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Native title payments discussion paper – *Optimising Benefits from Native Title Agreements*

Australian Human Rights Commission

Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Australian Government's native title payments discussion paper

4 March 2009 (extension granted)

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Australian Government, providing comments on the native title payments discussion paper, *Optimising Benefits from Native Title Agreements.*

2 Summary

2. The Aboriginal and Torres Strait Islander Social Justice Commissioner has produced 15 Native Title Reports which include analyses and recommendations on the operation of the native title system and its effect on the exercise and enjoyment of Aboriginal and Torres Strait Islander peoples.[1] Particularly relevant is the *Native Title Report 2003,* which provides a detailed comparative analysis of the international context of Indigenous peoples and agreement-making, concerning their lands, waters and natural resources.

3. The Commission notes that the capacity and skill building that is necessary to improve the current system must be further supported by amendments to the *Native Title Act 1993* (cth) (Native Title Act) which strengthen procedural rights, including the right to negotiate.

4. Tax reform is also necessary to provide appropriate tax concessions for organisations which have been established as a result of agreements made under the native title system.

5. The Discussion Paper touches on a range of issues that have significant implications for the lives of Indigenous peoples in Australia. It is particularly pertinent for Indigenous communities in rural and regional areas as the paper is focused on the agreements these communities make with the resource industry for use of their lands for mining.

6. The Commission considers that nearly all issues identified in the discussion paper, apart from the section on tax policy, can be addressed by building capacity and providing skills to communities to negotiate fairly and on an equal footing. This will require dedicated resources. With skilled negotiators, and skilled, capable communities who know their rights, good agreements will be made.

7. The Commission notes that the native title system has come under international scrutiny, particularly concerning the impacts of the 1998 amendments to the Native Title Act which severely limited the rights of Indigenous Australians to their lands, waters, and natural resources.

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[1] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Reports,* Australian Human Rights Commission, Sydney. At: http://humanrights.gov.au/social_justice/nt_report/index.html (viewed 7 February 2009).

8. The Commission acknowledges that the native title payments discussion paper - *Optimising Benefits from Native Title Agreements* (the Discussion Paper) aims to address some of the concerns raised by the Office of the High Commissioner for Human Rights, Human Rights Committee in their Concluding Observations on Australia in 2000.

3 Recommendations

9. The Australian Human Rights Commission makes the following recommendations.

3.1 Consultations

10. With regard to the consultation process, the Government undertake further consultations with those Indigenous people whose lives will be affected by any policies that result from the paper; that is, those in communities where mining interests have been indicated. As a start, the Commission recommends that the Government:

    a. make additional resources available for NTRBs to attend the information sessions and to consult extensively with their members in order to make submissions on the paper

    b. send a hard copy of the paper to all existing PBCs and Natural Resource Management (NRM) organisations

    c. produce a plain English community guide on the Discussion Paper, and send it out with a copy of the Discussion Paper, to all existing PBCs and NRM organisations

    d. contact the PBCs and NRM organisations by phone, or if possible by email, to ensure they received the paper, seek their opinion and receive oral submissions

    e. ensure interpreters are available

    f. if necessary, fly members of communities to consultations in regional centres or alternatively conduct sessions in more regional centres and ensure transport is available for Traditional Owners.

3.2 Increased transparency

11. A register of experts be established and funded by the Government for Indigenous people to access the expertise required to effectively participate in the negotiation and implementation of native title agreements.

12. The current registers of agreements: the Treaties and Negotiated Settlements Project and the National Native Title Tribunal Register of ILUAs, be considered as possible options for providing a central repository of agreements enabling a degree of transparency of agreements, and that a

review be conducted to assess what improvements could me made to these systems.

13. An assessment of agreements be conducted to compile a range of template or framework agreements that include various options that relate to the benefits, process, and format of agreements that can be accessed by Native Title Representative Bodies to assist with their negotiations.

3.3 Improved workability of agreements

14. The Government further examine how the procedural rights afforded under the right to negotiate provisions can be separated from the progress of the native title claim, in line with the discussion of this issue in this submission.

15. The Government work with native title parties to agreements to identify and develop a set of guidelines for the process of conducting a successful negotiation process.

3.4 Promoting good practice

16. The Government and native title parties to agreements work together to develop a set of guidelines for developing native title agreements, which are aimed at economic and social development, and underpinned by a human rights based approach to development. The guidelines should:

    a. respond to the group's goals for economic and social and cultural development

    b. provide for the development of the group's capacity to set, implement and achieve their development goals

    c. utilise to the fullest extent possible the existing assets and capacities of the group

    d. build relationships between stakeholders, and ensures the fullest participation of Indigenous peoples in the negotiating process

    e. integrate activities at various levels to achieve the development goals of the group.

17. Where a mining lease is to be granted, the Government and NTRBs work with the Indigenous group to identify as early as possible the enterprise aspirations of Traditional Owners and assess their capacity to engage in economic development by:

    a. consulting with the Traditional Owners and their communities

    b. auditing the existing resources

    c. auditing the groups access to government resources

d. specifically targeting resources to communities according to their relative disadvantage.

18. The Government direct ICCs and other agencies responsible for supporting and facilitating business development in Indigenous communities to work with Indigenous land corporations (including representative bodies) to:

    a. Develop a communication strategy to inform all Indigenous Australians of economic development policy, programs, initiatives, and potential sources of funding.

    b. To work with Indigenous parties to agreements to assist with applications for funding that leverage economic development projects and opportunities, and coordinate appropriate training and development to support economic development and the full implementation of agreements.

19. In order to increase the efficiency and effectiveness of the native title system as a whole, the Government must include in the native title budget sufficient ongoing funds to promote a level playing field and sustainability from the outset.

3.5 Tax Options

20. The Government consider creating a distinct tax treatment for Indigenous entities, which clearly and unambiguously applies tax concessions afforded to charities, Public Benevolent Institutions and Deductible Gift Recipients to Indigenous entities which make agreements under the Native Title Act.

21. The overlap between native title and tax law should be comprehensively reviewed by the Treasurer, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs. The Commission would like the opportunity to provide further and more detailed comment when further consultation is undertaken.

3.6 Statutory Schemes

22. Any minimum standard or set of criteria must be set in the context of human rights principles, and relate specifically to the conduct of the negotiations. For example, principles such as free, prior and informed consent; good faith negotiations; and monitoring, assessment and review provisions should be regarded as a minimum standard.

23. Any minimum standard of benefits must be defined in terms of categories, and include as a minimum:

    a. employment, education and training that is based on a minimum percentage of employment, and include specific targets.

    b. business investment and development including support and mentoring of business aspirations, access to advice on investment opportunities,

and a first option tendering process to Traditional Owners for company contracts.

c. the protection and maintenance of cultural heritage.

d. environmental protection and rehabilitation of lands affected by the mining operation.

e. committed resources to ensure the full implementation of the agreement.

f. community development.

g. sufficient resources to build the capacity and governance of Indigenous organisations charged with implementing the agreements and managing the benefits.

24. Access to market information will also be vital for Indigenous groups to be able to determine whether they have a good agreement on the table – that offers are based on current market value, consider the expected gain from the life of the mine, the cost to rehabilitate the lands and waters after the mine, and the impact on Indigenous culture and heritage.

