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AIATSIS Submission

Inquiry into the Development of Northern Australia

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide input to the Committee in its inquiry into the development of Northern Australia (the Inquiry).

Through its Native Title Research Unit (NTRU), AIATSIS seeks to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples through independent assessment of the impact of policy and legal developments. We offer these comments in our capacity as the leading proponent of legal and policy research in the native title sector.

We note that the Inquiry is to consider policies for developing the parts of Australia that lie north of the Tropic of Capricorn. We do not propose addressing the terms of the inquiry in the format contained in the terms of reference, though we will be addressing all of those issues. Many of the issues we address cross over all aspects of the inquiry.

It is imperative that any policies for development of Northern Australia consider the impacts on the Indigenous Australians who have traditional connections to and native title rights and interests in the land which may be affected by this development (the traditional owners). Accordingly we have based our submission on that principle.

In preparing this submission AIATSIS refers to the various reports and studies already undertaken by AIATSIS and other researchers about the social impact of development on Indigenous communities and land tenure reform. We do not wish to repeat the contents of those studies but refer to them in this submission and ask that the Committee draw on the extensive existing research and recommendations listed in this submission.

In our view the five main issues which need consideration are:

1. social impact assessments;
2. land tenure and land tenure reform;
3. water rights, allocation and planning;
4. economic and social development; and
5. taxation issues.

1. Social Impact

AIATSIS submits that as part of the Inquiry there needs to be a full and thorough social impact assessment (SIA) of the intended development in Northern Australia. The concept of an SIA is now a well understood and widely adopted practice in planning. However, the Planning Institute of Australia notes that:

To date, most planning practice has given less attention to social impact assessment than to environmental and economic impact assessment. Many impact assessments omit social issues altogether while others consider too narrow a range of issues. It is common to find that demographic profiling and community consultation have been substituted for social science research finding and that the impact statement is based on speculation rather than assessment. As a result of these practices, PIA is concerned that actions have sometimes been taken, and decisions made, on an ill-informed basis and which did not foresee some serious social consequences before they eventuated.¹

There is a particular need to ensure that social impacts on the rights and interests of Indigenous people are properly assessed and that processes are culturally appropriate.² Professor O’Faircheallaigh of Griffith University has analysed various approaches to SIAs. He considers that an ‘effective SIA’ in the context of large-scale resource development of Aboriginal land involves, firstly, the level of control of Aboriginal people in the process, and, secondly, an analysis of the practical activities that must be undertaken and issues that must be addressed to realise an effective process.³

The SIA must be conducted as part of the initial enquiry stage to scope the whole landscape and then on a case-by-case basis for each large-scale project.

¹ Planning Institute Australia, ‘Social Impact Assessment (10/10)’, Current Positions webpage, <http://www.planning.org.au/policy/social-impact-assessment-1010>.

² It has been recognised that planning needs to be cultural sensitive in order to be effective. See L Porter, *Unlearning the colonial cultures of planning*, Ashgate Publishing Group, Farnham, UK, 2010; L Porter, ‘Planning in (post)colonial settings: challenges for theory and practice’, *Planning Theory & Practice* 7(4): 383–96, 2006; S Jackson, ‘Land use planning and cultural difference’, in D Rose & A Clarke (eds), *Tracking knowledge in North Australian landscapes*, Australian National University, Canberra, 1997, p. 87; son, R, Holmes, JH, Hardy, M, UniQuest, L, Cape York Peninsula Land Use Strategy. Land Use, P, University of, Q, Queensland. Dept. of, L & Queensland. Office of the, C-o-G 1995, Land tenure systems and issues of Cape York Peninsula, Office of the Co-ordinator General, Brisbane, Qld.; E Wensing, ‘Improving planners’ understanding of Aboriginal and Torres Strait Islander Australians and reforming planning education in Australia’, paper no. 112, *Proceedings of the third World Planning Schools Congress*, Perth, WA, 4–8 July 2011.

