

# NATIVE TITLE PAYMENTS WORKING GROUP

## REPORT

### **Aim**

To recommend to the Australian Government leading policy and practice to optimise financial and non-financial benefits from resource agreements to enable traditional owners and members of the wider Indigenous community to create wealth (in the broadest sense, encompassing positive health, educational, employment and economic development opportunities as well as social, cultural and spiritual well-being) for this and future generations.

### **Background**

The resources industry presents a significant opportunity and challenge for Aboriginal people and Torres Strait Islanders who have or may have native title or other interests in land and waters<sup>1</sup> to enter into agreements with industry that will provide to Aboriginal people and Torres Strait Islanders a range of socio-economic benefits with a positive intergenerational impact<sup>2</sup>.

To this end the Australian Government has enlisted the expertise of a working group with members from the Indigenous community, academia, the mining industry and the legal profession. A list of members is at [Appendix 1](#).

The terms of reference for the group (at [Appendix 2](#)) include consideration of the following:

- the types of benefits to be provided;
- the manner in which benefits should be provided;
- the manner in which benefits should be administered; and
- the potential for the use of template agreements and specified principles to guide the making and implementation of agreements<sup>3</sup>.

There was general agreement in the Working Group that it was inappropriate to mandate legislatively how benefits under agreements should be provided and applied. The National Native Title Council (NNTC) said in its recent submission to the Attorney-General “it is imperative that native title holders’ right to take responsibility for themselves and to make decisions that affect their own lives be enhanced and

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<sup>1</sup> Native title claimants and holders of native title are, for ease of reference, referred to as ‘traditional owners’ in this paper

<sup>2</sup> This paper does not seek to address agreement-making in areas where native title is unlikely to provide significant long-term economic benefits. While important work has been and is being done on this, particularly in Victoria, such work is outside the terms of reference of this working group

<sup>3</sup> A copy of the Terms of Reference is at Appendix 1 to this Report

maintained”.<sup>4</sup> Or as one of the Working Group members put it: ‘You teach people nothing if you stick it in the legislation’. There are also legal and equity issues in singling out Indigenous people for a legal regime which does not place similar constraints on non-Indigenous people.

It needs to be noted that not all Indigenous land comes within the ambit of the Group’s consideration. Not all Indigenous land has the natural resources or potential resource, development or related infrastructure projects to generate sufficient financial and other outcomes to provide substantial long-term intergenerational benefits.

The following observations reflect the discussions of the Group and draw on material members have cited. They identify the barriers to effective implementation of agreements, the settings needed for sustainable agreements, draw lessons from existing examples and make recommendations for the future.

### **Constraints on maximising benefits from agreements**

There are many obstacles in the way of successful agreements:

- there are *only a limited number of good agreements* to provide models
  - Working Group members estimated that while hundreds of agreements exist between traditional owners and industry, there are only around one dozen agreements that provide substantial benefits to Aboriginal people and Torres Strait Islanders and exhibit principles embodying best practice in agreement making. The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the *Native Title Act 1993* (NTA) is, in itself, deserving of inquiry.
- there is a *lack of available data about the terms of many native title agreements*.
  - This is because of unnecessarily broad confidentiality provisions in agreements. This means that instead of being able to consider appropriate clauses from existing agreements, new agreements are often drafted from scratch. This involves unnecessary expenditure and does not take advantage of best practice. In many cases there is no need for the totality of an agreement to be confidential. While information that is genuinely commercially or culturally sensitive should be protected, much of the structural and technical content of agreements could be made public, assisting future drafters and enabling greater transparency and accountability. It would also reduce costs for model clauses, based on best practice, to be made available.
- there is a *lack of capacity in the native title system* to support traditional owners, particularly at the negotiation stage
  - The foundational principle in any significant future act negotiation should be that the traditional owners should have available to them advice and

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<sup>4</sup> National Native Title Council, *NNTC policy position on native title: submission to the Attorney-General*, 11 July 2008, p3

representation of a similar quality as the mining company or other proponent. In other words there should be a *level playing field*.

