Taxation of Native Title and Traditional Owner Benefits and Governance Working Group

Report to Government

1 July 2013

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

Effective participation by Indigenous people in the Australian economy improves their health and social outcomes and increases the wellbeing of individuals, families and communities.

Land rights, native title and other land-related agreements, together with payments and benefits under these agreements (for convenience called land-related payments), are vital tools for increasing Indigenous economic development. Under the right circumstances, they can also bring a number of important broader social benefits including improved community functioning, education, health and wellbeing. However, there must be effective management and governance structures in place in order to achieve these outcomes. Poor governance and failure to grasp opportunities for intergenerational wealth building will perpetuate welfare dependency of Indigenous people.

The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (Working Group) was established to examine existing arrangements for holding, managing and distributing land-related payments, and to identify options to strengthen governance and promote sustainability. Its particular focus was on the tax treatment of current arrangements and of proposed options for holding, managing and distributing land-related payments. The Working Group's terms of reference, which include the membership of the Working Group, are at Attachment A.

The Working Group recognises that an income tax exempt, not-for-profit entity with Deductible Gift Recipient (DGR) status which can invest in community development and for the long term has potential to provide significant economic development benefits for Indigenous people. The Working Group supports establishing an entity based on the concept of the Indigenous Community Development Corporation (ICDC) proposed by the National Native Title Council and the Minerals Council of Australia. Recognising the diversity of social and economic circumstances of different Indigenous communities around Australia, such an entity might have the legal form of a not-for-profit corporation or a trust that, when registered by the relevant regulator, would have the tax-exempt status of an ICDC. An ICDC entity would be subject to sound governance standards and would be accountable both to the Indigenous community it serves and to the regulator.

The Working Group supports the ICDC model for two main reasons. First, an ICDC could be used by Indigenous communities to provide financial support for a wider range of community or economic development activities than is possible using other entities such as a charitable trust. It could contribute to developing the local Indigenous community by building local and regional businesses and social ventures that create flow-on economic and social development opportunities, particularly job creation. It could also encourage cooperative approaches in which holders of land-related payments can work as co-investors with governments and the private sector in delivering holistic regional development projects.

A second important feature of a tax exempt entity with DGR status could be to facilitate the accumulation of payments towards a 'future fund' of private monies derived by an Indigenous community from native title agreements or other sources, to be applied for the community's benefit in the long term. This fund could be invested, applying strong prudential standards, to develop sustainable income streams for future generations as well as current community members. The tax exempt status would maximise the funds available for both the economic development and intergenerational investment purposes.

The Working Group also expressed significant concern about the adequacy of current governance arrangements for managing land-related payments. The National Native Title Council has proposed a number of reforms to address governance problems, including changes to the *Native Title Act 1993* (Native Title Act) or relevant regulations, to clarify that a fiduciary relationship exists between a native title applicant and the broader group of native title holders; and to provide for the regulation of private agents involved in negotiating native title future act agreements. While the Working Group did not have an opportunity to give them detailed consideration, it strongly supports these reforms and considers they should be progressed urgently. Improved governance is crucial if maximum benefits are to be derived from any new entity which might be used by Indigenous communities for managing land-related payments.

The Working Group's recommendations to Government are:

Recommendation 1: The Government introduce legislation into Parliament to make an ICDC type of entity — a registered not-for-profit entity as described in this report that is exempt from income tax and has DGR status — available to Indigenous communities as soon as possible. The Working Group suggests the Department of Families, Housing, Community Services and Indigenous Affairs, as the department of the minister responsible for Indigenous affairs, co-ordinate implementation of the proposal, with ongoing support from the Attorney-General's Department in relation to native title issues and Treasury in relation to taxation issues.

Recommendation 2: The Government take urgent steps to regulate private agents (persons or firms other than Native Title Representative Bodies or Native Title Service Providers and/or their legal representatives) involved in negotiating native title future act agreements.

Recommendation 3: The Government refer the following matters for consideration to the current Review of the Roles and Functions of Native Title Organisations:[1]

(a) the establishment under statute of a trust that would be the holder of native title agreement funds where there was no Prescribed Body Corporate, ICDC entity or other appropriate funds management entity to receive them; and

(b) a process for the registration of section 31 native title future act agreements. (If this matter is outside the scope of the Review's terms of reference and it is not practicable for it to be referred to the Review, the Working Group recommends the Government take other steps to achieve this outcome.)

Recommendation 4: The Government take urgent steps to amend the Native Title Act or relevant regulations to clarify that the native title holding community is the beneficial owner of funds generated by native title agreements, irrespective of the identity of the legal owner or possessor of those proceeds, and that the named applicant is in a fiduciary relationship to their native title holding group.

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[1] More information about the review, including its terms of reference and discussion paper, is available on the Deloitte Access Economics website: http://www.deloitteaccesseconomics.com.au/our+services/economic+analysis+and+policy/native+title/about+the+review

1. INTRODUCTION

A clear priority of the Closing the Gap agenda is to ensure that Indigenous Australians have the opportunity to achieve greater economic independence and security for themselves, their families and their communities.

Land-related payments and other income are vital tools for increasing Indigenous economic development. Under the right circumstances, they can also be used to achieve important social benefits including improved community functioning, education, health and wellbeing.

However, land-related payments and other income on their own do not necessarily ensure ongoing economic participation, or build the social capital and capabilities of Indigenous individuals and communities. There must be effective management and governance structures in place in order to achieve these outcomes.

Good governance is vital both so that native title or traditional owner groups receiving land-related payments and other income are actively involved in directing the use of those payments, and to ensure those payments are used appropriately, as agreed by the group and in an accountable way.

The finite nature of many land-related payments must also be recognised and the payments managed appropriately. Structures for managing these payments should encourage investment in economic development activities that are sustainable after payments cease, for example in the case of mineral production.

Ongoing concerns have been raised about the adequacy of existing governance and tax arrangements for holding, managing and distributing land-related payments.

A number of reforms have been proposed to ensure that governance and tax policy settings support these important objectives. A proposal for an ICDC has been developed by the National Native Title Council, the Minerals Council of Australia, native title tax experts and Indigenous leaders (Attachment B). The model focuses on the management of land-related payments and other income and rewarding of effort for the future and the application of robust governance standards.

As proposed, an ICDC would be a not-for-profit corporation or trust with the purpose of promoting and participating in Indigenous community and socio-economic development. It would be exempt from income tax and would have DGR status. The purposes of an ICDC would be wider than charitable purposes.[2] ICDCs would be able to accumulate funds and provide support for Indigenous businesses and associated initiatives established for community benefit, and also for Indigenous families to participate in the mainstream economy.

The primary function of an ICDC as proposed would be to receive, generate, manage and apply funds rather than conduct activities directly. However, an ICDC could conduct activities directly if this was consistent with the purposes of the ICDC.

An ICDC would be an optional entity that could be used by Indigenous communities on its own or together with other entities. It could also be applied at a regional level if discrete communities saw fit to utilise such an entity at that level.

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[2] *Charities Act 2013.*

To avoid confusion, this report adopts the terminology of an ICDC entity, which may take the legal form of a corporation or a trust. If the Working Group's recommendation is adopted, the Government should consider the appropriate Name for such an entity.

Also, a 'statutory trust' arrangement has been proposed by Native Title Services Victoria and the National Native Title Council to ensure that future act—generated monies are disbursed in accordance with the instructions, or for the benefit, of the entire 'claim group' as opposed to the individual applicants.[3]

The Working Group

On 18 March 2013 the Australian Government announced that it would establish a working group to examine the tax treatment of land-related payments, and how they can better benefit Indigenous communities now and into the future.[4]

The Working Group's task was to examine existing arrangements for holding, managing and distributing land-related payments, and to identify options to strengthen governance and promote sustainability, with a particular focus on the tax treatment of current arrangements and of proposed options for holding, managing and distributing those payments. The ICDC option was to be considered by the Working Group together with other options.

The Working Group was required to report on options to the Government by 1 July 2013.

The terms of reference for the Working Group enabled it to consider taxation and governance issues in relation to all land-related payments and other income received by Indigenous communities. In particular, the Working Group was not confined to a consideration of the tax treatment of native title benefits.

The main focus of the Working Group's discussions was the ICDC option. While other options were considered in response to identified governance concerns, these options were not considered in detail and the Working Group acknowledges that further development is required to progress these reform options.