25. Any statutory or regulatory schemes must not compromise the self-determination of Indigenous peoples; as a minimum it must facilitate it. Reporting as to how this is being achieved should be required as part of the agreement.

4 Scope of the Native Title Payments Discussion Paper

26. The Commission notes that the Native Title Payments Discussion Paper (the Discussion Paper) is part of the Australian Government's commitment to closing the gap of disadvantage between Indigenous and non-Indigenous Australians. It aims to explore ways to strengthen financial and economic outcomes for Indigenous people under the Indigenous Economic Development Strategy which is also currently being developed.

27. The Commission notes that one of the focus areas for the Government is the engagement between Indigenous Australians and the resources industry; particularly in the context of agreements about access to Indigenous land to facilitate mining and other resource development.

28. The Commission also notes that, parallel to this process, the Government is considering a second discussion paper, *Proposed minor native title amendments*[2], which will also consider issues relevant to this process.

[2] Attorney-General, *Discussion Paper, Proposed minor native title amendments,* Attorney-Generals' Department, Canberra, December 2008. At: www.ag.gov.au.

29. The Commission notes that the Discussion Paper was prepared by the Australian Government in response to the Native Title Payments Working Group who provided their expert advice in the *Native Title Payment Working Group Report.* The report provides advice about issues including:

    a. constraints on maximising benefits from agreements

    b. learning from existing agreements

    c. characteristics of good agreements

    d. international experience

    e. securing intergenerational benefits from existing economic activity

    f. facilitating the development of Indigenous enterprises

    g. measures to address barriers in the taxation system and other financial arrangements

    h. the role of governments

    i. contents of future agreements.

30. The Government's response, the Discussion Paper, aims to build on the report of the Working Group and discusses a number of options that are intended to ensure that the benefits accruing to Indigenous peoples under native title agreements contribute to addressing the economic and social disadvantage facing Indigenous communities and are delivered to current and future generations. The Discussion Paper considers the following issues:

    a. optimising benefits from native title agreements

    b. the type of benefit to be provided

    c. options – the manner in which the benefits could be provided and administered

    d. next steps.

5 General Comments

31. The Commission commends the Government's commitment to consider the limitations of the native title system, and what requirements are necessary to improve it, and ensure that the benefits derived from native title agreements provide the best possible outcome for Indigenous communities.

32. The Commission notes that the Australian Labor Party has acknowledged the importance of land and water to Indigenous peoples' spirituality, law, culture, economy and well-being. It has also identified native title and land rights as both symbols of social justice and valuable economic resources to

Indigenous Australians. The Australian Labor Party believes that negotiation produces better and more efficient outcomes than litigation and that land use and ownership issues should be resolved by negotiation where possible.

33. The Commission acknowledges that the Government is currently involved in a number of processes designed to improve the standard of living for Indigenous peoples across the country, including the Close the Gap campaign. It is also developing a number of strategies across different departments to address issues faced by Indigenous communities such as climate change.

34. The Commission is concerned that governments ensure that these processes and strategies are complementary and fully engage Indigenous peoples in the development and implementation of these initiatives, particularly where the decisions being made will have a direct impact on their lives. Access to, and control and management of their lands, waters and natural resources are areas where this will be especially important, as they are crucial elements in achieving economic development, and will be critical in creating sustainable futures for Indigenous people.

35. The Commission further notes that how the native title system protects the rights of Indigenous peoples to their traditional lands, territories and resources is legitimately a matter of international interest. Australia has human rights obligations related to these issues under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). These obligations have been discussed in depth in successive Native Title Reports.

36. The native title system has also come under international scrutiny, particularly concerning the impacts of the 1998 amendments to the Native Title Act.

37. In 2000, the Human Rights Committee's concluding observations on Australia stated:

> The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).
>
> The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo, 1992; Wik, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective

> participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.[3]

38. The Committee on the Elimination of Racial Discrimination (CERD) has also expressed the following concerns in 2005, 2000 and 1999.

39. In its March 1999 decision, the Committee observed that:

> While the original Native Title Act recognises and seeks to protect Indigenous title, provisions that extinguish or impair the exercise of Indigenous title rights and interests pervade the amended Act.[4]

40. In March 2000, the Committee reiterated the concerns it raised in 1999. The Committee noted that:

> …after its renewed examination in August 1999 of the provisions of the Native Title Act as amended in 1998, the devolution of power to legislate on the "future acts" regime has resulted in the drafting of state and territory legislation to establish detailed "future acts" regimes which contain provisions further reducing the protection of the rights of native title claimants that is available under Commonwealth legislation. Noting that the Commonwealth Senate on 31 August 1999 rejected one such regime, the Committee recommends that similarly close scrutiny continue to be given to any other proposed state and territory legislation to ensure that protection of the rights of indigenous peoples will not be reduced further.[5]

41. At its sixty-sixth session in February/March 2005, the Committee again reiterated its view that the Mabo case and the Native Title Act constituted a significant development in the recognition of Indigenous peoples' rights, but that the 1998 amendments wound back some of the protections previously offered to Indigenous peoples, and provided legal certainty to government and third parties at the expense of Indigenous title.

42. The Committee recommended that:

> the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous

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[3] Office of the High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee: Australia*, 24/07/2000, A/55/40,paras.498-528. (Concluding Observations/Comments), Sixty-ninth session, Consideration of reports submitted under article 40 concluding observations of the human rights committee, 1967th meeting, Geneva, Switzerland, on 28 July 2000. At: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?OpenDocument (viewed: 7 February 2009).

[4] Committee on the Elimination of Racial Discrimination, Decision 2 (54) on Australia – Concluding Observations/Comments,18 March 1999, [6], UN Doc CERD/C/54/MISC.40/rev.2.

[5] Committee on the Elimination of Racial Discrimination, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, 19 April 2000, [8], UN Doc CERD/C/304/Add.101.

> peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.[6]

43. While the CERD acknowledged that the provisions introduced by the 1998 amendments to the Native Title Act regarding Indigenous Land Use Agreements, as well as the creation of the Indigenous Land Fund in 1995 to purchase land for Indigenous Australians unable to benefit from recognition of native title, the Commission also notes that the intended response to the Mabo decision by the Australian Government in 1992 has not yet been implemented in its entirety.

44. At the time, it was agreed that there would be a three pronged approach – a Native Title Act, a land fund and a social justice package. The social justice package is yet to be implemented, but it would provide an important complementary process to the native title system in responding to the Mabo decision, and ultimately in improving the lives of Indigenous peoples.

45. The Commission is of the view that while the native title system is currently limited in its ability to deliver meaningful outcomes to a significant number of Indigenous peoples and their communities, many of the issues identified in the Discussion Paper, apart from the section on tax policy, can be improved by building capacity and providing skills to communities to negotiate fairly, and on an equal footing. This will require dedicated resources. However, with skilled negotiators, and skilled, capable communities who know their rights, good agreements will be made.