- It needs to be acknowledged that the native title environment is often factually, politically and technically complex.
- *Native Title Representative Bodies (NTRBs*<sup>5</sup>*)* are not resourced sufficiently to access appropriate expertise, including legal and research expertise to *inter alia* identify the correct traditional owners to undertake negotiations; to make high-quality situation analyses; to develop and to execute suitable and effective negotiation strategies; and to develop the institutional framework necessary to ensure that agreements are managed properly and consistently for intergenerational benefit.
- There can be very large transaction costs in preparing properly for and negotiating complex agreements, particularly for major resource projects.
- Generally, the lack of resources for NTRBs and Prescribed Bodies Corporate (PBCs) means that traditional owners' interests are often compromised in negotiations. Commonly the traditional owners' interests are not adequately represented. In some cases the mining company or proponent is left with no practical choice other than to meet the costs of both parties in the negotiations.
- Adequate and secure funding is integral to successful and sustainable outcomes for all parties, and for future generations of traditional owners.
- Having regard to the financial implications of the *level playing field* principle, and to the reality of almost 15 years of operation of the NTA, it is reasonable to conclude that even if the Australian Government makes additional resources available to NTRBs, the Australian Government is unlikely ever to make *adequate* provision for the proper, professionally-supported preparation and execution of all significant future act negotiations.
- Therefore, mining companies' financial contributions to the costs of traditional owners' advice and representation in negotiations are likely to remain, at least, an important top-up to achieve the *level playing field*. In the prevailing circumstances it would be desirable to develop and circulate best-practice conditions attaching to negotiation funding provided by mining companies and other proponents, to ensure that it is applied for its intended purpose.
- there are still companies (and governments) which aim towards *minimal compliance with the "right to negotiate" and other future act provisions* and processes of the NTA. This is despite the mining industry generally being much

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<sup>5</sup> This term includes Native Title Service Providers, funded under S203FE of the *Native Title Act 1993* to provide the same services as NTRBs

more prepared and better equipped and resourced for negotiations with traditional owners than when the NTA commenced.

- the current mining boom means there are a number of recent entrants into the mining industry who had shown a *lack of understanding of Indigenous rights and cultures*, the legal processes under the NTA and the norms of native title processes and agreements.
- there is also a *lack of capacity of Indigenous organisations* and communities to implement agreements once made
  - This is because most agreements are silent as to implementation or provide minimal provisions, structures and resources to enable long term and effective implementation. Where agreements do provide substantive implementation provisions, there can in practice be insufficient priority or attention given by the parties to implementation issues over the longer term.
  - There is a view that, notwithstanding the significant capacity building initiatives funded by the Australian Government over the last three years, there are inadequate human and financial resources available to monitor and implement complex agreements. Native title parties, their agents and institutions, are not currently funded by the Australian Government for economic development activities, which constrains them in the implementation phase. It is also clear that members of PBCs need to achieve a level of financial literacy including an understanding of the role and responsibilities of trusts and the importance of corporate governance that is lacking in many cases.
  - As mentioned above (“*level playing field*”), the end-goal should be to ensure competent and effective advice, representation and other necessary support to traditional owners in native title future act negotiations and the implementation of agreements arising from such negotiations.
- parties are also hampered by a *systemic lack of government investment in core citizenship entitlements and normal government services in mining areas*
  - This is despite record taxation and royalty receipts to governments as a result of the expansion of resources development.
  - This has meant that benefits from agreements that could otherwise be applied to economic development have instead been directed to the provision of infrastructure and services that should be the responsibility of governments<sup>6</sup>.
- there are significant *limitations on the use of charitable trusts* as a vehicle for economic development
  - Indigenous trusts have to rely on charity status to be tax exempt. It was noted that tax concessions to encourage the accumulation of funds for the future of Aboriginal communities are not available (cf with superannuation funds). There is no *tax deductibility* for expenditure on capacity building and insufficient incentives for joint ventures between mining companies

