Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada

Ciaran O’Faircheallaigh

Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada

CIARAN O’FAIRCHEALLAIGH

Centre for Australian Public Sector Management
Griffith University

Aboriginal Politics and Public Sector Management
Research Paper No 13

January 2003

ISBN 0 909291 764
The Centre for Australian Public Sector Management is affiliated to Griffith University’s Faculty of Commerce and Management, and its objectives are to undertake and promote research into the effectiveness and efficiency of the public sector in Australia, and to analyse the role of the public sector in the Australian community. It is a component of the Key Centre for Ethics, Law, Justice and Governance.

Research Project on Aboriginal Politics and Public Sector Management

The Centre’s Research Project on Aboriginal Politics and Public Sector Management was established in 1995 under the direction of Professor Ciaran O’Faircheallaigh. Supported by grants from the Australian Research Council, the Project’s general aim is to help develop an approach to management of public policies and programs which is tailored to the specific needs, aspirations and circumstances of Aboriginal people in Australia.

Copies of this and other Project publications and more information on the Project can be obtained from:

Professor Ciaran O’Faircheallaigh
School of Politics and Public Policy
Faculty of International Business and Politics
Griffith University
NATHAN QLD 4111

Telephone: (07) 3875 7736
Fax: (07) 3875 5363
Email: Ciaran.Ofaircheallaigh@mailbox.gu.edu.au
THE AUTHOR

Ciaran O’Faircheallaigh is Professor of Politics at Griffith University, Brisbane. For over a decade he has undertaken research on the interrelationship between resource development and indigenous peoples, on Aboriginal politics and on management of public policies and programs affecting Aboriginal people in Australia. He has assisted a range of Aboriginal organisations to negotiate agreements with mining companies, and has recently extended his research to include negotiations involving indigenous people in Canada and the United States.

Cover Artwork and Design: Rhonda Kelly
Acknowledgments

Part of the research on which this paper is based was undertaken jointly for the Kimberley Land Council and Argyle Diamonds Limited. However, the views expressed here are solely those of the author.
Introduction

There is a growing awareness among Indigenous groups, resource companies and governments that the conclusion of an agreement relating to resource development on Indigenous land does not automatically bring about the outcomes the agreement provides for. Though not based on any systematic study of the outcomes of agreements, this awareness does reflect a growing body of evidence that in a substantial number of cases provisions of agreements are either not put into effect at all or do not bring about the results intended by the parties. For instance, in 2000 Indigenous groups created legal precedent by obtaining in a New South Wales Supreme Court injunction against a resource developer for non-compliance with the cultural heritage provisions of an agreement negotiated under Australia’s Native Title Act (Phillips 2001). Native title groups in Western Australia have initiated legal proceedings against Anaconda Ltd for alleged failure to implement financial provisions of agreements (‘Aborigines to Sue Miners’, Sunday Times (Perth), 28 April 2002). In a number of cases trusts receiving financial compensation payments to native title parties have failed to operate, with the result that no benefits have accrued to native title holders.1 A recent study of 10 agreements undertaken for the Human Rights and Equal Opportunity Commission found many instances of non-implementation (O’Faircheallaigh and Kelly 2001), as did a comprehensive, retrospective evaluation of the agreements for the Nabarlek and Ranger uranium mines (O’Faircheallaigh 2002). Similarly, major concerns have arisen regarding the implementation of agreements in Canada (Ivanitz 1998; Sosa and Keenan 2001).

It is important not to overstate the problem. Some agreements are working well and have generated substantial benefits for Indigenous peoples over extended periods of time (O’Faircheallaigh 2002, Chapter 7). However it cannot be taken for granted that concluding an agreement will ensure such an outcome.

Against this background, it is important to consider how implementation issues can be identified and addressed in a systematic manner throughout the negotiation of proposed agreements. This paper seeks to identify the factors which need to be taken into account in structuring negotiations and framing and drafting agreements so as to maximise the prospects that agreements will lead to achievement of the parties’ stated objectives. These factors relate to the implementation of agreements, to the monitoring of activities and initiatives provided for under agreements, and to the review of agreements. ‘Implementation’, ‘monitoring’ and ‘review’ are defined as follows:

**Implementation:** The initiatives and activities required to give effect to the provisions of agreements.

**Monitoring:** The ongoing collection and analysis of information regarding implementation (or non-implementation).

**Review:** The periodic analysis of relevant information to establish the extent of implementation, and to consider the appropriateness of implementation initiatives and of relevant provisions of agreements.

Implementation, monitoring and review are closely linked. A primary purpose of monitoring is to establish whether implementation has occurred or is occurring as intended. Review is also linked to implementation in that there is a need to assess, given changing circumstances, whether implementation mechanisms that were effective in the early years of project life continue to be effective. However review extends beyond the issue of implementation, as it is desirable to consider the appropriateness of the goals established in agreements (and not just their
implementation) from time to time. Monitoring is linked to the issue of review in that monitoring may indicate the need to undertake a review.

For brevity, when referring to the full range of matters relating to implementation, monitoring and review the term ‘implementation issues’ is employed.

It must be acknowledged immediately that no established models or frameworks exist in relation to implementation issues involved in agreements between Indigenous peoples, developers and governments. Indeed despite the fact that the importance of implementation is increasingly acknowledged, there is little research or writing in this area to draw on. Thus the purpose of this paper is not to explore the costs and benefits of a number of clear and alternative approaches to implementation issues. Rather it is to provide a starting point for the development of a comprehensive framework to address implementation issues.

