Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) response to:

The joint Attorney-General and Minister for Families, Housing Community Services and Indigenous Affairs' Discussion Paper, 'Leading practice agreements: Maximising outcomes from native title benefit', July 2010.

Introduction

This submission is made by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in response to the discussion paper, *Leading practice agreements: Maximising outcomes from native title benefits* (the Discussion Paper) produced by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Attorney-General's Department (AGD).

Underlying Principles
AIATSIS welcomes the Government's commitment to improving the mechanisms of the native title process to improve outcomes for Aboriginal and Torres Strait Islander peoples. The Government's deliberations on reform should be underpinned by principles that empower Aboriginal and Torres Strait Islander peoples, and native title holders/claimants specifically, to exercise greater control over their own lives and to determine their economic and cultural development. Native title reform should be consistent with and improve compliance with Australia's international obligations under the *Declaration on the Rights of Indigenous Peoples.*

Evidence based policy
The Discussion Paper is wide ranging with some specific and some general proposals and is presented in the context of a number of consultation processes, which again cover a broad array of issues with some specific and broad issues being canvassed. It will not be possible to comment substantially on all of the complex issues touched on by the Discussion Paper. However, AIATSIS research and activities are directly relevant to a number of aspects of the Discussion Paper. In particular we have conducted research over many years on native title agreement making and taxation and corporate design, as well as communication and decision-making processes within native title groups and corporations.

The Discussion Paper does not clearly articulate evidence of systemic mismanagement of native title benefits and payments. Rather there appears to be a perceived need for greater support for native title groups in making good agreements and decisions, which, wherever possible, provide intergenerational benefit. The majority of ILUAs are small scale and involve only small amounts of money, though it is recognised that they are highly significant to local signatories. The Native Title Payments Working Group convened by the Government identified only a handful of agreements that provided substantial benefits. And, of those, only perhaps twelve agreements could be said to be 'good' or model agreements.[1]

[1] *Native Title Payments Working Group Report*. Accessed 30 November 2010 at http://www.google.com.au/search?q=Native+Title+Payments+Working+Group+Report&rls=com.micr

Government policy must address the experience of both the minority of native title corporations who have received substantial benefits from development agreements, and in particular from mining agreements together with the majority of native title groups, Registered Native Title Bodies Corporate (RNTBCs) and other native title corporations, who have not received significant benefit from native title agreement-making. Moreover, proposed measures must be appropriate to the scale of the problem, based on the evidence, and not unnecessarily undermine the importance of native title groups managing their own affairs. Nevertheless there is undoubtedly benefit to native title groups from better access to information about how to make good agreements and better access to resources to improve implementation of agreements and sustainability of benefits, including effective communication and dispute resolution.

The unique nature of native title often challenges the public/private divide. Primarily, native title has been treated under Australia law as private property, not a sovereign jurisdiction. In any case, financial benefits from native title agreements are not public funds over which governments can assert undue control. Any government action in this area must be cognisant of issues of equity and discrimination in the treatment of native title land and the private funds of Aboriginal and Torres Strait Islander peoples.

A. Governance measures

The Discussion Paper proposes several governance measures:

1. incorporation of entities that receive native title payments;
2. independent directors on the Board of entities that receive native title payments;
3. adopting enhanced 'democratic controls' to improve transparency and accountability to native title beneficiaries; and
4. linking such measures to beneficial tax treatment.

The Discussion Paper notes that many of these governance features are relatively common and are recommended practice by ASIC. The *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (CATSI Act) includes significant accountability and transparency measures for Directors of Corporations, and has a significant emphasis on compliance, as does the governance training conducted by the Office of the Register of Indigenous Corporations (ORIC). There are also legal remedies available to individual members of a native title group and corporation members as well as beneficiaries under trust law.

There is no rationale for making additional measures compulsory for Indigenous entities in a racially discriminatory manner. Nor is there a rationale for denying access to all generally available legal forms (including unincorporated trusts). Rather, the government should invest in existing organisations and mechanisms to allow them to improve their own practice. The sector has shown a willingness to adopt best practice, for example in the separation of commercial activities from native title holding bodies.

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Keys to sustainable outcomes – investing in process

Given Australia's history of depriving Aboriginal and Torres Strait Islander peoples of their economic freedom and their land and resources, and given the particular power imbalances inherent in the native title process, Governments have a role to play in ensuring a level playing field in native title agreement-making, and in particular by funding agreement making that involves skilled and appropriate third party community facilitation processes that build good governance for the future.

