

**AIATSIS CONFERENCE
CAIRNS 5 – 8 JUNE 2007**

**Lessons Learned “An Evaluation of the Framework of the Negotiations
for the Ord Final Agreement 2006”**

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Introduction

(Slide 1)

Thank you for the opportunity to speak here this afternoon.

I would like to begin by acknowledging the traditional owners on whose land we are today. I would also like to acknowledge the Miriuwung Gajerrong community of the East Kimberley for their part in the negotiation process and contribution to this report.

On the part of the Western Australian State Government, it has made a strong commitment to resolve native title matters through the negotiation of sustainable agreements, where possible.

To ensure the continuing quality of the agreement, evaluation has been an essential component of sustainable agreement making. The identification of those processes and practices that characterise a successful outcome can provide a valuable lesson for the future.

In May 2006, the Office of Native Title Western Australia commissioned an independent evaluation of the structures, characteristics and processes that underpinned the successful negotiation of the Ord Final Agreement.

About the Agreement

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The Ord Final Agreement was signed on 6 October 2005 and registered as an Indigenous Land Use Agreement (ILUA) with the National Native Title Tribunal on 16 August 2006.

The Agreement provides the necessary native title consents and heritage clearances over 65,000 hectares of land in the far north of Western Australia to make way for Australia's largest irrigation scheme. The Agreement includes recompense for the 1960s Ord River Scheme. The Scheme saw parts of the historic Argyle pastoral station flooded to create Lake Argyle, which led to dispossessing local Aboriginal people.

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Outcome of the evaluation:

The report “Lessons Learned: An evaluation of the framework of the negotiations for the Ord Final Agreement 2006” confirmed that the success of the Ord negotiation was characterised by the following: **(Slide 4)**

- Good will on both sides;
- A willingness by the parties to re-examine and re-articulate outcomes as the process unfolded;
- Good support and advice from relevant experts to test the understandings and agreements reached during the negotiation;
- Highly effective lead negotiators on both sides;
- A common communication process operated by both parties, and
- A developing appreciation and understanding of each parties’ position as the negotiation unfolded.
- The negotiation was also underpinned by solid political support, both Indigenous and non-indigenous, and was well resourced.

A range of key players and stakeholders moved in and out of the negotiation process, and it is understandable that the relationship and structure of the negotiation moved through a number of phases.

A number of pivotal events influenced that relationship and structure, including:

- The election of the recent Government and its decision to negotiate a settlement of Ord with the Miriung Gajerrong people.
- The decision to negotiate a “global agreement” incorporating Miriung Gajerrong #1 and the eventual settlement of the Miriung Gajerrong #4.
- There was a natural progression from a “partnership” to a “negotiation” especially with the appointment of the Government lead negotiator who reported to the Deputy Premier.
- The appointment of the Miriung Gajerrong lead negotiator.
- The responsibility of the Office of Native Title to manage native title negotiations on behalf of the State.
- The formation of the State Negotiation Committee including the Office of Native Title, State Solicitors Office and the lead negotiator.

Key structural elements of the negotiations included the following: **(Slide 5)**

- Cabinet Standing Committee on Native Title (including Minister and Minister's Office)
- Ord State Steering Committee
- State Negotiating Team
- State Lead Negotiator (Mr Chris Athanasiou)
- Miriuwung Gajerrong Steering Committee
- Aboriginal Social Economic Impact Assessment (ASEIA) Sub Committee
- Wider Miriuwung Gajerrong meetings (Miriuwung Gajerrong #1 native title holding group and Miriuwung Gajerrong #4 Applicants)
- Miriuwung Gajerrong /Kimberley Land Council Negotiating Team
- Miriuwung Gajerrong Lead Negotiator (Mr Patrick Dodson)

Both parties' Negotiating and Steering Committees met at agreed times in Kununurra over the period of the negotiations during 2004 and 2005. They worked toward negotiating a number of key outcomes including:

- (a) The **Ord Global Framework Agreement**, which set out the principles and protocols for the negotiation process.
- (b) The **Memorandum of Understanding (MOU)** the "plain English version" for the settlement of native title and heritage issues agreed between the parties.
- (c) The **Ord Final Agreement**, which comprised the formal legal agreement between the key parties (taken from the MOU).
- (d) **The Ord Enhancement Scheme (OES)**, which was agreed as part of the negotiations, and provided for separate funding designed to address the key recommendations of the ASEIA of Ord Stage 1.

The Agreement stands as monument to the efforts and application of the people on both sides who brought it together. This is the most significant ILUA drafted in this form and complexity and is a tribute to all parties involved in the negotiation process.

This Review describes the structures and processes used in the Ord negotiation and assessed them against the principles for sound negotiations. It suggests a number of lessons, which could be considered for other negotiations in the future.

SUCCESSFUL NEGOTIATION PROCESSES

(Slide 6)

Seven key qualities that the research attributes to successful negotiation processes. These are:

- Build trust, respect and understanding

One of the pivotal events in the negotiation was the progression from a “partnership” to a “negotiation”. At this stage lead negotiators were appointed by both of the parties.

Also there had been a series of events over the course of the negotiation when the levels of trust were tested by both parties.

However, trust and an effective working relationship were built up over the course of the negotiations between the key parties.

Trust and relationships were strained at times, for example:

- there was pressure placed on the negotiation to complete the deal within twelve months;
- complex legal documents were signed by people who had to take on trust, its integrity and intent.

