

Working with Aboriginal Communities

**A guide book for
APPEA member companies
July 1996**



**AUSTRALIAN PETROLEUM PRODUCTION & EXPLORATION
ASSOCIATION LIMITED**

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INTRODUCTION

The Australian Petroleum Production & Exploration Association Limited (APPEA) represents over 45 companies engaged in petroleum exploration and production activities in Australia. These activities can affect Aboriginal communities, and special awareness and consideration is appropriate.

The booklet *Aboriginal Communities and Petroleum Exploration and Development* was issued in the 1980s to inform members of their responsibilities under various land rights and heritage legislation, and to offer advice about negotiations with Aboriginal communities. The High Court's Mabo decision of July 1992 and the Commonwealth's legislative response in *The Native Title Act* 1993 have redefined Aboriginal land rights in Australia. APPEA wants to ensure that member companies are fully aware of the complexities of the moment, and to encourage caution and sensitivity in their dealings with Aboriginal communities.

Any APPEA member company which

- has existing onshore exploration or production titles; or
- is seeking onshore exploration permits; or
- has offshore interests but is seeking onshore pipeline or other permits

is potentially affected by Aboriginal heritage, land rights and native title legislation, and needs to be properly advised about these matters, and attentive to corporate responsibilities and obligations. In the past, these issues have been relevant mainly in the more remote regions, but they are becoming progressively significant in rural and urban areas.

This booklet offers member companies some practical advice about dealing with Aboriginal communities and is mainly for companies who do not have previous experience with Aboriginal issues. General information on the current status of native title legislation and heritage issues is contained in APPEA's 1996 publication, *Native Title - Current Legislative Situation*.

LEGISLATION AND REGULATIONS

'Aboriginal land' is used in Australia as a general term for any land to which title is held by Aboriginal groups or organisations, or by a designated Government body or trustee on behalf of an Aboriginal community. Companies must be aware of any Aboriginal land within their areas of interest or activity. Laws and regulations applying to Aboriginal land vary significantly from State to State, and companies need to be aware of the different legislative and regulatory requirements.

- Reserves formerly covered large areas of many states but most have been converted to freehold or leasehold title. Entry onto reserves requires a permit from the relevant government authority.
- Land granted under land rights legislation is generally freehold title or equivalent, and the title is held by a land council or community corporation, or in trust by a Government authority. Entry onto these areas requires a permit. Access for exploration and development requires prior agreement with the resident Aboriginal community which commonly holds a power of veto over any activity. In the Northern Territory Aboriginal communities hold a power of veto over any activities. In other states, there are statutory and administrative requirements to obtain the community's consent to projects.

- Native Title Land has not yet been designated on mainland Australia but many claims have been lodged with the Native Title Tribunal, and registered claimants have the right to negotiate conditions of access and compensation with Government and any petroleum company which seeks a new exploration or production tenement.
- Leasehold and freehold land held by Aboriginal people is subject to the provisions of the relevant land and petroleum acts. However legislation which applies to prevent unauthorised trespass or damage to sites of significance gives the resident community additional authority over access and compensation conditions.

GENERAL PRINCIPLES

Companies should consider the following principles as a starting point in developing their working relationships with Aboriginal communities and traditional owners:

- open dialogue early in the life of the project;
- respect the traditions and culture of the Aboriginal community;
- acknowledge that cultural differences exist, and commit to understand and accommodate them as much as possible;
- appreciate that a different view of history is held by Aboriginal people and seek to understand it, particularly their experience with government and the non-indigenous community;
- provide time and funding to develop expertise, either in-house or through consultants on local Aboriginal communities, traditional customs and contemporary politics;
- accept that petroleum exploration and production activities can have an impact on communities, and commit to minimise that impact and provide compensation where appropriate;
- commit to develop a working relationship based on respect and trust, with open and ongoing dialogue throughout the project;
- ensure that the company is represented to the community by a person suited to the task;
- develop protocols and lines of communication between the company and Aboriginal representatives;
- assist in community development where appropriate and in accordance with the wishes of the community and relevant Government authorities;
- employ and train Aboriginal people from the community whenever possible and appropriate.