The paper proceeds in the following manner. It begins by reviewing general literature on policy implementation, which provides an indication of issues that are likely to be critical to successful implementation in the area of agreements. It then examines the existing literature on agreements between Aboriginal people, resource companies and governments in Australia to identify existing knowledge in relation to implementation issues in this specific context. While many agreements include only resource developers and Indigenous groups as parties, government is a party in a substantial minority of cases and, in addition, government policies and program are often critical to the success of initiatives provided for in agreements between Indigenous groups and resource developers. The paper then examines the way in which implementation issues have been dealt with in practice, by examining a substantial number of resource agreements concluded in Australia and Canada. This analysis offers some precedents that may prove useful in addressing specific issues, but the general conclusion is that many agreements deal poorly with implementation issues or ignore them entirely. The final section of the paper considers how parties involved in negotiations can set about developing a comprehensive framework for dealing with implementation issues.

Existing Knowledge: The Policy Implementation Literature

As discussed in detail below, the literature dealing with implementation of agreements is scant. It is therefore important to consider the general literature on policy implementation as a source of relevant insights. While the focus of this literature is on implementation of public legislation and programs rather than on agreements involving Indigenous interests, it does reach conclusions regarding the requirements for successful implementation which may be important at a general level.

It is some 30 years since public policy analysts first explicitly recognised that introduction of policy or legislation does not necessarily produce outcomes ‘on the ground’ (Pressman and Wildavsky 1973). There is now a very large literature on policy implementation, much of which uses case study or quantitative analysis of actual implementation processes to identify the ‘factors’ whose presence or absence are associated with implementation success or failure. Numerous ‘lists’ of factors critical to implementation have been compiled (see for example Bardach 1977; Fesler and Kettl 1991; Ingram 1990; Sabatier and Mazmanian 1980; Hood 1976; and O’Toole 1986 who summarises the findings of over 100 implementation studies).

Such lists do have a number of drawbacks. There is no consensus among analysts on which factors are the critical ones, indicating that in fact this depends on the specific context involved.
In some lists the factors identified are so numerous as to make any concerted approach difficult. In addition, some factors are ambiguous in their implications. For example, many authors argue that expression of clear and specific goals are essential for successful implementation. Others claim that if politicians espouse clear goals it may actually hinder implementation in that it provides their political enemies with clear targets and leads to the mobilisation of political opposition, an effect which might be less pronounced if goals are vague and ill-defined.

Taking these limitations into account it is still possible to identify a series of key issues that recur across many different contexts and appear to be central to implementation processes. Seven are of particular importance.

1. **The need for adequate and appropriate resources.** ‘Resources’ does not just mean money, but also means human resources and skills, and information. It is not sufficient to have access to an aggregate level of ‘resources’ over the life of a program — resources of particular sorts and in different combinations must be available at different stages of an implementation process. Virtually every implementation study undertaken to date highlights the critical importance of adequate resources in allowing successful implementation. (Despite this, as noted below agreements continue to be concluded that fail to provide any resources to support implementation processes.)

2. **The need for a sound causal theory.** There must be a correct understanding of the connection between initiatives and activities provided for under a policy and the outcomes desired by policy-makers. For example if policy-makers build a program to combat smoking on the assumption that there is a causal connection between what students learn at school and their smoking behaviour, but in fact there is no causal connection between these two things, the policy will fail to achieve its objectives.

   This factor is obviously of enormous importance in the context of mining agreements. For example, if provisions designed to encourage Indigenous employment are not based on a sound causal theory about why Indigenous people face barriers to employment and about how those barriers can be overcome, those provisions will not be effective. As noted in the later discussion of uranium agreements, their employment and training provisions failed to recognise the importance of access to housing as a factor shaping the ability of Aboriginal people to take advantage of employment opportunities, with the result that some provisions could not be implemented.

   Development of sound causal theory requires a systematic understanding of the wider social, cultural and economic context within which provisions of an agreement will operate. Agreements are frequently negotiated without reference to such an understanding, which helps to explain their lack of success.

3. **The need for goals to be clearly and precisely identified.** The fact that there may be short-term benefits in allowing goals to remain vague does not change the fact that implementation can be very difficult if goals are not explicitly and clearly defined.

4. **Clear and explicit lines of responsibility** for the performance of actions and roles required to achieve implementation. This highlights the importance of developing appropriate structures within which implementation activity can occur.

5. **Design of policies so as to take the requirements of implementation into account.** This critical factor is often overlooked. Policies are frequently designed in order to achieve consensus among
Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada

participants in the policy development process; on the basis of electoral commitments and/or political principles; or to generate an expected benefit for specific political interests. In this situation and given that policies are usually formulated within tight time constraints and in a ‘pressure cooker’ environment, the requirements for successful implementation is rarely to the forefront. (The parallel with negotiation of agreements is clear.)

6. The support of key political actors, including groups which are the ‘targets’ or ‘recipients’ of policy. Policies are always implemented in a political context, and have little chance of being successfully implemented unless they enjoy strong political support. Goals and lines of responsibility may be clear, a sound causal theory may be available, resources can be mobilised and implementation requirements considered in advance, but all of this may have little effect if critical political support is not available as implementation occurs. A central question then becomes: how can the participation and support of key political actors be secured?

This question is of equal importance in relation to mining agreements, and is one that should be considered carefully throughout the negotiation process. Timing is critical in this area. For example involving too many different actors at too early a stage may hamper progress; on the other hand, leaving it too late to involve powerful actors may alienate them and turn them into opponents.

7. The policy goals being pursued remain relevant in a political sense and within the changing context of the wider economic and social environment. This highlights the importance of regularly reviewing policy objectives in order to evaluate their continuing relevance and appropriateness. It also highlights the importance of seeking to build into policy mechanisms a capacity to adjust to changes in the external environment.