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<sup>6</sup> Marcia Langton and Odette Mazel, “Poverty in the Midst of Plenty: Aboriginal people, the resource curse and Australia’s mining boom”, *Journal of Energy and Natural Resources*, vol 26 No 1 2008, p37

and indigenous corporations.<sup>7</sup> (There is further discussion of barriers in the taxation system later in this report). Indeed there are *legislative disincentives* to investment in Indigenous enterprises, such as s193X of the *Aboriginal and Torres Strait Islander Act 2005*, which allows the Office of Evaluation and Audit to investigate the activities of individuals or organisations who have derived benefit from Australian Government programs, either directly or indirectly. Potential joint venturers may be inhibited by this potential to have their affairs examined. Other examples of Australian Government legislative overreach in the management of traditional owners' business are contained in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

- there is a *lack of educated and skilled Indigenous workers* in remote areas. This imposes a significant training burden on industry where employment outcomes form part of the agreement (and it was agreed that the most useful agreements have a high employment component). The formation of Indigenous small business enterprises was also hampered by a general *reluctance of banks* to finance such enterprises.
- *government programs to encourage investment are not assisting agreement making*
  - Indigenous Business Australia (IBA) processes are unwieldy and overly prescriptive
  - Indigenous businesses find it difficult to access venture capital programs

### **Learning from existing agreements**

In Australia there are some significant agreements that provide some guidance for future agreements. O'Faircheallaigh presents the Western Cape Communities Co-existence Agreement finalised between Rio Tinto Aluminium (formerly Comalco) and traditional owner groups affected by Comalco's presence and operations (represented and assisted by Cape York Land Council) in March 2001 as having a good mix of short and long term benefits<sup>8</sup>. He argues that positive engagement by government (in this case through diversion of statutory royalty payments<sup>9</sup> and facilitating land transfers) results in a win for all parties – the company gets certainty for its mining operations, the Aboriginal people achieve financial and other benefits and the government advances its policy objectives in relation to the growth of resources investment.<sup>10</sup> It is an example of the commercial arrangements being underpinned by a positive working relationship.

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<sup>7</sup> Adam Levin, Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts, Discussion paper, ATNS workshop, 28 August 2007

<sup>8</sup> Ciaran O'Faircheallaigh, Creating Opportunities for Positive Engagement: Aboriginal People, Government and Resource Development in Australia," presented to the International Conference on Engaging Communities, Brisbane, 12-17 August 2005 pp15-17)

<sup>9</sup> Which would otherwise not have been payable for the benefit of traditional owners as the land the subject of Rio Tinto Aluminium's bauxite mining leases was not "Aboriginal land" under the *Aboriginal Land Act 1991* (Qld)

<sup>10</sup> Agreements, Treaties and Negotiated Settlements, <http://www.atns.net.au/agreement.asp?EntityID=453>

The Argyle Diamond Mine Agreement provides a relevant case study. Argyle Diamonds incorporated social, economic and environmental outcomes in its rehabilitation program, working with traditional owners to reintroduce plant species of cultural significance to the local people. Business and employment and training opportunities were provided in the related horticultural enterprise and in the mining operations.<sup>11</sup>

Rio Tinto was commended for its leading role in sustainable agreement making. The following features of its agreement-making were noted by the Working Group:

The management of direct financial benefits under Rio Tinto agreements is characterised by:

- Aboriginal control of the funds.
- Strong governance arrangements with multiple safety nets.
- Significant emphasis on training and capacity building of Aboriginal managers of funds.
- Payments to individuals absolutely minimised.
- Payments focussed on community development purposes.
- Intergenerational benefits are guaranteed.
- Accumulation of capital funds structured to provide income stream post mine life equal to or greater than payments made during mine life, in perpetuity.
- Allocation between charitable trust for tax effective accumulation and non charitable trust for effective governance for funds for immediate distribution.
- Allocation between community development purposes pre determined, according to community plan'.

