, procedures and rights for linking Indigenous self determination with social justice, economic development and environmental protection over large regions. They are not 'one off' packages, but are meant to establish an ongoing policy framework whereby Indigenous and non-Indigenous interests can cooperate and coexist through bicultural institutions for land management and planning. The most recent agreement, the *Nisga'a Final Agreement* (2000), also embodies legal recognition of the inherent right of self-government. The formal title for the Canadian agreements – comprehensive land claim agreement – tends to understate these wider aspects. They are often referred to as regional agreements or modern treaties.

The regional nature of the settlement is important to Indigenous peoples because proper environmental management and protection of environmental rights (eg hunting and fishing rights) can only succeed where decision making is organised over a sufficiently large area to enable the various ecological and social interactions to be dealt with adequately by the responsible agencies. Environmental management is an essential component of the regional agreements strategy, not only because of the central role of land care in Indigenous cultures and value systems, but also because Indigenous peoples cannot expect to determine their economic and social development without control over the forces which govern, and which can otherwise undermine, their natural resource base.

Canadian regional agreements alone have not always resulted in Indigenous peoples obtaining self-determination over their traditional territories, although the *Nisga'a Final Agreement* (2000) is an exception. The processes that led to Nunavut self government being recognised in legislation and ratification of the the *Nunavut Comprehensive Land Claims Agreement* (1993) occurred at the same time and provided a range of political, economic and social benefits that give a significant degree of self management and autonomy. For the Indigenous participants, the core objectives in pursuing regional agreements appear to have been to:

- ▶ define a new legal and political relationship between themselves and Canadian governments (the federal government and the relevant provincial governments)
- ▶ establish a clear framework concerning management (co-management), access to and use of land, seas and resources that accommodates the needs of Indigenous peoples and other interests

- preserve and enhance the cultural and social wellbeing of Indigenous societies
- enable Indigenous societies to develop self-governing institutions and economic bases which will assist them to participate effectively in decisions which affect their interests (Nettheim *et al.* 2002).

Nevertheless, as noted in the *Canadian Royal Commission Report on Indigenous Peoples* (1997), there has been considerable diversity in the models and strategies pursued among claimants, ranging from self determination and political autonomy, to participation as full citizens in established Canadian institutional processes.

To date, 14 regional agreements have been finalised, with several claims advanced to agreements in principle. The final agreements are listed in Appendix A (p.39).

## Components of a regional agreement and structure for negotiating claims

The terms of these agreements generally are that the Indigenous claimants renounce all, or some of, their native title to the relevant territory, and in exchange receive:

- fee simple title to portions of land traditionally used and occupied (some areas are granted with fee simple title to mines and minerals and the right to work the mines and minerals)
- provisions for resource royalty and royalty sharing; rights to hunt, fish and trap wildlife over a larger area of surrounding land
- rights to advise government authorities or share in the making of decisions regarding land use, fisheries, environmental management, wildlife conservation and the regulation of non-renewable resource development planning (management and co-management arrangements)
- financial compensation for past, unauthorised use of this land and in consideration for land given up (Nettheim *et al.* 2002).

Some of the regional agreements being negotiated do not require the extinguishment of native title – after extensive controversy on this issue. The Canadian Government is now prepared to negotiate this issue (unlike the early regional agreements) following revision of the *Comprehensive Claims Policy* in 1987.

The regional agreements are negotiated under the Canadian Government's *Comprehensive Claims Policy*. The key steps are outlined below:

- claimant group prepares a statement of claim and provides evidential documentation
- Office of Native Claims accepts or rejects a claim, depending on whether it is considered to be historically and legally well-founded
- if the claim is accepted, a framework agreement defines the scope of negotiations, timetables and procedural issues
- negotiation of an agreement-in-principle which must be endorsed by federal cabinet and the claimant's constituency
- negotiation of a final agreement which must be ratified by respective parties
- preparation of implementation plans and agreement which allocates responsible agencies and organisations, identifies responsibilities, prepares timetables and budgets
- enactment of federal agreement legislation to give effect to agreement (becomes constitutionally protected under the *Constitution Act* 1982).



The terminology of 'final agreement' is misleading in the Canadian context. The agreements can be amended by a procedure defined in each agreement and each 'final agreement' establishes ongoing development and management processes which often lead to further issues being negotiated. In this sense they are 'living' treaties.

## Australian negotiated agreements

Many negotiated agreements with Australian Indigenous peoples exist but none are as comprehensive or as constitutionally significant as the Canadian regional agreements. The most significant developments have been in relation to the many Indigenous land use agreements under the *Native Title Act*. These are very useful forms of agreement but often are not regional in nature, nor do they integrate Indigenous customary law governance of natural resources.

### Agreements under the Native Title Act

There are three main areas of the *Native Title Act* from which agreements may arise: firstly in the determination of native title; secondly through the future act provisions and the right to negotiate; and thirdly through other negotiated agreements. The growing emphasis on negotiation and agreements relates to ongoing uncertainty about who has native title, what it is (use, access, resources, ownership) and what can be done while native title is being determined. Adjudication is often too slow and fragmented for all parties who have to deal with this uncertainty.

When an Indigenous group applies for a determination of native title, there is a period of time in which mediation can occur with governments and other interested parties. An agreement can result from the mediation that recognises native title and outlines the relationship between native title rights and interests and any other rights and interests over an area. This sort of agreement can form the basis of a determination of native title. Joint management of national parks and protected areas will be a central feature of many determinations of native title. National parks were used in the Mabo judgement as an example of a land tenure that is consistent with the continued exercise of native title. Issues of biodiversity protection are likely to be considered in this context.



Young Anmatyerr people engaged in natural resource management training as part of developing sustainable livelihoods; a major way of providing for cultural values.

In contrast to the right to negotiate provisions, the provisions relating to agreements were cursory in the original legislation. Section 21 provided for agreements with Commonwealth, state or territory governments to surrender title or to authorise a future act. Section 21(4) of the Act made the briefest reference to 'agreements – being made by native title holders on a regional or local basis'. The provisions were broad in terms of subject matter and compensation, but gave little guidance in terms of process. No resources or clear incentives to negotiate agreements were provided, in stark contrast to the Canadian regional agreements. However, the potential of the agreement process was immediately recognised, and many parties began to explore negotiated agreements outside the complexity of the right to negotiate process.

The changes to the agreements provisions were the least controversial aspect of the government's amendments to the *Native Title Act* in 1998. Changes were made to provide a more detailed and more structured agreements process. While undoubtedly designed to provide greater certainty for non-Indigenous parties entering into agreements there are potential benefits for Indigenous peoples. The provisions have retained the flexibility of the original provisions in relation to subject matter, have made the process more flexible in terms of the parties to agreements, and in some instances can avoid the need to involve state and territory governments.

In the same amendment process, however, the strongest procedural right available to native title holders and applicants, the right to negotiate, was severely curtailed and, in some instances, removed. This may impact upon the culture of agreements and negotiation that had begun to develop between native title holders and resource developers as well as community groups and local government. Effective negotiations require reasonably equitable bargaining power, access to information and expertise, realistic time lines for the relevant issues, facilitation and resourcing, and cross-cultural approaches designed for each negotiation. The 1998 amendments did not go much further than the old Section 21 in providing for these conditions in negotiations over agreements.

## Indigenous land use agreements

A determination of native title has to be accompanied by a determination of a prescribed body corporate, either to hold the title as trustee, or to act as agent for native title holders.

The three types of Indigenous land use agreement under the legislation are:

- ▶ Body corporate agreements, which can be made for areas where native title has been proved to exist
- ▶ Area agreements, which are made where there are no registered native title bodies corporate for the whole area, and which may deal with a range of future acts and access to non-exclusive agricultural and pastoral leases
- ▶ alternative procedure agreements may be made where there are no registered native title bodies corporate for the whole area and which may provide the framework for making other agreements about matters relating to native title rights and interests (Neate 1999).

These types of agreements are discussed in more detail below.

The Act specifies who may be a party to an agreement. The perceived advantages relate to the flexibility of their content and the legal certainty provided if the agreement is registered by the National Native Title Tribunal on the Register of Indigenous Land Use Agreements. The registrar must give notice of the agreement. The decision to enter into an agreement is voluntary.

Neate (1999) states that those who could benefit from an Indigenous land use agreement include people who want to:

- do things on the land which are inconsistent with native title
- upgrade their interest in land
- negotiate the exercise of native title rights and interests on land where other people have legal rights.

Specifically, an Indigenous land use agreement may deal with the following matters in relation to an area:

- 'side' or ancillary agreements to the native title claim mediation process
- negotiated native title settlements, including frameworks for the determination of native title or compensation applications
- alternative future act agreements
- land access, use and management agreements
- wildlife and natural resource agreements
- co-management or partnership agreements
- regionally-based agreements specifying relationships with key private or public sector parties
- frameworks and alternative procedures for making other agreements (Smith 1998).

The Act provides that persons wishing to make agreements can request assistance from the National Native Title Tribunal. A trend anticipated by the tribunal is that parties to native title determination agreements will increasingly negotiate a number of agreements concurrently with consent determinations of native title (NNTT 2000). This was most noticeable in Queensland and New South Wales. The tribunal provided assistance with 17 agreement related negotiations during 1999–2000 (NNTT 2000).

This is not an exhaustive list of what can be done under an agreement. However, there are some limitations. A body corporate agreement or an area agreement may provide for the extinguishment of native title rights or interests by surrender to the Commonwealth, state or territory government. The issue of extinguishment has greatly divided Canadian Indigenous negotiators. Notably, the alternative procedure agreement, under the Act, must not provide for the extinguishment of any native title rights or interests.

The complexity of the legislative provisions make it necessary to clarify who may be a party to particular types of agreements and what may be contained in them. These aspects are summarised below (Smith 1998).

Body corporate agreements are appropriate when native title determinations have been made over the entire area (and accordingly there are registered native title bodies corporate in relation to all of the area). Area and alternative procedure agreements apply to areas where native title determinations have not been made over the entire area. Body corporate agreements and area agreements can provide for extinguishment of native title rights or for changing the effect of native title on an intermediate period act. However, in these situations, the government must be a party. Alternative procedure agreements cannot provide for extinguishment or for changing the effect on native title of intermediate period acts.



All time spent on country includes children who learn from adults.

The major difference between area and alternative procedure agreements relates to who can be parties and the notice provisions. All registered native title claimants (if any) must be parties to an area agreement. Registered native title claimants need not be parties to an alternative procedure agreement although all registered native title bodies corporate and representative Aboriginal or Torres Strait Islander bodies must be (Bartlett 2000).

### Body corporate agreements

These agreements can only be made after there has been a determination of native title and a body corporate established for the native title holders. For a body corporate agreement to be made there must be one or more native title bodies corporate (also known as prescribed bodies corporate).

The registered native title bodies corporate must be parties. Any other person may be a party, including a native title representative body. The government must be a party if the agreement provides for extinguishment of native title rights by surrender, for validation of an invalid future act, or for changing the effect on native title of an intermediate period act. Otherwise, the government may be a party, but it is not mandatory.

These agreements can be about:

- ▶ the doing of future acts
- ▶ dealing with future acts that have already been done (including validating them), other than intermediate period acts
- ▶ changing the effect on native title of a validated intermediate period act
- ▶ withdrawing, amending or varying native title claim applications
- ▶ the relationship between native title and other rights
- ▶ the manner of the exercise of native title and other rights and interests
- ▶ extinguishing native title by surrender to the relevant government
- ▶ compensation for past, intermediate period or future acts
- ▶ any other matter concerning native title rights and interests.