These principles will help ensure a good working relationship with local Aboriginal communities, and will ultimately assist the company's operations. An informed company which understands, for instance, that decision-making can be a protracted process will ensure that adequate time is available for community consultation, and thereby minimise the possibility of delays.

CONTACTING AND MEETING THE COMMUNITY

Contact with the Aboriginal people associated with the company's permit area should be established well in advance of any activity in the area, and preferably before the time of granting of the exploration or production permit. Recommended steps towards meeting and negotiating an agreement with the community(ies) are set out below.

1. Identify the Aboriginal community(ies) living in the permit area and any other groups claiming traditional authority in the area. This information can be obtained from various

sources. Native Title Representative Bodies (NTRBs, listed at the back of this document) have been established under the Native Title Act and are funded by ATSIC to conduct negotiations in relation to native title issues in designated areas. Many Mines Departments now have an Aboriginal Liaison Officer and this is the best starting point. The relevant 'Aboriginal Affairs' Department should also be consulted. This process will identify local ATSIC offices, regional land councils, local 'resource agencies' and other Aboriginal organisations, and may assist with a first approach to the community.

2. Contact petroleum companies who have previously explored in the area, or who are working in nearby areas, and seek advice about local communities, recognised elders, past site surveys, and other relevant information.
3. Consult the relevant authority regarding any registered Aboriginal sites in the area - in Western Australia, for instance, the Heritage and Culture Section, Aboriginal Affairs Department.
4. Contact the various communities and organisations by letter as early as possible in the life of the project, advising them of the company's proposed activities and seeking meetings with them, separately or jointly, as they prefer, to discuss the company's activities, and the communities' concerns and conditions regarding access, site clearance and other matters. Unless specifically so instructed by the community or their legal representatives, do not simply accept at this point that the community is represented by a NTRB. If a particular organisation does purport to be the community's designated representative, it would be prudent to agree to future discussions with them, subject to confirmation by the community of this arrangement.
5. While negotiations will ultimately be with the community leaders and traditional custodians, or their designated representative, it is best to invite the community to arrange the initial meeting however they prefer, possibly including the entire community in open forum. Be prepared to have several meetings to establish familiarity and allow time for community discussion. "Flying visits" should be avoided. Be prepared to spend time with the community and camp with them.
6. With all groups, especially the Aboriginal community, discuss in clear and simple terms
 - **who** the company is and who will represent it;
 - **what** the company is exploring for and what activities they plan;
 - **when** those activities will be conducted;
 - **how** the company is committed to working with the community to ensure that sites are protected, disruption minimised and, where appropriate, that proper and adequate compensation is made for any disruption or damage.
7. At that community meeting, in as open a forum as possible, ask the community
 - **what** their concerns are and what they would like to discuss;
 - **who** their preferred representatives would be in negotiating an agreement with the company, be they community members or another organisation;
 - **when** they would like another meeting to discuss things further;
 - **how** they believe that sites can be protected and the company's impact minimised;
 - **if** the company could help them in any way with local activities.

Companies which have no experience in Dealing with Aboriginal communities should seek professional help for the initial contacts. This could be an anthropological consultant or a local individual known and respected by the community, or a person experienced in dealing with Aboriginal communities. The Aboriginal Liaison officer in the State Department of Mines/Energy will be able to advise regarding suitable persons. Information can also be obtained from industry

contacts, local Aboriginal organisations and Government agencies - though some caution may be prudent here, and information from these sources should be cross-checked to avoid the company becoming entangled in local disputes.

REACHING AN AGREEMENT

More than one meeting may be required to reach an agreement and it is preferable to have the same company representative throughout the discussions, and ongoing through the operation. This assists in progressively establishing the credibility of both the individual and the company. It is also politic that the representative should have the authority to give reasonable undertakings without seeking head office approval. It would be advantageous for company representatives to undertake some form of cross cultural training.

The content of the negotiations will vary considerably from one situation to another, with the major determinants being the nature of the land title held by the community, and their receptiveness to petroleum exploration. In areas where Aboriginal people have a veto over exploration on their land, their conditions for access may include a carried-interest in the venture or profit-sharing, as well as matters related to sites, employment and so on. In other areas, an Aboriginal community may have no legally defined title to the land but still maintain a traditional association with it and the negotiations will be mainly about heritage issues and site surveys.