5.1 Consultation process

46. The Commission notes comments made by the Aboriginal and Torres Strait Islander Social Justice Commissioner regarding the lack of Government engagement with Indigenous communities:

> Federal government departments have, in my view, got out of the habit of regularly consulting with Indigenous peoples and in many instances don't seem to know how to do it. We are certainly not at a point where bureaucrats value such engagement or understand its importance in terms of respect and in terms of improving the quality of decision making and policy formulation.[7]

47. Additionally, the Attorney-General in a presentation to the Native Title Consultative Forum prior to the launch of the Discussion Paper, conveyed the Government's desire to build partnerships with Indigenous communities through 'equitable agreements'. He also emphasised the need for 'positive

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[6] Committee on the Elimination of Racial Discrimination, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, March 2005, UN Doc CERD/C/AUS/CO/14. Sixty-sixth session, 21 February - 11 March 2005,

[7] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Essentials for Social Justice: the Future*, 12 November 2008, Australian Human Rights Commission, Sydney. At: http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20081112_future.html.

and enduring relationships', and promoting native title and agreements as a vehicle for reconciliation.[8]

48. However, the Commission is concerned about the short response deadlines and the lack of consultation in centres most affected by the topics addressed in the Discussion Paper. This approach is contrary to the Government's multiple commitments to partnership and engagement with Indigenous communities.

49. Further, the consultations announced do not fulfil this commitment, and will not contribute to the Government's stated intention of information sessions that will provide an 'opportunity to give input and feedback on the direction of the [Indigenous Economic Development] Strategy'(IEDS)[9].

50. Holding information sessions in capital cities and only three major centres with extremely short notice means that those Indigenous people whose lives will be the most affected by the policies decided as a result of consultation on the paper, are least able to attend the information sessions.

51. While the Commission understands that the Government may be relying on Native Title Representative Bodies (NTRBs) in regional areas to provide information, this is just another unexpected burden on these bodies who are already severely under-resourced.

52. The Government may also be presuming that Traditional Owners will be able to make written submissions. The communities most affected by this Discussion Paper are the least likely communities in Australia to have the capacity and resources to do so. There are a number of barriers that will influence this including:

    a. the cost and ability to travel long distances to attend the information sessions

    b. the restriction on members of proscribed communities in the Northern Territory where 50% of their benefits are quarantined

    c. the ability to access the internet to receive the paper and submit a written submission

    d. language barriers.

53. As a result, these communities are the most in need of cross-cultural information sessions that will enable them to understand the implications of the Discussion Paper and have their voices and input heard.

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[8] R McClelland, *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008).
[9] Department of Families, Housing, Community Services and Indigenous Affairs, Native Title Discussion Paper website: http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/programs-native_title_discussion_paper.htm.

54. In the National Platform and Constitution, the Australian Labor Party committed to ensuring that NTRBs would be supported to enable them to freely advocate on behalf of the people they represent. Yet, given their current resourcing, many NTRBs are not in a position to represent the Traditional Owners in their region as adequately as they would like.

55. The Commission is concerned that human rights principles of engagement are adhered to in all decision-making and consultation processes concerning Indigenous peoples. This includes free, prior, and informed consent.

56. The CERD in 2005 recommended:

> That the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land.[10]

57. The Commission encourages the Government to be more proactive in creating the new relationship that has been committed to.

58. The Commission recommends that the Government undertake consultations with those Indigenous people whose lives will be affected by any policies that result from the paper; that is, those in communities where mining interests have been indicated. As a start, the Commission recommends that the Government:

    a. make additional resources available for NTRBs to attend the information sessions and to consult extensively with their members in order to make submissions on the paper

    b. send a hard copy of the paper to all existing PBCs and Natural Resource Management (NRM) organisations

    c. produce a plain English community guide on the Discussion Paper, and send it out with a copy of the Discussion Paper, to all existing PBCs and NRM organisations

    d. contact the PBCs and NRM organisations by phone, or if possible by email, to ensure they received the paper and seek their opinion and receive oral submissions

    e. ensure interpreters are available

[10] Australian Human Rights Commission, Information concerning Australia and the United Nations International Convention on the Elimination of All Forms of Racial Discrimination - Consideration of reports submitted by States parties under Article 9 of the Convention, Concluding observations of the Committee on Australia, UN Docs CERD/C/AUS/CO/14, March 2005, Sixty-sixth session, February – March 2005. Please note: These Concluding Observations are the advance unedited version issued by the Committee. At: http://www.hreoc.gov.au/legal/submissions/cerd/report.html.

f. if necessary, fly members of communities to consultations in regional centres or alternatively conduct sessions in more regional centres and ensure transport is available for Traditional Owners.

59. In undertaking the consultation with communities, the Government should be guided by human rights principles, including those contained in:

    a. The United Nations guidelines on engaging the marginalised, which require participation of indigenous peoples based on the principle of free, prior and informed consent. It also provides that governments establish transparent and accountable frameworks for engagement, consultation and negotiation with Indigenous peoples and communities. See Appendix 1.

    b. The Declaration on the Rights of Indigenous Peoples which provides that indigenous peoples' have the right to free, prior and informed consent before decisions are made which affect their lands (article 28). Article 19 of the Declaration urges states to consult and operate in good faith, with Indigenous peoples in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

    c. The International Covenant on Civil and Political Rights (particularly article 1 - the right to self determination) which the Human Rights Committee has stressed in its concluding observations on Australia, requires Indigenous peoples be given a stronger role in decision-making over their traditional roles and natural resources.[11]

6 Optimising benefits from native title agreements

60. The Commission supports the proposal to develop mechanisms that allow Indigenous peoples to optimise the benefits available to them from native title agreements. The Commission also agrees that these agreements provide an opportunity for Indigenous people to leverage outcomes that will contribute to sustainable development for Indigenous communities.

61. The native title system – as it operates today – does not often deliver on the original objective of the Native Title Act. The original purpose of this legislation was to recognise and protect native title; in particular:

> to provide a national system for the recognition and protection of native title and for its co-existence with the national land management system.[12]

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[11] Office of the High Commissioner for Human Rights, *Concluding Observations of the Human Rights Committee: Australia. 24/07/2000. A/55/40,paras.498-528. (Concluding Observations/Comments),* Consideration of reports submitted under article 40, concluding observations of the human rights committee, Australia. At: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?Opendocument (viewed 12 January 2009).

[12] Native Title Bill 1993, Explanatory Memorandum, Part B, p 1.

62. The Aboriginal and Torres Strait Islander Social Justice Commissioner has previously stated that:

> Agreements, framed by human rights principles rather than discriminatory principles contained in the *Native Title Act*, are an important tool for providing a stable and enduring basis for a dynamic and long term relationship between Indigenous and non-Indigenous people over land.
>
> Now that the key principles guiding the law of native title have been crystallized by the High Court and the implications of these decisions are being felt by Indigenous people, a re-evaluation of the law needs to occur at the political level. Human rights principles should be at the forefront of such a process.[13]

6.1 Leveraging the system

63. The Commission is concerned that the ability of Indigenous people to take the greatest advantage of the native title system for their economic and commercial benefit - to leverage the system - is contingent on many factors that are often outside their control.

64. The outcomes of agreements are in large part determined by the attitude of governments and other parties to the negotiations.