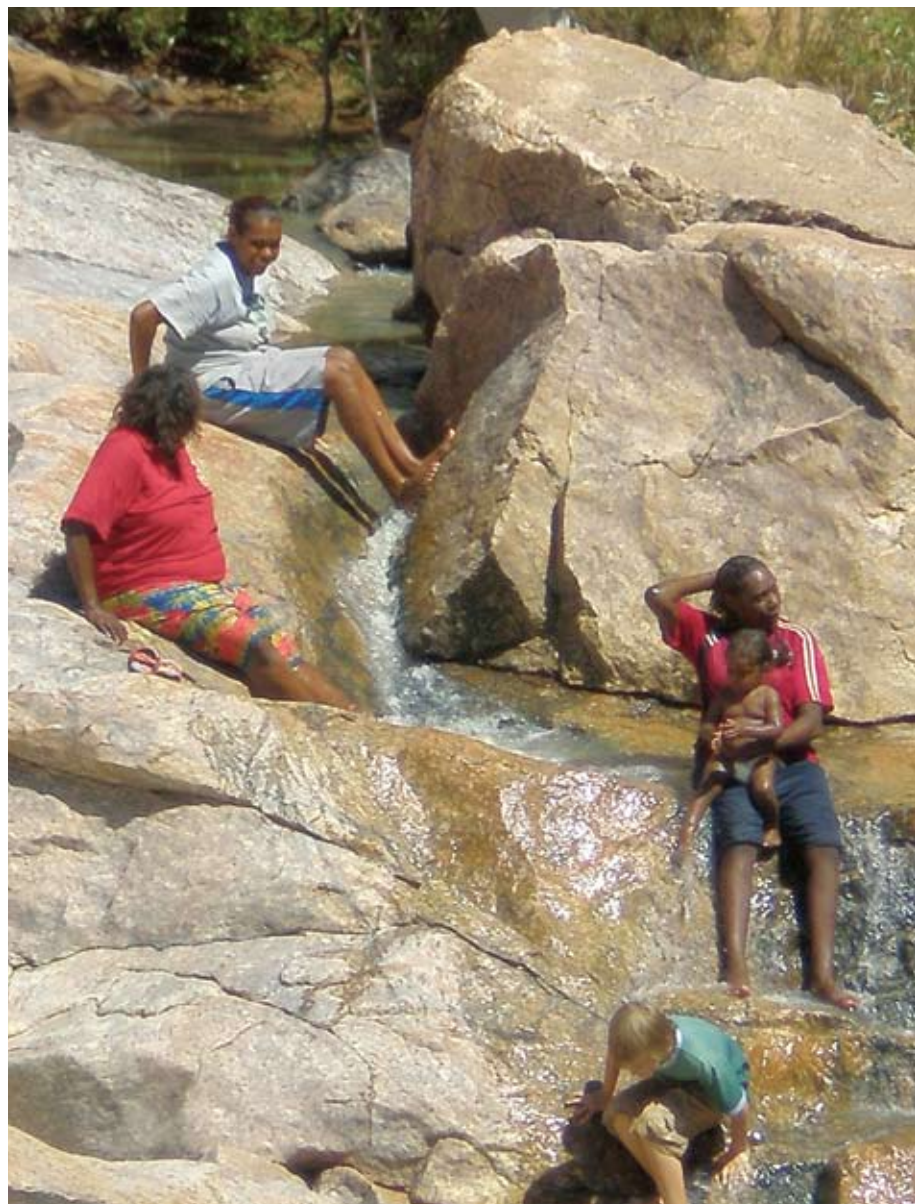
## Area agreements

Area agreements may cover land or waters where native title has not yet been determined for the whole area. They can be made in any situation other than where there are registered native title bodies corporate for the whole area subject to the proposed agreement (in which case the agreement would properly be a body corporate agreement).

Area agreements can include the same range of matters covered by body corporate agreements. As well, an area agreement can be made about any matter concerning the statutory rights of access conferred by section 24CB of the *Native Title Act*. This includes the rights of access of persons with registered native title claims to lands or waters covered by non-exclusive agricultural or pastoral leases.

The area agreement must have the 'native title group' as a party (defined in section 24CD). This should include all registered native title claimants and bodies for the area to which the agreement relates. The native title group may also include as a party any other Indigenous person, or a representative body, who asserts that they hold common law native title to the area. This type of agreement can be made with Indigenous people who assert a common law claim to native title for the area before any native title claims are made or registered over the area.

Swimming and camping on country provides people with opportunities for teaching and learning culture and for relaxation with friends and family in neutral spaces.



The government must be a party if the agreement provides for the extinguishment by surrender, for validation of an invalid future act, or for the changed effect on native title of an intermediate period act. Any other person may be a party.

### Alternative procedure agreements

An alternative procedure agreement can also cover land or waters where native title has not yet been determined and there are no registered native title bodies corporate for the whole area subject to the proposed agreement (in which case it would be a bodies corporate agreement).

An alternative procedure agreement can include the same range of matters as an area agreement with three exceptions: (i) this type of agreement must not provide for the extinguishment of native title and, (ii) as a consequence, may not be used to provide for changing the effect on native title of intermediate period acts, and (iii) it has an additional role in providing a framework (including alternative procedures) for developing other agreements about native title rights and interests.

The parties to an alternative procedure agreement include a 'native title group' (defined differently than in area agreements – see section 24DE). This native title group must consist of all registered native title bodies corporate and all representative bodies in relation to the area covered by the agreement. Every relevant government, according to its jurisdiction, must be a party. Any other person may be a party.

## The Tumut-Brungle area agreement

The Tumut-Brungle agreement process is used as an example of how agreements within the framework of the *Native Title Act* can potentially be scaled up to be regionally significant and provide benefit sharing arrangements. It also demonstrates the importance of negotiation and ethical protocols in reaching any agreement of this kind.

The process followed in developing this agreement was described by Geoff Clark (Clark 1999). Minco was a small public mining company which applied for a mining lease (from the NSW Government) for an area near Adelong in south-west New South Wales. The area of the mining lease application, which was predominantly freehold, had been subject to dozens of pastoral, mining and other interests over the past 140 years. A small portion of the area had reverted to the Crown at the end of last century and was held under a lease. At the time of the mining lease application (April 1998), there was considerable legal uncertainty in the context of the Wik debate and the proposed amendments to the *Native Title Act*.

The NSW Government considered that it was very likely that native title had been extinguished but asked Minco to resolve the issue before the government would issue the mining lease. If native title continued on part of the area then the mining lease would constitute a future act. Minco did not wish to be dragged into the native title debate. It wanted its lease to be issued without adversely affecting native title rights, if such interests were found to exist. Minco, following this strategy, decided to lodge a non-claimant application under the *Native Title Act*. The company realised that it would need the trust and cooperation of local Indigenous people and agreed not to lodge a claim in the two-month period during which the non-claimant application was being advertised.



Surface waters need management guidelines to ensure that the allocation to environmental and cultural values achieve set objectives.

Minco approached the Tumut-Brungle Aboriginal Land Council, which advised that the wider local Aboriginal community would also have to be involved in the process. The Tumut-Brungle Aboriginal Land Council received assistance from the NSW representative body, the NSW Aboriginal Land Council, in the form of expert advice. Formal negotiations were commenced and the parties resolved to develop a protocol as a first step in the negotiation process. The protocol was a crucial element in the success of these negotiations as it set out the framework, timelines and objectives. Other important features of the protocol were:

- ▶ each party would deal only through its nominated representatives and there would be no side meetings or side deals
- ▶ all negotiations would be between the working party and the nominated representatives of Minco
- ▶ specific rules would be developed on funding assistance by Minco to assist local Indigenous people to make informed decisions
- ▶ there would be agreement as to each party's objectives in the negotiation process (Clark 1999).

After the protocol was signed, the project agreement negotiations were concluded in about three weeks. Clark (1999) considers that the protocol and Indigenous access to legal, financial and environmental advice were the reasons for this quick outcome. A major issue for the negotiations related to compensation. This was resolved when Minco proposed making a placement of equity to the Indigenous people, not just from the mineral lease but from all of Minco's activities.

This was accepted and a body corporate was established to hold the equity on behalf of the Indigenous community.

About this time, the Indigenous land use agreement provisions in the amended *Native Title Act* were enacted. Minco and the local Indigenous people saw the opportunity for a further agreement in the form of an Indigenous land use agreement (area agreement). Minco had exploration licences over large areas in southern New South Wales and proposed that the parties enter into an area agreement over the entire land council area in return for further equity placement. Local Indigenous people and the Tumut-Brungle Land Council agreed to this proposal. The representative body was also made a party to this agreement.

The benefits of the process (both the contract and the agreement) for local Indigenous people included:

- a recognition by Minco that the Indigenous people held interests in the land, which had to be recognised and accommodated
- the right of the Indigenous people to enforce environmental standards
- involvement in environmental monitoring and archaeological clearance with secure rights to protect significant areas
- jobs, education and training opportunities and sub-contracting arrangements
- a base for economic self-sufficiency through equity in Minco (Clark 1999).

The benefits of the contract and the agreement for Minco included:

- allowing the issue of a mining lease at a strategically important time in its corporate history, in the middle of a tense political debate and uncertainty which had frozen much of the government process, as well as mining activity in many other parts of Australia
- guaranteeing certainty with respect to native title and future acts in the area covered by the agreements
- a willing and cooperative Aboriginal workforce within the project area
- a dramatic improvement in the relationship between the Aboriginal community, the mining company and the wider community since the signing of the agreement (Clark 1999).

## Agreement negotiation issues

### Equitable bargaining positions

Maintaining the bargaining position of Indigenous parties to agreements and ensuring they are adequately resourced for the exercise are crucial factors to achieving outcomes that will be of lasting benefit to native title holders. For Indigenous people, the native title process sometimes heightens internal disputes, which continue to hamper the process of agreement. It also affects the willingness of parties to enter agreements. The benefits of the process provide their own concomitant obstacles. The fact that agreements can be binding and with final settlements of compensation and may also involve the surrender of native title rights and interests, creates a significant burden for Indigenous negotiators to ensure fair and equitable outcomes for present and future generations.



## Ethical and benefit sharing approaches

Parties to agreements need to follow stringent ethical and practical guidelines if an agreement is to be concluded. Non-native title holders need to ensure that they are dealing with native title holders for the area, under the Act. It is especially important that all people who should be parties are involved in the negotiations and that they are adequately resourced. The negotiations need to accord with timeframes for such cross-cultural negotiations and contain details relating to implementation and dispute resolution. In Canada, all of the regional agreements (after the *Inuvialuit Agreement*, 1984) have required separate implementation agreements with provisions for Indigenous training, allocation of responsibility for provisions in the regional agreement, budget and timing for each obligation. During these negotiations, non-Indigenous people often complain about delays stemming from government actions.

## Agreements are not just 'a deal'

Indigenous Australians see native title rights as a recognition of their law and the basis for their future. Matters affecting native title rights have constitutional and fundamental meaning. They are never 'just a deal', no matter how small the agreement.

## Precedents

The confidentiality of agreements has meant that, to a large degree, parties have been re-inventing the process at each negotiation. While larger Indigenous organisations, such as the Cape York Land Council or the Northern Land Council, have their own historical precedents to rely on, many representative bodies, and the native title holders themselves, are often faced with the simple question 'what should we be asking for?' They may have clear ideas about what they want for their community and their people but often it is not clear what they can or should expect.

## Role of the non-government sector

Government support for the process, both actual and perceived, would go a long way to fostering a culture of agreement. As in the past, however, it will be corporations and community groups that will lead the way in forging partnerships with Indigenous people. The possibilities for agreements appear almost limitless, whether they are reached in relation to a determination of native title, in future act processes, or in relation to Indigenous land use agreements for re-negotiating existing structures of land use and management. The process of reaching agreement will not only involve Indigenous people in the protection and development of their lands but has the potential to bring together diverse community interests. In doing so it gives the community the opportunity to participate in the recognition of Indigenous peoples' inherent rights and responsibilities for their land.

## Settlement of native title claims

Individual claims under the *Native Title Act* can be negotiated through the processes under the Act. However, this could be costly and time consuming for Indigenous claimants. There will be winners and losers and possibly arguments between Indigenous people about who belongs to what land. Another strategy would be the negotiation of Indigenous land use agreements under the 1998 Amendments to the Act.

## Constitutional development

Alternatively, regional agreements could result in specific legislation which overrides inconsistent state and federal laws. Native title claimants could seek to negotiate regional settlement of claims to land and sea outside the *Native Title Act*. Specific legislation could enable native title rights to continue for land which is successfully claimed by Indigenous peoples and granted in fee simple.