The content and scale of compensation, if any, to the community will also vary considerably, again largely dependent on the land title held by the community. During the exploration stage, local communities may look to companies for support activities such as drilling water bores or helping with roads. In the event of production, the expectation can be for significantly increased benefits, including financial support for community projects and joint venture participation, regardless of the form of title held to the area by the Aboriginal community.

The agreement and conditions should be documented, and both community and company representatives should indicate their understanding by signing the document. The conditions of any agreement reached in this manner are legally binding and should be conveyed to company employees, and made legally binding on contractors and sub-contractors. Legal costs in preparing these documents may have to be met by the company.

Consultation with Aboriginal communities and groups requires sensitivity and honesty and can be greatly helped by a knowledge of Aboriginal culture, both traditional and contemporary. It also benefits from a good dose of political acumen. Companies need to ensure that the people who represent them are suited to the task. Consultation will not be effective unless trust exists on both sides. Be aware that Aboriginal negotiators usually will be accompanied by a "witness". There may be different interpretations of the same meeting or discussion, so a good tactic is to ask the negotiators to repeat in their own words what they understand to be the proposals and/or outcomes.

ON-GOING COMMUNITY CONTACT

Regular contact should be maintained with the community, both by written communication and visits, including during periods of relative inactivity. The company should advise the community (and other relevant groups) of each stage in the work programme well in advance of the proposed start date, and arrange a meeting to discuss the work and any implications for the community, either as covered in the agreement or additional to it.

The most important element of these consultations during the exploration stage is to ensure that the proposed operations will not interfere with any Aboriginal sites. After the visit(s) to the areas covered by the programme by representatives of all parties, the entire operation should be reviewed a final time, using a map of the area with which the Aboriginal negotiators have become familiar. The negotiators may need to refer back to the broader community before a final clearance is given.

Companies should take particular care to ensure their contactors are briefed fully on the agreed codes of conduct and monitor their activities. There should be a designated person with sufficient authority to deal with any complaints from the community.

NATIVE TITLE AREAS

Companies wanting to apply for onshore permits in many areas currently face and potential delays because of Native Title legislation. If the granting of the permit and commencement of work are to proceed without significant delay, the negotiate of an agreement with the relevant Aboriginal group(s) will be essential.

1. Consult the relevant Mines and Aboriginal Affairs departments and Native Title Tribunal to establish the status of native title, if any, over the area, and to identify any native title holders or claimants.
2. Contact the Native Title Representative Body for the region and seek their advice. (These bodies were established under the Native Title Act 1993 and perform a wide range of mandated functions on behalf of, and in consultation with, Aboriginal native title holders and claimants. These functions include assisting native title holders and claimants with the negotiation of exploration and mining agreements. A list of contact addresses appears at the end of this booklet.)
3. If a native title claim has been lodged, or the Native Title Tribunal or the Federal or High Court has determined that Native Title exists, the company and the Government granting the permit will need to negotiate with the native title claimant or holder regarding access and compensation, and obtain the agreement of the holders or claimants to the grant of the exploration or production tenement. This negotiation process can be initiated only by the Government concerned and, political or other factors may limit Government commitment to the process.
4. If no agreement has been reached with the native title holders or claimants after negotiations for four months (six months, for a production tenement), the petroleum company may apply to the Native Title Tribunal for a determination of the matter. Although the Tribunal must take all reasonable steps to determine the matter within a further four months (or a further six months in the case of a production title), there is no guarantee that this timetable will be adhered to and, even if a determination is made, the matter may then be appealed to the Federal and the High Court. In other words, agreement with the native title claimants is essential if the permit is to be granted and work proceed on any reasonable schedule.
5. A company seeking the grant of a petroleum permit in an area under native title claim will be well advised to make early contact with the native title claimants, and seek an agreement with them to provide, among other matters, for the claimants' agreement to the relevant Government's granting of the permit. This will normally allow the 'expedited procedure' to

be applied to the proposed grant of title and the time involved in the granting process will be minimised

6. Similarly, if no native title claim has been lodged, but the area is potentially claimable, (eg, vacant crown land) the company should proceed to identify the community (ies) likely to claim native title, arrange a meeting to advise them of the proposed permit application and exploration work, and seek their agreement not to lodge a native title claim within two months after the Government advertises its intention to grant the permit. If the Aboriginal group were to file a claim with the Tribunal and object to the granting of the petroleum permit, then significant delays in the granting of that permit could result.