Existing Knowledge: Literature on Agreements

There is now a substantial literature on negotiation of agreements in Australia (see, for example, Agius et al. 2001; Ah Kit 1996; Allbrook 1995; Blowes and Trigger 1999; Bradshaw 1995; Edmunds 1999; Holden and Duffin 1998; Holmes 2001; Indigenous Support Services/ACIL Consulting 2001; McKenna 1995; Meyers 1996a, 1996b; Neate 1999; O’Faircheallaigh 1995, 1996, 1997, 2000; Senior 1998; Stariha 1998; Stephenson 1997; and numerous papers published under the auspices of the National Native Title Tribunal (www.nntt.gov.au) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) (www.aiatsis.gov.au). However most of this literature deals with the supposed benefits of a negotiation-based approach; frameworks within which to conduct agreement-making, including a great deal of material on relevant provisions of the Native Title Act 1993; negotiation processes; and strategies for pursuing agreements. I have not been able to identify a single paper which focuses on implementation issues involved in agreements between Indigenous peoples and developers. For example none of the 40 or so papers published by AIATSIS in its ‘Issues of Native Title Series’ has such a focus. It is also significant that a number of ‘lists’ of issues relating to agreement-making (French 1996, Lane 1996) omit any reference to implementation. Publications that include ‘implementation’ in the title tend to deal with the putting into effect of the provisions of the Native Title Act itself, not with the implementation of agreements negotiated under the Act or under other relevant policy or legislation (Altman 1995, Meyers 1996b).

Some authors do refer to implementation issues, but generally they comment only on specific aspects of implementation, often in passing, and there is little by way of sustained analysis. For instance in discussing the Century Zinc negotiations Blowes and Trigger stress the importance of drafting an agreement which is ‘a readable, logical, sensible document capable of being
understood and implemented in full by persons who did not write it’ (1999:101). They note that implementation issues, particularly the structure, funding and powers of a representative body for implementing the agreement, were a difficult and contentious aspect of the Century negotiations. They also argue that discontinuity between the personnel responsible for negotiations and for implementation represents a problem, and state that time frames imposed by the Native Title Act left little opportunity to address implementation issues in a way that would give ‘greater Aboriginal ownership of the subsequent process of negotiation’ (1999:125,127).

O’Faircheallaigh (1997) stresses the importance of ensuring that appropriate enforcement provisions are included in agreements and that implementation issues receive ‘sustained attention over time’. In this latter regard he notes two distinct institutional structures that may be useful. The first involves the creation of an ‘implementation unit’ within a regional land council or other equivalent organisation to monitor implementation of all agreements within the organisation’s jurisdiction. O’Faircheallaigh points out however that such units are vulnerable because of the tendency to direct resources away to where pressures are more urgent, for example to litigation, negotiation of new agreements or pursuit of land claims. The second approach focuses on ensuring that the means to ensure effective implementation are contained within agreements themselves, and O’Faircheallaigh identifies three such components (from an Indigenous perspective):

(i) An administration fee which can cover the costs of the Indigenous parties in monitoring compliance with the agreement;

(ii) Provisions ensuring Indigenous access to project sites and relevant information;

(iii) Creation of a joint Coordination Committee that is assigned the role of ensuring effective implementation.

Smith also stresses the need to address implementation within agreements, arguing that ‘worthwhile agreements quickly become unsustainable and hotly contested in implementation costs and responsibilities have not been assigned within the terms of the agreement itself’ (1998:19).

In a more specific context O’Faircheallaigh’s seven-stage characterisation of the ‘Cape York Model’ of project negotiation (O’Faircheallaigh 2000) has ‘Implementation’ as the final stage. However the relevant section of this paper simply stresses the importance of implementation; notes how easy it is to overlook it when communities and developers are in the throes of negotiations; and indicates that more recent Cape York agreements pay greater attention to the issue of implementation. He states that to allow effective implementation agreements:

should be unambiguous and concrete yet sufficiently flexible to allow for the unexpected; provide for funding of implementation activities and initiatives; and … create structures (such as joint Aboriginal community-mining company coordination committees) whose primary purpose is to ensure that implementation occurs as planned’ (2000:19; emphasis in original).

He also notes that the earlier in the negotiation process attention is paid to implementation issues, the easier it is to ensure that it occurs effectively. However neither here nor elsewhere in the literature is any indication provided of how a focus on implementation can be achieved throughout a negotiation process.
In dealing with a distinct but related area, Ivanitz (1998) comments on implementation issues in relation to comprehensive land claim settlements in Canada. The importance of implementation planning has been recognised in this case after the occurrence of numerous problems with implementation in relation to the early claims agreements (James Bay in 1975 and Inuvialuit in 1984). The Canadian government’s Comprehensive Claims Policy was amended to require the negotiation of implementation plans in association with each land claim agreement. However problems remain as a result of:

- The Canadian government’s view that implementation plans are not contractually binding, and its consequent decisions not to adhere to time frames or funding commitments contained in such plans. This has resulted in litigation which has the effect of further delaying implementation;
- Negotiation of implementation plans has generally occurred at the conclusion of the land claim negotiation, by which time government ‘is confident in receiving certainty and generally is “less than enthusiastic” about commencing negotiations on implementation’;
- Insufficient resources to fund implementation initiatives, arising in part from the Canadian government’s reluctance to provide agreed levels of funding because of a general need to reduce budget spending;
- Disputes regarding how available resources can or should be applied, which has also resulted in litigation;
- Scarcity of suitably trained personnel to undertake implementation initiatives (Ivanitz 1998:13–14).