³ C O’Faircheallaigh, ‘Effectiveness in social impact assessment: Aboriginal peoples and resource development in Australia’, *Impact Assessment and Project Appraisal* 27(2): 95–110, DOI: 10.3152/146155109X438715, Taylor & Francis Online, 2012.

Access to land is a key aspiration of many indigenous groups in remote and rural northern Australia and there are a number of key indigenous stakeholders that must be consulted. In particular the native title representative bodies and the registered native title bodies corporate (NTRBCs) These organisations have an intimate knowledge of indigenous aspirations and capabilities within their regions. They also are acutely aware of the pressures of development on their country and the social impacts. However, even NTRBs are statutory bodies and RNTBCs are required to be established under the Native Title Act 1993 they are not adequately resourced to deal with these issues. Any engagement with indigenous organisations must involve funding and/or other assistance to enable free prior and informed consent and proper negotiations.

Many Indigenous groups in Northern Australia have dual aspirations to engage with both the market and customary sectors.⁴ There is growing recognition of the productive value of a range of cultural and economic Indigenous activities within the mainstream market.⁵

2. Land Tenure

The traditional owners do not distinguish between land and water, it is all country. It is now well understood that Aboriginal and Torres Strait Islander Peoples have a deep association with country.

Any development proposal, irrespective of size, must acknowledge and respect the rights of the traditional owners of the country where the proposed development is to occur. We submit that the SIA process must also underpin any consideration of planning issues.

There are a number of options available to governments and proponents for any development that requires access to land, either permanent changes to tenure or short term interests. The NTA provides a number of options to deal with developments⁶. In short the government can either agree of land access via an Indigenous Land Use Agreement (ILUA) or unilaterally undertake compulsory acquisition. In either case compensation for loss of native title must be negotiated. Proponents of development cannot compulsorily acquire interests in land, though can lobby the government for that outcome.

There are arguments for and against which method is the most appropriate on an individual case basis, however it is submitted that any outcome which extinguishes native title should be used sparingly and only with the free prior informed consent of traditional owners and with fair and reasonable compensation.

⁴B Scambary,. *My Country, Mine Country*. Canberra, ANU E-Press, 2013 p.238

⁵ *Ibid.* p239

⁶ Division 3 of the *Native Title Act 1993* (Cth) regulates future acts (including any proposed development on native title lands). Subdivisions B, C and D deal specifically with Indigenous Land Use Agreements.

Development policies should support innovative and flexible agreement making between Indigenous groups and third parties in order to ensure that Indigenous forms of economic activity and cultural practice are recognised and accommodated. A number of governments have engaged in ‘comprehensive settlements’ with traditional owners that address many of the issues raised in this submission. These settlements may address public housing, health, welfare, education and training, compensation and joint management of conservation or heritage areas. There have now been a number of ‘comprehensive settlements’, including developments over the Burrup Peninsular, The M-G Ord Scheme, the Broome Settlement, the Browse Basin LNG project and others.⁷ Much can be learnt from these experiences and we urge the joint Committee to review the literature on these projects.

It is critical in all future development planning to address the requirements of the Native Title Act (NTA) to ensure that the requirements of the NTA are addressed early and appropriately. Failure to address native title issues until late in the planning process can lead to delays in developments and frustration to all parties.⁸

3. Water rights, allocation and planning

Agreements in relation to water catchment management must involve traditional owners and include considerations of their cultural values⁹. They should also provide opportunities for Indigenous economic development through commercial allocation of water to Indigenous land holders such as through a Strategic Indigenous Reserve (NAILSMA IWPG)¹⁰

Native title initiatives, including with state and territory governments, have provided impetus for traditional owner involvement in catchment management and water sharing plans.¹¹ To provide equitable rights to traditional owners it is argued that the following issues, as a minimum, need to be included in any agreement made in relation to water rights:

⁷ K Guest, *The promise of comprehensive native title settlements: the Burrup, M-G Ord and Wimmera agreements*, AIATSIS Research Discussion Paper no. 27, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2009, http://www.aiatsis.gov.au/_files/research/dp/DP27.pdf.