Consistent with the principles of free prior and informed consent, research has shown that sustainable outcomes with intergenerational benefits can only be achieved through processes that ensure that native title holders and other land owners are involved, informed, and own the outcomes that are negotiated.[2] That is, the nature of the negotiating process itself will have a major bearing on maximising outcomes from native title benefits, including any implementation measures.

Research has also demonstrated that agreements reached with the support of native title representative bodies and service providers (NTRBs) provide much greater and more sustainable benefits.[3] This relationship reflects the importance of good advice and negotiating experience.

Learning from mistakes

Issues around transparency and accountability are critical governance issues that require significant on-ground community facilitation, communication and education. Government investment that improves access to good advice and good information in order to assist decision making should be encouraged. In particular, investments should be made at the front end of the agreement making process, and in the organisational capacity of native title groups to sustain their agreements and benefits while avoiding paternal regimes that increase the compliance costs. Promoting the development of good decision-making may require the acceptance of some level of failure. Part of learning to make good decisions is learning from mistakes.[4]

Independent Directors

Independent directors should not be mandated. Native title groups face difficult decisions in designing their corporations in trying to balance culturally appropriate governance and decision-making processes that are also commercially/corporately

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[2] Between 2003 and 2006 AIATSIS ran the Indigenous Facilitation and Mediation Project funded by FaHCSIA. Many of its findings and recommendations regarding native title decision-making and dispute management remain relevant to this inquiry, though have not been implemented. See T. Bauman, 2006, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Indigenous Facilitation and Mediation Project. Report No. 6. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

[3] C. **O'**Faircheallaigh**,** 2007, 'Unreasonable and Extraordinary Constraints: Native Title, Markets and the Real Economy', *Australian Indigenous Law Review*, 11, 18-42; C. O'Faircheallaigh & T. Corbett, 2005, *Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements*, Department of Politics and Public Policy, Griffith University, Brisbane; C. O'Faircheallaigh, 2007, 'Native Title and Mining Negotiations A Seat at the table, But No Guarantee of Success', *Indigenous Law Bulletin*, March- April, Vol 6, Issue 26 p 18.

[4] S. Cornell, 2008, *Cornell Lecture* to the National Press Club, 11 September 2008, Lecture One, Reconciliation Australia's Closing the Gap Conversations Series, Canberra. Accessed 30 November 2010, http://www.reconciliation.org.au/home/get-involved/events/closing-the-gap/dr-stephen-cornell

robust. Culturally appropriate decision making and governance arrangements may not accommodate independent directorships. However, evidence suggests that some corporations have adopted independent Directors, informed by best practice. Others have instead adopted creative options such as advisory bodies or paid consultancy advice to fulfil this role. This may include establishing an independent commercial entity that is related to the RNTBC but includes professional independent directors. Independent directors lose their effectiveness when they are mandated and are not welcomed by the members. It should be noted that mandating independent directors would impose a fixed cost on native title corporations that may not have the funds to meet this requirement or to provide equity in payments to other board members.

Communication and transparency

There is a recognised constraint on native title bodies that are under-funded and unable to meet the most basic compliance requirements (Registered Native Title Bodies Corporate in particular). As a result, most RNTBCs and native title groups do not have the capacity to:

- Ensure implementation, monitor compliance and secure benefits contained in agreements;
- Communicate and work effectively with members and native title holders to arrive at sustainable outcomes.

There is a strong argument for increased funding and resources for NTRBs and RNTBCs to provide a basic level of corporate capacity to undertake these functions.

Tax treatment

The proposal in the Discussion Paper to link governance measures to tax treatment is ill-conceived. It would create greater complexity and diversity rather than certainty and simplicity and is thus anathema to good tax policy design.

The current proposals to address the tax treatment of native title are based on a conceptual difficulty in determining the appropriate tax treatment of native title payments and the imperative to avoid uncertainty and potential for litigation.[5] To make 'beneficial' tax treatment dependent on some qualifying criteria would undermine the primary purpose of clarifying the tax treatment. In any event, native title groups could successfully argue in the courts that the payments are tax exempt under the general law and as such there is no 'incentive'. As a result the proposal would become conceptual nonsense in this particular circumstance.

The government should quarantine the tax reform proposals from agreement governance and compliance matters.

[5] L. Strelein, 2008, 'Taxation of Native Title', *Research Monograph* 1/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

B. Improving governance and native title agreements

The Discussion Paper proposes a new independent body to register, review and assess native title agreements. The rationale for the new body is to support parties to maximise positive outcomes.