O’Faircheallaigh (2002) offers what is the most sustained analysis to date of implementation issues in relation to mining agreements. This study uses Australia’s uranium policy and its impact on Aboriginal people as a basis for developing a new approach to policy evaluation, and includes an analysis of the implementation of the employment and training and financial provisions of the Ranger and Nabarlek agreements. It is unique both in that it covers the actual implementation of key aspects of two agreements over an extended period of time, and is based on access to the files of the mining companies which were parties to the agreements, of Aboriginal organisations involved in their implementation (particularly the Northern Land Council, which negotiated the agreements on behalf of traditional owners) and of a number of government agencies, including the (then) Department of Aboriginal Affairs (DAA).

However the purpose of the study is to develop a new approach to policy evaluation, and it focuses on evaluating and explaining policy outcomes, not on implementation as such. Failure or success in implementation is discussed as one of a number of factors that help explain outcomes, and the book does not attempt to develop a framework for improving implementation of mining agreements. Nevertheless its findings are useful in identifying some of the key issues an implementation framework would have to address.

The study found that while in some respects implementation was very successful, problems occurred in the following areas:

- In relation to employment and training, important aspects of the Nabarlek and Ranger agreements were not implemented at all;
- Although all payments required under the financial provisions of the agreements did occur, the outcomes that resulted from those payments were often different from those envisaged by
agreements. In addition, they created effects the parties regarded as undesirable (in particular social conflict within Aboriginal communities).

Some of the major factors explaining implementation failure are outlined below. From another point of view, the opposite of the factors discussed below assist in achieving successful implementation.

**Lack of clarity and precision in the Agreements and relevant legislation**: In relation to employment and training, there was an absence of specific commitments or objectives, and relevant provisions of agreements were couched in terms that were general and ambiguous. In this latter regard a particular problem involved wording that was open to different interpretations, for example ‘as far as is reasonable’ or ‘as far as is practicable’. In the case of one of the mining companies whose senior management lacked a serious commitment to Aboriginal employment and training, language of this sort was used as an ‘escape clause’. The legislative provisions governing distribution of statutory royalty payments were either silent on critical issues or were ambiguous. This created confusion as to what constituted appropriate distribution outcomes and conflict over the allocation and use of payments.

**Absence of specific penalties or sanctions for non-compliance**: The agreements fail to provide any specific sanctions or penalties for non-compliance. The only option available to a party convinced that a breach of an agreement has occurred is to pursue legal action in the courts. This option is expensive, uncertain in its outcomes, and likely to undermine relationships with other parties to an agreement (a serious deterrent to taking legal action in a situation where other components of an agreement are working well). In combination with the previous point regarding absence of specific objectives and use of ambiguous wording, the absence of specific remedies for breach made relevant provisions of the agreements, in effect, unenforceable.

**Failure to deal with critical issues in agreements**: The agreements fail to deal with a number of issues that, while not integral to relevant provisions of the agreements, had a major bearing on their implementation. For example, appropriate housing for Aboriginal employees was not available at either mine. This issue was not addressed in the agreements, and in time the absence of appropriate housing became a major barrier to recruitment of Aboriginal trainees and workers.

**Absence of appropriate institutional arrangements**: The Commonwealth government failed to establish specific institutional structures to deal with the ‘Aboriginal dimension’ of uranium policy, structures which would have allocated responsibilities clearly, created a ‘lead agency’ with designated responsibilities in particular areas, and ensured that relevant agencies had a sound legislative or policy base and access to appropriate resources. This failure was in strong contrast to other areas of policy related to uranium mining, such as environmental protection and nuclear safeguards, where new, ‘dedicated’ institutions were created. One result was that no government agency had responsibility for some key implementation issues, for example provision of training programs and of housing for Aboriginal workers. A related outcome was an absence of coordination among government agencies, a particular problem after the Northern Territory became self-governing. The DAA attempted to play a coordinating role, but did not have the authority to insist on the cooperation of other agencies, federal or Territory.

**Rivalry between government agencies**: Linked to the previous point, considerable rivalry and jockeying for position occurred between government agencies and this detracted from implementation activity. Some agencies were more concerned about protecting or expanding ‘turf’ than about delivering services. One report identified 30 government organisations that
claimed some role in relation to Aboriginal education, training and employment. Yet between 1978 and 1988 not a single training program for potential Aboriginal mine workers was delivered by a government agency in the Alligator Rivers Region.

*Lack of commitment to the agreements by some of the parties:* Some senior managers in one of the mining companies, and (particularly after a change of government in 1983) relevant Commonwealth government ministers showed an obvious lack of commitment to implementation of the agreements. The Hawke Labor government dismantled much of the institutional apparatus created by the Fraser government as part of its uranium policy, and in particular disbanded the Social Impact of Uranium Mining Project, an initiative funded by the Commonwealth through the Australian Institute of Aboriginal and Torres Strait Islander Studies and intended to ensure ongoing monitoring of the impact of uranium mining on Aboriginal people.

*Inadequate resources:* One of the mining companies failed to provide adequate resources to its Aboriginal liaison office and at times this represented a substantial constraint on implementation. The NLC faced serious resource constraints throughout the period under review. Neither of the Agreements provided resources for the NLC’s implementation activities and, while the NLC did have access to a portion of statutory royalties generated by uranium (and other) mines, there were conflicting demands on these funds. The NLC initially established a Uranium Monitoring Unit to monitor implementation of the Ranger and Nabarlek agreements, but before long the demands of other negotiations (for example on Jabiluka and Koongarra) and of land claims and other related work took priority and the Unit was disbanded. The inability of the NLC to respond to company initiatives and to monitor company activities left considerable discretion with the mining companies, and in some cases this led to failures of implementation and/or to outcomes not envisaged by other parties to the agreements.

*Passage of time:* It is striking, reviewing the files of all the organisations involved, how activity in relation to the implementation of the agreements declined from about 1982-1983 onwards (ie five years after the agreements were signed). The agreements clearly declined in relevance as other issues vied for the attention of decision makers.

