

AUSTRALIAN GOVERNMENT DISCUSSION PAPER

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1 Optimising Benefits from Native Title Agreements

The Australian Government is developing its Indigenous Economic Development Strategy and in so doing is examining ways to improve economic development outcomes for Indigenous people and closing the gap between Indigenous and non-Indigenous Australians in key areas of Indigenous disadvantage.

Sustainable economic development is a critical factor in addressing Indigenous Australians' disadvantage, enabling wealth creation and home ownership. Addressing underinvestment on Indigenous owned or controlled land, better health, education and employment opportunities and delivering physical and social infrastructure are all elements critical to increasing economic development prospects. The Australian Government is determined to address these elements as part of its Indigenous Economic Development Strategy. In so doing it acknowledges that Indigenous Australians are central partners in efforts to closing the gap and that these efforts need to achieve results.

One area of focus for government is the engagement between Indigenous Australians and the resources industry; particularly in the area of agreements about access to Indigenous land to facilitate mining and other resource development activities. It is generally acknowledged that many Indigenous Australians live on land rich in resources that create wealth for the nation and for many businesses but delivers little in respect of equitable wealth distribution and wealth generation for Indigenous Australians.¹

While the opportunity presented by the minerals industry to Indigenous communities is increasing, so too are the demands placed upon Indigenous communities to engage effectively in highly complex commercial negotiations about access to land and related economic development initiatives. Over the past 20 years it is estimated that the minerals industry has contributed some \$500 billion into the Australian economy² and it employs approximately 340,000 people, directly and in related industries, mostly in regional Australia. It is also estimated that there are over 340 new resource development projects proposed for Australia in the coming years.³

¹ For a broader discussion on this see Marcia Langton and Odette Mazell (2008), *Poverty in the Midst of Plenty: Aboriginal people, the 'resource curse' and Australia's mining boom*, Journal of Energy & Natural Resources Law Vol 26 No 1 2008 at p 31

² The Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and indigenous Affairs, speech to the Minerals Council of Australia Sustainable Indigenous Communities Forum, 27 May 2008, http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/sustainable_indig_comm_27may08.htm (accessed 25 November 2008)

³ The Minerals Council of Australia (MCA) submission to the Review of Australia's Future Tax System (the Henry Review) November 2008, <http://www.minerals.org.au/> (accessed 25 November 2008)

The amount of wealth generated so far and likely to be generated present industry, Indigenous Australians and governments with a challenge. How to ensure that the benefits arising from agreements are used to improve traditional owners and Indigenous communities' economic status and social well being? There are a number of assumptions behind this question. They are that:

- direct financial contributions resulting from agreements do not necessarily translate into substantive benefits for Indigenous communities;
- substantive benefits, such as employment options and community development initiatives often deliver benefits to all members of the community, not just the traditional owners; and
- an equitable approach to distribution is more likely to generate socio economic benefits for the whole community.

Indigenous Australians' ability to engage effectively with the resources industry is influenced not only by the differing capacities of the players but also by the variety of laws and policies that may apply to the land in question.⁴ Across Australia, while State or Territory governments bear primary responsibility for issuing mining tenements and receive the majority of royalties paid to the Crown for mining on Indigenous owned or controlled land, both Commonwealth and State legislation apply to the management of these lands, access to them and dealings with Indigenous Australians.

The policy, legal and administrative regimes that apply to agreements between Indigenous Australians and members of the resources sector all, to varying degrees, provide for Indigenous communities agreeing to mining or other developments on Indigenous controlled or owned lands in return for economic and other benefits.

The *Native Title Act 1993* (the Act) provides a process for the negotiation of such agreements, as it establishes a 'right to negotiate' for native title holders or registered native title claimants (referred to in this paper as the *traditional owner*) in relation to certain proposed actions contemplated by government (such as the issue of mining leases to resource developers), referred to in the Act as *future acts*. Since the passage of the Act in 1993 the National Native Title Tribunal (the Tribunal) has made over 2450 future act determinations.

⁴ The division of responsibilities between the various tiers of government influence the implementation of a number of the options discussed in this paper. For further discussion on this point see Langton and Mazel (2008) at pp 39 – 42 and Godden, Langton, Mazel and Tehan (2008), *Accommodating Interests in resources Extraction: Indigenous Peoples, Local Communities and the Role of Law in economic and Social Sustainability*, Journal of Energy & Natural Resources Law Vol 26 No 1 2008 at pp 6 – 11.