2. ECONOMIC DEVELOPMENT AND OTHER KEY OBJECTIVES

This chapter discusses the key objectives identified by the Working Group for management of land-related payments received by Indigenous groups. These key objectives fall under the headings of economic development, sustainability, governance and administrative simplicity.

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3 Native Title Services Victoria's submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Senate Legal and Constitutional Affairs Committee inquiries into the Native Title Amendment Bill 2012, p 18.

4 Joint media release of Attorney-General, Minister for Families, Community Services and Indigenous Affairs and Assistant Treasurer, *Native title tax treatment to be examined*, 18 March 2013.

2.1 Economic development

Effective participation by Indigenous people in the Australian economy is critical to addressing the disparity in employment and income levels between Indigenous and non-Indigenous Australians and contributing to our continued economic growth as a nation.

Indigenous communities are concerned to ensure that land-related payments and other income are applied effectively to promote sustainable economic development. This economic development could take a variety of forms including community-focused development, the support and promotion of individual Indigenous entrepreneurs (for example, by providing loans) and building skills in Indigenous communities to take advantage of employment opportunities created by mining, agriculture, tourism and other industries.

2.2 Sustainability

The sustainability of economic development of Indigenous communities for future generations is a key objective. It is generally taken to require:

- ensuring the interests of both current and future members of communities are represented and protected in decision-making (noting that the interests of current and future members must be properly balanced in such decision-making);
- ensuring communities understand agreements under which they are entitled to receive land-related payments, and are provided with the information required to understand and make informed decisions about how those payments are deployed;
- incorporating mechanisms to ensure that at least some of the land-related payments and other income received by the community is adequately preserved; and
- ensuring land-related payments and other income are applied for the benefit of not only the current but also future generations.[5]

As the Minerals Council of Australia and the National Native Title Council explain in their proposal, it is common for native title payments to be received by native title groups as a number of relatively small payments from several mining agreements which individually may not provide the critical mass necessary to promote sustainable economic and social development.[6] The arrangements for holding and managing land-related payments and other income need to facilitate accumulation from multiple agreements and potentially from multiple claimant groups.

2.3 Governance

Governance arrangements should be transparent and promote accountability and the sustainability of land-related payments and other income. Sound governance is critical to ensure that land-related payments and other income are:

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5 For example, see FaHCSIA and AGD discussion paper of July 2010, *Leading practice agreements: maximising outcomes from native title benefits*, p 4.

6 Minerals Council of Australia and National Native Title Council's Indigenous Community Development Corporation (ICDC) Concept (March 2013), p 3.

- directed in accordance with the decisions of the Indigenous community, including for community and socio-economic development purposes; and
- sustainable for future generations.

Sound governance will also give greater certainty to the provider of the land-related payments that payments will be directed to agreed purposes.

Poor governance arrangements may reduce the benefits that Indigenous communities can derive from land-related payments now or in the future.

2.4 Administrative simplicity

Currently there is no entity tailored to the circumstances of Indigenous communities that they can use to manage land-related payments and other income, and leverage off them. It is arguable that current arrangements may not be the most effective way to promote the sustainable economic development of a community:

- Current arrangements can require extensive planning and expertise to structure appropriately, and some communities may lack access to such resources and expertise.
- Even where such expertise and resources are available, the complexity of the arrangements entered into to achieve taxation and other objectives frequently means establishment costs are high and the resulting arrangements may impose an onerous compliance burden.
- Existing arrangements do not necessarily deliver all the outcomes communities are looking for, because such arrangements were not designed for the unique circumstances such communities face.

3. Governance concerns and current arrangements

This chapter outlines governance issues; the types of payments received or generated by Indigenous communities; the entities used by Indigenous communities for managing payments; the taxation of current arrangements; the limitations of charitable trusts and DGR status; and the not-for-profit reforms.

The Working Group has significant concerns about existing governance arrangements for managing land-related payments, in particular the scope of these arrangements to ensure that the potential benefits to Indigenous communities, both now and in the future, are maximised.

Other factors also relevant to economic development include:

- the nature, size and timing of land-related payments received by Indigenous groups;
- the entities used for managing these payments;
- the tax treatment of these arrangements;

- the not-for-profit sector reforms; and
- the limitations of charitable trusts and DGR status.

3.1 GOVERNANCE CONCERNS

Land-related payments to some Indigenous groups are growing. This is the case particularly as the size of the Indigenous estate grows, as resource development projects move into the production phase, and as Indigenous participation in the real economy continues to grow.

Specific arrangements governing native title payments are limited. Whereas the Native Title Act regulates the entry into ILUAs by providing for their authorisation by the relevant native title group(s), it does not regulate the entry into other native title future act agreements. In addition, the Native Title Act does not expressly regulate the management and use of native title—related payments.

In practice, the management and use of native title payments is determined by the parties to the agreement, or, more likely, the entity receiving the payments. There are no specific requirements regarding advisers to the parties to agreements or to entities that receive native title payments.

In situations where the governance arrangements for native title payments have not been given adequate or timely attention, the arrangements may be open to exploitation by unscrupulous individuals from either within or outside the native title group (for example, private agents). Even where there is no deliberate exploitation, poor governance is likely to undermine the contribution that native title payments could otherwise make to the long term development of the relevant native title group. Poor governance can also result in social disruption and costly litigation and remediation.

In his recent decisions in *Weribone on behalf of the Mandandanji People v Queensland* (Mandandanji), Justice Rares of the Federal Court found that, when negotiating an ILUA, an applicant (or registered native title claimant) may owe a fiduciary duty to the native title claim group and to all persons who are ultimately determined to hold native title.[7]

In his judgment, Justice Rares articulated a concern that those people who might ultimately be found to hold native title may not be receiving benefits to which they may be entitled under an ILUA if they are not included within the claim group prior to a determination.[8]

The Working Group is aware that the *Mandandanji* decision is the subject of proceedings currently on appeal before the Full Court of the Federal Court. However, the case raises complex legal and practical issues relating to the existence of a fiduciary duty under the current operation of the Native Title Act and, if such a duty is found, how this would interact with the future acts regime. This is of particular importance, given the future acts regime is designed to enable claimants and proponents to negotiate about their interests prior to any determination of native title which recognises the ultimate native title holders.

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[7] *Weribone on behalf of the Mandandanji People v State of Queensland* [2013] FCA 255 at [58], [60]-[62]; *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 at [44]-[46] .

[8] *Weribone on behalf of the Mandandanji People v State of Queensland (No 2)* [2013] FCA 485 at [31] and [39].

The Working Group is also aware that the draft terms of reference for an Australian Law Reform Commission (ALRC) inquiry into native title, which have been released for public consultation, cover the authorisation and joinder provisions of the Native Title Act. Broader related issues that flow from the joinder and authorisation provisions that could be considered by the ALRC include whether the applicant or registered native title claimants should be under a fiduciary duty to the finally determined native title holders, the circumstances in which such a duty would arise and the scope and nature of that duty.

A further example relates to Dunghutti Elders Council Aboriginal Corporation RNTBC. In recent litigation, evidence was given that 13 per cent of the funds held in trust for the native title group were spent on legal fees and legal fees amounted to approximately 50 per cent of the expenditure of the corporation over a two year period.[9]

In contrast, there is greater (but not complete) transparency and accountability of payments made to traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976*. As a minimum, mining-related payments are generally required to be publicly reported by land councils, and statutory royalty equivalents must be paid to corporations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) (and accordingly subject to the regulatory oversight of the Registrar of Indigenous Corporations).

3.2 Native title payments and other payments received by Indigenous communities

Income received by Indigenous organisations comprises mainly land-related payments. There are some other categories of payments made to Indigenous communities, for example, rental income from leases and some business or investment income, but these payments could be expected to comprise less than 10 per cent of total payments received by Indigenous organisations. It is difficult to find data on these private payments.

Native title payments

The main source of native title payments are native title agreements. In addition to direct financial benefits, native title agreements can provide a range of non-monetary benefits such as employment and community development, education and training, housing, cooperative land management and environmental and heritage initiatives.

There are many kinds of agreements that may be classed as 'native title agreements'. The most common include ILUAs and section 31 agreements made in accordance with the Native Title Act.