*Staff turnover:* Significant staff turnover occurred in the NLC, one of the two mining companies and a number of government agencies. One result was that some staff lacked familiarity with agreements and relevant policy and legislation (see next point). Another was an obvious absence of ‘policy learning’, so that unsuccessful initiatives were sometimes repeated, as where training programs were offered in Darwin rather than close to the home communities of trainees. The impact of staff turnover was highlighted by the contrasting experience of the second mining company, which had the same general manager from 1979 to 1987. This company had much greater success in Aboriginal employment and training, in part because of the continuity and commitment provided by this senior manager. Staff turnover is also related to the wider issue of relationships between parties to agreements. Strong relationships are critical in ensuring continued commitment to implementation, and high turnover makes it very difficult to establish and maintain these relationships.

*Lack of information on agreements and related policy and legislation:* Many traditional owners were not conversant with the detail of the agreements or of relevant legislation and policy (which in this case were highly complex). This made it very difficult for them to hold those responsible for implementation to account, and resulted in suspicion and confusion that further undermined implementation efforts. In some cases the officials ‘on the ground’ who had immediate responsibility for implementation also lacked detailed knowledge of agreements and policy. At
times this resulted in actions which were inconsistent with effective implementation and which could be difficult to reverse.

Complex and culturally inappropriate institutional arrangements: A number of the organisations created to receive payments under the Agreements (referred to as ‘royalty associations’) had complex constitutions and organisational structures, designed by non-Indigenous people. This resulted in a lack of transparency (from an Aboriginal perspective) and made it difficult for traditional owners to understand and participate in decision-making and to hold employees and office holders accountable. One organisation was defrauded by a number of non-Indigenous employees, while others experienced conflict as a result of the ability of individual Aboriginal people to use positions of influence for their own benefit.

Inadequate consultation and preparation: In some cases insufficient time and resources were available to undertake adequate consultation and preparation for the establishment of royalty associations. As a result fundamental issues such as the basis for membership of associations were not adequately dealt with prior to the establishment of the organisation, leading to tension and conflict in later years.

Absence or inadequacy of skills: Personnel in mining companies were often poorly skilled, or unskilled, at operating in a cross-cultural context. A number of senior company staff made statements or took actions that caused negative reactions among Indigenous people, adversely affecting implementation. There was a fundamental failure to ensure that Aboriginal people affected by the agreements had access to financial services (such as banking facilities) and to financial skills (such as an understanding of how financial institutions operate, or what options were available in terms of using of royalty monies). This failure occurred despite repeated warnings by the Social Impact of Uranium Mining Project that absence of financial skills and services was creating major problems for recipients of agreement monies.

Timing of payments: In some cases substantial payments were made under agreements before clear policy guidelines were in place to govern their distribution. This led to confusion and conflict and resulted in the establishment of dysfunctional distribution patterns that were subsequently difficult to break.

Failure to recognise ‘Aboriginal political agency’: There was a failure among many non-Indigenous policy-makers and officials both in the mining companies and government to recognise the power of ‘Aboriginal political agency’, in other words the capacity of Aboriginal people to shape non-Indigenous processes and institutions to their own purposes. This resulted in a naïve assumption that implementation mechanisms designed by non-Indigenous people would bring about the intended effect. As a result there was often a failure to engage with Aboriginal political actors to achieve a mutually-acceptable approach to implementation issues. An example was the assumption by non-Indigenous officials that because the provisions of an agreement and the constitution and rules of a royalty association required payments to be distributed in a particular manner, this would in fact occur.

Substitution of government funding: There is now strong empirical evidence that in the region affected by the Ranger mine, government funding for Aboriginal communities has been substantially lower than in adjacent regions which lack a major mine. In other words government agencies redirected funding to other regions because of a belief that revenues from mining agreements could be used to provide services to affected Aboriginal communities. This approach has had serious consequences in terms of achieving certain objectives identified in agreements.
Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada

It means that the effect of financial provisions designed to compensate Aboriginal people for the negative impacts of mining and to assist in their cultural, economic and social development have largely been ‘cancelled out’ by the withdrawal of ‘normal’ government funding. (I say ‘largely’ because some activities were supported which government would not have funded, and services were delivered under Aboriginal control and so in a way that reflected Aboriginal priorities.) Thus at one level the activities of the Gagudju Association (which used Ranger agreement royalties between 1979 and 1992 to build up economic assets and fund services) is an implementation ‘success story’. However at another level Gagudju’s efforts were substantially negated because of the failure of government to maintain ‘standard’ service provision.

Existing knowledge: precedents from agreements

Some 40 resource development agreements were reviewed, drawn from Australia and Canada in roughly equal numbers and negotiated within a wide range of legislative and policy frameworks. About a third of the agreements include government parties as well as Indigenous peoples and resource developers. A majority was negotiated during the period 1990-2001. Earlier agreements were included because there is no indication that there has been a steady improvement in the way in which implementation issues have been dealt with over time and so that earlier agreements might be of little interest. The review includes a substantial number of the largest and highest-profile projects to be developed on or adjacent to Indigenous lands over the last two decades. Confidentiality provisions mean that not all developments in this category could be analysed, but the inclusion of a substantial number, the extended time frame involved and the fact that the sample also includes a wide variety of smaller and medium-sized projects means that the discussion below should provide a good indication of the range of available precedents. Each agreement was examined in full for provisions relevant to implementation, monitoring and review, ie the analysis was not confined to sections with headings such as ‘Review’, ‘Monitoring’ or ‘Implementation Committee’. To maintain confidentiality, information is omitted which might allow individual agreements to be identified.