The regime established under the Act for negotiating agreements between traditional owners and the resources industry can contribute to closing the gap on key areas of Indigenous disadvantage. Since the introduction of the Act, traditional owners in resource rich areas of Australia have achieved a range of direct and indirect benefits through negotiation and agreements relating to access to Indigenous lands and associated compensation for impairment of native title rights.⁵

Agreements negotiated under the auspices of the Act now constitute a major form of engagement between Indigenous people, industry and governments and provide Indigenous people, to varying degrees, a genuine planning and decision-making role in a range of issues affecting their lives and their environments. This role also brings with it responsibilities and duties in governance and community development as agreements provide an opportunity for the parties to build relationships and set parameters for future interactions on matters involving, for example, economic development, social wellbeing and environmental and cultural matters.⁶

These agreements often take the form of Indigenous Land Use Agreements (ILUAs), as provided for under the Act. Since 1998 over 340 ILUAs have been registered with the Tribunal.⁷ Agreements can potentially deliver considerable social and economic benefits capable of being harnessed by the current Indigenous community and used for future generations. An example of a recent agreement that is clearly designed to achieve just that is one between Rio Tinto and Indigenous communities in the Pilbara region of Western Australia. This agreement includes a commitment of \$1 billion

⁵ For further discussion on this see Ciaran O’Faircheallaigh & Tony Corbett, (2005) *Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements*, Department of Politics and Public Policy, Griffith University, Brisbane, Australia Environmental Politics, Vol. 14, No. 5, 629 – 647, November 2005

⁶ See O’Faircheallaigh & Corbett (2005) pp 630 - 631

⁷ A explanation of an ILUA can be found at the NNTT website

http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Pages/About_iluas.aspx

It provides that

An indigenous land use agreement is an agreement between a native title group and others about the use and management of land and waters.

These agreements allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances.

An indigenous land use agreement can be negotiated over areas where native title has, or has not yet, been determined to exist. They can be part of a native title determination, or settled separately from a native title claim.

Indigenous land use agreements can be formed on the following topics:

- *native title holders agreeing to a future development*
- *how native title rights coexist with the rights of other people*
- *access to an area*
- *extinguishment of native title*
- *compensation.*

When registered with the Tribunal, indigenous land use agreements bind all parties and all native title holders to the terms of the agreement.

Indigenous land use agreements were introduced as a result of amendments to the Native Title Act in 1998.

through binding initial agreements between Rio Tinto Iron Ore and the traditional owners of the Pilbara. Among other things, the monies distributed through such agreements are allocated to benefits-receiving trusts and programs related to education, training and employment, business development, cultural heritage protection, environmental, co-management and cross-cultural education. Many of these distributions will contribute to regional economic development in remote Indigenous communities over the course of next 20 to 30 years.⁸

However, while agreement-making provides a context for engagement, the mere existence of an agreement does not necessarily deliver meaningful or equitable outcomes for Indigenous communities.⁹

Reflecting a joint desire to address this challenge and find ways to move forward, the Minister for Families, Housing, Community Services and Indigenous Affairs and the Attorney-General drew together a group of experts in a Native Title Payments Working Group (the Working Group) to share their perspectives.

The Working Group was invited to develop suggestions to ensure that the benefits accruing to Indigenous interests under native title agreements contribute to addressing economic and social disadvantage experienced by Indigenous communities and are delivered to not just current but future generations.¹⁰

Attached to this discussion paper are the:

- terms of reference of the Working Group
- membership of the Working Group; and
- the final report of the Working Group.

The scope of the Working Group's focus was targeted as not all Indigenous Australians have the opportunity to benefit from economic developments occurring on Indigenous land. However, with more than 60 per cent of mineral operations

⁸ See Rio Tinto's submission to the House of Representatives Standing Committee's Inquiry into Developing Indigenous Enterprises, 24 July 2008. The submission also states that, since 1996, Rio Tinto has signed nine major mine development agreements and negotiated more than 100 exploration agreements across Australia. Through these times Rio Tinto has committed to affected Aboriginal communities over the next 20 years a total sum of economic and social investments in the order of \$1.4 billion, <http://www.aph.gov.au/house/committee/atsia/indigenousexercises/subs.htm> (accessed 25 November 2008)

⁹ Ciaran O'Faircheallaigh, *Native Title and Mining Negotiations A Seat at the table, But No Guarantee of Success*, Indigenous Law Bulletin, March- April 2007, Vol 6, Issue 26 p 18.