There is a clear intent in the Discussion Paper to improve outcomes from agreement making for native title groups specifically, not necessarily improving the system or outcomes for non native title parties. There is therefore a policy rationale for investing in the NTRB/RNTBC sector to carry out the functions identified in the Discussion Paper. AIATSIS has conducted a successful pilot project to establish a database of agreement precedents for use by NTRBs. The resource has no guaranteed funding into the future but its utility has been acknowledged and potential exists for the development of resources, practice commentary and research on the agreements included on the database.

The agreements precedents database is an example of effective sector self-regulation. The process is intensive and requires active engagement from NTRBs in identifying clauses and agreements of precedential value and managing the confidentiality concerns. AIATSIS would recommend further investment in this resource to meet the needs identified in the Discussion Paper.

There are a number of concerns about the capacity of the proposal as presented in the Discussion Paper to address the issues identified. This will be discussed in some detail below. In summary, however, the following points are worth highlighting:

- Regulating the content of native title agreements may give rise to minimum compliance approach by causing a 'rush to the bottom', if generic standards are established. A precedent for this exists in the case of the Fair Work Australia tribunal set up in 2009 to assess enterprise agreements against specified standards (s.193 *Fair Work Act 2009* (Cth)).
- It is not clear how the proposed review body could cause parties to change the terms of an agreement, where the terms of the agreement are of a low standard, given the review body has no direct or indirect powers of compulsion.
- The key term 'benefits' is insufficiently defined. 'Financial benefits' alone form a broad category including compensation, benefit sharing, and commercial components. Incorporating non-financial benefits would extend the scope of the proposal dramatically. In either case a proportion of the 'benefits' the proposal seeks to regulate are not native title related. The extent of this proportion is not clear due to the definitional imprecision.
- Analysis of the available empirical data suggests the number of agreements subject to registration by the proposed regulatory body is very low.

B.1 Review Function

i) Overview

Maximising outcomes from native title 'benefits' encompasses a hierarchy of processes:

1. Maximising the effectiveness of the legislative framework regulating the rights and interests of parties coming to agreement (the Future Acts framework);
2. Maximising the quality of agreements reached within that framework (including benefits provisions, where they exist); and
3. Maximising the implementation, distribution and (where required) enforcement of any resultant benefits.

The Discussion Paper proposes that additional regulatory requirements be imposed at the third tier of the above hierarchy. To the extent that the following practical and procedural considerations apply, AIATSIS does not support the proposal.

The term 'benefit' is not defined in the Discussion Paper. The practical implications of the proposal hinge on the definition of this term; definitional clarity is therefore important. Although stating that the proposed review function would apply to both 'financial and non-financial benefits', all of the reasons cited for the need to regulate relate to risks around the management and use of financial benefits. The focus on financial benefits is a theme throughout the Discussion Paper.

If 'benefits' in this context can be taken to mean financial benefits, such a limitation in scope still includes several distinct elements in the context. These include compensation for impairment of native title rights, profit sharing, and various commercial incentives (including, for example, in relation to efficiency or certainty). Only the first of these has a direct nexus with native title. It seems however the Discussion Paper has not differentiated between these forms of financial benefit and, as such, it is proposing to regulate both native title and non-native title benefits.

On the other hand, if 'benefits' were not limited to financial benefits, then the ambit of the proposal would increase dramatically. Theoretically, the single most significant non-financial benefit in this context would be the right to say 'no' to a proposed development, through the implementation of an unqualified right to free, prior and informed consent.

ii) Functions

There are several practical issues with the proposed functions of the review body.

Given the non-binding nature of the decisions made by the proposed review body, it appears its primary function would be to gather information. It does not appear the review body would have any power to cause the provisions of an agreement to be altered to comply with 'leading practice', save where parties were in complete agreement – in which case the review function would be largely superfluous.

AIATSIS is of the view that there may be a conflict of objectives where the review body has the power to advise 'relevant Ministers' of unspecified matters, if the contents of agreements are to be kept confidential.

It is not clear how the regulatory body, presumably established by Commonwealth statute, will be able to take a consistent approach when assessing agreements against leading practice principles, when those agreements arise within a decentralised regulatory and policy context. For example, a leading practice exploration agreement arising in a state in which the expedited procedure is not asserted as a matter of policy, will be very different from such an agreement arising in a state in which the expedited procedure is asserted as a matter of course.

If the register of agreements is kept confidential, parties will not be in a position to draw on the information contained in the register of their own volition. From a knowledge management perspective, the value of this register to parties would therefore be limited, as parties would be subject to the discretion of the review body. This can be contrasted with the extant AIATSIS Agreements Precedents database – a fully searchable online resource accessible to all NTRBs, containing legal precedents and related information contributed by NTRBs themselves.