65. Many agreements do not recognise the native title rights of Indigenous peoples.

66. In addition, correspondence from Indigenous community members received by the Commission has raised the issue of Indigenous peoples engaged in native title agreement processes feeling pressured into extinguishing or surrendering their native title rights and interests.[14]

67. The Commission is concerned that the priority placed on achieving economic outcomes, while extremely important, is undermining the equal importance of securing and protecting the underlying native title rights and interests of Indigenous peoples. While the Commission understands that for some Indigenous groups a determination of native title may not be the aspired outcome, for others it will.

68. Therefore the Commission favours ensuring that the native title system is developed to provide the full suite of options. Indigenous peoples will then be in a better position to shape their agreements in a way that enables them to optimise the outcomes of these agreements.

69. In the context of optimising the benefits from native title agreements, the Commission is also concerned about the current global financial crisis. In

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[13] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002 Summary,* Australian Human Rights Commission, Sydney. At: http://humanrights.gov.au/social_justice/nt_report/ntreport02/summary.html (viewed 7 February 2009).
[14] Confidential, Correspondence with T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 27 July 2008.

the short-term at least, the resources industry will not be in a position to offer the same level of benefits as we have seen in the recent past. Additionally, not all Indigenous peoples live in regions where there are mining operations.

70. Additionally, the Commission is concerned that Indigenous peoples with mining operations on their lands have had to rely on the benefits obtained from native title agreements to provide essential services and infrastructure to their communities - services that should be guaranteed by governments, whether state or federal.

71. For example, some communities have negotiated the provision of health infrastructure such as dialysis machines for their communities. In mainstream towns, health services such as these are taken for granted.

72. Cultural and environmental protections are also government responsibilities. However, Indigenous peoples often negotiate these as elements of their agreements, because they are not adequately provided for otherwise.

73. The provision of these services is not only beneficial to Indigenous people. Indigenous peoples living on country also play a major role in addressing issues of national interest. For example, Indigenous people across Australia, contribute to managing the impact of feral animals and weed control, as well as providing border protection in remote coastal areas. Without these agreements, much of this work is done voluntarily.

74. These services are essential to Indigenous people and their communities and must be accounted for in the Indigenous Economic Development Strategy (IEDS). Government provision of these services is essential to ensuring the success of the policy discussed in the Government's Discussion Paper, and ensuring that Indigenous people are free to leverage benefits additional to essential services and infrastructure from their native title agreements.

75. Therefore the Commission is concerned that the outcomes from this Discussion Paper should apply not only to agreements between the resources industry and Indigenous peoples, but also extend to other native title agreements, and all Government policy relevant to Indigenous peoples.

6.2 Access to Information

76. The Commission is concerned that there is still a lot of work to do with Indigenous people and their representatives to enable Indigenous people to effectively engage in native title negotiations.

77. A survey conducted by the Aboriginal and Torres Strait Islander Social Justice Commissioner for the *Native Title Report 2006* found that only 25 percent of Traditional Owner respondents claimed an understanding of land

agreements they'd entered into, while 60 percent of responses from Representative Bodies claimed that Traditional Owners were able to understand the agreements.[15]

78. Traditional Owners must have all the information they need to make decisions in a timely, comprehensive and understandable form, suitable to the needs of the Traditional Owner group.

79. In negotiating the Argyle Participation Agreement, the language barriers between industry representatives and Indigenous people were identified as an issue that must not be under-estimated, particularly when communicating with non-English speaking communities based historically on oral tradition or communities who may have low English literacy skills. The parties to the Argyle Participation Agreement found that effective communication strategies required dedicated resources, experimentation, talking and listening.[16]

80. The Commission argues that parties to native title agreements should be compelled to fully disclose all the information about the project and inform the community they are negotiating with when any aspect of the project change. For example, although a small change to the project may seem insignificant, the diversion of a road by 50 metres to the right may mean the destruction of a sacred site. Changes such as this will have significant impacts for Indigenous peoples.

(a) Access to expertise

81. Indigenous parties to agreements must have access to the necessary expertise to negotiate the best agreement possible.

82. A mining company would not come to the negotiating table without all of the necessary expertise required to secure the best protection possible for their interests. For example, this may include economists, investment advisors, business managers, and contract lawyers.

83. Indigenous peoples must rely on under resourced Native Title Representative Bodies to provide advice on all of those things at the negotiating table.

84. The Commission believes that an innovative response to this issue would be for the Government to establish and fund a Register of Experts whereby Native Title Representative Bodies and native title claimants have access to

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[15] Human Rights and Equal Opportunity Commission, *National Survey on Land, Sea and Economic Development 2006*, Australian Human Rights Commission, Sydney.
[16] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Australian Human Rights Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_5.html (viewed 7 February 2009).

the expertise they require to negotiate the best native title agreement possible.

85. A number of consultants/ experts were contracted to assist both parties on the Argyle Participation Agreement. These included:

    a. interpreters

    b. people with experience in the development of other native title agreements

    c. legal and financial experts who gave advice on technical aspects of the agreement and negotiated outcomes on behalf of the Traditional Owners

    d. anthropologists

    e. experts in business development

    f. those who could advise on the economic and social impacts of the Argyle Diamond mine on Aboriginal communities.

86. A Register of Experts will require dedicated resources. However, with skilled negotiators and skilled, capable communities who know their rights, good agreements can be made.

87. The Commission notes that the Government has maintained an expert panel of consultants to assist in the negotiation of Shared Responsibility Agreements (SRA's).[17] Additionally, substantial work has also been completed by AIATSIS to support agreement making processes through the Indigenous Facilitation and Mediation Project (IFaMP) that was finalised in July 2006.[18]

[17] The Australian Government constituted an Australia-wide Panel of Consultants to assist with the Australian Government's Indigenous affairs arrangements and to negotiate Shared Responsibility Agreements. Experts were required to meet criteria including: providing assistance to ICC's to Support facilitation of governments' engagement with communities including through cultural appropriateness training, negotiating and partnering in a culturally appropriate way, and community development training for ICC Mangers and staff to negotiate and develop Shared Responsibility Agreements with Indigenous communities; assistance/facilitation for communities in priority setting, developing responses based on shared responsibility and negotiating with governments; support for communities to implement, manage and monitor agreed shared responsibility activities; facilitating/coordinating communities' access to specialised expertise in community development, including scoping project proposals; mediation and other appropriate support for community members to enable inclusive engagement in the SRA process. See http://www.success-works.com.au/projects.htm for further information.

[18] The IFAMP supported best practice approaches to Indigenous decision-making and dispute management, particularly in relation to the Native Title Act 1993 which emphasises agreement-making through non-adversarial approaches, such as mediation, facilitation and negotiation. See http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf for further information.

6.3 Indigenous Economic Development Strategy and government services

88. The Commission supports the Government's endeavours to develop an IEDS and considers the inclusion of economic, spiritual and cultural significance of lands and waters to Indigenous Australians in that policy as crucial and extremely positive.

89. The importance of culture and its relevance to Indigenous peoples' relationship to their lands and waters is not completely understood and acknowledged by all Australians. This is evidenced by the fact that governments continue to develop Indigenous land policy in isolation from other social and economic areas of policy.

90. The Commission is concerned that in order to be fully effective, the IEDS must be holistic. This means that all government policy must be complementary, and avoid contradiction and the capacity to override protection provisions as far as possible.