The negotiation of the Ord Enhancement Scheme (OES) was a means to “fix the past” in the Ord and allowed the negotiation to progress to its eventual conclusion. This was a critical threshold issue for the Miriuwung Gajerrong people and it was pivotal in moving the negotiations forward.

- Negotiate according to agreed protocols

The Ord Global Framework Agreement was a comprehensive document setting out the key negotiation arrangements including:

Key definitions (a full glossary) encompassing the scope of the agreement,

Issues of interpretation and meaning to specific concepts and words,

Issues of representation at the negotiation table from the Miriuwung Gajerrong people, the KLC and the State,

The negotiation process, scope, funding and negotiation targets,

The protocols to guide the negotiations (eg communications, sanctioning, correspondence, etc) and

The key stages to resolve, by agreement, native title and Aboriginal heritage issues in relation to the Ord Global Agreement.

- Apply good data and information access

The Ord negotiation performed well on this characteristic as evidenced by the following:

Including an elder and younger representative on the negotiation team representing each dawang, and having the right family groups who had connection to the land involved in the negotiation.

Access by the KLC to other consulting advice funded by the State for these negotiations.

The State's negotiating committee had many of the representatives from key agencies that would be involved in implementing the Agreement. These representatives had access to the necessary information needed during the negotiation, which was able to inform decision-making.

- Employ effective and meaningful communications

These negotiations had set up effective communication channels, protocols and mechanisms via the Ord Global Framework Agreement. It also defined terms and definitions.

The establishment of "one forum and one voice" which was a single point of contact and communication operating for both of the parties during the negotiation. This was highly effective in ensuring the focus on the negotiation was not disrupted by any side deals or discussions. This operated for both parties.

- Negotiate in good faith

The Ord negotiation process took place in good faith as demonstrated by the following characteristics shown during the negotiation:

The level of flexibility and innovation displayed by both parties,

The parties were prepared to compromise to reach agreement,

The lead negotiators worked together to deliver a deal for their respective party,

The level of genuine commitment demonstrated by the State to have a negotiated outcome,

The negotiation process was well resourced and funded by the State,

- Sustain equitable power and influence

One potential difficult aspect of negotiations is the difference in the relative power of the parties. This can arise from differences in levels of knowledge and experience, language, culture.

While the lead negotiators acted as a counterbalance, the reality was that the *Miriuwung Gajerrong / Kimberley Land Council Negotiating Team* members were at a disadvantage having never participated in a native title negotiation to this level.

Micro improvements

(Slide 7)

These are what the Review has called “micro” improvements, which if implemented may have improved timeframes and process and made a more positive “emotional” contribution to the negotiation. These are suggested for consideration in other native title negotiations.

Improve the legal aspects of the negotiation:

A number of people from both parties have suggested that the drafting of the Agreement could have commenced sooner during the negotiation process. This could have reduced the time spent drafting the Agreement. Clauses could have been drafted after they had been agreed in principle during the negotiation.

Others suggested that involving commercial lawyers in the process would also have helped to improve with the legal drafting and streamlined this step.

Training in Indigenous culture and the mechanisms of Government for Native Title Agreements:

If the parties understood more about each other prior to negotiations proper it would be advantageous to building a common set of understandings about each other and an appreciation of the issues, concerns and requirements each has to “do the deal”. This could involve for the State representatives building a better cultural understanding of the Miriuwung Gajerrong representatives in their country and to hear the stories and understand the history and heritage of their people.

Equally, this could involve the Miriuwung Gajerrong representatives gaining an appreciation of the machinery of Government and putting into context relevant statutes and policies.

Improved mapping

Production of accurate maps is a critical part of the Agreement, and both parties told the review team that this was an issue that consumed a lot of time, and caused some delays in getting the Agreement signed off by the National Native Title Tribunal. It is understood that some of the maps had to be re-done. It has been suggested that a specialist group, such as the Land Claims Mapping Service, should have been invited to produce these maps. The Review was advised that they are well experienced in producing the type of maps necessary for native title Agreements.

Document management and version control

The following improvements are suggested for future negotiations especially where complex documentation is involved.

Marking up of documents through track changes would have enhanced the document review process.

Setting more realistic turnaround times for document review.

Showing respect and consideration for the other party by forwarding documents to be discussed during a negotiation session a reasonable period prior to a negotiation session commencing.

Negotiation process and meeting management

Generally negotiations took place between the two negotiation teams proper for about one day during each visit by the State to Kununurra. Other briefings took place before and after the negotiation session with the KLC and Lead negotiators to prepare and plan the next steps.

To maintain continuity of the negotiation proper, consideration ought be given to running these sessions with the two parties over a two or even three-day period to build momentum and continuity particularly when there were significant issues to be discussed.

• Concluding: Secrets of Success (Slide 8)

The overarching success of the negotiation was underpinned by eleven defining elements in the Agreement process termed the Agreement's "Secrets of Success."

- Political support and guidance was available
- Strong indigenous leadership
- The negotiation was well resourced on both sides
- One forum, one voice
- Strategic focus, combined with flexibility
- A clear purpose for the negotiations
- Competent negotiators with a shared "chemistry"
- Relevant state agencies were engaged in a co-ordinated manner
- Foundations were built on background research
- Local support.

The report can be viewed at:
http://www.nativetitle.wa.gov.au/agreements_OrdFinal.aspx

(Slide 9)

I thank you for your interest this matter and open the floor for questions.