Agreements with native title groups may also be made under State and Territory regimes. The Native Title Act allows for States and Territories to make their own legislation about certain future acts instead of using the Commonwealth scheme, provided that they comply with prescribed standards. South Australia and New South Wales have some aspects of the 'right to negotiate' regimes in operation. In addition, Victoria's *Traditional Owner Settlement Act 2010* provides an alternate, 'out-of-court' system for recognising the rights of Aboriginal traditional owners and resolving native title and land claims in that state.

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[9] *Dunghutti Elders Council AC RNTBC v the Registrar of Aboriginal and Torres Strait Islander Corporations* ([2011] FCAFC 88; (2011) 195 FCR 318, (2011) 279 ALR 468 (21 July 2011).

Privately negotiated agreements between a native title group and other persons, which provide for benefits to the native title group, could also be native title agreements. Many such agreements are ancillary agreements to section 31 agreements or ILUAs. Privately negotiated agreements, including conservation agreements, joint parks management agreements, agreements to construct and access for beekeeping, are negotiated with native title groups.

Another possible source of native title payments is compensation paid under Division 5 of Part 2 of the Native Title Act, which provides for compensation for holders of native title in certain circumstances involving the extinguishment or impairment of native title. To date, there has been no judicial determination of native title compensation and it remains unclear what approach the courts will take in determining compensation for extinguishment or impairment.

Other payments

Indigenous communities can and do also pursue their own community-based initiatives that do not involve native title agreements with third parties. Other types of benefits that may be received or generated by an Indigenous community include: land rights payments; payments under land access agreements (other than under or ancillary to a native title agreement); natural resource management; cultural heritage or 'caring for country' payments (that may or may not be under a native title agreement); cultural mapping enterprises; government grants; gifts or donations; and investment, business and social enterprise income.

Value of payments

The Minerals Council of Australia advised that in terms of native title monies from the mining industry in 2011-12, based on audited accounts for the financial year, the total payments for this period is around $3 billion. This amount includes native title—related land access payments; *Aboriginal Land Rights (Northern Territory) Act 1976* royalty equivalents; Indigenous and non-Indigenous heritage management; other Indigenous land rights regimes; and impact/benefit agreements. It is based on negotiated agreements and company turnover. This amount is not limited to cash payments. Some payments may extend over several years. These payments are for:

- local business development and Indigenous contracting;
- land-related access agreements;
- recreation and culture;
- education (scholarships and bursaries);
- environmental management (non-mining related);
- health and wellbeing;
- town maintenance and facilities;
- accommodation (non-camp); and
- other community investment.

3.3 Entities used by Indigenous communities

Various legal entities are currently used for receiving, generating, holding and distributing land-related payments and other income including:

- charitable trusts (a substantial proportion of agreement funds is allocated to charitable trusts);
- discretionary trusts for the direct benefit of particular Indigenous clans or kin groups;
- corporations incorporated under the CATSI Act (CATSI corporations);
- companies limited by shares incorporated under the *Corporations Act 2001* (Corporations Act);
- companies limited by guarantee incorporated under the Corporations Act, where the 'not-for-profit' purpose or the object of the company is to benefit Indigenous persons; and
- associations incorporated under State or Territory based legislation.

Indigenous communities may use a combination of these legal entities (for example, both charitable and discretionary trusts), resulting in some cases in complex legal and governance arrangements. These arrangements often involve significant establishment and administration costs that are not affordable for organisations that receive small annual payments. Complex arrangements involving independent trustees can cost up to $1 million per annum.

3.4 Taxation of current arrangements

Amendments recently passed by Parliament clarify that native title benefits are not subject to income tax where they are received by an Indigenous person or an Indigenous holding entity.[10] There has been considerable uncertainty about the correct taxation treatment of native title payments in the hands of recipients. For example, in some circumstances the Commissioner of Taxation has ruled that native title payments of a compensatory nature are non-taxable.

The mining withholding tax applies at a rate of four per cent to mining payments made to Indigenous people and distributing bodies for the use of land for mining and exploration. Amounts from which the mining withholding tax has been withheld are not subject to income tax as they are treated as non-assessable non-exempt income. (The terms of reference for this Working Group ruled out any consideration of the mining withholding tax.)

Where land-related payments received by Indigenous people (or by a holding entity) are invested, any income earned from such investments would be subject to the normal tax rules unless a specific concession applies.

Other payments made to Indigenous people (or to a holding entity) would be subject to the normal tax rules unless a specific concession applies.

Where an Indigenous community adopts the structure of a charity (such as a charitable trust), the charity will be eligible for income tax exemption provided it is administered in accordance with its purposes, registered as a charity and other conditions for endorsement are satisfied. This means that

[10] *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (No. 84 of 2013), Schedule 1.

payments made to the charity and investment income earned by the charity will be exempt from income tax.

3.5 LIMITATIONS OF CHARITABLE TRUSTS AND DEDUCTIBLE GIFT RECIPIENT STATUS

Charitable trusts are not a neat fit for managing land-related payments and other income because:

- the use of the term 'charity' conveys a welfare rather than a development approach;
- accumulating funds in a charitable trust can be complicated especially where a view may be taken that significant delays in distributing funds may amount to a failure to apply the funds of the trust for the charitable purposes; and
- there are limitations around the purpose of charitable trusts in particular as regards economic development or business investment purposes.[11]

In addition, concerns have been expressed that the current provisions for DGR status are unduly limited, potentially requiring a focus on a single eligible purpose.

Under the current system the primary difficulty faced by many Indigenous organisations seeking DGR endorsement is the stringent manner in which the *Income Tax Assessment Act 1997* requires entities seeking it to primarily fit within the scope of one of the prescribed DGR categories. On many occasions, these entities fit into more than one DGR category and they are, therefore, prevented from successfully pursuing an application for DGR in any one category. This is despite the objectives of the entities often falling within the scope of multiple categories including, for example, organisations on the Register of Cultural Organisations, organisations on the Register of Environmental Organisations, Harm Prevention Charities and/or Public Benevolent Institutions (PBIs).

3.6 NOT-FOR-PROFIT SECTOR REFORMS

In the 2011-12 Budget, the Government embarked on a reform program to protect the integrity of the not-for-profit sector as well as reducing red tape and improving governance, accountability and transparency arrangements.

The Government has established a new regulator, the Australian Charities and Not-for-profits Commission (ACNC), which currently is authorised to regulate charities. The Working Group noted that a report by another Treasury working group on not-for-profit tax concessions, established in 2012, is in the process of being finalised.

The Working Group noted the statutory definition of 'charity' provided by the recently enacted *Charities Act 2013* specifically ensures that an Indigenous entity that receives native title benefits relating to native title will not fail the public benefit test only because the beneficiaries are related.

[11] Minerals Council of Australia and National Native Title Council's Indigenous Community Development Corporation (ICDC) Concept (March 2013), p 4.

4. PROTECTING INDIGENOUS COMMUNITY BENEFITS

This chapter considers the operation of the Native Title Act in relation to the management of native title payments and identifies reform options to improve governance arrangements, including clarification that the native title group is the beneficial owner of funds generated by native title agreements.

4.1 ISSUES OF CONCERN

The Working Group is concerned about the adequacy of current governance arrangements for managing native title payments. Improved governance is crucial if maximum benefit is to be derived from any new entity for use by Indigenous communities or groups for managing native title payments.

The Working Group is aware of instances where individuals have diverted for their own benefit the proceeds (or significant portions of them) from native title—related 'future act' agreements that were intended by the Native Title Act or the terms of an agreement to be enjoyed by an entire community.

The National Native Title Council's view, which is shared by a number of Working Group members, is that the opportunity for such situations to develop has been allowed by a lack of clarity in the Native Title Act regarding two matters. The first is whether, or the extent to which, a named native title applicant has fiduciary obligations to the broader native title group. The second is that, while the Act contemplates that native title groups will usually be represented by Native Title Representative Bodies (or Native Title Service Providers), section 84B of the Act allows for private agents to provide these representational services but does not establish any regulatory mechanism in respect of these private agents.

There are two key issues. First, is the uncertain status of funds generated by native title agreements. Second, is the uncertainty regarding a named applicant's duties to the native title group (comprising both the native title claim group and the determined native title holders) and the representation of some, but not all, members of a native title group, by private agents who have dubious authorisation to act on behalf of all members of the native title group. It might be thought that, under the Act, the proceeds of native title agreements would belong to the native title group and that the named applicant is in a fiduciary relationship with the group. As noted above in Section 3.1, this issue has been raised in the *Mandandanji* case and is the subject of ongoing litigation.