⁸ In the context of housing see C Stacey & J Fardin, *Housing on native title lands: responses to the housing amendments of the Native Title Act*, Land, Rights, Laws: Issues of Native Title 4(6), Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2011, http://www.aiatsis.gov.au/_files/ntru/IPHousing.pdf.

⁹ G Macdonald, ‘Territorial boundaries and society in the New South Wales Riverine: a Wiradjuri analysis’, in T Bauman & G Macdonald (eds), *Unsettling anthropology: the demands of native title on worn concepts and changing lives*, Australian Institute of Aboriginal Studies, Canberra, 2011, pp. 62–81; M Barber & S Jackson, *Water and Indigenous people in the Pilbara, Western Australia: a preliminary study*, CSIRO: Water for a Healthy Country Flagship, 2011, <http://www.csiro.au/~media/CSIROau/Files/PDF/p12ei.pdf>.

¹⁰ NAILSMA Indigenous Water Policy Group, 2012. Indigenous people’s right to the commercial use and management of water on their traditional territories. An Indigenous Water Policy Position. The Strategic Indigenous Reserve. NAILSMA Knowledge Series 018/2013. North Australian Indigenous Land and Sea Management Alliance Ltd., Darwin. <http://www.nailsma.org.au/hub/resources/publication/indigenous-peoples-right-commercial-use-and-management-water-policy>

¹¹ J Weir, SL Ross, DRJ Crew & JL Crew, *Cultural water and the Edward/Koety and Wakool river system*, research report, AIATSIS Centre for Land and Water Research, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2013, pp. 13–14, http://www.aiatsis.gov.au/_files/ntru/CulturalWaterAndTheEdward_FINAL.pdf. See also JK Weir, *Murray River Country: an ecological dialogue with traditional owners*, Aboriginal Studies Press, Canberra, 2009.

- The recognition of cultural flows by all governments in their legislation and policy.
- The right to exploit water resources for cultural and commercial purposes.
- The right to full and meaningful participation in water management processes.¹²

Government agencies involved in Northern Australia provide support to indigenous organizations and communities to carry out water uses which are non-extractive and do not require a specific allocation of water, which would otherwise result in a diminished ecosystem.¹³ The outcome is a greater participation in involvement of indigenous people, inclusive of their aspirations and their role in water management itself.¹⁴ This needs to be maintained and strengthened.

Water use in any major development has the potential to seriously impact on the rights and interests of traditional owners. Over use can diminish water flows, which will impact on the ecology of the water catchment area. Similarly, intensive pastoral and agricultural industries on land within the catchment areas can have significant impact, for example, chemical residue run off, erosion, and increased incidence of invasive weeds and destruction of native habitats. Similarly, extensive use of aquifers as a source of water for large scale projects may potentially have a critical impact on permanent and semi-permanent water holes throughout northern Australia. These waterholes are mostly (if not always) very significant sites both culturally and physically.¹⁵ There is great fear that by depleting the aquifers these waterholes could be lost or irreparably damaged.

Any development which could impact on rights and interests over the sea also needs proper consideration. In particular coastal and island communities, including the Torres Strait Islands, could face significant impact through increased fishing and aquaculture developments. Major infrastructure for shipping facilities and increased commercial shipping activity will have a significant impact on the traditional rights and interests of traditional owners and the environment. As with all other aspects of this submission the Traditional owners must be part of the planning and policy development for the region.

4. Economic Development including social issues

Economic development must be inclusive of all sectors of the community. Many large-scale projects create unintended, and often ignored, negative impacts for Indigenous people in Australia.

¹² Ibid., p. 14.

¹³ Ibid., p. 16.

¹⁴ Ibid.