## Indigenous land use agreements registration

An Indigenous land use agreement has the legal effect of a contract while registered and all persons who hold native title are bound by its terms and conditions even if they are not parties to the agreement. This assumes that all actual and potential native title holders have had the opportunity to object to its registration. The process for registration varies for each of the three types of agreements and is specified in the *Native Title Act*.

## Objections to Indigenous land use agreements

There is no right of objection to a body corporate agreement and only persons claiming native title may object to an area or alternative procedure agreement. The right of objection to registration of an area agreement can only be made in relation to applications certified by representative bodies and on the ground that the representative body did not perform its certification function (*Native Title Act 1993* ss 24 CI, 202 [8]). The right of objection to the registration of alternative procedure agreements is broader and can be made on the ground that it would not be fair and reasonable to register the agreement having regard to its content, effect on native title, benefits provided and their distribution, and any other relevant circumstance: (*Native Title Act 1993* ss 24 DJ, 24 DL [2] (c)).

# Potential for regional agreements in Australia

## Extending Indigenous control over land and sea use and resources

Regional agreements can be negotiated to provide for Indigenous control of land use and development on their land. Resource royalties may also be granted for development on this land, which can provide a financial base for further Indigenous economic initiatives in the region. A precedent exists for resource royalties under the *Aboriginal Land Rights (Northern Territory) Act*. However, policies and decisions relating to areas and resources outside the ownership and control of Indigenous people may affect their resources and land and sea rights. Therefore, regional agreements can create new institutions and processes which give Indigenous people a legal and practical right to participate in planning, development control, environmental and social impact assessment, resource allocation policies and decisions for an area which is considerably larger than that which they own. This provides the opportunity for Indigenous people who cannot establish native title to regain some control along with native title holders.

## Managing land, sea, resources and wildlife with bioregional planning

Regional agreements can be negotiated to provide for control or co-management by Indigenous people over their lands and the wider region. Regional agreements extend co-management from conservation (e.g. joint management of national parks) to the management of land, resources and wildlife, which are to be sustainably utilised by Indigenous and non-Indigenous people.

### **Pastoral land: settling use and access rights of Aboriginal people**

Regional agreements can be negotiated to resolve legal disputes over the coexistence of native title rights with pastoral leases. Pastoralists, conservationists and the Cape York Land Council have negotiated a historic *Heads of Agreement* on these issues. The Cape York Land Council, the Peninsula Regional Council of ATSIC, the Cattlemen's Union of Australia, the Australian Conservation Foundation, the Wilderness Society signed the *Cape York Peninsula Heads of Agreement* on 5 February 1996.

### **National parks, conservation and world heritage issues**

Regional agreements ensuring Indigenous control and co-management of national parks, world heritage areas and environmental management processes would be a recognition of Indigenous rights and of benefit to all Australians.

### **Participation in resource development and other economic initiatives**

Regional agreements can provide the framework for Indigenous enterprises, joint ventures and benefit sharing from major projects. The Tumut-Brungle agreement illustrates this potential.

### **Provision of services to Indigenous people by Indigenous organisations**

Existing funding and service delivery arrangements do not meet the basic needs of Indigenous people, who are often denied the normal citizenship rights of other Australians to services such as water, housing, health and education. Direct funding to Indigenous organisations to provide these services could be negotiated through regional agreements.

### **Strengthening Indigenous local government**

Regional agreements provide an important opportunity to negotiate new powers and resources for Indigenous local government, policing and community justice.



Digging for water provides a fresh supply of drinking water. Soakage water was frequently sourced during bush trips, with children always watching and learning the technique.

# 6 Significance of regional agreements and Indigenous land use agreements

## Significance for Indigenous governance

Indigenous land use agreements have become an important form of negotiated agreement in Australia. Many agreements will relate to native title issues in small areas and/or specific projects or future acts. A comprehensive regional agreement goes considerably beyond native title issues and builds upon them as a basis for self-government. Obviously, these agreements could provide part of a regional agreement process relating to the exercise of native title rights (in the above contexts), the doing of particular future acts and compensation issues. However, they seem to be intended (by the federal government) to be a flexible and (sometimes) quicker alternative to native title adjudications and the determination on future acts. They are not intended as a means of negotiating a future for Indigenous people relating to their ownership, use and management of their land, waters and resources at the regional level. The government has power to extend Indigenous land use agreements by amending the Act, in the future, or using other legislation for broader regional agreements. The risk to Australian Indigenous peoples is that Indigenous land use agreements will be a continuation of ad hoc, uncoordinated and confidential agreements, which fail to achieve long-term gains for those involved.

An option for future Indigenous governance would be negotiated comprehensive regional agreements outside the *Native Title Act* or added to or incorporated within the agreement process. A comprehensive agreement involves many issues other than native title and could provide for funding and Indigenous governance of the environment and natural resources based on need rather than ownership. This would require special (usually federal) legislation, resourcing and facilitation of negotiations. The South Australian Government's very significant financial, expert, legal and dispute resolution support to state-wide native title agreement negotiations sets a precedent through the demonstrated benefits that have ensued. Resourcing at the federal level would be a significant step forward and, by necessity, would include state and local governments as parties to negotiations and regional agreements.

The opportunities provided by Indigenous land use agreements are very significant for both Indigenous and non-Indigenous Australians. In most cases, equitable, well-planned and resourced and bona fide negotiated agreements are preferable and more enduring than adjudicated or bureaucratically imposed 'solutions'. Serious concerns are held about Indigenous Australians' inequitable bargaining power given the erosion of their right to negotiate in the 1998 Amendments to the *Native Title Act*. There does not appear to be any coordinated federal or state government policy to provide the resources and facilitation required if Indigenous land use agreements are to meet their potential as just and lasting agreements.

It is also a concern that Indigenous land use agreements involve notice to prescribed parties but registered agreements are confidential. This adds to the ad hoc and fragmented approach that already plagues environmental planning and natural resource management. If there is to be an evolving cross-cultural arrangement for Indigenous involvement in these areas at the regional level, Indigenous land use agreements will be an important mechanism.

Another weakness of the agreement process, is that there does not appear to be any monitoring to evaluate whether agreements are likely to deliver long-term benefits to Indigenous Australians or how they could be improved. Indigenous land use agreements have the advantage of providing





"Working together" on Anmatyerr country: Parks and Wildlife and Anmatyerr men participated in a regional bio-survey on Stirling Station (June 2006).

a mechanism for agreement without government involvement under certain circumstances and a more flexible approach to dealing with native title issues. These factors seem to have facilitated the conclusion of several agreements and the parties have often been creative and cooperative in arriving at compromises and mutually advantageous positions.

From a wider perspective, Indigenous land use agreements cannot, by themselves, cover the geographic areas and range of issues included in the regional agreements negotiated in Canada. To have a comprehensive regional agreement, relevant governments should be parties and the legal framework will need to extend beyond the *Native Title Act*. This form of agreement may be more time consuming and complex than an Indigenous land use agreement but it is more likely to address the fundamental needs of Indigenous Australians such as the recognition of their human rights and specific Indigenous rights, as well as the delivery of services in a way that is comparable to other Australian citizens. Native title recognition under the legislation is painfully slow. Indigenous land use agreements may speed up some determinations, but a full understanding of their deficiencies highlights the need for improved agreement processes.

There is no reason why Indigenous management, co-management and issues related to use of land, water, sea, resources and wildlife cannot be negotiated in a more coherent regional context together with sustainable economic strategies. These frameworks should address the needs of contemporary Indigenous Australians and should not depend on the formal recognition of native title. Negotiations should be based on approaches like the social justice package that was proposed in 1995 (Dodson 1995) and go considerably further than Indigenous land use agreements and native title in addressing the disadvantage of Indigenous Australians and the development of new governance strategies by them.

The opportunity exists for Aboriginal and Torres Strait Islander peoples to negotiate forms of regional agreements based on the recognition of native title and need (through the Land Fund and other regional initiatives). There appears to be no good reason why Australian regional agreements should be based only on settling native title claims (although this could be part of many





Janey Long and Selina Gorey with Arlewatyerr (sand goanna) which are highly valued and hunted for many months after good rains.



Children copy the adults by digging for their own yerramp (honey ants) which are harvested regularly after good rains.

agreements). Many concerns of Australian Indigenous peoples relate to control and management of their lands, seas, resources and wildlife, as well as service delivery. Gaining Indigenous control of service delivery is likely to be a very important aspect of Australian negotiations.

## Significance for agreements with Anmatyerr governance

The examples already described and experiences in Australia and overseas provide hope for positive outcomes in situations such as those faced by the Anmatyerr people in Central Australia. There is still hope and a future for places and resources of cultural significance that may be 'out of sight and out of mind' to other parties or that cannot command resources and attention. This is enormously encouraging for Indigenous people. Small changes in rights and interests in local situations can make a major difference to the lives and wellbeing of individuals and their communities and the flow-on effects for the whole country are significant.

The main lesson for the Anmatyerr region from experiences in Canada is the importance of the regional scale to agreements – to encompass (and not divide) the whole language group and its lands. Demonstration of successful self-governing institutions and an economic basis should encourage the Anmatyerr people to pursue similar structures and agreement arrangements as a basis for ensuring the long-term viability of their communities and effective cultural and natural resource management.

The Anmatyerr agreement process combined aspects of negotiated agreement making from the First Nation groups and governments in Canada as well as examples and experience from Australia. The process was also constructed *in situ* to ensure full understanding of all parties and adherence to the tenets of free and prior informed consent. The nature of the agreements was influenced by the opportunities and resources available and the willingness of various parties to prioritise and negotiate the issues of concern related to Mer Ngwurla in particular, as described in the following section 7.



"Working together" on Anmatyerr country with women from Wilora. Generally, female researchers work with women and male researchers with men.



# 7 Anmatyerr agreement for customary governance of water

## Agreement process

Anmatyerr people raised the need for greater protection of, and access to the rock hole Mer Ngwurla and surrounding country during research activities of the wider Anmatyerr Water Project. The lack of management in terms of cultural and ecological heritage and the missed opportunities at this place were repeatedly raised in discussions about regional water management. Anmatyerr people explicitly stated their wish to be actively involved in management decisions that concerned this site of significant cultural and heritage value and to take a lead role in the absence of other authorities and activities. Some of the concerns of the Anmatyerr traditional managers included the degradation of this large rock hole from algal blooms, and stock and wildlife during dry periods, and difficulties with access to undertake caring for country responsibilities. The opportunity for a good outcome was clear given the interest and activity of the local parties.

Land and Water Australia provided the funding for the research team to develop a governance of water agreement that connects western and customary management approaches. This would be an agreement model additional to alternative options such as Indigenous land use agreements and joint management frameworks being progressed by representative and government bodies. The intention was to develop an approach that local parties could adopt quickly and effectively. Overarching issues of tenure, ownership and processes of regulatory and legal responsibilities are essential in contested situations but are better circumvented where local parties can reach agreement.

At the outset it was regarded as good research practice to establish a memorandum of cooperation (MOC) between the Anmatyerr people, the researchers and their host organisations. The MOC would set out the terms of their engagement in this relationship. This was drafted and approved by the Anmatyerr people but, despite initial direction from Charles Darwin University to formalise the relationship, the university did not progress the MOC. In lieu of this, the research team achieved a similar result with a 'negotiation protocol' between the active parties and the researchers. This process ensured the parties to the Mer Ngwurla agreement committed to mutual respect for each other's knowledge, laws, governance and understanding of what is required of people to coexist on the one parcel of country. This is especially important where Indigenous language, culture and close connections to country remain strong at the same time as other land owners and managers have legislative rights and interests. The role of the researchers in this protocol was one of mediation and facilitation by an external impartial team. The parties alone brought agreement issues to the process while the researchers remained as non-participants, simply providing the mechanism to facilitate agreement. The context of this research centred on collaboration and consensus between the parties. Ethical intellectual property protocols for cross-cultural research and knowledge management were addressed through the host organisations' ethics approval processes for research involving humans.