4.2 OPTIONS FOR REFORM

The National Native Title Council has suggested a number of different models to address these issues. These include:

- the regulation of private agents (persons or firms other than Native Title Representative Bodies or Native Title Service Providers) involved in negotiating native title future act agreements;

- the establishment under statute of a trust that would be the holder of native title agreement funds where there was no Prescribed Body Corporate, ICDC or other appropriate funds management entity to receive them; and

- a process for the registration of native title future act agreements.

The Working Group agrees that these matters require urgent attention which must involve significant and detailed consideration, and considers that each of the models proposed by the National Native Title Council has merit. However, the Working Group did not have an opportunity to discuss the proposals in detail. They necessarily involve a level of policy development that the Working Group was not equipped to undertake and there may be potential practical implications and complexities with the proposals and their implementation.

The Working Group considers the regulation of private agents (persons or firms other than Native Title Representative Bodies or Native Title Service Providers and/or their legal representatives) involved in negotiating native title future act agreements needs to be progressed by the Government as a matter of priority.

Recommendation:

The Government take urgent steps to regulate private agents (persons or firms other than Native Title Representative Bodies or Native Title Service Providers and/or their legal representatives) involved in negotiating native title future act agreements.

The Working Group is aware that Minister Macklin announced a review of the role and statutory functions of native title representative bodies and native title service providers in June 2012, to be conducted by Deloitte Access Economics (the FaHCSIA review).[12] The Working Group considers the establishment of a statutory trust and the registration of native title future act agreements are matters that ideally would be considered by the FaHCSIA review.

Recommendation:

The Government refer the following matters for consideration to the current Review of the Roles and Functions of Native Title Organisations:

- the establishment under statute of a trust that would be the holder of native title agreement funds where there was no Prescribed Body Corporate, ICDC or similarly newly created entity or other appropriate funds management entity to receive them; and
- a process for the registration of section 31 native title future act agreements. (If this matter is outside the scope of the Review's terms of reference and it is not practicable for it to be referred to the Review, the Working Group recommends the Government take other steps to achieve this outcome.)

[12] More information about the review, including its terms of reference and discussion paper, is available on the Deloitte Access Economics website: http://www.deloitteaccesseconomics.com.au/our+services/economic+analysis+and+policy/native+title/about+the+review

4.3 Fiduciary duty

The Working Group considers that urgent steps should be taken to clarify that the native title group is the beneficial owner of funds generated by native title agreements, irrespective of the identity of the legal owner or possessor of those proceeds, and that the named applicant is in a fiduciary relationship with the group. The Working Group considers amendments to the Native Title Act or the relevant regulations are required to achieve this outcome.

The Working Group is aware that there is ongoing litigation relating to the existence of a fiduciary duty under the current operation of the Native Title Act. This litigation raises complex legal and practical issues, including how such a fiduciary duty would interact with the future acts regime (particularly given the future acts regime is designed to enable registered native title claimants and proponents to negotiate about their interests prior to any determination of native title which recognises the ultimate native title holders). In addition, public consultation has commenced on draft terms of reference for an Australian Law Reform Commission (ALRC) inquiry which cover the authorisation and joinder provisions of the Native Title Act and related issues such as fiduciary duty.

Recommendation:

The Government take urgent steps to amend the Native Title Act or the relevant regulations to clarify that the native title holding community is the beneficial owner of funds generated by native title agreements, irrespective of the identity of the legal owner or possessor of those proceeds, and that the named applicant is in a fiduciary relationship to their native title holding group.

5. Economic benefits of an income tax exempt entity with DGR status

This chapter considers the economic benefits for Indigenous communities that could arise from an income tax exempt entity with DGR status. This chapter also seeks to identify possible second tier benefits.

5.1 Economic benefits

An income tax exempt entity with DGR status, such as an ICDC, could provide economic development benefits for Indigenous people for a number of reasons. Tax exempt and DGR status would maximize total funds available and could secure further private sector funds.

Properly designed and managed, an ICDC could empower Indigenous people to make informed decisions about their priorities and how they want to use land-related payments and other income. In particular, Indigenous people could be encouraged to take a longer-term approach to the investment and management of funds.

It could also reduce levels of welfare dependency, as private income streams from land-related payments and income from investing in business and employment activity are used more effectively. Over time, this could help create real economies in remote locations.

Future fund

In particular, Indigenous people could be encouraged to take a longer-term approach to the investment and management of land-related payments and other income. An important purpose of a tax exempt entity would be the accumulation of payments towards a future fund to support ongoing activities where income allows. This fund would enable private monies derived from land-related agreements to be applied for community benefit, and could help people:

- develop sustainable income streams for both current members of communities and future generations; and

- build local and regional businesses and social ventures that create flow-on economic and social development opportunities, particularly job creation.

The future fund concept is particularly important in the native title context where traditional owner corporations must continue to fulfil statutory and cultural obligations received and recognised through native title determinations and agreements. The ICDC could improve the capacity of corporations to meet these obligations on an ongoing, long term basis.

It could also encourage cooperative approaches in which holders of land payments can work as co-investors alongside government and other players in delivering holistic regional development projects.

New DGR category

Many native title—related organisations, particularly those that do not necessarily receive native title benefits from mining and related activity, are keen to pursue alternative sources of funding, in addition to and beyond funding derived from Government sources. The directors and members of these organisations are determined to move beyond Government and welfare dependency to achieve economic independence and to grow their native title—based activities, including through empowering philanthropic partnerships.

To enable these organisations to obtain and enjoy available tax concessions and to attract donations from the private and philanthropic sectors so that they may achieve those aims, they invariably seek to be endorsed as DGRs.

As noted in Section 3.4 above, the *Income Tax Assessment Act 1997* requires entities seeking DGR endorsement to fit primarily within one of the prescribed DGR categories. Often these entities fit into more than one category.

The difficulty of not fitting within the scope of only one DGR category is particularly pronounced in the case of many native title—related organisations. For Indigenous peoples, there is an inextricable link between the environment and culture, and native title—based organisations are established in large part to protect and sustain those links, and at the same time to provide ‘direct relief’ (to use PBI-related language) to constituent members.

Together, these concepts represent and embody fundamental values and aims of Indigenous peoples. Because of these inextricable links, it is wholly artificial to require an Indigenous organisation to focus on cultural activities to the exclusion of those which are environmental and/or those which provide direct relief to members. However, the result under current legislation is, inevitably, that these organisations with a holistic focus can neither secure entry on the Register of

Cultural Organisations nor on the Register of Environmental Organisations and generally aim to be endorsed as a PBI. This is far from ideal.

Further, it is important that the process by which endorsement is sought is straightforward to ensure that the limited resources of such organisations are not unnecessarily wasted. Currently, seeking DGR endorsement for Indigenous organisations, many of which are small, resource-stretched entities, can be a time consuming, confusing and costly process.

Generally speaking, persons who hold or may hold native title as a community seek to leverage off their native title benefits for communal good, and to do that by establishing corporations or trusts with a range of interrelated and connected aims and objectives in mind. The entities then aim to engage or assist to engage in real economic activity and to create conditions for future economic success through, for example, the improvement of education and health outcomes. In some cases they also seek to establish or assist related organisations that provide community assistance in various forms, ranging from general business guidance to information sharing about 'caring for country', generally arising in the context of native title determinations having been made in their favour.

The proposal to make such entities DGRs would very likely assist to foster more confident private sector involvement in Indigenous economic and community development. Part of the anticipated private sector attraction to donating to ICDCs is that like-minded philanthropists will feel more confident they are contributing to the success of entities that are carrying out activities that truly reflect those sought to be undertaken by many Indigenous communities as they work to improve outcomes for their peoples, leveraging off native title gains.

Such a new DGR category would avoid Indigenous organisations having to find ways to fit their activities into more narrowly defined and constraining current DGR categories, and through private sector involvement would help to build the economic independence of Indigenous communities.

5.2 SECOND TIER BENEFITS

A substantial body of research demonstrates that effective forms of economic development improve standards of living and deliver substantial second tier positive social outcomes for disadvantaged people, including in the areas of health, education, housing and community safety. In particular, employment may enhance an individual's self-esteem and reduce social alienation and enhance a sense of wellbeing.