Rio Tinto also made some suggestions about best practice in this area:

- The trust structure and purpose needs to be aligned with the objectives of the broader traditional owner group (i.e. structure follows purpose, not the other way around).
- Trust structure needs to have 'cultural fit', i.e., be representative of the broader group, with membership based around land connectedness, rather than non indigenous criteria or institutions.
- Independent trustees or directors are an effective way of bringing expertise into the trust management, as well as in built mentoring and support for traditional owner trustees.
- The decisions of the trust need to be transparent to the entire traditional owner group.
- There needs to be a mechanism where the entire traditional owner group regularly revisits its longer term objectives, and that the trust(s) is seen as an agent of those objectives, rather than a purpose of its own.
- During the life of the operation, there needs to be some link between the operation and the trust (observer status/access to the trust papers and audits) as Rio Tinto's reputation is linked to the performance of the trusts.

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<sup>11</sup> Australian Government, Department of Industry, Tourism and Resources, Working with Indigenous Communities, 2007

- Regional development, inclusive of all local Aboriginal people, can be accommodated within agreements and benefit streams centred on traditional owners.

### **Characteristics of good agreements**

The Working Group agreed that sustainable agreements:

- provide to the traditional owners financial benefits commensurate with the scale and impacts of the relevant mining or other operation the subject of the traditional owners' consent, and ensure that those financial benefits are applied, so far as possible, for the long-term benefit of the traditional owners concerned;
- support Indigenous business and employment, rather than just provide an income stream;
- cover a range of areas including environmental protection, and cultural heritage as well as making provision for mine failure, assignment or failure of the parties to meet their obligations;
- have an acceptable balance between the nature of the effect or impact to the traditional owner group's land and waters and the nature and extent of the benefits to be received;
- have trust structures appropriately aligned with the purposes of the agreement;
- are culturally appropriate; and
- involve regular review of the long-term objectives.

Ciaran O'Faircheallaigh examined what was required for successful implementation and cited the following factors<sup>12</sup>:

- resources;
- a specific structure whose primary purpose is implementation, aided by regular input from key decision-makers;
- regular reviews of progress, and adjustments where necessary;
- unambiguous and concrete goals, commitments and responsibilities while retaining flexibility;
- appropriate and credible measures to deal with failure by a party to fulfil its commitments; and
- support of key representatives who can provide ongoing leadership.

The NNTC also addressed this question, noting that there was a need for new structures and incentives with the following essential characteristics:

- they do not provide perverse incentives;
- they have sufficient flexibility for diverse outcomes;
- they maximise the benefits to meet intergenerational needs; and
- they do not substitute for the responsibilities of government<sup>13</sup>

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<sup>12</sup> Ciaran O'Faircheallaigh, Implementation: the forgotten dimension of agreement-making in Australia and Canada,' *Indigenous Law Bulletin*, vol 5(20) pp14-17

<sup>13</sup> National Native Title Council, *NNTC policy position on native title: submission to the Attorney-General*, 11 July 2008, p3

## **International experience**

There are also useful models from Canada, South Africa and New Zealand. It is useful to look at the experience in these comparable jurisdictions which have greater experience in agreement-making and have relevant legislative frameworks and established standards of rights and obligations for all parties.

In Canada, Impacts and Benefits Agreements, sometimes known as Access Agreements or Access and Benefit Agreements, are usually negotiated between a project proponent and local community leadership where a significant project is proposed for development on an Indigenous nation's traditional lands. Impacts and Benefits Agreements are formal, written agreements that help to manage the social, cultural and environmental impacts associated with a development and to secure economic benefits for local communities affected by that development. Unfortunately, there are not many of these agreements (less than 30) and the contents of most of them are confidential. However, a number are best practice in building wealth in the local indigenous community.

South Africa has legislated to address historic disadvantage and specifically to encourage industry to adopt social responsibilities.

The Black Empowerment Act (BEE) is concerned with increasing the levels of black ownership and with promoting skills development for sustainable development and general prosperity. The relevant Minister issues codes of good practice, with weighted indicators used to measure compliance, for example ownership, management control, skills development, socio-economic initiatives. A company's BEE status may govern the issue of licences or concessions, as well contracts with the State.