The research team set out to discuss the potential of this project with relevant pastoralists, Anmatyerr traditional owners and managers, the Parks and Wildlife section of the Northern Territory Government, and the local business owner (as a representative of local tourism).





Children learning to make and use panth or rnwang (coolamons) and rntwem (dancing sticks) from elder Clarrie Long using the wood from the spiritually important Bean Tree that grows adjacent to watercourses.

Anmatyerr people have a trusting relationship and work history with the managers of the local pastoral lease. The pastoralists showed an appreciation of the need for Anmatyerr people to continue their land and water management practices and welcomed the opportunity for a new mechanism to achieve this and other mutually agreed goals. The local business owner similarly supported this objective and better opportunities for visitors to the region to add value to existing enterprises. Management of Parks and Wildlife and the Central Land Council explained their non-availability to participate due to resource constraints and their view of the area as a low priority. Despite obligations of government and representative bodies and their perceived prowess to Indigenous affairs, local parties are at liberty to proceed with their own contractual agreements. Indeed, local active parties may be better on their own than being included in agreements with remote agencies that may exist for regulatory or other reasons. Natural alliances are stronger than forced relationships that run the risk of being counterproductive.

The first stage was to ensure an understanding of the process of successive meetings and consultations. These would be as transparent and robust as possible. Discussions were documented on film and/or in a notebook, and later summarised in text and discussed with the various parties for verification. Discussions focused on what was important to people and any issues of concern, wishes or aspirations, especially ideas which they had not previously had the chance to air. For example, what was the vision for the future? The researchers held many on-site consultation meetings and workshops with Anmatyerr people at local communities and towns. Fewer, but no less significant, meetings were held with the local pastoral managers and business owners.

The Anmatyerr researchers expressed their wish for mechanisms to strengthen customary law in water resource management. Although they understood the need for a variety of things to agree upon, their main priority was to make sure that all people followed the processes of customary law governance. This was for the welfare of all people, both Indigenous and non-Indigenous. The Anmatyerr feel responsible for others as they pass through or pursue separate activities

on Anmatyerr traditional lands. Anmatyerr people aspired to put customary law on an equal footing with other laws and governance. There was a persistent feeling that regional Indigenous governance structures, such as land councils, and other government-directed processes did not provide for this, particularly at the local level.

Separate discussions were designed between the outside researchers and the different groups from the outset and these were maintained due to the success of this approach and logistic difficulties of getting all the parties together in the one place at the same time. The intent and aspirations of each party were summarised and discussed with the other parties in a process of tabling common issues and differences, and deciding what was suitable for a first agreement. Issues were discussed separately, clarified and modified under direction. The aim was to avoid over-representation or under-representation of values and issues, aiming for equitable attention and understanding.

A major point of discussion was the mechanisms by which values and ideas could be addressed. These were the negotiation principles and protocols that set the ground rules; eg what knowledge can be shared and how it can be protected; common ground and goals; timeframes; contingencies; the actors and their roles; the need for language speakers, interpreters and a verification process; the frequency and location of meetings; and the process for gaining the appropriate approvals from Anmatyerr elders (eg refer to The Tumut-Brungle agreement).

These principles and protocols were framed in terms of a traditional knowledge strategy that would protect spiritual rights and practices in relation to water and appropriate levels of engagement and revealing of Indigenous values. The aim of the strategy was to identify cultural values and aspirations for Mer Ngwurla and the surrounding Station country and to frame these in terms of protection and management through recognition of customary governance. The strategy would demonstrate traditional knowledge management approaches, such as best-practice protocols and recognition of customary law that could potentially improve effective governance arrangements for water management. Central to the formulation of a traditional knowledge strategy was the involvement and building of skills and partnerships around cultural and natural resource management that are an investment and foundation for further positive outcomes.

The negotiation process is as important as the agreement. It involves building partnerships and learning and exchanging skills as parties engage in a benefit-sharing process. In effect, livelihood opportunities were being constructed informally with improved access, use and management of heritage values and natural resource management. The concurrent heritage survey that stemmed from the agreement was a step towards the intention of the Anmatyerr people to provide greater services to tourists including a deeper understanding of Anmatyerr culture.

## Anmatyerr Customary Law and Management Trust

Both the Anmatyerr and the researchers recognised very early on that an effective governance structure for Anmatyerr was needed that represented the whole language group and their traditional lands. This structure needed to closely follow a customary law governance structure while being readily and legally recognised as an appropriate internal representative body for Anmatyerr. A Trust would act as the overall party for an agreement representing the whole language group. This may at times be limited to approval for sub groups or families to proceed with more detailed subsidiary agreements. This agreement structure was designed to meet the specific needs of the traditional owners and managers of Mer Ngwurla, while also acknowledging their responsibilities to the whole language group.

The Trust was considered vital in achieving effective capacity building for the community. The Trust was already a recommendation by Rea and the Anmatyerr Water Project Team (Rea *et al.* 2008) with regard to Anmatyerr people being able to work effectively with the Ti Tree Water Advisory Committee and other private and government interests over water use and management. It was recommended as one of several 'highest priorities' to be incorporated into the 2008 updated *Ti Tree Water Resource Strategy* (Provision 6.3.2 Establish Anmatyerr Customary Law and Management Trust).

A number of on-country meetings and workshops were held to discuss options relating to customary law, governance and how to best find the mechanism to address these important issues. As often happens with large clan gatherings, there was some disagreement about whether enough of the appropriate representatives of Anmatyerr people were present to move forward with any resolutions or motions in relation to the setting up of the trust, however, there was unanimous approval amongst all present that a trust be set up with the suggested title of *Anmatyerr Customary Law and Management Trust*. Anmatyerr people told researchers in the team that they wanted facilitation of a 'big mob' meeting to ensure that the right people had the opportunity to express an opinion. This included all of the four pairs of traditional owners (Merekartwey) and traditional managers (Kwertengwerl). Unanimous consensus was the internal approval process necessary to move forward with a formal customary law and management trust.

It is important to note that this approval process and a trust that encompasses the Anmatyerr language group would be a vital and powerful endorsement and tool for Anmatyerr people in terms of making agreements and advancing issues of importance with other groups. The intent to set up a trust, and finding a mechanism to achieve it, are two different things. It became apparent that it would not be an easy process, not least because of the costs involved and deciding who would pay them.

Following field work and meetings, it was decided that the traditional knowledge strategy should form part of a wider agreement in principle that was informed by lessons learned from existing Australian negotiation approaches, such as Indigenous land use agreements, as well as frameworks and approaches in Canadian regional agreements (particularly the Yukon First Nations comprehensive land claims agreements). The traditional knowledge strategy was eventually embedded into this wider agreement in principle titled: *The Umbrella Draft Agreement in Principle: Rules of Engagement and Negotiation Principles Concerning Traditional Knowledge, Natural Resource Management & Access to Significant Sites on Anmatyerr Country* (Appendix B). Called the *Umbrella Agreement* in short, this agreement framework would be managed by the *Anmatyerr Customary Law and Management Trust* for regional agreements and regional approval as well as to endorse the making of smaller subsidiary agreements within the wider region. As part of the process of preparing this draft agreement, many on-site consultation meetings and workshops were held with Anmatyerr people to provide the mechanisms for Anmatyerr values and ideas to be included in the document.

The overarching governance of water agreement (*Umbrella Agreement*) and the framework for subsidiary agreements became the model and formal structure for Anmatyerr people to use in situations such as that posed by Mer Ngwurla. This 'big mob' meeting of all the skin groups, not only the specific traditional owners and managers for this site, was the initiative of Anmatyerr people. The aim was to endorse this framework through a final sign-off in customary terms that allowed for the establishment of a new Anmatyerr entity or customary law and management trust based on the customary structures of the Anmatyerr language group.

The Anmatyerr people chose a local Arrnente leader with experience in this area as the person to instruct and assist in the establishment of this entity. Despite progress, this person was forced to withdraw due to being overcommitted and unavailable in the foreseeable future. Assistance and advice was also sought from legal sources and from independent experts, with pro bono work assured. Anmatyerr were on the verge of having this entity realised when intervention by other parties stalled the process.

The interventions related to suspicions about the implications of the Anmatyerr people having their own representative body, especially in terms of other resource users. This is despite self-organised and self-managed governance structures at the local level being specific recommendations of the comprehensive Western Australian Inquiry into Aboriginal customary laws and their recognition in Australia.

Evaluation of the efficacy of the process and whether the agreement achieved its purpose was therefore similarly stalled as a result of these interventions. The research team, including the Anmatyerr traditional owners and managers for Mer Ngwurla, are united in their disappointment at the interference by third parties and the long-term negative consequences for Anmatyerr people if their customary law and management group is not formally established.

Although the *Umbrella Agreement* still needs to be endorsed and the Trust formally constructed, the parties wanted to finalise agreement about the use and management of Mer Ngwurla.

In summary, the agreement process involved six main steps:

- 1 Discussing the idea for, and finding the right people to set up, a trust, corporation or group of Anmatyerr people who legally represent the voice of Anmatyerr people using customary law as a founding principle.
- 2 Drafting a main guiding document called the *Umbrella Agreement*. This becomes the process by which other agreements are negotiated.
- 3 Setting out a process by which a number of smaller documents, called subsidiary agreements (which come under the main *Umbrella Agreement*), can be developed.
- 4 Construction and signing of the first subsidiary agreement regarding the use and management of Mer Ngwurla and the surrounding Station. This agreement between the Anmatyerr traditional manager for Mer Ngwurla and the local pastoralist demonstrated a strong spirit of cooperation.
- 5 Endorsement of the *Umbrella Agreement* through a 'big mob' meeting.
- 6 Establishment of the *Anmatyerr Customary Law and Management Trust*.

## Draft *Umbrella Agreement* in principle

The draft *Umbrella Agreement* in principle, the *Rules of Engagement and Negotiation Principles Concerning Traditional Knowledge, Natural Resource Management & Access to Significant Sites on Anmatyerr Country* is referred to in abbreviated form as the *Traditional Knowledge, Natural Resource Management & Access Agreement* (Appendix B).

The summary of this *Umbrella Agreement* in principle illustrates its major features and character. It is not an Indigenous land use agreement or a settlement of land claims but a broad, non-binding agreement that fore-fronts Indigenous customary law. Where customary laws are practised and effective, legally binding statutory rights, contracts and agreements may be



entered into and can draw on the framework developed in the agreement. Another reason for preferring a flexible umbrella draft agreement is that capacity building in Anmatyerr agreement making and natural resource management is in the early stages and very few resources are available. The agreement can be elaborated on and reviewed over time. However, the draft agreement provides frameworks, processes and protocols that can be used immediately.

## Terminology

The word 'umbrella' is used to suggest that this document sits above or is the main covering document to be read before any following agreements which will come beneath it. These other documents will be called subsidiary agreements. The word 'draft' is used in the beginning stages of drawing up the wording for the agreement, to identify that the document is subject to change by all participants before final agreement. When agreement is reached between the participants (for example between the local pastoralist and the Anmatyerr people) the word draft is removed from the document to signify that agreement has been reached.

'Agreement in principle' is used to describe, in this case, a written agreement between two or more groups that may not be legally binding or enforceable in the eyes of Australian or Western law. This might be similar to a verbal agreement or protocols where, in good faith, the parties agree to stick to the agreements that have been made. This may provide the basis for later binding legal agreements.

## Parties

The *Umbrella Agreement* is meant to be an agreement in principle between a recognised Anmatyerr entity and an outside party or parties (for example a water resource agency, mining company, a commercial business or even a student wanting to do research). The strength of this agreement model is its local focus, being by the parties for the parties.

### Anmatyerr entity or entities

For future legally-binding agreements a legally recognised entity such as a trust or a corporation may be needed. A legally recognised entity for Anmatyerr negotiations and governance may be set up in a number of ways. The Anmatyerr people requested independent legal advice because of obligations that may not fit well with customary law principles in operating the chosen body (for example a statutory trust or a corporation). They desire a legal entity that fits as closely as possible to customary law institutions and governance processes – to strengthen Anmatyerr law.