On the other hand, to be in a position to provide accurate advice or relevant assistance to parties in a given instance, the review body would require a level of contextual information not available from the agreement in question on its face.

AIATSIS agrees that there would be significant value in increasing the level of information available on trends and issues in future act agreement making. AIATSIS is of the view that such information should be gathered in a manner that does not increase the regulatory burden on parties to native title agreements.

iii) Establishing the body

It is likely that the volume of agreements being processed by the proposed body, if established, would be low (see following point). This would need to be taken into account in the design of any such body.

iv) Agreements subject to registration

The Discussion Paper identifies development-related future act agreements as the subject of the proposed regulatory measures. It does not, however, specify whether all or only certain categories of future act agreements would be captured.

The vast majority of development related future act agreements arise in relation to mineral resource projects. Analysis of the data produced by the various state government departments responsible for mineral tenement applications shows that in 2009 a total of 2,660 exploration and mining tenements were granted Australia-wide. Of these, 2,224 were exploration tenements. In the context of native title agreement making, exploration agreements do not generally involve the provision of benefits – financial or otherwise – to the relevant Indigenous group. It is therefore presumed that this category of agreement would not fall within the purview of the proposed regulatory body. Instead it is agreements relating to the grant of mining tenements that

would make up the bulk of the proposed review body's work. In 2009, 436 mining tenements were granted nationally, of which 278 or almost two thirds were granted in Western Australia.

These figures are important for two reasons. First, they indicate that the great bulk of high-level future act agreement making is clustered in specific regions. The implications of this for the proposed review body are that its workload would naturally be biased toward those regions. This – along with the fact that the Northern Territory, South Australia, Victoria and New South Wales have alternatives to the future act regime in place – indicates that the proposed review body would in fact have either diminished functions or no function at all in the majority of the country.

Further, of the 436 mining tenements granted in 2009, a proportion would not coincide with native title land and of those that did, only a small percentage would involve a level of 'benefits' sufficient for regulatory scrutiny. While there are no material statistics to draw on in this context, it can reasonably be asserted that the proposed body would have a very low workload. Anecdotal evidence suggests that the figure may be as low as 50 relevant agreements per annum nationally, and this, during a period of high activity in the mineral resources sector.

Another issue is that parties may seek to enter into 'side deals' to avoid any new regulatory obligations, as they have done in relation to Indigenous Land Use Agreements. It is not clear to what extent this could be managed or avoided.

v) Review against leading practice principles

As with the term 'benefits', there are definitional questions around the term 'leading practice' – particularly where specific standards are to be established. AIATSIS' primary concern is that establishing a generic set of leading practice standards could have a perverse effect by causing a 'rush to the bottom'. That is, development proponents may take a minimum compliance approach instead of engaging with Indigenous groups on a case-by-case basis, where standards are imposed. A precedent for such a 'rush to the bottom' exists in the case of the Fair Work Australia (FWA) tribunal set up in 2009 to assess enterprise agreements against legislated standards (s.193 *Fair Work Act 2009* (Cth)). Paradoxically, the establishment of standards and model clauses in the FWA legislation was criticised as resulting in inflexibility and settling for the minimum standard.[6]

The potential for the same to occur in the present context is particularly problematic given the significant variance in agreement-making environments around the country: leading practice in one area may constitute poor practice in another. This reflects the fact that leading practice by definition requires something more than mere compliance with standard requirements.

In addition, and as mentioned above, the review function would be largely superfluous in the absence of coercive power (save for its information gathering role).

[6] Australian Mines and Metals Association 'Individual Flexibility Arrangements (under the Fair Work Act 2009): The Great Illusion' (research paper, 2010) at: http://www.amma.org.au/home/publications/AMMA_Paper_IFAs.pdf.

The relationship between any proposed review body and the National Native Title Tribunal in registering and documenting agreements would also have to be clarified. It is unclear why the role of the NNTT could not be expanded to account for the contents of agreements rather than establishing a new regulatory body.

Assessing agreements against leading practice principles runs the risk of considering only the content of agreements and not the contextual and negotiation processes by which they were arrived at. These processes have a major impact on outcomes.

Effectively evaluating negotiation processes requires substantial participatory evaluation processes to establish:

- whether free prior and informed consent was arrived at;
- the impact of the relative skills of negotiators;
- the relative resources which parties bring to the table; and
- the power plays both within and across groups which can have a major impact on outcomes.

B.2 Leading practice agreements toolkit

AIATSIS is of the view that there is a clear need to rationalise and where possible centralise the resources relating to native title agreement making. The diversity of these resources, however, reflects the decentralised and rapidly evolving regulatory and policy context in which native title agreement making occurs.