The South African *Mineral and Petroleum Resources Development Act* (MPRDA) recognises that government needs to promote local development and social advancement of communities affected by mining (not legislatively restricted to black communities). The Act requires the holders of mining rights to contribute to the socio-economic development of the communities in which they operate. Where land is held communally, the MPRDA provides for the preferential right to prospect or mine where a development plan is submitted showing that the community has the capacity and that any benefits will accrue to the community.

In New Zealand all agreements with government are publicly available, including details of benefits provided.

## **Securing intergenerational benefits from existing economic activity**

There is broad recognition among the Working Group that the current social and economic policy framework in Australia has failed to create sufficient progress towards economic independence for Indigenous people and is in need of a radical re-think.

Accordingly, the participants in the Working Group concur with the need for significant reforms to the existing legal and financial arrangements to improve the long-term investment prospects of financial benefits from agreements to ensure that intergenerational and sustainable benefits accrue to the communities through what is a significant investment of funds.

Key barriers in the existing taxation system to achieving this goal include that:

- while tax concessions designed to encourage long-term accumulation of funds currently exist (including superannuation, the Future Fund and a range of private foundations), similar concessions are not available to encourage the accumulation of funds for the sustainable future of Indigenous communities. The current tax policy of not allowing for tax effective accumulation of charitable trust funds restricts the usefulness of these trusts as vehicles for accumulating intergenerational wealth, particularly where benefits may continue to be provided over the life of a mine;
- there are other issues in relation to charitable trusts that would benefit from clarification, including the difficulties associated with identifying the ‘section of the public’ that stands to benefit from the charitable fund. A tension exists between, on the one hand, the negotiation by the native title claimant or holding group in relation to the effect on native title rights and interests by the grant of various mining tenements and approvals which give rise to a benefit to the claimant or holding group and the obligation of a charitable trust to provide funds for charitable purposes in respect of the public or a “section of the public”. Often what occurs under native title agreements is that the charitable trust is established for identified charitable objects but also by reference to a specified class of beneficiaries such that the same beneficiaries fall into both categories;
- there exists a need for greater guidance as to what constitutes a charitable purpose particularly as it concerns Indigenous economic development, community development and the preservation and enhancement of traditional law and custom;
- there is a lack of clarity about the proper characterisation of the tax treatment of the payments received under agreements. It is noted that there have been a number of private binding rulings issued concerning the capital nature of such payments. The outcome of the consideration of this question has major implications for the type of structures that may be used to receive benefits.
- confirmation is needed that, regardless of the characterisation of the payment in the hands of the recipient (ie the traditional owner financial benefit management structure), the payer of the payment (ie usually the mining company or proponent) obtains the necessary deduction
- while tax deductibility for upfront capital expenditure or ongoing tax losses is recognised for a range of essential investments, such as capital works and research and development, no such recognition is provided for expenditure on capacity building in Indigenous organisations, key to ensuring the necessary skill base and governance arrangements for the effective, long-term management of funds held; and
- while existing tax legislation recognises many worthwhile causes through specific categories of tax-exempt status that do not fit within the legal definition of

charities (such as conservation organisations), no such category exists for Indigenous trusts.

### **Facilitating the development of Indigenous enterprises**

It is clear that in many Indigenous communities there is currently not the level of economic activity required to provide sufficient employment opportunities for all Indigenous people, including the higher than average requirement for unskilled or semi-skilled roles and given lower average levels of education and training among Indigenous communities.

It is also clear that even with the most aggressive local Indigenous employment practices, mining companies will not alone be able to absorb the present level of Indigenous unemployment in remote Australia, let alone provide the labour market demand for emerging generations. Neither should it be assumed that all Indigenous people aspire to work in the mining industry.

A combination of mining employment opportunities, Indigenous participation in the supply chain and a vigorous local economy with a range of employment entry points and opportunities is required to address present and emerging unemployment trends.

In addition, little or no support has been given over time for the development of sustainable Indigenous enterprises in remote and regional communities given both the lack of fit with existing government programs and investment strategies and the lack of incentives for private sector investment in this area.