In setting up a group, which according to customary law legally represents the wishes and voices of Anmatyerr people, it is very important to consider the types of situations within which this group will operate. For example, if we are talking just about Mer Ngwurla, there may be a sub-group which operates as part of the main representative body for all Anmatyerr people and which more appropriately represents the customary law obligations relating to this site. On the other hand, it may be that an overall body is set up with authority over all matters relating to Anmatyerr country.

## Structure of draft agreement

The *Umbrella Agreement* has three main parts, namely traditional knowledge, natural resource management and access. However, it is meant to cover as many possibilities as the Anmatyerr people advise are important to them. It remains a non-binding draft agreement while Anmatyerr people have time to agree on what is included and to remove sections they do not wish to be included. This also applies to any subsidiary agreements.



Senior spokesman of Anmatyerr values, Eric Penangk, born Ryan's Well 1927, Merekartwey for Atwel (Bushy Park Station) and Yerramp (Honey Ant) and Kwaty (rain) dreaming man.

### Traditional knowledge

Provisions relating to the protection of traditional knowledge include examples such as the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

There may be other examples that are not included and the Anmatyerr people have time to further consider what they would like to include or exclude and what measures are appropriate (see Craig 2005; Smallacombe 2007; CLC 2005).

### Natural resource management

The provisions relating to natural resource management cover a broad range of natural resources that include (but are not be limited to) water, minerals and gas, native plants and animals, geographic features and ecosystems. Anmatyerr people can continue to decide what is most appropriate to include or exclude in this definition.

### Access

The access agreement includes what Anmatyerr people have said about protecting important cultural and spiritual sites, including sacred sites. Western laws (eg the *Sacred Sites Act*, 2006) cover the issue of legal access to some of these important sites but Anmatyerr customary laws and processes can be clarified and developed so that access to sites being managed – as well as the process by which permission might be granted – is workable. These provisions can be expanded after future negotiations with national parks authorities and other interested parties.

## Work plan

The *Umbrella Agreement* refers to a 'work plan', which would provide details – in written form or using diagrams – submitted by people (eg a water resource agency, mining or tourism company, a research student or other organisation or individual) to explain what they would like to do on Anmatyerr country. This process will allow the Anmatyerr people, through their entity, to assess each proposal on its merits and to request further details and information, where necessary, to ensure that decisions are based on the best available information. It is important that the Anmatyerr people look carefully at the requirements of this section as set out in the draft *Umbrella Agreement*, to ensure that it meets their needs. It is also important that the agreement maximises the sharing of information which might disadvantage the Anmatyerr people (for example where application for access to a sacred site, or work near a sacred site might damage that site).

## Other provisions

The principles, purpose, process, phases, responsibilities, prior informed consent, benefit sharing, confidentiality, ownership, dispute resolution, term, expiry, amendment and assignment sections of the *Umbrella Agreement* are all important parts of the overall agreement, which Anmatyerr people can refer to in relation to all future negotiations concerning Anmatyerr traditional knowledge, natural resources and access permission.

## Amending and expanding the agreements

Anmatyerr people, through their recognised entity, will continue to look at all sections of the agreements (umbrella and subsidiary) to make sure what has been written accurately reflects their wishes, definitions and scope according to customary law.

## Subsidiary agreement

Unanimous consensus from the local parties to proceed with future local management options for Mer Ngwurla resulted in the negotiation of something akin to a private conservation agreement between affected parties on the ground. The achievement of this historic agreement has had a profoundly positive effect on relations between the Anmatyerr traditional owners and managers, the pastoralists and local tourism operators, and continues to be a catalyst for building effective local relationships.

Importantly, the agreement was used to address capacity building for Anmatyerr in relation to water management issues, future site management and economic opportunities as well as good relations with neighbours and access to sites. Sign-off of the Mer Ngwurla agreement was an auspicious occasion.



Sign-off of the *Private Subsidiary Agreement in Principle for the use of Anna's Reservoir (Mer Ngwurla) and Aileron Station* between Eric Penangk, Anmatyerr traditional manager of Mer Ngwurla (centre); Garry Dann, manager of Aileron Pastoral Lease (right); and Greg Dick, manager of Aileron Roadhouse (left). Witnessed by consultant anthropologist, Dale Hancock (standing).

## Anmatyerr agreement status

An explanatory document about the agreement was very well received by Anmatyerr representatives who attended several workshops on site facilitated by the research team. Anmatyerr traditional owners and managers who attended the last workshop (including Eric Penangk, Josie Nabangardi, Valerie Ross, Deborah Scrutton, Charlie Glen and Andrew Glen) all expressed a commitment to and enthusiasm for the umbrella and subsidiary agreement. They clearly understood and agreed that the formation of an *Anmatyerr Customary Law Management Trust* was vital to underpin the agreements. This entity would give authority, but not necessarily public exposure, to Anmatyerr customary law and governance.

The formation of an Anmatyerr entity, a customary law management trust or corporation underpins the foundation of this and all subsidiary agreements. No body has yet been formed. The *Umbrella Agreement* and any subsidiary agreement(s) need to be able to clearly articulate with whom any agreement is being made (the parties). So, it is vital for the implementation of the agreement to facilitate the formation of such a body. The formation of a trust, or similar body, is beyond the scope of this project. It must rightly be addressed in future community work and be driven by Anmatyerr people.

There were extended discussions about the eventual dissolution of the Anmatyerr Community Government Council as part of the current rationalisation processes of the Northern Territory Government to move to a system of a few large shires. The council represents the eight Anmatyerr skin groups, and it was concluded that this would be the ideal group to provide effective customary law governance for the proposed *Anmatyerr Customary Law and Management Trust*.

## Strengths and weaknesses of the process

This project was an important aspect of region-wide Indigenous action research and capacity building in natural and cultural resource management. Anmatyerr researchers identified the research need, focusing on Mer Ngwurla. The research grant application addressed this priority in an attempt to provide a benefit sharing process for Anmatyerr communities. The process proved to be difficult and time consuming because of the exceptional demands being placed on a small and poorly resourced region. This included resource-poor management agencies with other priorities and a sense of ownership of all negotiations with Indigenous people. Anmatyerr people are also extremely poorly resourced, in part due to the lack of an Anmatyerr organisation. Anmatyerr people face major issues daily, such as the failure of their drinking water supplies, ill-health, poor transport and a lack of food options. During the project the rare earth and uranium mine proposal for this local area also diverted attention and catalysed questionable responses by agencies who appeared to feel threatened by the empowerment of Anmatyerr people. Inadequate understanding by the main host institution (Charles Darwin University) about the project and implementation of remote Indigenous research projects contributed to destabilising progress with the research.

The justification for the project was a response to Anmatyerr research priorities and the wishes of local parties to focus on local needs and concerns, especially relating to customary law governance. However, other governance institutions and processes (such as Parks and Wildlife and Central Land Council) did not attach the same importance to local priorities as the research team. An exception was the NT Water Resource Agency (DNREA) who did provide excellent cooperation. The research team understood the importance of the wider legal, planning and management frameworks and recognised the limited resources of these organisations



and agencies. However, the project did highlight the different views and priorities of various levels of governance. This was one of the key aspects of the project – to highlight the importance of Aboriginal local concerns, customary law institutions and laws in the face of constant pressure to focus on the larger scale. It was hoped that this small-scale project could become the focal point for cross-cultural engagement and governance approaches at the local level and provide some powerful lessons about the importance of and critical need for this level of governance.

The key participants were the Anmatyerr traditional owners and managers, the pastoralist and the main local business owner. The agreement making process demonstrated that private in principle agreements are an excellent option for resolving matters of regional and local importance, as well as for developing capacity and experience in negotiation and agreement-making. Considerable advances can be made by engagement, clarifying priorities, roles, responsibilities and benefit sharing through this process. It is not essential (but desirable) that government be part of this process, nor is it essential that the initial broad agreements be legally binding, although this can be an important step in addressing power imbalances in later negotiations and agreements.

The inability of the Anmatyerr people to get timely advice and assistance to develop a regional customary law institution slowed the project and highlights the resource and time pressures placed on Aboriginal people in Central Australia. The community had a consistent and strong understanding of the forms of customary law governance of natural resources for which they wanted greater recognition. These aspirations were expressed in increasingly powerful ways during the project. However, obtaining local support for administration issues and advice resulted in costly delays. The outside authors are deeply grateful for the generosity and patience of the Anmatyerr researchers and cultural supervisors. The project provided abundant evidence that customary law governance remains strong in regional natural resource management and in relation to Mer Ngwurla.

This project highlights the importance of negotiated approaches, even in the most difficult and frustrating circumstances. It allows capacity building, development of a knowledge base and the establishment of protocols, best practice and working arrangements. These may not need to be formalised in a legally-binding agreement or aspects may become part of a later agreement, such as an Indigenous land use agreement. The most important lesson is that communities and stakeholders can take the lead and not have to wait for government to begin the process of agreement making and livelihood creation. It is hoped that some of these initiatives will be expanded when the plan of management for Anna's Reservoir is reviewed.

It is important to note that this approval process and a Trust that encompasses the Anmatyerr language group would be a vital and powerful endorsement and tool for Anmatyerr people in terms of making agreements and advancing issues of importance with other people. Existing agreement options, which are not able to encompass the whole family tree and structure of a language group might suit a portion of the group and a specific area of country, but do not allow for inclusive representation on a regional basis. Indigenous land use agreements and joint management agreements which include parts of a group and exclude others can cause internal friction. Approaches which essentially divide a group are the antithesis of customary approaches, especially for language groups whose structures and laws are strong and intact.

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# Appendix A

## CANADIAN REGIONAL AGREEMENTS THAT HAVE BEEN FINALISED

- › James Bay and Northern Quebec Agreement (1975)
- › Northeastern Quebec Agreement (1978)
- › Inuvialuit Final Agreement (1984)
- › Yukon Umbrella Final Agreement (1990) & Final Agreements with 7 Yukon First Nations
- › Gwich'in Final Agreement (1992)
- › Nunavut Land Claims Agreement (1993)
- › Sahtu Dene and Metis Agreement (1994)
- › Nisga'a Agreement (2000)
- › Labrador Inuit land Claims Agreement (2003) – to be ratified by Labrador Inuit, Newfoundland, Labrador and Canadian Governments before it comes into effect.





Young Anmatyerr women participating in resource management training and learning about Anmatyerr culture and history on a local pastoral station.

# Appendix B

## Rules of Engagement and Negotiation Principles Concerning Traditional Knowledge, Natural Resource Management and Access to Significant Sites on Anmatyerr Country (Draft Umbrella Agreement in principle)

### WITHOUT PREJUDICE

**THIS AGREEMENT, to be regarded as a model agreement for the purposes of this publication,**  
is AMONG:

**THE • Anmatyerr People**, as represented by Anmatyerr Customary Law Management Trust (the “**ACLMT**”)

AND

**TKNRMAA APPLICANT PARTY**, as represented by •, (the “Applicant”)

being collectively referred to as “the Parties” to this draft agreement (the “Agreement”).

- A. The “Anmatyerr Customary Law Management Trust” and the “Anmatyerr people” represent the Aboriginal rights, titles and interests of the Anmatyerr people of the Northern Territory of Australia.
- B. The Anmatyerr people have Aboriginal rights, titles and interests within the Traditional Territory and are constitutionally protected under Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), Commonwealth of Australia; the Native Title Amendment Act 1998 (Cth), Commonwealth of Australia; The Native Title (Indigenous Land Use Agreements) Regulations 1999 (Cth), Commonwealth of Australia; Northern Territory Aboriginal Sacred Sites Act March 2006, the Native Title Act 1993 (Cth), Commonwealth of Australia (1994 - ) and specific Anmatyerr Customary Laws.
- C. Anmatyerr Aboriginal rights include rights to ownership, protection and custody of their Traditional Knowledge and that every such right includes the incidental right to teach such practices, customs and traditions to a younger generation to ensure their continuity.
- D. Anmatyerr Aboriginal rights include rights to seek compensation for others’ profitable use of Anmatyerr land and water resources (including native plants & animals, water, mineral and gas resources).
- E. Anmatyerr Aboriginal rights include rights to approve access, protect and stipulate culturally appropriate rules concerning visits to Anmatyerr Significant Sites including Sacred Sites and sites of cultural significance.
- F. The Applicant is...