¹⁰ The Hon Jenny Macklin MP, Media Release, Native Title Payments Working Group meets in Canberra, 30 July 2008, http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/native_title_payments_31ju108.htm (accessed 25 November)

neighbouring Indigenous communities,¹¹ there are significant opportunities for many traditional owners and Indigenous communities and it is these opportunities that can potentially result in benefits for both the present and future generations of Indigenous Australians.

The obligation to ensure that these benefits are harnessed so as to optimise these opportunities falls directly on industry, traditional owners and their representatives, and government.

This discussion paper builds on the report of the Working Group and discusses a number of options to guide positive developments. Its purpose is to generate ideas, stimulate discussion and seek input from interested people and organisations on the way forward. It also raises a number of questions on which specific comment is sought.

2. The type of benefits to be provided

In considering how to optimise benefits from agreements to improve Indigenous Australians' economic status in the short and the long term, the Working Group agreed on the characteristics of good agreements that, if adopted, would assist in achieving this objective. The critical provisions of good agreement are summarised as providing:

- financial benefits proportional to the impact of the mine or other operation for the long-term, through trusts and regular ongoing payments;
- Indigenous business, employment and training opportunities;
- community development payments and initiatives;
- Indigenous involvement in cultural, heritage and environmental projects;
- Indigenous control of funds, combined with mentoring and support by independent parties;
- appropriate trust structures aligned with the specific community needs and group composition and the purposes of the agreement; and
- regular review of the long-term objectives of the agreement and the extent to which these are being met.

In identifying these, the Working Group also acknowledged a number of barriers that need to be addressed for such agreements to be negotiated, implemented and sustained. Some of these barriers relate to capacity:

- of the native title system to support traditional owners engagement in the often complex commercial negotiations that are required;

¹¹ Australian Government (Department of Industry, Tourism and Resources), Working with Indigenous communities: Leading practice sustainable development program for the mining industry (2007). <http://www.ret.gov.au/resources/pages/publications.aspx> (accessed 19 November 2008)

- of some in the resources industry to understand the cultural context and to effectively engage in negotiations with traditional owners; and
- of traditional owners and Indigenous communities to implement and sustain such agreements once negotiated.

Other barriers were more to do with the agreements themselves. In summary the Working Group noted that:

- there are only a limited number of good agreements which are sufficiently transparent to be useful models;
- there is a lack of available data about the terms of many agreements; and
- due to the confidential nature of agreements, it is difficult to quantify the level of benefits that have been transferred to Indigenous people through past native title agreements in mining regions.

The Government is committed to ensuring that traditional owners and local Indigenous communities derive long-term benefits from engagement with the resources industry. Major opportunities for economic and social development present in the development of major project on land over which Indigenous people have native title interests. To harness these opportunities, Indigenous people and organisations must be encouraged to apply income streams to optimal effect and to minimise cash payments to individuals in circumstances where such payment are unlikely to yield lasting benefits. The central question arises - how is this best achieved?

The Working Group considered the type of benefits to be provided through agreements but it did not directly discuss whether such benefits should include upfront cash payments, either directly or through royalty streams, or payments only in terms of infrastructure, education and training, employment, and longer term economic development initiatives.

The Government is concerned to maximise the opportunity to improve Indigenous people's economic status that arise from payments flowing to traditional owners and Indigenous communities.

Upfront cash payments rarely achieve this outcome. Responsible companies are moving away from this practice in favour of structuring benefits in a more sustainable way. Nonetheless the practice continues as not all companies embrace industry best practice. The result is often conflict within Indigenous communities as direct payments to some and not others creates division and inequity. Rarely are such payments directed towards the benefit of the whole community or longer term investment strategies.

Innovative approaches are needed so that the financial benefits create employment and educational opportunities for individuals and are invested for the long term benefit of communities.

These innovations need to be such as to deliver better outcomes while avoiding undue Government interference or regulation of financial transfers through private agreements and the legal complexities which would ensue.

The options raised in this paper suggest a number of approaches to achieve this balance, including increasing the transparency of agreements, improving governance arrangements and identifying governments' responsibilities for better regulation in this environment.