Key barriers in the existing taxation system and institutional arrangements to facilitate the development of Indigenous enterprises include that:

- while federal income tax exemptions (and state limited partnership regimes) exist to encourage venture capital investment in emerging businesses (the Venture Capital Limited Partnership and Early Stage Venture Capital Limited Partnership regimes), including a tax exemption for non-residents, no venture capital tax concessions exist to encourage Indigenous enterprise development or development of businesses in Indigenous communities;
- while a range of Government funded venture capital products and sectoral grants schemes and development funds exist (eg Small Business Incubator Program and Business Ready Program for Indigenous Tourism), the application guidelines for these funds are overly onerous and prescriptive, and their eligibility criteria is too narrow to support the diversity of Indigenous enterprise development necessary to facilitate the development of real economic opportunities for a significant number of Indigenous people and communities;
- the existing institutional and governance arrangements of IBA, particularly in relation to the Indigenous Business Assistance and Indigenous Equity and Investments are overly onerous, require emerging businesses to meet equivalent hurdles that are required by mainstream investment options such as banks, and have tended to favour investment in businesses that would be sustainable and economically viable even without investment by IBA and therefore do not add

significant value in facilitating the development of emerging Indigenous enterprises; and

- many of the application requirements for assistance under the strategic land acquisition and management activities of the Indigenous Land Corporation are overly onerous and do not facilitate effective capacity building for Indigenous businesses seeking to establish in this area, nor do they support the incubation and further development of Indigenous businesses which do not fit within narrow Program Guidelines.

### **Measures to address barriers in the taxation system and other financial arrangements**

Although the Working Group is firmly of the view that legislatively prescribing what use should be made of payments is not the immediate answer, it does support a number of other legislative changes. Levin has proposed amendments to taxation legislation to set up alternatives to charitable trusts by establishing a new category of tax-exempt or deductible gift recipient for the growth and development of specific Indigenous communities. Levin further proposes tax deductibility for specific capacity building and infrastructure expenditure and tax incentives for venture capitalists, with statutory minimum requirements for Indigenous shareholding.<sup>14</sup>

Joint ventures may be encouraged by limiting the capacity of the Office of Evaluation and Audit to publish the results of their examination of entities associated with Government-funded programs.

The Working Group proposes that there be a series of amendments to the existing taxation and financial arrangements in Australia to achieve better outcomes from the tax/social policy interface including in facilitating the development of Indigenous enterprises. These proposals focus on the federal income tax law (*Income Tax Assessment Act 1997* and *Income Tax Assessment Act 1936*) but similar amendments may also be desirable for State and Territory tax laws. Such amendments could include:

- allowing long term tax exempt accumulation of mining benefit agreement funds, with appropriate governance and auditing arrangements, to provide for the creation of an intergenerational capital base with which Aboriginal people can contribute to their own regional and economic development;
- amendment of Divisions 30 and 50 of the *Income Tax Assessment Act 1997* to establish a specific category of tax exempt deductible gift recipient entities for use by Indigenous communities for the growth and development of their specified community;
- full and immediate tax deductibility for expenditure incurred on specific capacity building and community infrastructure in indigenous communities, recognising that in many cases this is provided in situations where there is both an absence of government investment and significant market failure. These expenditures should

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<sup>14</sup> Adam Levin, Improvements to the Tax and Legal Environment for Aboriginal Community Organisations and Trusts, Discussion paper, ATNS workshop, 28 August 2007

be able to be deducted on a flow through basis against other sources of business income or profits of investors; and