**Note:** We advise introducing the nature of the party that has requested access to your TKNRMAA. That is, if the Applicant is a researcher, regulatory authority, commercial entity (corporation, partnership or other business) or an individual, it is recommended that you set out some introductory details. This will be background to the purpose and objectives of the request to acknowledge/use/negotiate concerning your TKNRMAA.

- G. The Applicant acknowledges that Anmatyerr People have Aboriginal rights, titles and interests within the Traditional Territory, and is entering into this Agreement as an act of good faith recognition of such rights. This includes Anmatyerr rights to ownership, protection and custody of their Traditional Knowledge, and entitlement to the

recognition of the full ownership, control and protection of their intellectual property. The Parties further acknowledge that Aboriginal peoples have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

- H. Pursuant to Anmatyerr laws, including Aboriginal customary law, the Anmatyerr Customary Law Management Trust has reviewed and recommended this Agreement to their duly authorised representatives and agents.
- I. The Applicant has reviewed and recommended this Agreement to its duly authorised representatives and agents.

In consideration of the exchange of promises set out in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the Parties, the Parties covenant and agree as follows:

## 1 DEFINITIONS

**Note:** *Definitions appropriate to Anmatyerr society, culture, language and overall governance are to be considered for this section. For example, if there is a particular clan system, council of elders, trust or name for specific heads of families, these might be included (eg Merekartwey & Kwertengerl). This is of vital importance, as it is an affirmation of Aboriginal right to self-governance.*

- 1.1 “Disclosure of documents” means the Parties disclose the documents they each have, for example, those that may be held in the Anmatyerr community, at a regional or national level containing Traditional Knowledge in written, audio, video or other electronic form, including maps designating specific traditional land use and occupation within the Traditional Territory.
- 1.2 “Anmatyerr people” means individuals who are recognised as eligible Indigenous members of the Anmatyerr Customary Law Management Trust within the Traditional Territory.

**Note:** *This definition reflects the Anmatyerr word for member of your community. For instance, in Anmatyerr Country this would be “Anmatyerr Tyerry”.*

- 1.3 “Anmatyerr Customary Law Management Trust” or the “Trust” means the elected body of members established by the Anmatyerr People for the purposes of dealing with all matters relating to preservation, maintenance and protection of Traditional Knowledge, valid negotiations concerning access to and compensation for use of land and water resources (both surface and sub-surface) and access to Significant and Sacred Sites within the Traditional Territory.

**Note:** *This TKNRMAA uses a particular governance structure. It proposes a quorum of elected members of the Anmatyerr Customary Law Management Trust would review all applications for access and use of traditional knowledge, resources and access to significant and sacred sites. As set out below, the Trust has the powers to review, set terms and conditions for access and request the Applicant to resubmit their proposal if unsatisfactory. The Authority for approval remains at the Anmatyerr Trust level (i.e., Chairperson and Council). The Trust is a legally recognised body with expertise in the preservation, maintenance and protection of traditional knowledge, authority where not contravening territory or commonwealth legislation in determining and proposing appropriate compensation for land and water related resource exploitation (both monetary and in kind), and acceptance or rejection relating to access to sites of cultural significance, including Sacred Sites within the Traditional Territory. Additionally the Trust has the authority to represent Anmatyerr People in determining any rules relating to behaviour or actions which may compromise or adversely affect culturally significant or Sacred Sites.*

- 1.4 “Parties” means the Applicant and the Anmatyerr People and “Party” means one of them.
- 1.5 “Report” means a written narrative that includes the nature and scope of the TKNRMAA including objectives, methods and findings.
- 1.6 “Sacred Site” means a site used and/or identified by the Anmatyerr People for sacred purposes since time immemorial, including but not limited to, burial sites and sites of ceremonial, spiritual, social and/or cultural significance.

**Note:** *It is our experience that access and use of sacred sites is of the highest importance for Anmatyerr People. The majority of Aboriginal people would consider it contrary to Aboriginal law to allow commercialisation, destruction or desecration of sacred sites. Understandably, Traditional Knowledge that relates to the protection and confidentiality of sacred sites must be strictly protected. As set out below, this definition is closely tied to the specific provision that speak to protection of sacred sites.*

- 1.7 “Traditional Knowledge” includes tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to the Anmatyerr People or its Traditional Territory; and, are constantly evolving in response to a changing environment. Categories of Traditional Knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; “expressions of folklore” in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties.<sup>1</sup>

**Note:** *The above Traditional Knowledge definition is from the World Intellectual Property Organization’s fact-finding mission on traditional knowledge. Anmatyerr Traditional Knowledge-holders’ reserve the right to amend the understanding of the scope, nature and content of Traditional Knowledge.*

- 1.8 “TKNRMAA Documentation” for the purpose of this Agreement, means the Inventory, Maps and Report including all versions, editions and drafts thereof.
- 1.9 “TKNRMAA Project” means the gathering, documentation and preservation of Traditional Knowledge, Land & Water Resource Negotiation Rights and Rules of Access to culturally significant and Sacred Sites that result in TKNRMAA Documentation.

**Note:** *The particular TKNRMAA Project set out in this Agreement contemplates that with appropriate conditions being met (including compensation or in-kind arrangements where applicable) the Anmatyerr Customary Law Management Trust will share Traditional Knowledge from Traditional Knowledge-holders, negotiate where appropriate concerning commercial and non-commercial use of land and water related resources, and negotiate or agree where applicable to grant access to culturally significant or Sacred Sites according to an arrangement proposed by the Applicant. The Applicant is in essence contracting with the Anmatyerr Customary Law Management Trust for the development of particular products, use of particular land and water related resources or access to particular sites.*

- 1.10 “Traditional Owners” means Anmatyerr People with a long family tradition of occupancy and use of an area within the Traditional Territory.

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<sup>1</sup> World Intellectual Property Organization, “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge” 2001 at 25.



**Note:** *This Agreement contemplates that much of the Traditional Knowledge collection and gathering will be under the control of traditional owners that will interface directly with Traditional Knowledge-holders. The Applicant would not necessarily have person-to-person contact with the Traditional Knowledge-holders unless expressly authorised by the Anmatyerr Customary Law Management Trust.*

*This would likely have to be modified in circumstances where a researcher desired direct interviewing with Traditional Knowledge-holders. In such case, a Traditional Owner might have a more supervisory role to ensure that inappropriate behaviour and questions were avoided.*

- 1.11 “Traditional Territory” means that portion of the traditional territory of the Anmatyerr People located within the Northern Territory, as set out in the map entitled “Anmatyerr People’s Traditional Territory”, a copy of which is attached as Schedule “A” to this Agreement.

**Note:** *It is very important to set the geographic parameters of the traditional knowledge, resources and sites being accessed. It may be counter intuitive, but it may be in the best interests of the Anmatyerr People to define its Traditional Territory narrowly to ensure that the Applicant accesses traditional knowledge in a restricted area. Also, if the Applicant gathers Traditional Knowledge outside the defined area, it may be contrary to this Agreement. An alternative to a narrow definition would be to have a specific distinction between the traditional territory as a whole and “project-specific traditional territory.”*

- 1.12 “Traditional Knowledge, Natural Resource Management and Access Agreement” means the gathering, collection and storage of Traditional Knowledge, commercial and non-commercial Use of Land and Water related Resources or Access to Sites by the Applicant for the purposes of...

**Note:** *It is important to define the specific project that the Applicant proposes. This may be key to the enforceability of this Agreement. In-depth discussions with the Applicant on the specific details of their intended use of the Traditional Knowledge, resources or access to sites is necessary to get an appropriate understanding of the project.*

- 1.13 “Traditional Knowledge-holders” means a person/s of Anmatyerr descent that has been given the responsibility by his or her Anmatyerr birth-right to act as custodian of particular Traditional Knowledge to ensure the preservation of such Traditional Knowledge for future generations.

- 1.14 “Workplan” means the Applicant’s plan in effect to access Traditional Knowledge, commercially or non-commercially use Land and Water related Resources, or access particular identified Sites and needs to be appended as Appendix “B” to this Agreement.

**Note:** *Determining the timeline, plan and scope of the project is essential information, particularly as it applies to community consultation purposes. Much of the on-the-ground details will likely be set out in a Workplan.*

## 2 PRINCIPLES

The Parties agree to the following principles set out hereunder:

**Note:** *The following principles are intended to set a best practice standard for engagement with Anmatyerr People and their Traditional Knowledge, Natural Resource Management and Site Access Permission. They represent the basic understanding between the Parties and context that the TKNRMAA will be negotiated. These particular principles may have to be revised over time and reflect positive language supporting Aboriginal rights, titles and interests recognition.*

- 2.1 **Customary Law Recognition.** The Applicant acknowledges that the Anmatyerr People have a system of Aboriginal Customary Law, and the Applicant recognises prior rights pursuant to that Law.
- 2.2 **Prior Rights.** The Applicant acknowledges that the Anmatyerr Customary Law Management Trust has prior, proprietary rights, titles and interests over the air, land, waterways and the natural resources within the Traditional Territory where these rights do not contravene Commonwealth or Territory legislation, together with all knowledge and intellectual property and traditional resource rights associated with such resources and their use.
- 2.3 **Self-Determination.** The Applicant acknowledges that Anmatyerr People have the Aboriginal right to self-determination within their Traditional Territory.
- 2.4 **Inalienability.** The Applicant acknowledges that the Anmatyerr Customary Law Management Trust has inalienable rights to the Traditional Territory, including the natural resources within them and associated Traditional Knowledge where these rights do not contravene Commonwealth or Territory legislation. These rights are collective by nature but can include individual rights. The Applicant shall defer to the Anmatyerr Customary Law Management Trust to internally determine for themselves the nature and scope of respective communal resource rights regimes.
- 2.5 **Traditional Guardianship.** The Applicant acknowledges that the Anmatyerr People have a holistic interconnectedness with the ecosystems within their Traditional Territory and the Anmatyerr People's obligation and responsibility to preserve and maintain their role as traditional guardians of these ecosystems through the maintenance of their culture, spiritual beliefs, and customary law.
- 2.6 **Active Participation.** The Applicant acknowledges the crucial importance of the Anmatyerr People as represented by the Anmatyerr Customary Law Management Trust to actively participate in all phases of any Traditional Knowledge Use Programs, Resource Use Agreements or Site Access Applications, and in the integration, use and application of such Programs, Agreements or Applications.
- 2.7 **Full Disclosure.** The Applicant acknowledges that the Anmatyerr Customary Law Management Trust is entitled to be fully informed about the nature, scope and ultimate integration of any Traditional Knowledge Program (including methodology, data collection, and the dissemination and application of results), Resource Use Agreement or Site Access Application. This information is to be given in a form and style that has meaning to the Anmatyerr communities, including translated information where possible.
- 2.8 **Prior Informed Consent.** The Applicant acknowledges that the prior informed consent of the Anmatyerr Customary Law Management Trust must be obtained before the Traditional Knowledge or any publications associated with the Traditional Knowledge, Resource Use or Site Access is transmitted from Traditional Land.  
  
Stewards to the Applicant: Ongoing consultation is necessary to maintain the prior informed consent throughout the Term of the particular Project (relating specifically to use of Traditional Knowledge or Land & Water related Resource Use). This principle will be satisfied by meeting the obligations set out in Clause 8 herein.
- 2.9 **Benefit Sharing.** The Applicant acknowledges the Anmatyerr People's rights to benefit sharing arrangements relating to Projects. These may include, but are not limited to those articulated in Clause 9. of this Agreement
- 2.10 **Confidentiality.** The Applicant acknowledges that the Anmatyerr Customary Law Management Trust has information concerning their Traditional Knowledge, including particular aspects of their culture, traditions, spiritual beliefs and customary laws that must be maintained and treated as confidential by the Applicant, its members, alternates and/or agents thereof. This principle will be satisfied by meeting the obligations set out in Clause 10 herein.