AIATSIS has recently been involved in scoping a native title negotiation toolkit and suggests that similar issues will arise in the scoping of any leading practice agreements toolkit.[7] Investigations have shown that clarification of the audience is critical as is the type of information required. There is a demand for three classes of information: practical capacity building tools (eg, facilitation exercises, training, power points, for use with native title holders in building negotiation capacity); sets of practice principles (eg, legal principles and templates) and substantive information (eg, identification of human resources and the content of agreements).

Within these categories, NTRBs, native title holders, lawyers, developers, governments and other parties also have significantly different requirements. These relate to the three components of agreements-making: context; process (both as legal procedural process and engagement and communication processes at local, state and national levels, within and across native title groups, governments and developers); and substantive content.

A toolkit, depending on its content, might have limited utility since each agreement is context specific and must match local circumstances and seek the best fit with local actors and factors. No two agreement-making scenarios will be identical. Similarly, legal procedural issues and frameworks are also context dependent and a toolkit would require frequent updating to keep abreast of regulatory and policy developments including within State and Territory jurisdictions.

[7] For a comparative Canadian toolkit, see G. Gibson and C' O'faircheallaigh, 2010, *IBA Toolkit, Negotiation and Implementation of Impact and Benefit Agreements*, Gordon Foundation, Canada.

In developing any tool kit, care must also be taken not to duplicate existing research materials[8] and initiatives such as the AIATSIS Legal Precedents Database. Rather, AIATSIS suggests that a review of existing materials could be useful and that the expansion of the Database should be supported.

Any leading practice toolkit initiative should thus not proceed without considerable scoping which addresses the following questions:

- Who is the audience?
- Is the tool kit intended to address only native title agreement-making substantive content? Or is it also to address changing contexts, jurisdictional variations, and best practice process - ideally not only legal procedural issues but also engagement and specialised communication processes?
- Does the tool kit produce practical tools?
- What research material already exists and can this be collated into a useful form?
- How could the AIATSIS Legal Precedents Data Base be built upon and supported?

There is an urgent need to develop a community of agreement-making practice and AIATSIS would be pleased to be involved in any scoping activities.

C. Future acts reforms

Disputes amongst Indigenous people over the distribution of benefits, overlapping claims and group membership, are a major issue in Future Act negotiations, consuming the time and resources of NTRBs and depleting agreement benefits. They are a significant cause of delays in the native title system, and raise complex issues of individual and communal rights. There are further implications when beneficiaries identified in Future Act and other agreement-making processes are not congruent with subsequent Federal Court native title consent determinations, and when matters are listed for trial because of disputes, but allow little or no time to address the disputes effectively.

AIATSIS's research on Indigenous dispute management indicates the urgent demand for a national Indigenous dispute resolution service - as does the subsequent Federal Court and National Alternative Dispute Resolution Advisory Committee's case study report, 'Solid work you mob are doing' - but no funds have been forthcoming.[9] A funding submission to the Commonwealth Department of Attorney-General prepared by the Right People for Country Project, an initiative of the Victorian Native Title Settlement Framework, with assistance from AIATSIS, was turned down. This submission aimed to pilot the establishment of a panel of Indigenous community facilitators and mediators to work in land related issues in Victoria. It was also aimed at developing some fundamental requirements for a national dispute management

[8] See for example, D. Everard, 2009, 'Scoping Process Issues in Negotiating Native title Agreements', *AIATSIS Research Discussion Paper*, No. 23, AIATSIS, Canberra.

[9] Bauman, T. and J. Pope, 2008**,** *'Solid Work you Mob are Doing': Case studies in Indigenous dispute resolution and conflict management.* Federal Court of Australia, Melbourne.

service including the development of national standards, monitoring and evaluation procedures, and accredited training. Victoria's Department of Justice is now working on implementing a scaled down version of this proposal with two pilots to commence in 2011 but requires resources to make this project effective.

Where disputes appear to be intractable, there are various third party arbitration contingencies that might be negotiated at the outset of any agreement making process in the event of parties being unable to reach agreement or make a decision. Subject to the agreement of the parties, such contingencies might involve arbitration by a group of regional elders, the NNTT, or Land Councils, or, as Alison Vivian has suggested, a specifically dedicated Tribunal to deal with Indigenous land disputes.[10] Such a Tribunal could be a significant aspect of any national dispute management service and offer conciliation and arbitration services.

[10] A. Vivian, 2009, 'Conflict management in the native title system: A proposal for an Indigenous dispute resolution tribunal', *Reform* vol. 93, 2009, p. 34.