Conversely, the worst outcomes across the wellbeing spectrum are present in communities lacking any real economic activity. For example, aggregate-level quantitative studies have shown that, in comparison to those who are employed, unemployed Indigenous Australians and those not in the labour force are more likely to experience ill health.

To give one example, Thamarrurr is a poor socio-economic region of the Northern Territory which includes the Aboriginal community of Wadeye. In 2005, academics Taylor and Stanley undertook an analysis of the cost to the Indigenous population of Thamarrurr, and the Australian nation, in

maintaining the status quo as opposed to raising the Indigenous population's socio-economic status to reflect the Northern Territory standard.[13]

Two types of costs are implicit in their analysis: the costs due to foregone production, and the costs due to the remedial actions necessary to compensate for low socioeconomic status. To put it more fully, the cost to the Australian nation can be calculated as 'the full impost to government of sustaining the status quo of low labour force participation, low employment and occupational status, low income status, low educational participation and outcomes, high housing occupancy rates, high crime and custody rates and high morbidity rates against a background of expanding numbers'.[14]

To provide a quantitative measure, Taylor and Stanley compared Thamarrurr and a region of equivalent remoteness in Queensland, Longreach. Their calculations suggest that if Thamarrurr's employment outcomes equalled those of Longreach, Thamarrurr's average annual employment income would increase by $14.2 million per annum, and its contribution to GDP would increase by $23.70 million per year.

Research also shows children are more likely to have good health and education outcomes if their parents are participating in the economy. This can lead to important inter-generational change.

6. ICDC ENTITY PROPOSAL

This chapter describes the proposed ICDC entity; considers governance and regulatory requirements; and outlines proposed taxation arrangements that would apply in respect of an ICDC entity.

6.1 DESCRIPTION OF ICDC ENTITY

Under the Minerals Council of Australia and National Native Title Council proposal, an ICDC would be a not-for-profit, income tax exempt entity with DGR status established by an Indigenous community with the purpose of promoting sustainable community and socio-economic development.[15] Any Indigenous community could use an ICDC to manage any land-related payments and other income as an ICDC.

The purposes of an ICDC would be wider than the current concept of 'charity', so that an ICDC would be able to undertake a range of economic development activities and distributions beyond what a charitable body is currently permitted to do. An ICDC, in promoting sustainable community and socio-economic development, could provide funds and support to a wide variety of Indigenous businesses carried on for private profit (see *Activities and payments* below). The wider purposes of an ICDC would shift language away from concepts of charity and welfare to broader concepts of community and socio economic development and participation in the real economy.

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[13] J Taylor and O Stanley, The Opportunity Costs of the Status Quo in the Thamarrurr Region Working Paper No. 28/CAEPR, ANU Canberra.

[14] Ibid, p 2.

[15] Minerals Council of Australia and National Native Title Council's Indigenous Community Development Corporation (ICDC) Concept (March 2013), p 7.

Governance arrangements and appropriate regulation would ensure decisions about the use, investment and distribution of ICDC funds would be made by or with the concurrence of the relevant Indigenous community or regional communities and the use of funds would be consistent with the ICDC's purposes. Thus, ICDCs would have safeguards to ensure Indigenous community funds are not misused. Governance arrangements proposed for ICDCs are discussed in more detail at Section 6.2 below.

Under the ICDC model, an ICDC would be obliged to accumulate a corpus of funds towards a 'future fund' to support ICDC's activity for future generations. This could involve:

- accumulation guidelines with a mandatory minimum and maximum level of accumulation;
- the fund being held by a qualified professional institution on behalf of the ICDC, for asset protection purposes; and
- an approved accumulation plan designed to take account of the circumstances of the relevant Indigenous community or group, including predicted income flows.

An ICDC would be an optional entity that Indigenous communities could use either alone or alongside other entities. While the current law can provide many of the benefits that an ICDC would offer, the flexibility and tax exempt status of an ICDC would encourage their use by Indigenous communities.

An objective of the ICDC approach to the management of land-related payments and other income for Indigenous communities is to minimise duplication and administrative inefficiency by facilitating the establishment of a single fund that receives payments from a number of sources and then applies them in accordance with its objects to a potentially wide range of purposes. The primary function of an ICDC would be to receive, generate, manage and apply payments rather than conduct activities directly, although it could do that as well in particular circumstances.

The Minerals Council of Australia and the National Native Title Council consider that an ICDC-type entity is required to:

- provide a vehicle to generate sustainable and long-term social and economic benefits for Indigenous communities;
- provide more flexibility so that agreement funds can be used for a broad range of community development initiatives to achieve Closing the Gap and regional development outcomes;
- allow the accumulation of funds to deliver genuine, long-term wealth creation opportunities for Indigenous people; and
- provide sufficient incentives for strong governance to maximise effective use and administration of agreement funds.

Activities and payments

An ICDC could make a broader set of payments than charities because its purposes would extend beyond the concept of a charity to promoting sustainable community and socio-economic development. The payments ICDCs could make are outlined below and summarised in a diagram at Attachment C. The activities of an ICDC (Entity A in the diagram) and payments to the following

entities need to be considered: a not-for-profit entity connected to the ICDC (Entity B); businesses carried on for individual profit (Entities C and D); and individual community members.

ICDC entity (Entity A)

An ICDC would be an entity established to receive an Indigenous community's land-related payments and other income, and accumulate funds including towards a future fund. It would be a not-for-profit entity which could not make distributions to individuals on the basis of their membership interests in the ICDC. An ICDC might carry on some small-scale commercial activity itself but profits would be applied for the purposes of the ICDC and not distributed to individuals.

Not-for-profit community or charitable entity (Entity B)

ICDCs would be able to provide funds and support to certain not-for-profit entities undertaking activities, including commercial activities, for community benefit. Profits would be applied for the purposes of the not-for-profit entity and not distributed to individuals. Activities conducted by the not-for-profit entity could include: community store, health service, school, cultural tourism, natural resource management, meeting rooms and community housing.

Businesses for individual profit (Entities C and D)

An ICDC could provide loans and limited start-up and other support services to businesses conducted by community members for individual profit. ICDCs could also invest in these entities and receive distributions but could not make payments or grants to a business other than for goods or services.

Individuals

ICDCs could make payments and superannuation contributions to non-employee members in limited circumstances, but could not make distributions to individuals on the basis of their membership interests in the ICDC.

6.2 Governance rules for ICDC entities

The Working Group proposes there should be minimum governance standards for ICDC entities, which ensure that the fiduciary obligation of responsible persons of the ICDC and appropriate standards of accountability, financial management and investment planning are met and that this is able to be supervised by the ICDC regulator.

The ICDC governance standards would apply to all entities that seek registration for the status of an ICDC. These may include a variety of legal entities, for example, CATSI corporations, companies limited by guarantee (under the Corporations Act) or trusts. As a result of this, and given the range of size and circumstances of an ICDC, the ICDC governance standards will have built in flexibility but will identify the key elements to be satisfied.

Each different type of legal entity that is eligible to apply to be registered as an ICDC would already be subject to specific governance standards or rules, for example CATSI corporations are subject to the CATSI Act and the Office of the Registrar of Indigenous Corporations (ORIC) requirements. Meeting those CATSI Act requirements might be sufficient to demonstrate to the ICDC regulator that some of the ICDC governance standards are met.

An ICDC entity could take a variety of legal forms including a trust or company; could receive, control and invest a wide range of assets and revenue streams; and could operate in widely varying

geographic and social circumstances and with a range of capabilities. Accordingly, a majority of the Working Group considered that a principle-based model of governance is likely to achieve the best outcomes for the ICDC, the Indigenous people for whom it invests and controls funds, and other stakeholders.

In this regard, the principle-based approach to governance of charities to be used by the ACNC was thought to be appropriate. The principles-based governance standards proposed for ICDCs by the Working Group are set out at Attachment D.

However, several members of the Working Group expressed reservations about a purely principles-based approach and suggested that a tighter regulatory regime might be required to reduce scope for abuse, even for smaller entities. They have seen examples of attempted and successful abuses which would not be caught by a principles-based approach.

6.3 Regulation of ICDC entities

Sound regulation is important to build and maintain trust in the operation of ICDCs, promote high standards of governance and transparency and ensure that the burden of regulatory compliance is appropriate for a range of different circumstances.

An ICDC would be a not-for-profit entity but not a charity. Within these bounds, the ICDC could be an existing entity (such as a trust, or a corporation incorporated under the Corporations Act or the CATSI Act). Alternatively, a new type of legal entity could be created for the ICDC.