91. The Commission is pleased that the Government considers the commitment to closing the gap as a major component of land, economic and community development policy. The Commission is of the view that coordinated social policy across disadvantage indicators is a crucial element to overcoming disadvantage for Indigenous peoples, and this approach must be applied in the development of the IEDS.

92. The Commission specifically highlights the need for Indigenous land and water policy to be co-ordinated across jurisdictions. There is a particular need to ensure that native title complements state and territory land rights and water planning and management regimes. This will be important in achieving positive outcomes from the IEDS.

93. The Commission also notes that the linkages across, for example, health and access to land are now well established. However, Government policy does not adequately reflect these linkages.

94. For example, a study conducted over a ten year interval at the Utopia Homelands in the Northern Territory provides evidence that there are positive health benefits for Aboriginal people living on country. The study found: 'The factors associated with the particularly good [health] outcomes here are likely to include outstation living, with its attendant benefits for physical activity and diet and limited access to alcohol, as well as social factors, including connectedness to culture, family and land, and opportunities for self-determination'.[19]

[19] K G Rowley, K O'Dea, I Anderson, R McDermott, K Saraswati, R Tilmouth, I Roberts, J Fitz, Z Wang, A Jenkins, J D Best, Z Wang and A Brown, *Lower than expected morbidity and mortality for an Australian Aboriginal population: 10-year follow-up in a decentralised community*, 2007

95. Also linked directly to Indigenous peoples lands and waters is the ability to benefit from the leasing of their lands and accessing the Government's Indigenous home ownership programs. In order for these options to be available to Indigenous peoples, land rights regimes and tenure resolution will also need to be addressed, and therefore linked to native title and broader Indigenous policies including the IEDS.

96. The wealth creation and home ownership referred to in the Discussion Paper are not ends in themselves. Many Indigenous people's aspirations come from their land and management of their land.[20] Therefore, in developing policy that enables options such as housing and land leasing for Indigenous communities, the Government must ensure that Indigenous control over decision-making about the aspirations for their lands is maintained andadequate information is provided to enable individuals to make informed decisions.

97. The Commission notes that the Government has shown real commitment to improving the lives of Indigenous Australians. There are a number of critical steps that are required to ensure that this aspiration is achieved:

    a. a full understanding, recognition and respect for Indigenous peoples rights to their culture and their country

    b. developing policies that deal with Indigenous disadvantage from a holistic perspective

    c. engaging Indigenous people as major stakeholders in the development and implementation of policies, programs, and other negotiations that affect them

    d. increasing the cross cultural competence of bureaucracy to ensure policies and programs support the sustainability and self determination of Indigenous communities.

6.4 Evidence based policy

98. The Commission notes that the Government has committed to evidence based policy making, and promotes and supports this approach.

99. However, the Discussion Paper identifies a number of assumptions that have formed the basis of the paper. They are that:

    a. direct financial contributions resulting from agreements do not necessarily translate into substantive benefits for Indigenous communities

[20] Human Rights and Equal Opportunity Commission, *National Survey on Land, Sea and Economic Development 2006*, Australian Human Rights Commission, Sydney.

b. substantive benefits, such as employment options and community development initiatives often deliver benefits to all members of the community, not just the Traditional Owners

c. an equitable approach to distribution is more likely to generate socio-economic benefits for the whole community.

100. The Report provided by the Native Title Payments Working Group estimated that of the hundreds of agreements that have been negotiated between Traditional Owners and industry, only 12 provide substantial benefits to Aboriginal and Torres Strait Islander people, and exhibit principles embodying best practice in agreement making.

101. The Commission notes that in order to determine the extent to which the above assumptions are correct, a formal independent review of available native title agreements must be conducted. While the Commission is aware of the sensitivities concerning these agreements, as discussed further below, the information is necessary in order to develop policy that is evidence based.

102. The Commission notes that as each community differs in their needs, and consequently who in the community will benefit from the agreement also differs. For example, whether all Indigenous people within the community benefit or whether the benefits from agreements are available only to the Traditional Owners will differ.

7 Options

103. The Commission notes that the Discussion Paper alludes to a number of options for Indigenous peoples regarding the benefits derived from native title agreements. The Commission also notes that the intent behind the Discussion Paper and the Working Group Paper is to create incentives for strategic decisions about agreements. However, Indigenous people must be in a position to make decisions about what options are best suited to their particular needs.

104. The Commission notes that the Discussion Paper summarises the critical provisions of a good agreement as:

a. financial benefits proportional to the *impact of the mine or other operation for the long-term*, through trusts and regular ongoing payments

b. Indigenous business, employment and training opportunities

c. *community development* payments and initiatives

d. *Indigenous involvement* in cultural, heritage and environmental projects

e. *Indigenous control* of funds, combined with mentoring and support by independent parties

f. appropriate trust structures aligned with the specific *community needs and group composition* and the purposes of the agreement

g. regular review of the long-term objectives of the agreement and the extent to which these are being met.

105. The Commission notes that a common requirement relevant to all of the points raised above is good Indigenous governance. As identified by the Native Title Payments Working Group, securing these benefits is only one step in the agreement-making process. The second step is getting the most out of the benefits secured. This is done at the implementation stage. The experience of negotiating the Argyle Participation Agreement, for example, reinforces the importance of Indigenous models of governance. It was identified that:

> Good governance means having good rules for deciding how people work together to do the things they need to get done, how decisions are made, who has the authority to act for the group, how are disputes resolved and how to get community business done.[21]

106. The Commission notes that while the Government in its Discussion Paper confirmed its commitment to ensuring that long-term benefits are derived from agreements with Indigenous communities through maximising the payments flowing to Traditional Owners and Indigenous communities, much of the focus was on the inclusion of cash payments or royalty streams. The Government stated that:

> Major opportunities for economic and social development present in the development of major project on land over which Indigenous people have native title interests. To harness these opportunities, Indigenous people and organisations must be encouraged to apply income streams to optimal effect and to minimise cash payments to individuals in circumstances where such payment are unlikely to yield lasting benefits.[22]

107. The Discussion Paper assumes that cash payments do not assist in maximising the opportunity to improve communities' economic status. That assumption is not always accurate. In some situations, such as where the community is in extreme poverty, some cash may be necessary to alleviate that situation. While the Commission understands that this can create dispute, division and inequality, in some instances it will be necessary to achieve short-term goals.

108. The Commission is of the view that the parties to the agreement must have the flexibility to decide what the most appropriate benefits are to meet the communities' needs now and in the future.

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[21] S Cornell, *Starting and Sustaining Strong Indigenous Governance,* Presentation at the 'Building Effective Indigenous Governance Conference, Jabiru, Northern Territory, 5 November 2003, pp 2-3.
[22] Department of Families, Housing, Community Services and Indigenous Affairs, Native Title Discussion Paper, p 7. At: http://www.fahcsia.gov.au/internet/facsinternet.nsf/indigenous/programs-native_title_discussion_paper.htm.

109. The Commission notes that the Australian Institute of Aboriginal and Torres Strait Islander Studies has been working in partnership with the Agreement, Treaties and Negotiated Settlements Project, the Office of the Registrar of Indigenous Corporations and the Minerals Council of Australia on a project that aims to support the growing number of determined native title holders, and their Prescribed Bodies Corporate (also known as registered native title bodies corporate), to hold and manage their traditional lands and waters. This is done through research and participatory planning to support capacity-building in effective decision making and conflict resolution processes/frameworks, negotiation skills, agreement making, strategic planning and governance.