All options raised in this Discussion Paper are intended to provide incentives for parties to agreements to make strategic decisions about investing in their futures.

3. Options – the manner in which benefits could be provided and administered

As noted, this paper discusses a range of options relevant to optimising benefits that flow from native title agreements for intergenerational socio-economic development. In discussing these options, the paper canvasses both legislative and non-legislative proposals, ranging from specific ideas to ensure agreements are more effective and sustainable, to more general options regarding the role of government and the resources industry.

The options are not designed to be alternatives as, due to the wide variety of agreements and Indigenous communities involved in the native title system, there is unlikely to be a 'one size fits all' solution.

Many of the options discussed recognise that building the governance capability of traditional owners and Indigenous communities to decide and plan for how benefits should be distributed is a key requirement to ensuring long-term, sustainable development.

However, the challenge of optimising the opportunity for economic and social development is not only a matter of good governance. There are also structural impediments to investment opportunities including: remoteness; the small size of many Indigenous communities; limited investment opportunities; limited access to finance and investment advice. The following options seek to address some of these impediments.

3a. Increased transparency

Agreement-making creates an opportunity for effective engagement between Indigenous peoples, industry and government. However, the existence of an agreement does not necessarily deliver meaningful or equitable outcomes for

Indigenous communities. There are many reasons for this, some are mentioned above, but limiting the assessment and promotion of positive agreement making is the fact that many agreements and the terms contained within remain confidential.

Increased transparency of provisions in and benefits provided under agreements have the potential to impact significantly on maximising opportunities for traditional owners. As noted above the Working Group considered the limited number of good agreements accessible result in few models or templates for others to follow, while a lack of available data reduces the capacity to learn from what has gone before. If more models were available, it was argued, then transaction costs would be lower as the resources spent on drafting would be reduced, and parties would enter negotiations on a more informed basis.

The obvious difficulty in promoting transparency is whether and how to protect sensitive or confidential information of the parties to agreements. It is noted that Western Australia has published native title agreements, and New Zealand has a policy of publishing all settlement agreements.¹² Even if some provisions might warrant confidentiality, at least for a period, current practice in many areas is not to publish any features.

(i) Registration of agreements

One way to increase transparency, while still enabling people to protect sensitive information, is to require agreements to be registered on a public register which only discloses certain ‘relevant’ details of agreements. Alternatively, such a register could publish selected ‘best practice’ agreements.

A central repository of agreements would provide a single point of reference to negotiators and drafters looking for best practice examples and provide a more effective means of evaluating the ability of agreements to provide meaningful outcomes and long lasting benefits.

The difficulty with this option is that agreement provisions that are highly relevant for some negotiations may not be useful for others. Therefore, registered agreements are unlikely to provide sufficient information to assist all native title negotiations and agreements, and would provide a guide only. Another complexity is that legislation might be required to mandate the population of such a register and there would be associated costs in establishing and maintaining it to ensure its relevance and accessibility.

¹² See http://www.nativetitle.wa.gov.au/agreements_All.aspx and <http://www.ots.govt.nz> (accessed 19 Nov 2008)

Despite this, a public register may be a useful first step to providing more transparency, and could go some way toward reducing transaction costs by streamlining drafting requirements.

- **Are there options for increasing transparency without compromising sensitive information?**
- **What parts of agreements would be the most useful to publish to assist parties to reduce transaction costs and seek better outcomes?**

3b. Improved workability of agreements

(i) Indigenous Land Use Agreements and contracts

Indigenous Land Use Agreements (ILUAs) are generally agreements that, once registered under the Act, allow for an agreed act to be done over land subject to a native title claim or positive native title determination.

Under the Act, amendments to ILUAs are required to be registered to ensure their ongoing enforceability. Unlike contracts, ILUAs have the capacity to deliver ongoing and sustainable benefits over the areas they cover. This is because ILUAs provide long term certainty and bind all parties, including all current and future native title holders in that area. In this way, ILUAs may be potentially less flexible in responding to changing needs of the community than other contractual agreements.

The Working Group suggested that all provisions that may be subject to review and change by the parties, be removed from an ILUA and be provided for in associated management plans or side agreements. There are numerous examples of such arrangements: ILUAs formalise the benefits provided and the process for ensuring the recognition of the traditional owner's native title rights and interests, while a set of management plans deal with issues such as business development, training and employment.¹³ This approach allows the parties greater flexibility to vary and update the management plans to reflect their aspirations as, unlike ILUAs, there is no requirement for formal registration.