Many agreements display features that, on the basis of the earlier discussion, are likely to impede implementation. For instance only two allocate specific funding to employment and business development programs. (Most agreements involve commitments, such as to ‘establish an employment and training program’ that must be funded at some level. The point is that agreements fail to make a specific allocation of financial resources to support such commitments). Only seven (or less then 20 per cent) allocate any resources to the tasks of implementation, monitoring and review. No agreement provides for penalties or sanctions, other than by way of court action for breach, for failure to honor commitments made by the parties (with one possible exception, where if goals are not achieved in a specific area of the agreement the project operator must increase expenditure on relevant activities). Many agreements lack specific goals in relation to employment, training and business development programs. Use of terms such as ‘as far as is practicable’ and ‘reasonable efforts’ is common. Few agreements make specific provision for monitoring activities that could help in assessing implementation.

No agreement stands out as a possible model for ‘best practice’ in implementation, because none attempts to develop a coherent and comprehensive implementation framework, with the result that all of them ignore at least some important issues. For instance, none of the agreements contains specific provisions aimed at ensuring that the skills required for successful implementation are available; none mentions the issue of staff continuity/staff turnover; and few address the need to achieve coordinated responses from government (including those which
have governments as parties). Agreements that are explicit in addressing one implementation issue are often silent on another.

Having said that, one set of agreements negotiated in Canada during the late 1980s and early 1990s, all involving the same facilitator, do stand out in terms of the seriousness with which they address implementation issues. Specific implementation provisions contained in these agreements are:

- **Statements of the parties’ objectives** includes a commitment to create structures ‘to ensure that the provisions of this Agreement are complied with’;
- **A section of each agreement is explicitly devoted to management and implementation issues**;
- **Specific Coordinating Committees are established, with appropriate membership, to deal with each major area of the agreements (for example economic and business development, social and cultural development)**;
- **Specific government agencies are nominated as ‘lead agencies’ and to take responsibility for commitments by government parties**;
- **A Management Committee, composed of very senior personnel, is charged with implementation of the agreement as a whole. In one agreement its membership consists of an Independent Chairperson, the Vice President (ie CEO) of the resource company involved, the Chairman of the Band Council, the Chief of the Band and two public servants at Deputy Secretary level. While the parties are free to nominate who will participate in Coordinating Committees, the membership of Management Committees is specified and under one agreement, members may not nominate delegates to attend meetings on their behalf. Management Committees meet quarterly. Where Coordinating Committees are unable to deal with alleged non-implementation of the agreement, the matter can be referred to the Management Committee.**
- **Substantial resources are allocated specifically to the tasks of implementation, monitoring and review (by the federal government in some cases, by the federal government and the developer in others). In an agreement signed in the early 1990s, for instance, C$335,000 (indexed) per annum is allocated jointly by the developer and Canada to these tasks. It should be stressed that these funds are not allocated to specific programs (eg training, business development). They are to support the ‘administration, management and implementation of the Agreement’, for instance by resourcing the activities of the coordinating committees.**

The establishment of coordinating or management committees is common (indeed in recent years almost universal) in both Australia and Canada. Typically, such committees have membership from each party to an agreement; have a brief that includes the review of various aspects of the agreement; and meeting costs are borne by the non-Indigenous parties. What is distinctive about the agreements just discussed is the tailoring of committees to specific tasks; the fact that the membership and role of the Management Committees ensures that senior personnel from all of the parties turn their minds to implementation issues on a regular basis; and the commitment of substantial resources to implementation tasks.

Other features (each of which occurs in only one agreement) that are of interest in an implementation context are:

- **The employment, funded by the developer, of a full-time position dedicated specifically to the task of ‘overall coordinator for the implementation of this Agreement’ (This is in addition to...**
to an Indigenous Employment and Training Officer/Indigenous Liaison Officer, a position created under a substantial number of agreements.)

- The funding of a part-time employee in each of four Indigenous communities to support their participation in implementation activities related to the agreement;

- The creation of a joint Implementation Panel with representation from the developer, Indigenous and government parties, which must compile an annual report detailing implementation in relation to each major aspect of the agreement. The cost of producing the Report is borne by the developer; each party bears the cost of participating in the Implementation Panel;

- Provisions which create a specialised joint environmental management committee, and provide funding for a full-time environmental officer to support that committee and for the committee to commission independent environmental studies (within a budget limit);

- An arrangement under which the Indigenous signatories may commission an Independent audit of the implementation of environmental management programs, at any time at their own cost and under specified circumstances at the mine operator’s cost;

- A provision under which the federal and provincial governments, both of which are parties to the agreement, indicate that nothing in the Agreement shall replace existing government programs available to the Indigenous communities concerned;

- A requirement that a coordinating committee must hold an annual general meeting, which any Indigenous person in the region affected by the mine may attend and raise questions about the operation of the agreement.

On the specific issue of review provisions, a surprising finding is that half of the agreements do not include any provision allowing for the review of the entire agreement (as opposed to clauses which include the ‘review’ of specific activities as a task for a joint coordination, liaison or management committee). In the remainder, one approach is to state that reviews may occur at any time by agreement between the parties, but to set a time by which a review must occur (ranging from two to five years). The other common approach is to require a periodic review of the agreement, in one case at least once a year, but more commonly once every three to five years. One agreement provides for a review of implementation every four months during the first year of project operations, every six months for the next five years and on an annual basis thereafter.

In only one case does an agreement require independent review of an agreement (after two years).

No agreement provides separate funding to support review processes. (Some of the small number of agreements that provide implementation funding indicate that these resources may also be applied to review activities). No agreement specifies any details regarding review processes (other than their timing), for example in terms of who should be involved in the review; how long it should take; what method of review should be employed; what information will be required to support the review; or what process will be used to deal with review findings.