- simplification of the eligibility of deductible gift recipient (DGR) status for income tax purposes to enable Indigenous organisations to establish economic independence and to expand their activities. This would include enabling organisations whose roles cover more than one DGR category (eg organisations which have a mixed cultural, environmental and capacity building focus) to be eligible for achieving DGR status; recognising that several Indigenous organizations may appear to have similar roles but will be independent entities and should therefore not be restricted from achieving DGR status on the basis that a similar organisation exists.
- granting flow through income tax treatment, coupled with exemption of income and capital gains for venture capital partners in Indigenous enterprise development where business have prescribed minimum levels of Indigenous ownership and targets for increasing equity arrangements over time;
- granting up front tax income tax concessions similar to the research and development tax deduction/credit for capital investment in Indigenous businesses or enterprise development in Indigenous communities;
- providing specific arrangements for government funded Indigenous enterprise development, including venture capital grants targeted at small family enterprises, application processes that are simplified and do not simply rule out Indigenous enterprises in undefined markets or products as higher risk and unsuitable for investment, and the provision of a specific Indigenous Enterprise Development Grants Program (akin to the existing Export Market Development Grants Program) that supports the promotion, marketing and growth of Indigenous enterprises following their establishment;
- reforming the focus and function of IBA such that their capacity building and investment strategies better facilitate the incubation and emergence of Indigenous businesses including: a reduction in the commercial viability hurdles required for the provision of support or assistance by IBA, enhanced provision of capacity building and other support measures, removal of the requirements to provide security in the form of assets of sufficient real value that can be sold to recover the full value of the loan in the case of default, removal of the loan application fee requirements, reductions in the credit report requirements and removal of the requirement to provide a financial return which is consistent with the relevant industry sector; and
- reforming the Indigenous Land Corporation to better facilitate Indigenous enterprise development, including a simplification of the application process, greater capacity building assistance for business incubation and development, and revision of the Program Guidelines that currently prescribe narrow parameters within which a business must demonstrate that it is sustainable over the long term and delivers quantifiable and sustainable benefits, specifically in employment and training, through land ownership.

## **Role of governments**

The Working Group considers that the role of government in agreement-making has at times been counter-productive to better outcomes for Indigenous peoples. A core role of government is nation-building and this has not been well-managed in regional and remote areas. Amongst the limited number of good agreements, State and Territory Governments have more often than not played a supporting role to that of the resource company or proponent. There are cases of governments waiting for resources companies to negotiate agreements and provide certain levels of infrastructure. Only at a later stage have they become involved in meeting normal government obligations in relation to the provision of utilities.

There are opportunities for governments to exemplify good practice in agreement-making. They can develop the pool of potential employees through employment and training initiatives, and leverage procurement processes to encourage Indigenous enterprise, thus promoting sustainable improvements in socio-economic outcomes.

Governments need to build confidence about their participation in negotiations involving major resource projects by playing a constructive role within an incentive framework. Currently, resources companies would prefer that governments were not involved, at least in the early stages of negotiations.

## **Content of future agreements**

In the interests of continuous improvement, there are a number of issues that should be addressed in agreements. The Working Group considers that key stakeholders (the Minerals Council of Australia, the National Native Title Council, and State and Territory governments) should collaborate on developing guidance for all parties on the negotiation, content and implementation of agreements.

The guidance on content could include leading practice examples and the use of template agreements and generic clauses. The Working Group supports the judicious use of model agreements in appropriate circumstances. The Working Group also supports transparency through non-confidential agreement terms and conditions being publicly available through a repository of agreements. Access to a range of real agreements could be more helpful than putting resources into developing templates which may not suit all circumstances. To be most helpful, a range of templates would be required – eg variations for big, small and medium agreements, variations between industry sectors etc. It must be stressed however that any agreement precedent or template is still susceptible to misapplication in inexperienced hands.

The Working Group also considered:

- the types of benefits to be provided
  - what should the balance be among immediate and long-term benefits, and cash (if any) and other (eg infrastructure, education and training, employment, economic development)

- the manner in which benefits should be provided
  - benefits may be in a variety of forms including direct employment, opportunities for Indigenous businesses and support for education. The last of these should in no way replace or be in substitution for the services or benefits normally provided to the community by government
  