(ii) Implementation issues

The successful implementation of a native title agreement is integral to ensuring the benefits provided under agreements are practical, workable and sustainable. A substantive benefits package is of little use if the beneficiaries are not able to access appropriate advice, training or resources to effectively apply the benefits package to their practical needs and development.

A range of issues identified as contributing to successful implementation, include the need for structures to fit the specific purposes of the beneficiary group; dedicated

¹³ See Strelein (2008) pp – 9 – 21

resources to the actual tasks of implementation; regular reviews of concrete goals spelt out in agreement; and providing effective measures to deal with parties' failure to fulfil their agreement commitments.

- **What are practical steps for ensuring implementation is successful?**
- **How can ILUAs and contractual agreements be used to ensure long term outcomes for the traditional owners and Indigenous communities involved?**

3c. Promoting good practice

Promoting and achieving good practice is closely aligned with the governance capacity of all parties to an agreement. Poor governance capacity not only impacts on the organisation, but also affects the markets' confidence in the organisation as well as the quality of benefits delivered to the community. Individual mining companies, peak representative bodies, Government agencies and individuals have all contributed to improving the governance capacity of Indigenous organisations in remote Australia and this work continues. What follows are a number of options designed to promote corporate governance and capacity development, intended to complement the existing work being undertaken and add value where needed

(i) Traditional owners, Industry and Governments developing guidelines

The Act provides standards and procedures in relation to the negotiation of native title and related issues. However, it does not specify and nor is there a model or 'template' for agreement-making and the distribution of benefits.

The Working Group noted that while there were hundreds of agreements between traditional owners and industry there were few public examples of agreements that provide substantial benefits to Indigenous people. One way to improve agreement outcomes is to promote best practice principles and features that can be incorporated into future agreements. The Working Group recommended that the Minerals Council of Australia, the National Native Title Council and the Australian and State and Territory Governments collaborate to provide appropriate guidance on the negotiation, content and implementation of agreements.

(ii) Promoting consideration of Indigenous small business development

The Working Group concluded that a good agreement contemplates the development of and provides support for Indigenous business ventures. Sustainable outcomes from agreements for Indigenous communities can be supported by small business development as a way of providing economic development opportunities, particularly ones that can continue beyond the life of a mine.

A number of factors impact on the capacity of Indigenous people to start up businesses or engage in economic development opportunities outside of mining and other resource development activity.¹⁴ In particular, the challenges of capacity and governance faced by those negotiating and managing the benefits of native title agreements are also experienced by many Indigenous peoples in remote areas seeking to develop business.

Notwithstanding the absence of model agreements there are initiatives undertaken by government and industry intended to provide some guidance as to best practice in this area. The Australian Government and Minerals Council of Australia's *Working in Partnership Program* which works to strengthen the relationship between mining and Indigenous communities by improving opportunities for indigenous communities and individuals is one example of this. This program emphasises the need for long-term relationships between Indigenous communities and the mining industry as, by building these relationships, industry benefits from a local source of employees and service providers, and the Indigenous community benefits from employment and business opportunities that mining and related industries can provide.¹⁵

The Working Group considered other ways to stimulate growth and financial opportunities for existing Indigenous businesses and assisting with the development of new businesses, including various amendments to existing taxation and institutional arrangements. Many of the proposals focused on the federal income tax law, with particular emphasis on encouraging venture capital investment in emerging businesses.

(iii) Work ready assistance for Indigenous people to gain mining related employment

The Working Group indicated that a sustainable agreement is one that supports Indigenous employment, rather than just provides a royalty stream. It noted that even when mining companies include provisions in their agreements for Indigenous employment, their ability of to realise these opportunities can be restricted due to their lack of appropriate education and training.