ABORIGINAL HERITAGE ISSUES

Corporate and individual obligations in relation to Aboriginal sites are specified in State and Territory legislation and are subject to overview by Federal laws. Companies intending to operate in any onshore area need to be aware of their legal obligations under the relevant legislation, and need to consult with the appropriate Aboriginal people to ensure that sites are not disturbed. This applies not only in the remote regions normally associated with 'traditional' Aboriginal communities, but increasingly applies also in more rural and urban settings where acculturated Aboriginal people are re-emphasising their association with land.

Aboriginal sites can be subdivided into ethnographic and archaeological categories:

- **ethnographic sites** are related to people living today, and vary in purpose and significance from landforms mentioned in legends about mythical beings to the very personal spirituality associated with a conception site. They vary in size, from small well-defined features such as a particular rock or tree, to very large features such as a mountain. Some are very obvious; others are barely discernible in any physical way;
- **archaeological sites** show evidence of past Aboriginal culture and activity, and range from the internationally famous Wandjina paintings of the Kimberley to minor flint flakes.

The term 'sacred site' is used by many people and embodied in some legislation, but does not accurately express the significance of most sites, and use of the term is discouraged.

Knowledge of the location and meaning of a particular Aboriginal site may be restricted to certain adult Aboriginal people, usually termed the custodians or owners. There may be several custodians for a particular area, possibly living in different communities, and all need to be consulted. Attention to women's sites, as distinct from traditional men's sites, is necessary.

It will usually be best for the Company to engage a suitable anthropologist to help identify the appropriate Aboriginal custodians or advisers, and to handle the site surveying and clearance. It will always be preferable to work through an anthropologist who is known and respected by the community. This can allow the community to be more open in communications about sites than might have been possible talking to the Company directly.

The approach to 'site-clearance' will depend on the preferences of the relevant Aboriginal community, and the type and stage of the proposed programme of exploration or development. There are two basic approaches: either the Aboriginal custodians for an area identifies the location of the relevant sites and the company avoids those areas, or the company identifies where it

wishes to work and the custodians, without identifying the location of the sites, advise of any potential conflict with the exploration programme. In many instances, some combination of these two methods is used, but the site-avoidance approach is increasingly preferred, especially in early stages of consultation.

Disputes about Aboriginal sites arise for a number of reasons including

- community reluctance to reveal places of secrecy;
- failure to consult all Aboriginal people with knowledge of sites in an area;
- the political agenda of the group involved, or their advisers.

Some companies find sites to be the most difficult aspect of dealing with Aboriginal interests, seemingly for two main reasons:

- a general lack of understanding of the nature and significance of various types of Aboriginal sites, in terms of both traditional culture and contemporary Aboriginal politics;
- a cynicism about the validity of many site claims.

Much of the controversy and public cynicism about sites is not so much a disbelief in 'sacredness', as it is a discomfort with their apparent recent re-sanctification: the 'sacredness' is seen as exaggeration, or even fabrication, for political or economic purposes, usually stimulated by the proximity of mineral exploration or development. A more understanding perspective will benefit companies more.

There has been a marked increase in the importance accorded Aboriginal sites in recent decades but, whatever the facts of certain controversial incidents, that change needs to be seen as a complex socio-cultural phenomenon linked as much with contemporary Aboriginal politics as with traditional culture. Firstly, the importance of sites has changed for many individuals and communities because of the resurgence of Aboriginality in both remote and urban areas; sites are now among the most important elements in the contemporary construction of a pan-Aboriginality. Secondly, the value of sites has changed in real terms because of the importance accorded them and their 'owners' in State and Federal legislation. In simple terms, sites are recognised as 'proof' of traditional ownership of an area by an individual or community and, as such, can provide 'land rights', be it native title or otherwise to those areas. There may be some economic opportunism in this - Aboriginal people, no less than any other people, seek to maximise their advantage in a given circumstance - but companies should not be distracted from dealing with the matter thoroughly and sensitively.