110. The Commission is of the view that the work currently being done by AIATSIS with Prescribed Bodies Corporate is integral to creating an environment that supports positive outcomes for Indigenous people and builds capacity within communities to manage native title rights and interests and the benefits that come with that. The Commission believes that the Government should continue to support this project, as a major component of their strategy to improving economic development outcomes for Indigenous people and closing the gap between Indigenous and non-Indigenous Australians in key areas of disadvantage.

111. The Discussion Paper also outlines a number of options by which benefits could be provided and administered. These are set out below.

7.1 Increased transparency

112. As the Discussion Paper states, disclosure of the contents of agreements is important to enable the agreements to be evaluated and their implementation to be monitored.

113. The Commission agrees that a central repository would provide best practice examples of what communities have already done. The Commission notes that there are existing mechanisms for sharing agreements, such as the Agreement, Treaties and Negotiated Settlements Project, hosted by Melbourne University, and the National Native Title Tribunal's Register of Indigenous Land Use Agreements (ILUAs). However, databases, such as the Tribunal's register, contain minimal information and do not contribute to facilitating engagement in the agreement-making process. Further consideration should be given to expanding the information available, while also respecting privacy obligations and the commercial in confidence content of agreements. Indigenous community involvement should be built into any such process, or to evaluation processes for agreements. The community should determine when and who they want to undertake that evaluation.

114. The Commission understands that transparency of agreements provides for the more efficient use of resources, through having model agreements to use as framework agreements. However, the Commission is concerned about what information is publicly available. As native title agreements are confidential contracts between two private parties, Indigenous peoples have

the same rights as private parties to non-native title agreements to have the confidentiality of their agreements protected.

115. The Commission notes that the Discussion Paper refers to a system that is operating in New Zealand where all settlement agreements are published. However, the Commission notes that this system provides only for the registration of agreements between the NZ Government and Indigenous people. It does not provide for the registration of agreements between two private parties. The Commission has been unable to find an example of parties to a private contract being forced to make their agreement public.

116. The Discussion Paper asks:

(a) Are there options for increasing transparency without compromising sensitive information?

117. The Commission is of the view that transparency is not only concerned with the public availability of information. It is also about transparency within the agreement-making process.

118. The Commission notes that framework agreements provide an option where agreements can be made publicly available without compromising the confidentiality of the provisions relating to sensitive issues such as economic benefit or the protection of Indigenous knowledge.

119. Framework agreements provide a uniform process for all future acts of similar kinds, or set out a process for negotiating more substantive outcomes. The National Native Title Tribunal defines a framework or process agreement as:

> An agreement between a native title party and other interested parties, binding them to a particular process rather than substantive issues. For example, a framework or process agreement may set out the process agreed to between the parties for the negotiation of an ILUA.[23]

120. Confidentiality clauses which can be standardised or modified to meet the needs of the parties, and form part of the framework or template agreement, are also an option.

121. Additionally, Memorandums of Understanding (MoUs) may also be used to document the framework for the negotiations.

122. MoUs, or accords, are documents that demonstrate political will but are not legally binding. They can be used to create a framework for further action, clarifying roles and responsibilities of the parties. MoUs can be based on community consultations and negotiations rather than on a legal framework

[23] National Native Title Tribunal, *Local Government Agreements: Content Ideas,* Raine Quinn, Research Unit, August 2005, Commonwealth of Australia n, 2005, p 11.

involving lawyers. The aim is to reach an amicable and workable arrangement for the long-term benefit of the community.[24]

123. The *Native Title Report 2007,* studied the Queensland Local Government template ILUA which offers a model that may be used by Indigenous people seeking to enter agreements with local councils. The Central Queensland ILUA template has been adopted for use by many native title and local government parties in the Gurang Land Council region.[25] The Central Queensland ILUA template documented the framework for the negotiations in an MoU which also outlined the confidentiality arrangements for the agreements.

124. The Argyle Participation Agreement has been identified as a model agreement. In the *Native Title Report 2006,* the Commission outlined the framework in terms of the contents of the agreement and the process applied to making the agreement. The Traditional Owners were happy that the framework behind the ILUA has been made available for other Indigenous peoples to assist them in these processes. However, the financial component and issues concerning traditional knowledge remain confidential.

125. As suggested above, a register of experts would also contribute to a level of internal transparency, particularly in the context of framework or template agreements. Experts who are fully engaged in the agreement-making process would provide the relevant advice in accordance with the standard of agreements, and would be responsible for ensuring that a transparent process is applied to the negotiations. For example, the assessment of the financial benefits proportional to the impact of the mining operation on the lives of the Traditional Owners and their lands may be available only to the parties to the agreement. However, the process of how this is done is made publicly available.

126. Alternatively, a register of agreements such as the Agreements, Treaties and Negotiated Settlements Project that is accessible only by Native Title Representative Bodies or Indigenous groups or corporations engaged in native title negotiations would provide the transparency necessary while maintaining a degree of confidentiality.

127. The Commission recommends that:

    a. A register of experts be established and funded by the Government for Indigenous people to access the expertise required to effectively participate in the negotiation and implementation of native title agreements.

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[24] National Native Title Tribunal, *Local Government Agreements: Content Ideas*, Raine Quinn, Research Unit, August 2005, Commonwealth of Australia, 2005, p11.
[25] The Gurang Land Council region is now managed by the Queensland South Native Title Services.

b. The current registers of agreements, Treaties and Negotiated Settlements Project and the National Native Title Tribunal Register of ILUAs be considered as possible options for providing a central repository of agreements enabling a degree of transparency of agreements, and that a review be conducted to assess what improvements are required.

c. An assessment of agreements is conducted to compile a range of template or framework agreements that include various options that relate to the benefits, process, and format of agreements that can be accessed by Native Title Representative Bodies to assist with their negotiations.

(b) What parts of agreements would be the most useful to publish to assist parties to reduce transaction costs and seek better outcomes?

128. While the Commission acknowledges that standard agreements may reduce flexibility if the relevant expertise is not available, template/framework agreements provide important advantages. They provide a cost effective way of assisting parties to negotiate, without re-inventing the wheel every time. A generic template can be adapted to provide tailored outcomes through standard clauses and terms and conditions that can be applied to individual agreement to suit each particular situation.

129. Template ILUAs have been used recently by:

a. South Australia, where the state government has strongly advocated the use of ILUA templates to facilitate future ILUA negotiations

b. Victoria, where ILUA templates have been used in granting mining and exploration holdings.[26]

130. The South Australian Government developed a State-wide framework for negotiations, the South Australian Indigenous Land Use Agreement (ILUA) State-wide Negotiations to South Australian Native Title Resolution.[27]

131. The State-wide approach employed a strategic use of resources that established State-wide negotiation forums as well as State-wide ILUA templates. The templates contained agreed standards and provisions across areas including pastoral, minerals exploration, petroleum conjunctive agreements, fishing and aquaculture, local government and outback area ILUAs. While this process was not without its challenges, the templates

[26] National Native Title Tribunal, Correspondence with T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 October 2007.
[27] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Australian Human Rights Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_4.html (viewed 7 February 2009).

provided a useful practical guide to the parties in their attempts to efficiently and cooperatively resolve native title.