¹⁴ For further discussion on this see *Open for Business: Developing Indigenous enterprises in Australia*, the report of the Standing Committee on Aboriginal and Torres Strait Islander Affairs' inquiry into developing Indigenous enterprises. The Committee undertook an inquiry into Indigenous enterprises and explored ways that Indigenous people could be encouraged to embark upon or expand a business. The report can be found at: <http://www.aph.gov.au/house/committee/atsia/indigenouenterprises/report.htm> (accessed 19 Nov 2008)

¹⁵ More details can be found at <http://www.ret.gov.au/resources/pages/publications.aspx> (accessed 19 Nov 2008)

Government has a role in assisting Indigenous people to access these opportunities through providing more work ready assistance for Indigenous people to gain mining related employment such as building skills and capacity to take up employment opportunities as they arise. In addition, the Working Group recommended that the Australian and State and Territory Governments should commit to a target of work-ready Indigenous people who can be employed in mining and associated industries.

The Australian Government has recently released a paper on its preferred model for Indigenous employment programs, *Increasing Indigenous Employment Opportunity*.¹⁶ This includes reforms to Community Development Employment Projects (CDEP) and the Indigenous Employment Program (IEP) directed to reforms aimed at meeting the Government's target of halving the employment gap between Indigenous and non-Indigenous Australians within a decade.

(iv) Improving capacity – leadership training – mentoring scheme

The need to build capacity of traditional owners and Indigenous communities to engage effectively in negotiation with the minerals' industry resonated strongly throughout the report of the Working Group. The Report emphasised that, in order to maximise the benefits received through native title agreements, there is a need to ensure that those involved are adequately equipped to successfully negotiate and implement good agreements on behalf of traditional owners and the broader Indigenous community. There are many ways of improving leadership skills and capacity building for traditional owners. This may include financial training to assist communities to make good investment decisions and governance training to build capacity to represent diverse family and group interests.

A mentoring program involving business leaders from non Indigenous organisations and key individuals within the Indigenous organisation could assist the community with business strategy and project planning so as to build the capability of the community to implement agreement outcomes and create sustainable business opportunities.

A mentoring scheme could operate with mining company executives and with companies outside the minerals industry committed to supporting Indigenous enterprise development. The scheme would provide an opportunity for cultural exchange within a commercial context, as knowing how to 'do business' in both domains is critical to negotiating and securing agreements. It could also provide Indigenous organisation with an 'independent view' as to corporate governance

¹⁶ The Government's Discussion Paper can be found at http://www.indigenous.gov.au/economic_opp.htm (accessed 19 Nov 2008)

responsibilities, the role of boards, decision making processes, transparency and accountability.

(v) Improving capacity - NTRBs and PBCs

The Working Group also considered that Native Title Representative Bodies (NTRBs) lack the necessary resources to support traditional owners to negotiate a complex commercial agreement in a sustained manner. Similarly, there was a lack of resources and limited capacity for Prescribed Bodies Corporate (PBCs) in terms of understanding of the role and responsibilities of community trusts, corporate governance and financial literacy to assist them implement agreements that provide substantial benefits.

The capacity of NTRBs and PBCs to support their various roles and responsibilities under the Act has been the subject of much debate and consideration and the adequacy of the current resource allocation is currently under review.¹⁷

(vi) Government's role in providing infrastructure

It was noted by the Working Group that underinvestment by the market and governments in remote regions often results in non-existent or chronically under-resourced government services and a lack of infrastructure essential to the functioning of a community. As a result, the benefits from agreements may be diverted to providing services and infrastructure that is, in the ordinary course, the responsibility of one or more tiers of government.

The report calls on Governments to address this underinvestment in capital infrastructure in remote Australia, and to consider how Governments can support infrastructure development in remote Indigenous communities.

- **How would one or a combination of the options above best encourage economic development opportunities for traditional owners and Indigenous communities?**
- **What do you think are the appropriate roles and responsibilities of government; the resource industry and Indigenous communities in achieving this?**

¹⁷ In August 2008 the Commonwealth Native Title Coordination Committee recently completed a ten month review of the acquittal and future needs of the funding for the native title. The Committee is made up of representatives from the Attorney-General's Department, FaHCSIA, the National Native Title Tribunal and the Federal Court and recommendations from this Review of funding are intended to feed into 2009-10 budget process.

3d. Tax options

Much has been written on how trust structures, tax incentives and disincentives affect the use of native title payments by traditional owners and proposals have been made for amendment.¹⁸ In general, commercial dealings on Indigenous owned or controlled land is subject to the usual taxation arrangements in place for other businesses.¹⁹

The Working Group report, insofar as it deals with the current taxation regime, argues that this standard ‘business as usual’ approach imposes real constraints on the potential for economic development and wealth creation on Indigenous lands for traditional owners and Indigenous peoples. One unintended effect is that multiple tax liabilities apply to the various benefits realised through the life of a native title agreement, creating a compliance burden on the traditional owner body. The Working Group argues for change. What follows are some options for both streamlining the administrative complexities and burdens that arise, and increasing the possibility of economic development and wealth creation.