Regulatory functions in relation to ICDC entities

The Working Group considered the regulatory functions that would need to be addressed by a regulator of the ICDC entity. A range of regulatory functions may need to be performed in relation to the ICDC depending on the legal form that an ICDC takes. These functions could include:

- incorporation, where necessary — for example, under the Corporations Act;
- registration — for example, registration of an entity as an ICDC, having regard to listed criteria the entity needs to meet;
- regulation — for example regulatory actions to protect land-related payments similar to those currently taken by ORIC;
- reporting — including assessing financial/other reports provided by ICDCs, and monitoring breaches of reporting requirements;
- public education and information — for example advice hotlines, public information sessions, website guidance material and FAQs, and other resource materials;
- mediation of complaints — for example dispute resolution services similar to those offered by ORIC to CATSI corporations, members and directors;
- provision of assistance and support — for example, limited support at the registration stage such as issuing non-binding views on an entity's entitlement to registration before a formal application is received, and training in the operation of an ICDC; and

- liquidation and/or wind-up — for example when a corporate ICDC becomes insolvent.

Key regulation considerations

In setting up a system for the regulation of ICDCs, the following key considerations should be taken into account:

- avoiding duplicative and potentially inconsistent regulatory and reporting requirements. This could arise, for example, if an ICDC were a corporation subject to the Australian Securities and Investments Commission's regulatory regime as well as an ICDC-specific framework.

  One option to address this would be to provide for a single regulator for ICDCs, either by modifying the functions of an existing regulatory body or establishing a new regulator (noting that this would have complexities and costs);

- ensuring proportionality in the regulation of ICDCs, for example through a tiered system, to ensure small, medium and large ICDCs are subject to appropriate regulatory and reporting requirements;

- establishing appropriate appeals or objections processes for decisions of an ICDC regulator; and

- interaction of any new/stand alone ICDC regulator with other regulators (for example the Australian Tax Office).

Options for regulator

Consideration of a suitable ICDC regulator, or mix of regulators, will depend on the final legal form and functions of the ICDC model. This is the case regardless of whether existing entities could register as ICDCs or an entirely new entity is created. Consideration of appropriate regulator(s) and their role will depend on:

- the legislative framework that sets up and broadly governs the ICDC model;

- more detailed (and possibly tiered) governance arrangements applying to ICDCs; and

- implementation issues — for example:

  - how existing entities would need to modify their set-up and operations to qualify as an ICDC; and

  - transitional arrangements, including for existing charitable entities managing land-related payments and other income that wish to move to the ICDC model.

The Working Group noted that within the current regulatory framework the ACNC, ORIC and Australian Securities and Investments Commission could be possible regulators.

6.4 Taxation of ICDC entities

It is proposed that the ICDC would be exempt from income tax and have DGR status. The tax treatment proposed by the ICDC model is summarised in the diagram at Attachment C, and is

outlined in more detail below. The taxation of the following entities needs to be considered under the ICDC proposal: the ICDC entity (Entity A in the diagram); a not-for-profit entity connected to the ICDC (Entity B); businesses carried on for individual profit (Entities C and D); and individual community members.

Treasury advises that, although the proposed taxation arrangements for an ICDC entity as proposed would have an unquantifiable cost to revenue (due to the lack of comprehensive data), they are likely to have order of magnitude at the lower end of a $0-$10 million range.

Proposed tax treatment of ICDC (Entity A)

An ICDC would be a not-for-profit entity. The income of an ICDC, including investment income, would be exempt from income tax. An ICDC would be entitled to a refund of imputation credits for franked distributions it receives. An ICDC would have DGR status, and would be included on a newly created DGR register of ICDCs.

It is assumed that an ICDC would have the same FBT and GST treatment as most other not-for-profit bodies. Most other not-for-profit entities are entitled to the FBT rebate or exemptions, which compensates not-for-profit employers for their inability to claim an income tax deduction for the payment of FBT.[16] Also, as an ICDC would be a DGR entity, its non-commercial supplies would be GST-free.[17]

Not-for-profit entities (Entity B)

An ICDC would be able to provide funds to certain not-for-profit entities undertaking activities, including commercial activities, for community benefit. The not-for-profit entity may also attract tax-exempt tax treatment (like an ICDC), for example if it is a registered charity or community service organisation.

Businesses for private profit (Entities C and D)

Businesses carried on for private profit with which an ICDC engages would receive normal income tax treatment under the company or individual income tax.

Payments for individuals

An ICDC could make superannuation contributions on behalf of individuals in the community in limited circumstances. The ICDC concept proposes these contributions would be taxed in the same way employer contributions are taxed (15 per cent).[18] Treasury suggests a simpler arrangement that delivers an equivalent or better outcome would be for contributions to be made as non-concessional (that is, post-tax) contributions.

The taxation of non-business payments to individuals would depend on whether they were characterised as income. For example, a payment would not be taxable if it was a gift.

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16 *Fringe Benefits Tax Assessment Act 1986*, Section 65J.

17 *A New Tax System (Goods and Services Tax) Act 1999*, Subdivision 38-G.

18 Minerals Council of Australia and National Native Title Council's Indigenous Community Development Corporation (ICDC) Concept (March 2013), p 7.

6.5 Assessment of ICDC model

The Working Group supports the ICDC model. The ICDC should be a not-for-profit entity (but not a charity) that would be exempt from income tax. Within these bounds, the ICDC could be an existing entity, such as a trust or a corporation, or a new type of entity.

This approach would promote economic development in Indigenous communities by extending tax free status to additional activities beyond those permitted by the current definition of charity (including the statutory definition contained in the *Charities Act 2013*).

Even though its use would not be mandatory, the ICDC model would provide a very strong incentive for good governance because groups wanting to use the ICDC (with its attractive tax status) for economic development would need to comply with the ICDC's governance requirements.

The Working Group recognises there will be a trade-off between choice and complexity with any new optional entity for holding and managing funds. Compliance costs in the tax system generally increase with the number of options available to taxpayers because taxpayers will, justifiably, seek to obtain the most favourable tax outcome by combining the entities available to them. The utilisation of a registered tax-exempt status such as ICDC could be a better option for many Indigenous communities than arrangements currently available, which often involve significant establishment and administration costs that are not affordable for organisations that receive small annual payments. It would enable Indigenous communities to utilise a legal form with which they are familiar (such as a CATSI corporation, company limited by guarantee or a trust), but on satisfying the conditions, to register for ICDC status.

The Working Group considers that the potential benefits of this ICDC tax-exempt registered entity that enables a focus on economic development for the long term outweigh the complexity and compliance costs for Indigenous communities that would arise from the availability of a new kind of tax-exempt entity. However, significant education and out-reach will be required to ensure the ICDC reaches its full potential.

An ICDC could be particularly useful for organisations with medium to low incomes. The flexibility in terms of activities that could be undertaken by an ICDC would be very attractive to many organisations. Given the costs of governance under existing arrangements involving independent trustees (up to $1 million per annum), organisations with a turnover of up to $10 million, and in particular organisations with an income below $200,000, could benefit from the establishment of an ICDC.

The Working Group has evaluated the ICDC model at a high level and recognises further development would be required before it could be implemented, including in relation to:

- the legislative framework that would set up and broadly governs the ICDC model;
- governance arrangements that would apply to ICDCs;
- the regulation of ICDCs (including the mix of regulatory bodies working with ICDCs); and
- how the model would be implemented, including:
    - procedural matters, such as registration requirements;

- how existing entities would need to modify their set-up and operations to qualify as an ICDC; and

- transitional arrangements, including for existing charitable entities managing land-related payments and other income that wish to move to the ICDC model.

Consultation would be needed with Indigenous communities as well as relevant government departments and other stakeholders to develop the detailed framework and to ensure uptake and successful implementation of the ICDC model by Indigenous communities.

Recommendation:

The Government introduce legislation into Parliament to make an ICDC type of entity — a registered not-for-profit entity as described in this report that is exempt from income tax and has DGR status within a newly created DGR category — available to Indigenous communities as soon as possible. The Working Group suggests the Department of Families, Housing, Community Services and Indigenous Affairs, as the department of the minister responsible for Indigenous affairs, co-ordinate implementation of the proposal, with ongoing support from the Attorney-General's Department in relation to native title issues and Treasury in relation to taxation issues.