- 2.11 Support of Anmatyerr Traditional Knowledge Research.** The Applicant acknowledges the Anmatyerr People's need to develop capacity to undertake their own Traditional Knowledge research and publications and in utilising their own collections and databases.
- 2.12 Implementation of this Agreement.** The Applicant and the Anmatyerr Customary Law Management Trust acknowledge that in respect of commercial and non-commercial use of Traditional Knowledge or Land and Water related Resources, a serious ongoing commitment by both Parties and the dedication of necessary resources to implement this Agreement will be required to meet its objectives in a timely and complete way.
- 2.13 Non-Derogation.** Nothing in this Agreement does or will abrogate, derogate and/or prejudice any of the Anmatyerr People's Aboriginal rights, titles and interests in the Traditional Territory.
- 2.14 Third Party Consultation.** Nothing in this Agreement does or will limit the Parties ability to participate in consultations, discussions and agreements with any third party.

### 3 PURPOSE OF THIS AGREEMENT

**Note:** *Consideration should be given as to whether the purposes should be broadened (i.e., preservation of Anmatyerr cultural practices, customs and traditions).*

- 3.1** The purposes of this Agreement include, but are not limited to, the following:
- (a)** determination by Anmatyerr People of the methods and approaches to documentation of Traditional Knowledge to ensure the continuity of Anmatyerr customs, practices and traditions from one generation to the next;
  - (b)** provide a process to gather, preserve and integrate the Traditional Knowledge with respect to the Applicant's Project;
  - (c)** set out the mutual understanding of the Parties about ownership, protection, compensation and use of such Traditional Knowledge, Land and Water related Resources or Access and Rules relating to culturally significant and Sacred Sites;
  - (d)** set out a Workplan for the purpose of carrying out the particular Traditional Knowledge Program, outlining the intended Resource Use and exploitation method, or documenting the intended Site Access Application; and
  - (e)** commence a process of further integrating the Traditional Knowledge or commercial and non-commercial benefit gained from Resource exploitation into broader educational endeavours of the Anmatyerr People, including curriculum development, youth camps, language preservation and other activities that ensure the continuation of Anmatyerr social, cultural and spiritual customs, practices and traditions.

### 4 PROCESS BY WHICH THE AGREEMENT WAS REACHED

**Note:** *It is valuable to review in writing the process by which the Agreement is reached, to ensure transparency in the short term, and greater understanding of the considerations that contributed to development of the Agreement in both the present and into the future. The process by which the Anmatyerr People participate in coming to the Agreement, and the methods by which informed "consent" are acquired can be complex.*

- 4.1** The Applicant submitted a written proposal to the Anmatyerr Customary Law Management Trust for the particular Traditional Knowledge Project, Resource Use Agreement, or Access Application.
- 4.2** On or about •, 200•, the Chairperson of the Anmatyerr Customary Law Management Trust
- (a)** presented the proposal before a quorum of the elected members,
  - (b)** chaired a co-operative discussion of the proposal exploring relevant issues and suggesting solutions, and

- (c) incorporated, to the extent necessary, recommendations accommodating participant interests.

**Note:** *As set out under the definitions section, this Section contemplates the role of a member-comprised Anmatyerr Customary Law Management Trust that will review all applications for access and use of Traditional Knowledge, exploitation of Land and Water related Resources or permission and rules relating to entering a culturally significant site or Sacred Site. The premise behind this model is that traditional knowledge-holders will apply Aboriginal law and other customary practices, in their review process, which will reflect the custodial relationship between the Anmatyerr People and the traditional knowledge.*

- 4.3 The Anmatyerr People directed the initial draft of this Agreement.
- 4.4 The Parties reviewed, negotiated and amended this Agreement.
- 4.5 The Anmatyerr Customary Law Management Trust and the Applicant reviewed the aforementioned documents and designed the Workplan.
- 4.6 On or about •, 200•, the Chairperson of the Anmatyerr Customary Law Management Trust:
  - (a) presented the Agreement and Workplan before a quorum of the Trust members,
  - (b) with the assistance of legal counsel and other consultants, chaired a co-operative discussion of the Agreement and Workplan exploring relevant issues and suggesting solutions, and
  - (c) incorporated, to the extent necessary, recommendations accommodating participant interests.

**Note:** *If the Anmatyerr Customary Law Management Trust does decide to establish a Sub-Committee to review Applications, it is important to draft Terms of Reference that set out their practices and procedures, particularly as it applies to amending or setting conditions to a proposal, agreement and/or workplan.*

- 4.7 On or about •, 2008, the Chairperson of the Anmatyerr Customary Law Management Trust or their Nominee according to the Articles of Incorporation:
  - (a) presented the amended Agreement and Workplan before the Applicant; and
  - (b) the members of the Trust recommended the Agreement and Workplan for approval by the Anmatyerr Customary Law Management Trust.
  - (c) Each member, or their alternates, of the Applicant reported and recommended this Agreement to its nominating party.
- 4.8 The Applicant ratified this Agreement and Workplan.
- 4.9 Pursuant to the Anmatyerr Customary Law Management Trust's internal protocols, the Anmatyerr Customary Law Management Trust ratified this Agreement and Workplan.

## 5 PHASES OF THE APPLICATION/PROJECT RELATING TO TRADITIONAL KNOWLEDGE RESEARCH/USE OR RESOURCE EXPLOITATION

- 5.1 The Traditional Knowledge or Resource Exploitation Project will consist of five phases:
  - (a) **Phase 1:** Community consultation meetings informing members of the Anmatyerr Customary Law Management Trust of the Traditional Knowledge or Resource Exploitation Project, introducing the Applicant to Traditional Knowledge-holders, etc.
  - (b) **Phase 2:** Gather and document Traditional Knowledge or identify Resource Exploitation intentions on-country with the assistance of a Traditional Knowledge Assistant from the Anmatyerr Customary Law Management Trust.



**(c) Phase 3:** Applicant's preparation of intended Traditional Knowledge Use or Resource Exploitation Documentation.

**(d) Phase 4:** Review by the Anmatyerr Customary Law Management Trust of the Traditional Knowledge Use or Resource Exploitation Documentation.

**(e) Phase 5:** Integrate Traditional Knowledge into...

**Note:** *This Protocol contemplates that the Traditional Knowledge collected and gathered will be integrated in a more substantial project. The Phases will have to be amended in relation to the particular project. That is, if the Traditional Knowledge is being collected for an environmental assessment process, there are issues related to public disclosure, confidentiality, anonymity of Traditional Knowledge-holders, etc. If the Traditional Knowledge is being published by a researcher as part of a thesis, there may be University policies that will have to be taken into consideration.*

*If it is foreseeable that the Traditional Knowledge will be made public in any form, it is advisable to consider entering into further arrangements with third parties. For instance, if the Traditional Knowledge Documentation will be used by a regulatory authority (i.e., National Energy Board), then you may have to enter into an arrangement with that regulator to ensure that the traditional knowledge disclosure is minimal.*

- 5.2 The particulars of the work to be performed, services to be provided and payment with respect thereto will be as established in the Workplan.

## 6 RESPONSIBILITIES OF THE APPLICANT

- 6.1 For the purposes set out in Clause 3 of this Protocol, the Applicant will do the following:

- (a)** respect the privacy, dignity, cultures, practices, traditions and rights of the Anmatyerr Customary Law Management Trust and Anmatyerr People;
- (b)** recognise the Anmatyerr Customary Law Management Trust's rights to ownership, protection and custody of their Traditional Knowledge, including their rights to heritage resources;
- (c)** ensure that the Traditional Knowledge use, Access or Project occurs in an orderly, legal and respectful manner with due regard to the peaceable enjoyment of the Anmatyerr People to the Traditional Territory;
- (d)** offer to, and if accepted, respect the anonymity of the Traditional Knowledge-holders;
- (e)** in the manner set out in the Workplan, assist the Anmatyerr Customary Law Management Trust to develop the capacity to carry out the Workplan; and
- (f)** take any reasonable action required to ensure compliance with this subsection as requested by the Anmatyerr Customary Law Management Trust.

- 6.2 The Applicant will not, without the prior informed consent of the Anmatyerr Customary Law Management Trust:

- (a)** use or permit the Traditional Knowledge to be used by any other person or body other than for the purposes of or incidental to the Traditional Knowledge Project;
- (b)** knowingly undertake any collection of heritage or cultural materials;
- (c)** disclose any aspect of the Traditional Knowledge which is not publicly available and which was communicated to or observed by the Applicant pursuant to the Traditional Knowledge Project, except as set out in Clause 10;
- (d)** seek to obtain any Traditional Knowledge of the medicinal and cosmetic properties of plants from a Traditional Knowledge holder which is not publicly available; and

- (e) sell or claim rights to sell plants as herbal medicines or cosmetic products that were obtained as a result of the Traditional Knowledge Project.

**Note:** *Following community consultations, particularly with Traditional Knowledge-holders, it is advisable to consider whether there are any other specific prohibitory issues that should be added to this list.*

- 6.3** Sacred Sites. In the event of and upon becoming aware of any Sacred Site within the Traditional Territory, the Applicant will adhere to the following procedure:

- (a) not undertake any activities within the Traditional Territory which could reasonably be expected to damage or interfere with an identified Sacred Site;
- (b) not disclose the location of the Sacred Site to any parties outside of this Agreement,
- (c) treat all information with respect to the Sacred Site as confidential to the benefit of the interests of the Anmatyerr Customary Law Management Trust, and
- (d) seek the advice of the Anmatyerr Customary Law Management Trust regarding the Sacred Site.

It is noted that the Anmatyerr Customary Law Management Trust will closely consider these provisions to ensure that they are consistent with their Aboriginal customary laws and accordingly modify them if this is necessary.

- 6.4** The Applicant will not, without the prior informed consent of the Anmatyerr Customary Law Management Trust, knowingly enter upon any Sacred Site.

## **7 RESPONSIBILITIES OF ANMATYERR CUSTOMARY LAW MANAGEMENT TRUST**

- 7.1** For the purposes set out in Clause 3 of this Agreement, the Anmatyerr Customary Law Management Trust will do the following:

- (a) instruct and supervise the Traditional Owners in their gathering, analysing and documentation of Traditional Knowledge or Resource Agreements;
- (b) provide the Traditional Knowledge or agree to the Resource Exploitation or Site Access as described by the Workplan;
- (c) use reasonable efforts to secure the cooperation and participation of the Traditional Knowledge-holders;
- (d) in a timely manner, bring information, matters or issues of concern forward for discussion and resolution in order to assist the Applicant in the planning and development of the Traditional Knowledge, Resource Exploitation or Site Access Project;
- (e) provide advice and assistance to the Applicant, as necessary, to enable it to fulfill its responsibilities under this Agreement;
- (f) on a regular basis or when requested by the Applicant, provide an update of progress on the Traditional Knowledge, Resource Exploitation or Site Access Project to the Applicant; and
- (g) take any reasonable action to ensure compliance with this subsection as agreed to by the Applicant.

**Note:** *This section is particularly important to customise to the specific project following consultations with your community, particularly Traditional Knowledge-holders.*

## 8 PRIOR INFORMED CONSENT

- 8.1 Anmatyerr Customary Law Management Trust's Responsibilities and Obligations to the Anmatyerr People. Pursuant to internal Anmatyerr Customary Law Management Trust protocols and for the purposes of the Applicant's Project, the Anmatyerr Customary Law Management Trust must seek, obtain and maintain the prior informed consent of the Anmatyerr Customary Law Management Trust's members with respect to the protection, preservation and maintenance of Traditional Knowledge, exploitation of Resources and Access to Sites which may include the following recommendations.