¹⁵ See, for example, S Yu, *Ngapa Kunangkul (Living Water): report on the Aboriginal cultural values of groundwater in the La Grange sub-basin*, Water and Rivers Commission of Western Australia, 1999, <http://www.water.wa.gov.au/PublicationStore/first/11504.PDF>; P Sullivan, HB Pampila, WB Pajiman & DM Kordidi, 'The Kalpurto water cycle: bringing life to the desert of the south west Kimberley', in JK Weir (ed.), *Country, native title and ecology*, ANU Epress, Canberra, 2011; P-L Tan & S Jackson, 'Impossible dreaming: does Australia's water law and policy fulfil Indigenous aspirations?', *Environmental and Planning Law Journal* 30: 132, 2013.

Developments, particularly in remote areas, can create enclaves where workers live separately and apart from the surrounding communities. There is often little or no positive interaction between workers and surrounding communities. The negative interactions include workers hunting, fishing, camping on and traversing across native title lands with little knowledge of or respect for the rights and interests of the native title holders. Too often significant sites are accessed in ignorance and the quiet enjoyment of local communities is disturbed.

Similarly fly-in fly-out (FIFO) workers add little to the local economy but increase the demands on infrastructure. We deal in greater detail with the issue of FIFO workers and the local indigenous workforce in greater detail below.

Any project that is infrastructure intensive must ensure that adequate attention is paid to maintaining that infrastructure. Where new infrastructure and services are planned, those facilities and services must be extended to the local communities. Greater accessibility may well translate to greater participation of the local communities.

Agreements with traditional owners provide an opportunity to develop objectives of the traditional owners in relation to social and cultural contexts, including the values of the traditional laws and customs. The outcome of human rights considerations has resulted in the following suggested approaches for policy framework¹⁶:

- Capacity development – economic and social development goals, to meet the need for capacity building within indigenous communities.
- Good governance – achievement of community goals through a process of institutions and indigenous communities working collaboratively by engaging in mutual decision making.
- Whole of government – a coordinated and integrated approach of achieving goals and programs of various government agencies concerned with indigenous issues, to create an overall system for the effective and efficient improvement and wellbeing of indigenous people.
- Partnerships – building the capacity of people in communities to manage their own affairs in partnership with governments.
- Sustainability – social, political and cultural values of traditional owners are integrated in economic development.
- Economic Development – inclusive, transparent and equitable.

FIFO Impact on local communities

Employment opportunities will be brought to residents of regional towns as a result of the development of Northern Australia. FIFO workers may also be called upon to

¹⁶ E Wensing & J Taylor, *Secure tenure for home ownership and economic development on land subject to native title*, AIATSIS Research Discussion Paper no. 31, AIATSIS Research Publications, 2012, pp. 28–31, http://www.aiatsis.gov.au/_files/research/WensingTaylorDP_web_001.pdf.

fill the employment gaps. Long term investment in northern Australia is needed to positively affect local economies in the long term. To achieve this, private and public corporations and governments should invest in the training of indigenous people in northern Australia, to reduce the need to rely of FIFO workers. More importantly, employment opportunities should be afforded to the indigenous population of Northern Australia.

The House of Representative (HOR) reports that local economies are impacted both positively and negatively by FIFO worker presence.¹⁷ Long term resource communities such as Kalgoorlie-Boulder and Broken Hill, have grown accustomed to the FIFO presence in their towns. However, communities also equate the FIFO presence in their communities with social discord and unwelcomed changing demographics¹⁸. Regional communities experience difficulties with infrastructure planning and expanding public service provision due to high influxes in FIFO workers¹⁹. HOR reports an inability of regional towns to cope with the added infrastructure pressure and the drastic impact on small town communities²⁰.