ATTACHMENT A

TAXATION OF NATIVE TITLE AND TRADITIONAL OWNER BENEFITS AND GOVERNANCE WORKING GROUP — TERMS OF REFERENCE

OBJECTIVES

The Working Group will examine options for native title and traditional owner groups to strengthen governance and promote sustainability of land-related payments and other benefits, to facilitate greater social, cultural and economic development and wealth creation for current and future generations.

In examining options, the Working Group will have a particular focus on the tax treatment of current arrangements and of proposed options for holding, managing and distributing those benefits; such as the proposal for an Indigenous Community Development Corporation (ICDC) which has been the product of significant work by the National Native Title Council, the Minerals Council of Australia, native title tax experts and Indigenous leaders.

SCOPE

The Working Group will consider:

- the desired social, cultural and economic outcomes for native title and traditional owner groups from holding, managing and distributing benefits, including governance arrangements that deliver transparency, accountability and sustainability;
- the adequacy of current arrangements for holding, managing and distributing benefits in achieving these outcomes, including:
- the entities, including charitable trusts, used by native title and traditional owner groups as part of these arrangements and the current taxation treatment of these arrangements;
- options for reform, including consideration of an ICDC as proposed by the National Native Title Council and the Minerals Council of Australia; and
- implementation issues and timeframes for options, including for an ICDC.

The Working Group will not consider the mining withholding tax, which is currently levied on mining payments made to Indigenous people or a distributing body in relation to the use of Indigenous land for mining or exploration.

TIMING

The Working Group is required to report on options to the Attorney-General, the Minister for Families, Community Services and Indigenous Affairs and the Assistant Treasurer by 1 July 2013.

The Working Group will meet three times; enabling a focus on the core problems with current arrangements, as well as options for reform and implementation issues.

In addition to the Minerals Council of Australia and National Native Title Council ICDC proposal (March 2013), the Working Group will draw on past discussion papers and submissions in its considerations, including:

- submissions to the House Standing Committee of Economics regarding Tax Laws Amendment (2012 Measures No. 6) Bill 2012;
- submissions to the Senate Legal and Constitutional Affairs Committee and the House Standing Committee on Aboriginal and Torres Strait Islander Affairs regarding the Native Title Amendment Bill 2012;
- Treasury consultation paper of October 2010, Native Title, Indigenous Economic Development and Tax, and submissions;
- FaHCSIA and AGD discussion paper of July 2010, Leading practice agreements: maximising outcomes from native title benefits, and submissions; and
- the Native Title Payments Working Group's report to the Federal Government in December 2008.

MEMBERSHIP

Members of the Working Group are:

- Mr Rob Heferen, Executive Director, Treasury — Chair;
- Mr Murray Baird, Assistant Commissioner General Counsel, Australian Charities and Not-for-profits Commission;
- Mr Anthony Beven, Registrar, Office of the Registrar of Indigenous Corporations;
- Mr Michael Dillon, Deputy Secretary, Department Families, Housing, Community Services and Indigenous Affairs;
- Mr Kym Duggan, First Assistant Secretary, Attorney-General's Department;
- Mr Andrew England, Chief Tax Counsel, Australian Taxation Office;
- Mr Angus Frith, Barrister (Melbourne);
- Professor Marcia Langton, Melbourne University;
- Mr Graeme Neate, retired President, National Native Title Tribunal;
- Mr Graham Reeve, The Myer Family Company;
- Mr Peter Seidel, Partner, Arnold Bloch Leibler;
- Professor Miranda Stewart, University of Melbourne;
- Mr Matthew Storey, Chief Executive Officer, Native Title Services Victoria;
- Ms Melanie Stutsel, Minerals Council of Australia; and

- Mr Hector Thompson, General Manager, Treasury.

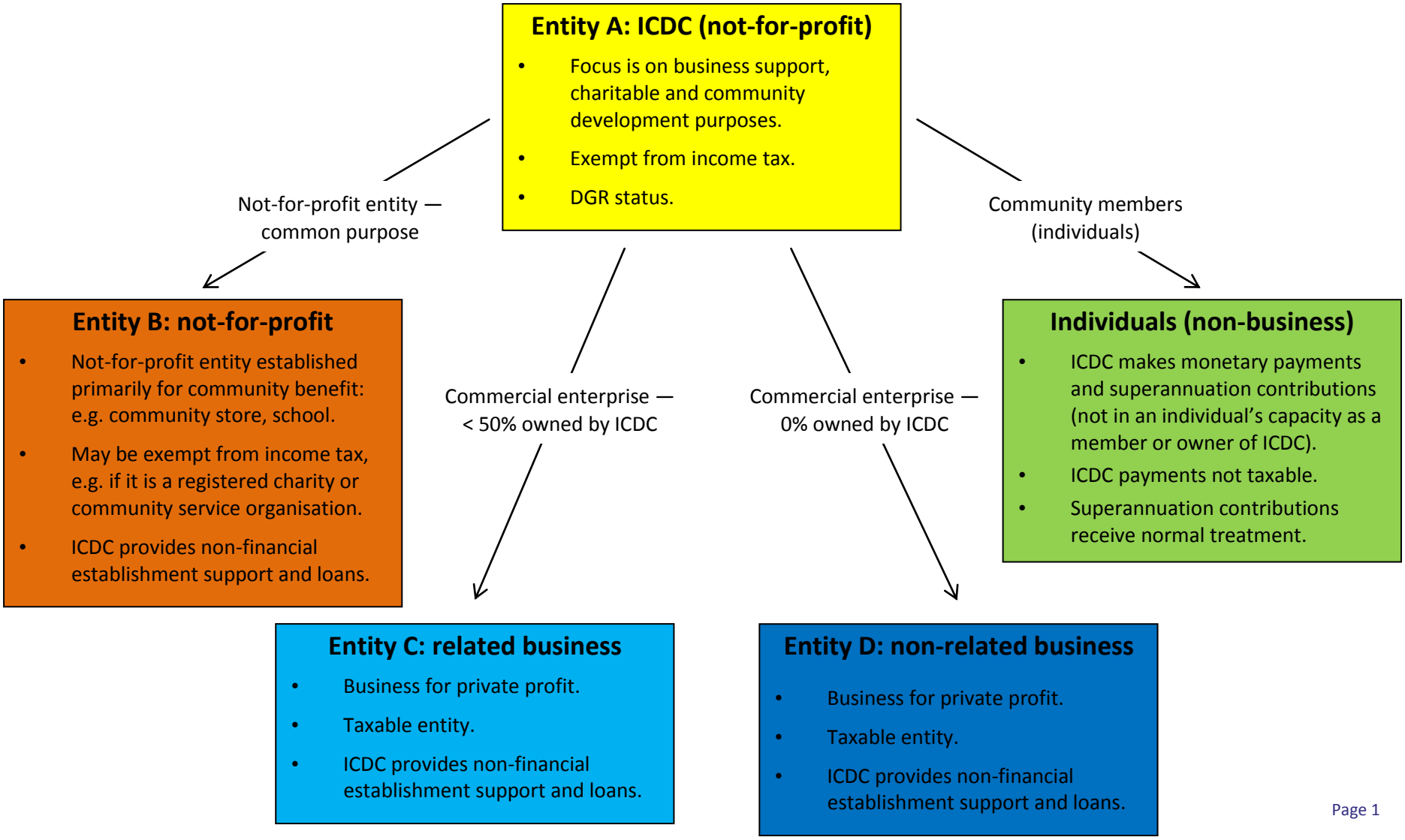
SUPPORT

The Working Group will be supported by a Secretariat in the Treasury that will be assisted by the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department.

ATTACHMENT B

MINERALS COUNCIL OF AUSTRALIA AND NATIONAL NATIVE TITLE COUNCIL INDIGENOUS COMMUNITY DEVELOPMENT CORPORATION (ICDC) CONCEPT (MARCH 2013)

DIAGRAM OF ICDC ENTITY AND OTHER COMMUNITY ENTITIES



ATTACHMENT D

ICDC GOVERNANCE STANDARDS

The ICDC needs to have high standards of governance, accountability and transparency. Compliance with governance standards should be one of the eligibility requirements for initial and ongoing registration as an ICDC, assessed annually.