In relation to amendment, about a third of Canadian agreements and half of Australian agreements have no explicit provision allowing for their amendment. Among those that do, the most common approach is to allow for amendment on the basis of written agreement between the parties. A small number of agreements make explicit provision for their renegotiation. In one case an agreement allows for its renegotiation if the output of the project is above a certain size or if this
Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada

is required to ensure the agreement is consistent with environmental approvals. In another agreement, which has a long life, renegotiation is provided for after every 20 years.

**Developing an Implementation Framework**

The following points emerge from this analysis of the wider literature on policy implementation, literature on agreements and agreements themselves.

First, the success of agreements depends on their implementation, and implementation does not happen automatically or easily. Indeed the evidence suggests that it is more difficult to implement an agreement than to negotiate it. Where resource developers, government and Indigenous groups wish an agreement to provide the basis for a positive and long-term relationships, they must attach a high priority to implementation issues throughout the process of preparing for negotiation, during the negotiations, in drafting an agreement, and throughout its life.

Second, while implementation is not easy the earlier discussion indicates that some of the major barriers to successful implementation are both obvious and within the control of parties to agreements. It is not surprising that there is evidence of substantial implementation failure in relation to resource agreements — many of them are poorly designed and drafted from an implementation perspective. Experience with the Ranger and Nabarlek agreements in particular, combined with the precedents available in other Australian and Canadian agreements and with the wider literature on policy implementation, provide valuable insights into the nature of implementation problems and the way in which they can be addressed. It is critical that maximum use be made of this available knowledge.

Third, resource developers, Indigenous groups and governments must take specific initiatives to ensure that they sustain a focus on implementation, especially as negotiations become more intense and the conclusion of an agreement approaches. A number of options in this regard are mentioned below as a point of departure for discussion. The options are complimentary rather than mutually exclusive.

One possibility is to allocate to one or more individuals on the team of each party involved in negotiations a specific responsibility to consider, raise and pursue relevant implementation issues at each stage of the process.

A second is to have a protocol under which a certain proportion of the time available for any activity or interaction is set aside to consider implications for implementation. For instance, in a community consultation exercise regarding the establishment of objectives and priorities in relation to an agreement, a part of the time allocated would be set aside to explore implementation issues relating to the goals identified. In a negotiation session devoted to employment and training provisions, a proportion of the available time would be set aside to focus specifically on implementation issues.

A third possibility, and one that could also help in developing the content of an implementation framework, is to compile a standard set of questions directed at a number of key issues, and to establish a commitment by the parties to address those questions which are relevant at each stage of the process. A range of such questions is listed below, under headings that reflect the earlier analysis and discussion. Again it should be stressed that the questions are meant to facilitate discussion and, though certainly numerous, make no claim for comprehensiveness. They are designed to show how such an approach might work.
Resources

What are the resources (e.g., money, skills, time, information) required to support implementation? Do the resources exist now? If not, how are they going to be mobilised by the time implementation is due to occur? Who will be responsible for providing them? Will these resources continue to be available into the future? What mechanisms are required to ensure that they will be?

Causal Theories and Policy ‘Technology’

Is there an understanding of the key causal relationships that will affect the success of programs provided for in an agreement, in areas such as employment and training, business development, cultural heritage protection and environmental management? Is enough known about the wider cultural, social and economic environment to provide such an understanding? If not, what is not known, and where and how can this knowledge be found? What resources must we devote to finding it? What approach should be adopted if it is not possible to obtain the required information within the time available for negotiations? Is the relevant ‘policy technology’ available, in other words do we have instruments (e.g., training programs, cross-cultural awareness programs, environmental monitoring systems) which will allow relevant provisions to be put into practice? If not, what must be done to develop these policy instruments? What resources are required to do so?

Goals/Intentions

Are goals and intended outcomes clear? Is there any ambiguity, could different interpretations be put on what has been agreed? Would individuals who had no involvement in the negotiation process be able to comprehend what was intended? Is language clear and precise rather than general, vague, or confused? What are the consequences of any possible difference in interpretation? Importantly, could there be any question, after some time has elapsed, as to whether or not implementation has occurred?

Consistency and Completeness

Does an agreement deal, to the extent possible, with all of the issues that will be critical to its implementation? Is the agreement internally consistent, or does it contain provisions that might undermine the operation of other provisions? (An example might be where employment and training provisions provide for a review of goals or programs in certain circumstances, but review mechanisms provided elsewhere in an agreement are clumsy and time consuming).

Responsibility and Authority

Is the responsibility for each action or initiative clear? Is there agreement among all the parties about who is responsible? Do those with the responsibility have the legal, regulatory or policy mandate to carry out the actions concerned? If not, are there alternative avenues for achieving implementation?

Political Support

Which political actors (individual and groups, ‘internal’ and ‘external’ to the organisations conducting the negotiations) must support (or at least not oppose) an agreement if it is to be implemented successfully? If they will be signatories to an agreement, what mechanisms are
Implementing Agreements Between Indigenous Peoples and Resource Developers in Australia and Canada

available to ensure their continued interest in the agreement and their support for it? If they are not involved in agreement-making, should they be? If it is not appropriate to involve them, what can be done to create incentives for them to support implementation? Alternatively, are there measures or initiatives that can be redesigned or that should be avoided in order to minimise the risk of creating political opposition to an agreement?

The Role of Government

While a number of other headings raise important general questions that encompass the role of government, its importance is such that it should also be considered as a separate matter. What part are government agencies expected to play in implementation, and which agencies will have relevant responsibilities? How and when should their involvement be sought and how can it be maintained? How can government agencies be encouraged to develop a coordinated approach to implementation? How can the danger of ‘funding substitution’ by government agencies be avoided (see earlier discussion of the Ranger agreement)?