It is suggested that the issues associated with the FIFO workforce on regional communities can be alleviated by the presence in the towns of a permanent workforce. To instigate a permanent workforce, priority must be given by policy makers to allocating funds to regional townships for infrastructure planning and public services, including increased health services and police presence.²¹

Most regional communities in northern Australia have an aboriginal presence, and these communities often sit on or are surrounded by native title land. The development of Northern Australia should utilize this presence and provide meaningful employment opportunities for traditional owners. The Wunan Foundation reported²² several areas of concern for employers in the Eastern Kimberly who had unsuccessful dealings with the indigenous workforce, some of which are:

- Low levels of participation in education and training for young people and poor transitions from education to employment. Accordingly, low levels of literacy and numeracy skills exist for Indigenous young people wanting to enter the labour market.

¹⁷ House of Representatives Standing Committee on Regional Australia, *Cancer of the bush or salvation for our cities? Fly-in, fly-out and drive-in, drive-out workforce practices in regional Australia*, report of the inquiry into the use of 'fly-in, fly-out' (FIFO) workforce practices in regional Australia, February 2013, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=ra/fifodido/report.htm.

¹⁸ *Ibid.*, pp. 44–6.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Wunan Foundation, *East Kimberley Remote Communities Indigenous Employment Initiative — FIFO Project: feasibility study and proposal*, July 2011, p. 5, Wunan website, http://wunan.org.au/pdf/Wunan_FIFO_Proposal.pdf.

- At a regional level, there has been an over reliance on welfare generally and CDEP in particular resulting in low levels of aspiration formation and engagement with employment and training. This becomes all the more salient as a theme at the remote and very remote community level.
 - education and training standards;
 - humbugging and the demands of immediate and extended family members;
 - substance use and misuse including alcohol and drugs; and
 - For Indigenous people in the region, there is a perceived lack of ‘real’ employment opportunities. This appears to be a contradictory finding when there are clear employment opportunities across industry and occupational categories.

There are numerous advantages of engaging a local work force and even engaging local indigenous workers as Drive in Drive out (DIDO) workers who stay on site for the duration of the shift cycle. Staying on site reduces the risk of indigenous people not showing up as has been an issue in the past reported by employers. The traditional owners also take the wealth back to their communities.²³

5. Taxation Issues

Future act proponents pay financial benefits to native holders in a number of circumstances, either for community benefits negotiated as part of the Heritage process or as royalties or compensation as part of a larger settlement package. This is akin to a form of indirect taxation where the benefits flow directly from the proponent to the native title holders and the proponent reduces its taxable income accordingly. We submit that there should be a significant tax exemption for all the costs of negotiated settlements with Aboriginal people, the costs of Aboriginal employment and training in the mining industry and the establishment of viable Aboriginal institutions to govern these arrangements.²⁴

We also submit that revenue from taxation collected by governments ought to be allocated to the very regions and communal lands where the wealth was generated. This could be incorporated into a natural resources account as has been developed

²³ Ibid.

²⁴ L Strelein, *Taxation of native title agreements*, Native Title Research Monograph no. 1/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, http://www.aiatsis.gov.au/_files/ntru/researchthemes/developmenttax/taxation/TaxationAgreements.pdf; L Strelein & T Tran, *Taxation, trusts and the distribution of benefits under native title agreements*, Native Title Research Report no. 1/2007, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, http://aiatsis.gov.au/_files/ntru/Taxworkshopreport_final_.pdf.

in Timor Leste. This approach is regarded as best practice and designed to avoid the impacts of 'resource curse' and to secure a proportion of the profits from extracting mineral resources to enhance the living standards and to secure a worthwhile lifestyle for future generations of indigenous Australians.

AIATSIS would like to thank you for the opportunity to provide input to this inquiry. If you would like further information on this submission, please contact Mr Robert Powrie, A/g Director, Indigenous Country and Governance, AIATSIS, on 6246 1167 or robert.powrie@aiatsis.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Dodson", with a long horizontal flourish extending to the right.

Prof Mick Dodson AM
Chairman
AIATSIS

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