As the ICDC can take a variety of legal forms including a trust or company; can receive, control and invest a wide range of assets and revenue streams; operate in widely varying geographic and social circumstances and with a range of capabilities, a principle-based model of governance is likely to achieve the best outcomes for the ICDC, the Indigenous people for whom it invests and controls funds, and other stakeholders.

The principle-based approach to governance of charities to be used by the ACNC is appropriate. The ACNC Governance Standards were settled after widespread public consultation on a Treasury consultation paper. The standards proposed here are based on the ACNC Governance Standards and meet most of the minimum governance standards considered in the Minerals Council of Australia and the National Native Title Council proposal.

A principle-based approach involves setting standards of governance, rather than being highly prescriptive. Principles could be reinforced with published recommendations, applied on an 'if not why not' basis as is done by the Australian Stock Exchange (ASX). Recommendations, which are guidelines not prescriptions, would be set out in guidance material. As the ASX does, the regulator could vary the application of the governance standards across a range of different circumstances and for organisations of different sizes. If an ICDC considers that a recommendation was inappropriate to its particular circumstances, it would have flexibility not to adopt it. The flexibility is tempered by a requirement to explain why if the recommendation is not followed. Culturally appropriate guidance materials, training and resources would need to be developed for ICDCs.

The regulator could develop recommendations underlying the governance standards to be applied differently in different circumstances and for small, medium and large ICDCs. Proposed tiers are:

(a) Small: annual income up to $250,000;

(b) Medium: annual income from $250,001 - $999,999; and

(c) Large: annual income exceeding $1 million.

The regulatory approach to monitoring compliance with the governance standards should be proportionate and risk based. Assessing what or who is at risk; nature and degree of potential harm; likelihood and frequency of occurrence or recurrence; risk profile of the ICDC (such as its size, the existence of accountability mechanisms, its history of compliance and cooperation); behaviour of those responsible.

The five proposed Governance Standards set out below are adapted from the ACNC Standards.

Standard One: Purposes and not-for-profit nature of an ICDC

An ICDC must:

(a) be able to demonstrate, by reference to the governing rules of the ICDC or by other means, its purposes and its character as a not-for-profit entity as defined in the ICDC criteria ; and

(b) make information about its purposes available to the public, including members, donors, employees, volunteers and potential beneficiaries; and

(c) comply with its purposes and its character as a not-for-profit ICDC.

Standard Two: Accountability of the ICDC to members and potential beneficiaries

An ICDC must take reasonable steps to ensure that:

(a) the registered entity is accountable to its members and potential beneficiaries; and

(b) the registered entity's members and potential beneficiaries have an adequate opportunity to raise concerns about the governance of the ICDC.

Standard Three: Compliance with Australian laws by the ICDC

An ICDC must not engage in conduct, or omit to engage in conduct, if the conduct or omission may be dealt with:

(a) as an indictable offence under an Australian law (even if it may, in some circumstances, be dealt with as a summary offence); or

(b) by way of a civil penalty of 60 penalty units or more.

Standard Four: Suitability of responsible persons of the ICDC

An ICDC must:

(a) take reasonable steps to ensure that each of its responsible persons meet the conditions mentioned in subsection (3); and

(b) after taking those steps:

(i) be, and remain, satisfied that each responsible person meets the conditions; or

(ii) if it is unable to be, or remain, satisfied that a responsible person meets the conditions, take reasonable steps to remove that person.

Standard Five: Duties of responsible persons of an ICDC

An ICDC must take reasonable steps to ensure that its responsible persons are subject to, and comply with, the following duties:

(a) to exercise the ICDC's powers and discharge the responsible person's duties with the degree of care and diligence that a reasonable individual would exercise if they were a responsible person of the ICDC;

(b) to act in good faith in the ICDC's best interests, and to further the purposes of the ICDC;

(c) not to misuse the responsible person's position;

(d) not to misuse information obtained in the performance of the responsible person's duties as a responsible person of the ICDC;

(e) to disclose perceived or actual material conflicts of interest of the responsible person;

(f) to ensure that the ICDC's financial affairs are managed in a responsible manner;

(g) not to allow the ICDC to operate while insolvent.

Note: A perceived or actual material conflict of interest that must be disclosed includes a related party transaction.

Role of Independent Directors

The role of independent Directors or members of the governing body of an ICDC can be very important. It is not advisable to make this mandatory, as there could be instances in which an ICDC could not secure the services of an independent Director. There may also be significant costs associated with properly remunerating independent directors, especially if they are not local. Different requirements may apply for small, medium or large ICDCs. The recommendations underlying this governance standard could make clear an expectation of an independent Director for a large ICDC, on an 'if not why not basis' unless there was good reason this was not possible.

Potential Beneficiaries of an ICDC

An ICDC must work for the benefit of the Aboriginal people or Torres Strait Islanders with rights and interests in the relevant land or waters, whether as a native title claim group, native title holders, Traditional Aboriginal Owners, or as defined under other legislation ('potential beneficiaries'). Not all of the potential beneficiaries will be members of the entity that manages their land on their behalf or of the ICDC. Some will be under age; some will not choose to join; there may be other reasons why they are not members.

It is appropriate that an ICDC has a fiduciary obligation to its members and potential beneficiaries in respect of all assets and funds received. Under Standard 2, ICDCs must take reasonable steps to be accountable and transparent to their members and potential beneficiaries and provide their members and potential beneficiaries adequate opportunity to raise concerns about how the ICDC is governed.

In addition, a mechanism is needed for accountability to the potential beneficiaries. Decision-making mechanisms in the Native Title Act, the relevant regulations and the *Aboriginal Land Rights Act (Northern Territory) 1976* provide some guidance in this regard. These include:

- native title groups authorising native title applications or Indigenous Land Use Agreements using a traditional or an agreed decision-making process;

- prescribed bodies corporate consulting and obtaining the consent of the native title holders to decisions affecting their native title; and

- Land Councils ensuring that Traditional Aboriginal Owners understand the nature and purpose of a proposal and as a group consent to it before they act on it.

While day to day governance is not as significant as decision-making about land, regular consultation about governance issues with the potential beneficiaries in a manner agreed by them or that takes account of traditional decision-making processes would greatly assist an ICDC's accountability to the group for whom it is working.

One such mechanism would be:

- Members and potential beneficiaries must be consulted and consent to the purposes and holdings of the ICDC.

- Members and potential beneficiaries should appoint decision-makers to ensure that the purposes for which the ICDC has been established are adhered to in relation to decisions regarding funds accumulation and distribution plans, investments and acquisitions.

- Members and potential beneficiaries should be periodically apprised of the performance of the ICDC in terms of funds held and distributed, and the achievement of outcomes in line with the purposes of the ICDC.

- An agreed dispute resolution process to be used in the event that members of the group consider that decisions that have been made by the responsible persons are contrary to the decisions previously agreed by consent of the members and potential beneficiaries, or where their consent cannot be achieved.

Responsible Management of Financial Affairs of an ICDC

There are some specific aspects of an ICDC that may make financial management more significant. An ICDC has some similarities to a Private Ancillary Fund (PAF) or Public Ancillary Fund (PuAF), which can receive tax-deductible donations and invest funds over time, with minimal distribution obligations, to ensure capital growth and maintenance for the long term. These Funds are subject to specific regulated Guidelines. Some of the financial standards for PAFs and PuAFs could apply to large ICDCs.

Some ICDCs will receive large amounts of annual income or receive income over a long period, which is in part to provide compensation inter-generationally for loss of access to and use of land. In these circumstances it would be appropriate for the recommendations in this governance standard to expect more stringent financial management and investment for the long term.

Based on the PAF/PuAF model, specific financial management recommendations for an ICDC with significant funds under management could include:

- an appropriate Accumulation and Distribution Plan to be monitored by the regulator;

- an appropriate investment strategy, having regard to the Accumulation and Distribution Plan;

- the investment strategy must be implemented by the responsible persons and published for the ICDC members and potential beneficiaries;
- an independent professional Trustee;
- the preparation of proper accounts, financial statements and audit of those statements each year by a registered auditor;
- limitations on borrowing or giving security by the ICDC; and
- possible limitations on particular types of investment.

A large ICDC should be required to prepare and maintain a current investment strategy for all or part of its fund of income and assets. An appropriate investment strategy should set out the investment objectives and explain the investment methods the trustee will adopt to achieve them. The requirements for an ICDC investment strategy could be adapted from the Public Ancillary Fund Guidelines 2011.