Changing Circumstances

How can an agreement be made as robust as possible so it can adjust to circumstances as they change? (It should be stressed that there is no inherent conflict between making the terms of an agreement clear and precise, and at the same time ensuring flexibility. For example specific commitments can be made in relation to employment and training, but a mechanism can be developed to allow these to vary if unexpected circumstances arise. Such approaches are well developed in the area of financial provisions: see O’Faircheallaigh 2003). When adjustment of terms cannot be automatic, what mechanisms for review, amendment or renegotiation are likely to be effective? Will resources be available to support those mechanisms? How will review findings be addressed? How will the transition from the ‘negotiating context’ to the ‘implementation context’ be handled, especially in terms of the change in personnel that will occur? More generally, how can the negative effect of personnel turnover on implementation be minimised? In particular, how can relationships between the parties be protected given that some turnover must inevitably occur?

The Broader Context: Issues in Agreement-making

While the whole purpose of this paper is to achieve a specific focus on implementation issues, it is important to recognise the relevance of wider issues related to agreement-making as a whole.

First, Indigenous parties often suffer from serious resource constraints (financial and organisational) in negotiating agreements, with the result that they must focus their attention on the most urgent tasks. These usually involve signing an agreement so as to deal with immediate pressures from developers and governments and to grasp available opportunities, which makes it difficult to achieve a substantial and sustained focus on implementation.

Second, negotiations often occur under tight time constraints. In particular, if a party involved in a Right to Negotiate under the Native Title Act elects to proceed to arbitration, only six months is available to complete the negotiation process. It is difficult enough to reach an agreement within such a brief period, let alone devote any serious attention to implementation.

Third, scarce resources and limited time can make it impossible to address some more systemic and contextual but vital issues affecting implementation, in particular those relating to
development of political support and of adequate causal theory. In relation to the latter it is the exception rather than the rule, for instance, for negotiations to be preceded by in-depth research designed to understand causal processes related to the interaction between mining development and Indigenous society.

Finally, much of the actual process of designing and drafting agreements is undertaken by non-Indigenous technical staff who typically work with specific Indigenous organisations for brief periods of time and indeed often move onto another negotiation as soon as one is completed. These individuals build a professional reputation by facilitating the conclusion of agreements (not their implementation over extended periods of time), and they are rarely still working with an Indigenous organisation by the time the consequences of implementation failure become apparent. It would therefore not be surprising if they did not tend to focus on implementation. This last issue can only be addressed if Indigenous groups enhance their capacity to conduct negotiations using their own, internal resources so that the people and organisations that negotiate agreements are the same as those who have to implement them.

Notes
1. Details of the trusts concerned are not provided for reasons of confidentiality or/and to avoid causing any offence to individuals or groups involved. The trusts referred to include agreements for mining projects in WA and Queensland and infrastructure projects in Victoria and New South Wales.

2. The Canadian literature on agreements represents an alternative source of knowledge that could not be included because of time constraints. However it seems unlikely that this omission is significant. In a recent (November 2001) review of Canadian literature on agreements Sosa and Keenan state that despite the fact that agreements have been negotiated in Canada for the last two decades, relevant literature is limited and includes ‘little analysis’ regarding the implementation or outcomes of agreements (Sosa and Keenan 2001:1, 18).

References
Agius, P et al. 2001 ‘Negotiating a Comprehensive Settlement of Native Title Issues’, paper presented to the Native Title Representative Bodies Conference, Townsville, August.
Bradshaw, R 1995 ‘Negotiating Exploration and Mining Agreements under the Native Title Act’ in P Burke ed The Skills of Native Title Practice, AIATSIS, Canberra, pp.114–31.


Holmes, M 2001 ‘Native Title Negotiation in the New Legislative Environment’, Deacons, Perth.


Ivanitz, M 1998 ‘The Emperor Has No Clothes: Canadian Comprehensive Claims and Their Relevance to Australia’, Regional Agreements Paper No. 4, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra.


McKenna, S 1995 ‘Negotiating Mining Agreements under the Native Title Act 1993’, *Agenda* 2(3):301–12.


Stariha, L 1998 ‘Negotiated Agreements: An Analysis of their Suitability for the Offshore Resources Sector in Queensland’, Honours Dissertation, Faculty of Environmental Sciences, Griffith University, October.

Aboriginal Politics and Public Sector Management Research Monographs and Papers

Research Monographs

No. 1 Economic and Social Impact of Silican Mining at Cape Flattery (November 1995) Annie Holden and Ciaran O’Faircheallaigh.

COST: $20.00 (Cheques payable to: Centre for Australian Public Sector Management)

Research Papers


No. 4 Negotiating Aboriginal Interests in Tourism Projects: The Djabugay People, the Tjapukai Dance Theatre and the SkyRail Project (March 1998) Annie Holden and Rhonda Duffin.

No. 5 Achieving Indigenous Involvement in Management of Protected Areas: Lessons from Recent Experience (March 1998) Tony Corbett, Marcus Lake and Chris Clifford.


No. 7 Culture, Ethics and Participatory Methodology in Cross-Cultural Research (July 1998) Michele Ivanitz.

No. 8 Achieving Improved Health Outcomes for Urban Aboriginal People: Biomedical and Ethnomedical Models of Health (July 1999) Michele Ivanitz.

No. 9 The Politics of Accountability: ATSIC, the Coalition Government and Public Sector Service Outcomes (July 1999) Michele Ivanitz.

No. 10 Indigenous Participation in Managing University Research (September 2001) Rhonda Kelly and Ciaran O’Faircheallaigh.