**Note:** *This Section contemplates the Traditional Knowledge collection and gathering, the Clarification of Resources to be Exploited and Sites to be Accessed being solely controlled and managed by the Anmatyerr Customary Law Management Trust. In this circumstance, much of the obligation on ensuring compliance with Aboriginal law is on the Anmatyerr Customary Law Management Trust itself.*

**Note:** *If the Applicant was first-hand involved in the collection or identification of Resources the prior informed consent requirement is the responsibility of the Applicant and more specific provisions would be suitable.*

- 8.2 The Anmatyerr Customary Law Management Trust's responsibilities and obligations to the Anmatyerr People with respect to the gathering, collection, integration and use of Traditional Knowledge or Resource Exploitation are further elaborated in the Workplan.
- 8.3 The Applicant Responsibilities and Obligations to the Anmatyerr Customary Law Management Trust. The Applicant recognises and respects that the Anmatyerr People's Traditional Knowledge and Land & Water related Resources is collectively owned, managed and controlled by the Anmatyerr Customary Law Management Trust where these rights do not contravene Commonwealth or Territory legislation.
- 8.3.1 Substantive work (more than 1 week) on Anmatyerr country will require ALL participants to undertake Cultural Awareness Training Workshops conducted by Anmatyerr Customary Law Management Trust and their nominees at the expense of the applicant prior to the commencement of works (or by agreement) with ACLMT.
- 8.4 Unless authorised by the Anmatyerr Customary Law Management Trust, the Applicant will not approach individual Traditional Knowledge-holders in an effort to obtain Traditional Knowledge or to negotiate or identify exploitable Resources.
- Note:** *This subsection speaks to common worst practice, whereby persons directly approach Traditional Knowledge-holders, compensate them poorly for Traditional Knowledge or resources without any respect for the collective ownership issues surrounding Traditional Knowledge or land & water related resources.*
- 8.5 When requested by the Anmatyerr Customary Law Management Trust, the Applicant will explain the potential benefits and outcomes associated with the Traditional Knowledge or Resource Exploitation Project to Anmatyerr Customary Law Management Trust members.
- 8.6 For clarity, the Parties acknowledge that ongoing consultation and provision of information will be required throughout the duration of the Traditional Knowledge or Resource Exploitation Project to maintain prior informed consent.
- Note:** *This subsection speaks to the often misunderstanding that consent occurs with a simple approval regardless of changes to use, scope or nature of a Traditional Knowledge or Resource Exploitation Project. Consent is something that requires ongoing communication between the Anmatyerr Customary Law Management Trust and Applicant.*
- 8.7 For further clarity, the Applicant acknowledges that the Anmatyerr Customary Law Management Trust may withdraw their prior informed consent in writing or by termination of this Agreement.

**Note:** *This is an important subsection that allows the Anmatyerr Customary Law Management Trust to end a Traditional Knowledge or Resource Exploitation Project or Site Access Agreement if the Applicant acts contrary to this Agreement. It is a protective mechanism that ensures that the Anmatyerr Customary Law Management Trust will remain in control of the Project at all times and circumstances.*

## 9 BENEFIT-SHARING

**9.1** Benefits to the Anmatyerr Customary Law Management Trust. As agreed to by the Parties and for the purposes of the Traditional Knowledge or Resource Exploitation Project, benefits relating to the Projects may include, but are not limited to, the following:

- (a) training or employment of community members;
- (b) equipment including vehicles;
- (c) production of procedure manuals;
- (d) video and tape recordings;
- (e) contribution to the Anmatyerr Customary Law Management Trust for cultural, commercial and non-commercial or community-based undertakings related to the Traditional Knowledge or Resource Exploitation Project;
- (f) remuneration, including honoraria, as set out in the Workplan; and
- (g) any other matters set out in the budget of the Workplan.

**Note:** *Anmatyerr will consider whether this enumerate list provides a broad enough range of benefits. These benefits will have to be closely customised for the scope of each project.*

**9.2** Benefits to the Applicant. The benefit to the Applicant includes, but is not limited to, the following:

- (a) Anmatyerr Customary Law Management Trust's assistance and advice to the Applicant;
- (b) opportunities to establish positive engagement of the Anmatyerr Customary Law Management Trust and People;
- (c) the authenticity and evidentiary value of the Traditional Knowledge contributions will be enhanced through Anmatyerr Customary Law Management Trust's participation in the development of any Traditional Knowledge Projects; and
- (d) benefits accrued relating to agreed resource exploitation.

**9.3** Mutual Benefits to the Parties. Mutual benefits to the Parties include, but are not limited to, the following:

- (a) protection and enhancement of the Anmatyerr People's cultural pursuits and traditional activities;
- (b) protection of areas of traditional use and sites of cultural importance to the Anmatyerr People;
- (c) preservation of Traditional Knowledge; and
- (d) furthering the development of positive, beneficial and harmonious relationships between the Parties.

## 10 CONFIDENTIALITY

**10.1** A presumption operates that information provided by the Anmatyerr Customary Law Management Trust will be confidential unless specifically authorised to the contrary in writing by the Trust.



- 10.2 In this Protocol, “Confidential Information” means information identified and considered to be confidential by the Party providing the information. The Party providing the information shall notify the other Party in writing of its confidential nature.
- 10.3 Unless otherwise agreed by the Parties, neither Party will disclose, divulge, or otherwise communicate to a third party any Confidential Information received from the other party as a result of this Agreement nor use such Confidential Information for any purpose.
- 10.4 Where Traditional Knowledge that is confidential is required or requested by a third party, the Parties will make reasonable efforts to engage, negotiate and conclude an agreement with the third party that will safeguard that Traditional Knowledge from public disclosure.

**Note:** *This subsection considers the possibility of third party obtaining access to the Traditional Knowledge within the Traditional Knowledge Documentation. This may be the case where the Traditional Knowledge may be published or subject to a regulatory process (i.e., traditional land use information in an environmental assessment).*

*It is advised that this provision be tailored to the circumstances to ensure that this Protocol is not undermined if a third party obtains the Traditional Knowledge. It may be necessary to have an Agreement with a third party or have that third party agree to the terms of this Protocol prior to obtaining access.*

## 11 OWNERSHIP

- 11.1 Anmatyerr Customary Law Management Trust Exclusive Ownership of the Traditional Knowledge. The Anmatyerr Customary Law Management Trust shall remain the exclusive owner of the Traditional Knowledge. The Applicant acknowledges and agrees that it has no interest whatsoever in the ownership of the Traditional Knowledge, including any intellectual property rights thereunder. The Applicant hereby waives any intellectual property and/or any other rights that the Applicant may have with respect to the Traditional Knowledge. If, notwithstanding the foregoing, rights to Traditional Knowledge are recognised by a third party as residing in the Applicant, the Applicant will take all reasonable efforts to waive or transfer all or any such rights to the benefit of the Anmatyerr Customary Law Management Trust.

**Note:** *It is strongly advised that this subsection be included in all Traditional Knowledge agreements. It spells out in clear terms the Anmatyerr Customary Law Management Trust shall remain the owner of its Traditional Knowledge at all times and provide mechanisms to correct operations of the law to the contrary. That is, Traditional Knowledge that is included in a publication may be considered to be the copyright ownership of the author.*

- 11.2 The Applicant Use of Traditional Knowledge. For the consideration provided under this Agreement, the Applicant will be able to use the Traditional Knowledge for the purposes set out in the Traditional Knowledge Project and Workplan, subject to terms and conditions set out by the Anmatyerr Customary Law Management Trust. For clarity, the Parties do not intend that this use of the Traditional Knowledge includes any grant of ownership to the Applicant.

## 12 PROCESS MATTERS IN RESPECT OF TRADITIONAL KNOWLEDGE

**Note:** *Again, this Agreement sets out a Traditional Knowledge collection process that will be under the control and management of the Anmatyerr Customary Law Management Trust by its Traditional Owners. The Anmatyerr Customary Law Management Trust will be responsible for the drafting and inclusion of traditional knowledge in the Traditional Knowledge Documentation, thereby having censorship abilities on the specific disclosure or confidentiality of certain Traditional Knowledge.*

*If the Applicant is directly gathering the Traditional Knowledge, this section will have to be amended to reflect this difference. We would suggest that the Anmatyerr Customary Law Management Trust remain integrally involved in approval of the Traditional Knowledge Documentation.*

- 12.1 Review of the Traditional Knowledge Documentation by the Anmatyerr Customary Law Management Trust. Prior to the release of the Traditional Knowledge Documentation to the Applicant, a draft report of the Traditional Knowledge Documentation will be distributed by the Anmatyerr Customary Law Management Trust to its members for its review and approval.
- 12.2 The Applicant Comments on the Traditional Knowledge Documentation. The Applicant shall have the opportunity to review and provide comment on the Traditional Knowledge Documentation before it is finalised by the Anmatyerr Customary Law Management Trust.
- 12.3 Communications. All external communications with respect to this Agreement or initiatives pursuant to this Agreement will be undertaken by joint communiqué, as authorised by the Parties.
- 12.4 Communities Information Strategy. The Parties, by their designated representatives, will collaborate in the development and implementation of an Anmatyerr community information strategy with respect to the Traditional Knowledge Project and any and all agreements, including the preparation of a summary thereof.

## 13 DISPUTE RESOLUTION

- 13.1 **Notice.** In the event that the Anmatyerr Customary Law Management Trust or the Applicant finds a conflict with the fulfillment of the terms, conditions or responsibilities set forth in this Agreement, that Party shall give written notice to the • (insert name of process/ body).

**Note:** *An appropriate body for appeal of disputes under this Agreement must be considered in this circumstance. Some Aboriginal Corporations create an independent Advisory Committee which would afford equal representation for the Applicant and Anmatyerr Customary Law Management Trust for dispute resolution. Another process worth investigating can be found on the Australian Centre for Dispute Resolution website.*

- 13.2 **Meeting.** The • shall convene a meeting with the Parties within 15 days of receiving the notice and shall attempt to reach a mutually acceptable resolution within 7 days.
- 13.3 **Appointment of a Third Party.** If the • cannot resolve the dispute between the Parties within 7 days they shall agree to designate a third Party to mediate the dispute.
- 13.4 **Resolution by Third Party.** The Parties shall attempt to reach a resolution with the assistance of the third Party. If a resolution cannot be reached within 30 calendar days of the designation of the third Party, the third Party shall resolve the dispute.

## 14 TERM, EXPIRY, AMENDMENT AND ASSIGNMENT

- 14.1 The Parties agree that this Agreement is a document of a “living nature” and may be amended from time to time to continue to achieve the purposes of this Agreement or such other objectives as may be agreed upon by the Parties from time to time.
- 14.2 This Agreement and the Workplan may be amended by agreement of the Parties in writing.
- 14.3 Unless the Parties agree otherwise in writing, the term of this Agreement is indefinite. If the Parties do agree to terminate this Agreement, the specific conditions and covenants that survive termination must be specifically agreed. For clarity, section 10 – Confidentiality and section 11– Ownership, will survive termination of this Agreement.

**Note:** *The Term of this AGREEMENT must be closely considered and is dependent on the nature of the Project. It may be advantageous in a continuing Anmatyerr Customary Law Management Trust-to-Crown relationship to have the term indefinite.*

*Whereas, a short limited term may be more appropriate between **Anmatyerr Customary Law Management Trust** and researcher to restrict use of the traditional knowledge.*

- 14.4 This Agreement may not be assigned without the express written consent of the other Party.

## 15 MISCELLANEOUS

- 15.1 The Parties deem this Agreement to be approved when it is executed.
- 15.2 The Parties agree that this Agreement may be executed in separate counterparts, each of which so executed shall be deemed to be an original. Such counterparts together shall constitute one and the same instrument and, notwithstanding the date of execution, shall be deemed to bear the effective date set forth below.

**TO EVIDENCE THEIR AGREEMENT** each of the Parties has executed this Agreement on the date appearing below.

### THE ANMATYERR PEOPLE

By: \_\_\_\_\_ on behalf of  
Anmatyerr Customary Law Management Trust.

Date: \_\_\_\_\_ Witness: \_\_\_\_\_

### THE APPLICANT

By: \_\_\_\_\_ on behalf of  
(Company, Organisation, Institution, Individual etc.)

Date: \_\_\_\_\_ Witness: \_\_\_\_\_









Australian Government

Land & Water Australia

## An Agreement Approach that Recognises Customary Law in Water Management

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