(i) A New Trust Vehicle?

Native title groups often choose charitable trusts as a model for managing benefits received under native title agreements. Predominantly, this is because they are exempt from income tax so beneficiaries of charitable trusts are not taxed on the benefits that they receive from the trust.

There are, however, significant limitations on charitable trusts providing a vehicle for economic development. Most notably, if a charitable trust accumulates excessive investment income it is not, generally, considered by the Australian Taxation Office to be applying the fund for charitable purposes. This risks loss of an exemption from income tax. Limits are also imposed on the length of time funds are entitled to be accumulated which restricts the funds being accumulated in the trusts for the benefit of future generations. Further, to obtain endorsement as a charitable trust, the trust is required to benefit a ‘section of the community’ and as such it is not always an appropriate vehicle for the communal nature of native title.

¹⁸ For a general discussion see for example, Strelein (2008) pp 6 - 64, Henry K, (2007), pp 1- 7 *Addressing Extreme Disadvantage Through Investment in Capability Development*, December 2007, Strelein, L & Tran, T. (2007) Senior Professional Officers Workshop: Taxation, Trusts and the Distribution of Benefits, Native Title Research Report No. 1/2007, Native Title Research Unit, AIATSIS, Canberra, Levin A, Discussion Paper August 2007, *Improvements to the tax and Legal environment for Aboriginal Community Organisations* and, Gunya Australia, www.gunya.com.au and *Open for Business: Developing Indigenous enterprises in Australia*. Additionally, the Australia’s Future Tax System Review Panel is currently conducting a review of Australia’s tax system (the Henry Review). The Henry Review may also produce options which have a bearing on taxation of native title payments.

¹⁹ See Strelein (2007), p 55

These complexities, weighed against the tax benefits of a charitable trust, raise significant questions as to their appropriateness for native title holders to manage benefits arising from agreements.

(ii) Tax incentives

The report of the Working Group favours changes to the taxation system in order for Indigenous economic development to be supported and sustained. It points to several unintended disincentives in the current taxation system that works against wealth accumulation for the benefit of future generations. For example tax deductibility, access to upfront capital expenditure or ongoing tax losses are recognised for certain essential expenditure such as capital works and research and development; however, no such recognition is given for expenditure on capacity building for Indigenous communities or organisations.²⁰ Existing taxation laws provide ‘deductible gift recipient’ status to certain kinds of organisations, in categories such as health, environment and education and whilst Indigenous entities may carry out similar roles to these organisations they do not attract the same tax status and consequential benefits.

In short, the argument is made for tax incentives for both investment in capacity building and Indigenous economic development. At a more general level the challenge is how tax incentives can be effectively utilised to achieve the desired end, as tax incentives have the risk of encouraging otherwise uneconomic investments and potentially diverting funds from more efficient areas of investment.

(iii) Tax exemptions

The Working Group proposed amendments to the *Income Tax Assessment Act 1997* to establish a specific category of tax exempt entities for use by Indigenous communities for the growth and development of their community.

A new corporate entity could potentially address a number of the complexities noted above. It could also be aimed at improving the governance of Indigenous organisations and the capacity of these organisations to support sustained investment and wealth creation. For example, such an entity could attract tax exemption if it were structured in a way that promoted strategies for long term accumulation of wealth and provided rules as to governance that ensured that the benefits accrued are for the long term benefit of the Indigenous community. Such an entity could be required to be registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

²⁰ See Levin (2007) p 2

This model could address a number of the concerns expressed about the effectiveness of tax incentives, if a regime could be established where tax incentives were available to mining companies who engage with and provide benefits to such corporate entities.

- **What would be a preferred model through which native title payments could be made for the benefit of the traditional owners and the Indigenous community?**
- **Are there non-tax related incentives that might achieve a similar outcome?**

3e. Statutory schemes

The options that are raised above are all intended to be, either functioning alone or operating in tandem, solutions for realising sustainable socio-economic development and wealth accumulation for traditional owners and their communities. They reflect the suggestions made by the Working Group in respect of how agreements should be structured, negotiated, managed and implemented in order to ensure that the benefits provided increase wealth and capital assets for Indigenous communities and create employment and educational opportunities.