132. Parties to the South Australia ILUA State-wide negotiations include the Aboriginal Legal Rights Movement (ALRM)[28] which supports 23 Indigenous claimant groups represented through a Congress of Native Title Management Committees (the Congress) and various fishing and resources representative bodies. Objectives of the State-wide ILUA include:

- the recognition of native title interests and Aboriginal heritage
- improved economic outcomes for Aboriginal people
- a framework for sharing responsibility in caring for land, protecting the fishing environment, and managing land and water.

133. Under this framework, at April 2007, 11 ILUAs were at the preliminary planning stage, 15 were progressing with negotiations, two were ready to be registered, six were at the implementation phase, and eight were signed but still to be registered.

134. As outlined in the *Native Title Report 2006,* the Argyle Participation Agreement was made up of two parts. The first part was the ILUA. The ILUA is legally binding on the parties and outlines and formalises the financial and other benefits that Traditional Owners receive. It also specifies how the benefits are to be administered, and contains a process that ensures that the Traditional Owners native title rights and interests are recognised to their fullest potential.

135. The second part was the Argyle Management Plan Agreement (AMPA), which contained eight management plans that dealt with a number of areas important to the Traditional Owners, such as:

a. Aboriginal site protection

b. land access

c. land management

d. training and employment

e. cross-cultural training

f. decommissioning of the mine

g. business development and contracting

h. Devil Devil Springs – a significant site.

136. The AMPA set out the way in which Argyle Diamonds and Traditional Owners agree to work together to achieve numerous objectives, including

[28] The ALRM were the Native Title Representative Body at the time the Agreement was developed.

preservation of the environment, the recruitment and retention of Indigenous mining employees and the development of Indigenous businesses that would be sustainable after the mine. The *Native Title Report 2006* provided a summary of what was included in each of the management plans in order to provide some guidance for others entering into similar negotiations.

137. The case study also provided information on the implementation plan for the Agreement, and the Committee's and Trusts that were set up to ensure that the various elements of the agreement would be implemented.

138. The Commission is of the view that stakeholders will gain more benefit from the publication of parts of agreements if guidance on the negotiating process is also provided.

139. The Commission considers case studies a very useful way of providing information to Indigenous people and other stakeholders working in native title about process and best practice. Hence, the inclusion of detailed case studies in the more recent Native Title Reports. Case studies may also provide an analysis of the challenges groups have faced in their negotiations and useful insight into the lessons that can be learnt from previous experience.

140. Ted Hall, the Chairperson of the Gelganyem Trust described what he saw as the legacy of the Argyle Participation Agreement for the Traditional Owners:

> It's been empowering, it has empowered us to made decisions on our own terms. We determine what happens in our area. We set the terms and goals and we are achieving them also. This process has bought unity between the elders and the young. The young bring the education and the elders bring the knowledge. People like RPM, ADM and the independent trustees give us direction.[29]

7.2 Improved workability of agreements

(a) Procedural rights and the right to negotiate

141. The Government has committed to an Indigenous Economic Development Strategy. This Discussion Paper is limited to one aspect of that policy, which, by virtue of the underlying procedural rights on which it is based, is limited to remote and rural Australia.

142. The procedural rights protected under the right to negotiate provisions of the Native Title Act are of significant value. The utilisation of these rights is the door for many Indigenous peoples' participation and engagement in the economy, and often provides the key to them taking part in the resources and other sectors.

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[29] T Hall, Correspondence with T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Interview, 20 December 2006.

143. The Commission notes that the economic significance of these rights has been identified by the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs as a reason for the this Discussion Paper on how to improve the benefits that flow from agreements made through this system.

144. The Commission notes that the right to negotiate which is triggered by having a native title claim registered, operates through the future acts Part of the Native Title Act. The granting of procedural rights after registration recognises that the claimants have a prima facie case; that is, it is likely they are the Traditional Owners of country. However, pursuing a claim and negotiating an agreement using the right to negotiate are two are very different activities to undertake with potentially very different outcomes.

145. Tony McAvoy has suggested that the two processes should be 'de-coupled'. He suggests that the National Native Title Tribunal should become a 'procedural rights oversight and management body'. The procedural rights would still be granted on the basis of passing the registration test, after which they could be a 'native title procedural rights holder'. The claimants then have the option to indicate if they wished to apply for a native determination or progress only to an agreement.[30]

146. One benefit to the approach that McAvoy has cited is that if claimants could discontinue on the basis that they would retain procedural rights, a number would take that opportunity, reducing the applications before the Federal Court.

147. The Commission recommends that the Government further examine how the procedural rights afforded under the right to negotiate provisions can be separated from the progress of the native title claim.

(b) The Process of agreement making

148. As identified by the case study of the Argyle Participation Agreement in the *Native Title Report 2006,* the process of negotiating the agreement was extremely important and useful to both the mining company and the Indigenous groups involved. By analysing the process that was undertaken, a number of key components of the process were identified, including:

    a. the preparation required to ensure the negotiations began positively, for example, the importance of building relationships with the community, the need for a process for recognition and cooperation between the two parties, and the inclusion of plain English explanations of legal clauses throughout the negotiations and written into the agreements and management plans

[30] T McAvoy, Native *Title Litigation Reform*, Frederick Jordan Chambers, Sydney, 24 November 2008.

b. what was required to establish that the negotiations were with the right people

c. establishing the roles and responsibilities of those within the group, and the establishment of negotiating committee's and trusts

d. establishing what resources were going to be required and where they were going to come from, including what economic and legal advice would be necessary, and what was required to provide a level playing field

e. what was required to execute the agreement.

149. The Commission believes that the workability of agreements would be significantly improved if both the industry stakeholders and the Indigenous groups began the negotiation process by working through criteria not limited to that listed above as a starting point. As discussed above, the process of the negotiations is of vital importance.

150. The Commission is also concerned that the Working Group was only able to identify up to twelve good agreements. This indicates that problems may be arising at the implementation stage and highlights the need for improved governance capacity for Traditional Owners.

151. The Commission emphasises that support is not only necessary to negotiate the agreement, but is also critically important to the successful implementation of the agreement. The following are examples of where existing structures could be better utilised:

a. Native Title Representative Bodies could play a role in assisting with the monitoring and implementation of agreements. However, they would require dedicated resources in order to take on this responsibility.

b. The Government's Indigenous Coordination Centres Business Solution Brokers could provide assistance with implementation of the agreements - particularly where business and community development opportunities have been identified as an outcome of an agreement.

c. The Office of the Registrar of Aboriginal Corporations has a significant role to play and could be working with Indigenous parties at the early stages of the negotiation to assist with identifying the governance needs of the group and building that capacity - particularly, in preparing Indigenous parties, prescribed bodies corporate or trusts to meet their responsibilities to implement these agreements.

152. Additionally, the bodies identified in the previous paragraph could assist with identifying the relevant assistance required, both financially and physically, and assisting the PBC/trusts to access funding or support programs to fill these gaps.