- the manner in which benefits should be administered
  - one difficulty the Working Group noted was the lack of flexibility caused by having relevant provisions of such agreements needing to be incorporated into Indigenous Land Use Agreements (ILUAs) under the NTA. The Working Group supported a move to drawing up outline agreements that could be registered formally through the ILUA processes, but to move all the reviewable provisions of the agreement to associated management plans or agreements which (although having obligations which would be contractually enforceable by the parties) would then be implemented in a manner to provide scope for greater flexibility, review and amendment
  - there is a need to take into account the communal decision-making processes and the rights and interests of the traditional owners

## Recommendations to the Australian Government

In summary, the Working Group recommends that:

- 1 In many cases there is no need for the totality of an agreement to be confidential. While information that is genuinely commercially or culturally sensitive should be protected, much of the structural and technical content of agreements could be made public, assisting future drafters and enabling greater transparency and accountability.
- 2 Agreements (or examples of best practice agreement provisions) should be able to be accessed from a central database or repository.
- 3 Traditional owners should have available to them the means reasonably necessary to assist them in negotiating and implementing agreements. NTRBs and PBCs should be better resourced to assist traditional owners, including at the implementation stage of agreements.
- 4 The Minerals Council of Australia, NNTC and the Australian and State and Territory Governments should produce guidance materials on the negotiation, content and implementation of agreements. Specifically, the guidance should:
  - a) highlight leading practice approaches for all parties in the agreement making process;
  - b) identify the characteristics of good agreements; and
  - c) provide guidance on generic clauses that should be a feature of such agreements.
- 5 The Australian, State and Territory Governments should invest in developing a pool of work-ready Indigenous Australians who can be employed in the mining and associated industries.
- 6 Consideration should be given to favourable tax treatment for model trust deeds that have an intergenerational benefit for Indigenous communities.
- 7 Immediate priority should be given to changes to the current tax policy of not allowing for tax effective accumulation of charitable trust funds.
- 8 Consideration should be given to adopting a new model of Indigenous corporation that provides tax and other incentives for agreement making with Indigenous communities that promotes long-term benefits.
- 9 Section 193X of the *Aboriginal and Torres Strait Islander Act 2005* should be amended to ensure the activities of the Office of Evaluation and Audit do not act as a disincentive to joint ventures with Indigenous corporations.
- 10 Consideration should be given to the provision of full and immediate tax deductibility (on a flow through basis) for expenditure incurred on

specific capacity building in Indigenous organisations, key to ensuring the necessary skill base and governance arrangements for the effective long-term management of funds held.

- 11 Consideration should be given to the provision of full and immediate tax deductibility (on a flow through basis) for expenditure on the establishment of community infrastructure, recognising that industry investment is undertaken in an absence of government investment and where there is significant market failure. Such an approach would recognise that this is essential expenditure, akin to capital works and R&D.
- 12 Consideration should be given to the provision of flow through tax treatment coupled with tax exempt income and capital gains for venture capital partners in Indigenous enterprise development, subject to the enterprise meeting minimum Indigenous ownership and equity arrangements.

**Membership of the Working Group**

Gina Castelain	Director Wik Projects
Chris Cottier	Title Manager, Iron Ore BHP Billiton
James Fitzgerald	Partner Chalk and Fitzgerald Lawyers
Bill Hart	[formerly] General Manager, Communities Rio Tinto Ltd
Philip Hunter	Partner HWL Ebsworth Lawyers
Glen Kelly	Chief Executive Officer South West Aboriginal Land and Sea Council
Prof Marcia Langton	Foundation Chair of Australian Indigenous Studies University of Melbourne
David Ross	Director Central Land Council
Melanie Stutsel	Director, Environmental and Social Policy Minerals Council of Australia
Brian Wyatt	Chair National Native Title Council

**Terms of Reference Informal Group on Native Title**

The intention is that the group should meet two or three times to develop tangible suggestions for ensuring that the benefits accruing to Indigenous interests under native title agreements contribute to addressing the economic and social disadvantage facing the Indigenous community and are delivered to current and future generations.

In particular, the group should consider

- i. the type of benefits to be provided;
- ii. the manner in which benefits should be provided;
- iii. the manner in which benefits should be administered; and
- iv. the potential for use of template agreements and specified principles to guide the making and implementation of agreements.