What follows are options for legislative schemes which if developed and implemented, have the potential to address in a systemic way issues that impact on traditional owners and Indigenous communities ability to harness the wealth that flows through the Indigenous economic realm for their economic and social advantage.

There are various examples of Indigenous communities and traditional owners engaging effectively with the resources industry. The issues are raised, however, in recognition that these examples are the exception and the challenges of capacity, remoteness, health, education, and capital infrastructure, are beyond the response of an individual community. .

(i) Legislative guidelines and templates

A legislative scheme could be designed that prescribes a minimum level of statutory benefits to be provided under native title agreements, and could also provide ‘off the shelf’ agreement templates for parties to use in negotiations. The templates could include optional and mandatory clauses to enable tailoring to specific agreement requirements.

Such a scheme would have the benefit of providing for minimum rights that could not be easily reduced or contracted away. It could also lead to lower transaction costs, by reducing drafting requirements and enabling parties to focus on substantive issues such as implementation. A further benefit of such a scheme would be to provide benchmarks surrounding minimum and maximum payments so as to minimise

disputes regarding quantum and perhaps allowing parties to focus on the nature of non-financial benefits to be negotiated.²¹

Although a degree of flexibility could be built into templates, some agreements would necessarily fall outside the scope of any template. A legislative scheme providing minimum statutory benefits or template agreements may be appropriate for smaller and less complex agreements. This is because less complex agreements would be more easily covered by standard agreement clauses and would be more likely to utilise minimum or maximum financial entitlements.

(ii) A Regulatory model

There is a distinct regulatory role for Government contemplated by many of the options raised above. It could be a role for the Australian tax office supporting and monitoring compliance with the various suggested changes to the taxation system. Arguably, the human and financial resources available to some government entities with an Indigenous focus, such as Indigenous Business Australia and the Indigenous Land Corporation, could also be expected to play a role in supporting and monitoring the Indigenous business enterprises and capital expenditure options. The Office of the Registrar of Indigenous Corporations could have additional regulatory role in assisting corporations who hold and manage the benefits arising from agreements to run properly and abide by principles of sound governance.

Whether it is an existing agency or one created for the purpose, its function would be clear; to provide advice to and support for an entity to manage agreements in a manner that results in sustained benefits now and for the future. In so doing it could ensure that the standard provisions and template agreements mentioned above are considered and met. It could, amongst other things, register, monitor and disseminate information about agreements and do so on a regional basis through an advisory structure with a focus on intergenerational aspirations.

Such a model might be operational for a specified period to ensure that its objective is met. Its resources could be utilised for appropriate governance building focused on current and future capability, so that the next generation is able to take over the management necessary to sustain and develop the benefits from agreements.

This option is not without difficulties, the resourcing of it being the most obvious as well as the extent of its regulatory and compliance role.

²¹ This approach has received support from Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC) and iron ore producer Atlas Iron Limited. In a Media Release of 15 September 2008 they made the joint call for minimum levels of compensation in native title commercial agreements. See <http://www.yamatji.org.au/index.cfm?objectID=63B7317A-1372-5CE6-24CD73BB4F1D0A33> (accessed 19 Nov 2008)

- **How might such legislative schemes operate to deliver meaningful benefits to Indigenous communities?**
- **How are they likely to impact on the socio-economic status of Indigenous communities?**

4. Next Steps

This discussion paper builds on the report of the Working Group and discusses a number of options intended to ensure that the benefits accruing to Indigenous peoples under native title agreements contribute to addressing the economic and social disadvantage facing the Indigenous community and are delivered to current and future generations. Its purpose is to generate ideas, stimulate discussion and seek your input on the way forward.

You may wish to consider the questions above when providing your comments.

Please provide comments by **13 February 2009**

There are two ways that you can do this:

Email

nativetitle@fahcsia.gov.au

Mail

Branch Manager
Portfolio Governance Branch
Department of Families, Housing, Community Services and Indigenous Affairs
Box 7576 Canberra Business Centre ACT 2610

The Australian Government will not be responding to individual submissions. However the government will acknowledge receipt of your submission and will refer to the submissions received to inform its Indigenous Economic Development Strategy.