153. The Commission notes that there are a number of options available in the philanthropic and public sector that would assist Indigenous stakeholders at all phases of the agreement-making process. For example:

    a. Indigenous Community Volunteers (ICV) works nationally with Aboriginal and/or Torres Strait Islander communities, organisations, businesses, families and individuals to facilitate community development projects. Communities nominate the skills they want to learn and select their own volunteers from an ICV volunteer list.[31]

    b. Indigenous Enterprise Partnerships (IEP) channels corporate and philanthropic resources into Indigenous development. IEP aims to foster Indigenous economic and social development in a way that encourages people to take responsibility for their own lives, seeks to build a network where Indigenous, government, corporate and philanthropic ideas can be shared, and where IEP lacks the internal capability or capacity, they identify appropriate corporate or philanthropic partners and facilitate their engagement with the relevant Indigenous organisations.[32]

154. Finally, the Commission believes that these agreements require review mechanisms that provide the flexibility to revisit components of the agreements that on implementation have come up against barriers. A good example of such review mechanisms is found in the management plans that were incorporated into the Argyle Participation Agreement. These plans provide flexibility to review plans and modify them where necessary thus ensuring that outcomes remain achievable and relevant.

155. The Commission recommends that the Government work with native title parties to agreements to identify and develop a set of criteria that gives guidance on the process of conducting a successful negotiation process.

7.3 Promoting good practice

156. While the minerals industry has great potential to enhance the lives of Indigenous Australians, it also poses a potential threat to Indigenous peoples and their culture. Sixty percent of mining activity in Australia is carried on in close proximity to an Indigenous community.[33]

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[31] Indigenous Community Volunteers. At: http://www.icv.com.au/index.php (viewed 12 January 2009).
[32] Indigenous Enterprise Partnerships. At: http://www.iep.net.au/aboutiep.htm (viewed 12 January 2009).
[33] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Minerals Week 2008,* (Speech delivered at the Minerals Week 2008 Conference, Canberra, 27 May 2008). At: http://www.hreoc.gov.au/about/media/speeches/social_justice/2008/20080527_minerals.html (viewed 12 January 2009).

(a) Guidelines

157. The Commission notes that the *Native Title Report 2003,* provides a detailed comparative analysis of the international context of Indigenous peoples and agreement-making concerning their lands, waters and natural resources, particularly in the context of the right to sustainable development.

158. The Commission is of the view that native title agreement making should occur in the context of the following principles that are based on the protection of the human rights of Indigenous peoples. In particular:

a. *Non-extinguishment principle.* Native title parties should not be required to give up native title in order to access or enjoy the benefits that arise from negotiations.

b. *Active Participation.* International human rights principles recognise that Indigenous peoples have a right to active participation in decisions affecting their traditional lands and waters. In relation to the negotiation of native title agreements this should lead to:

i. recognition of native title parties as owners or joint owners and managers of the land

ii. recognition of Indigenous governance on native title land.

c. *Native Title is a group right.* Article 33 of the Declaration on the Rights of Indigenous Peoples provides that indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions, and to select the membership of their institutions in accordance with their own procedures.[34] Under the principle of self-identification, the group itself should determine its own membership, and benefits arising from agreements should predominantly be based on the inter-generational nature of the right.[35]

159. In addition, a number of guidelines have been produced including:

a. *Corporate Social Responsibility* - This approach is based on acceptance by companies that they cannot continue to operate profitably over the longer term unless they can win support for their operations from the wider society, including Indigenous peoples. This means that companies may adopt certain policies and act in particular ways not because it makes money for them in the short term, or because they are legally required to do so, but because they believe

[34] Declaration on the Rights of Indigenous Peoples, article 33.
[35] M Donaldson, Human Rights and Equal Opportunity Commission, *A Human Rights Approach to Native Title Agreements, (Speech delivered on 30 August 2001 to the Representative Bodies Conference at Townsville from 28 August to 30 August 2001).* At: http://www.hreoc.gov.au/about/media/speeches/social_justice/native_title_agreements.html (viewed 12 January 2009).

that this will ensure support for their business activities in the wider community.

One very important aspect of corporate social responsibility involves the policies of companies towards the rights and interests of Indigenous peoples. In 2001, Rhonda Kelly and Ciaran O'Faircheallaigh compiled a Report for the Commission entitled 'Corporate Social Responsibility, Native Title and Agreement Making'.[36] This included an analysis of the policies of eight major mining companies in relation to the rights and interests of Indigenous peoples. It found that while most companies accept the idea of corporate social responsibility in principle, they vary greatly in what they mean by that idea, and in the extent to which they actually live up to their policies in practice.

This Report identified six distinct approaches which companies might adopt in relation to the rights and interests of Indigenous peoples. All of these approaches are listed below, in order to provide a starting point for the discussion of a Corporate Social Responsibility framework for making agreements. Approach 1 is the least favourable to Indigenous interests, Approach 6 the most favourable. Obviously some of these approaches would not be seen as amounting to socially responsible behaviour by companies.

i. Approach 1 - companies publicly oppose, and/or work covertly to undermine, legislation and policy designed to protect or promote Indigenous rights and interests.

ii. Approach 2 - companies fail to acknowledge the existence of relevant legislation or the fact that their operations affect Indigenous rights and interests, and fail to develop policies or programs which address the impact of their operations on Indigenous peoples.

iii. Approach 3 - companies publicly acknowledge the existence of Indigenous rights and interests, but lack the policies and practices required to give substance to that acknowledgement. Some firms which adopt this approach may conduct programs or activities which relate to Indigenous peoples but these either are required for performance of specific legislative obligations (cultural heritage protection) or are justified on commercial grounds (employment of local Aboriginal people).

iv. Approach 4 - companies are in the process of changing their policies and practices and are taking significant initiatives in recognising Indigenous rights and interests, but they have yet to

[36] Australian Human Rights Commission, *Corporate Social Responsibility- Frameworks for negotiation of mining agreements.* At: http://www.hreoc.gov.au/social_justice/publications/corporateresponsibility/frameworks.html (viewed 12 January 2009).

develop coherent policies, practices and monitoring systems across a range of issues and/or have yet to change their approach to Indigenous peoples in fundamental ways.

v. Approach 5 - companies have clearly articulated policies which reflect their recognition of Indigenous rights, support these policies with substantial resources and have systems in place for monitoring their achievements against policy goals. However in at least some areas their commitment to Indigenous rights and interests is limited to the extent required to comply with legislation, and/or they have yet to translate policy into specific practices in some relevant areas (for example negotiation of native title agreements).

vi. Approach 6 - companies have policies, practices and resource allocation in relation to Indigenous peoples which are consistent with a human rights based approach, with the result that the requirements of state or national legislation are exceeded where this is necessary to give effective recognition to Indigenous rights.

b. *Engagement with Indigenous Peoples* – Guidelines for engagement with Indigenous peoples, contained in *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society*[37], provides an excellent framework to build upon to formulate an extensive set of principles for Indigenous engagement in agreement-making. Such a framework should include national principles that provide for:

i. the full participation and engagement of Indigenous peoples in negotiations and agreements between parties

ii. the adoption of and compliance with the principle of free, prior and informed consent

iii. the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge

iv. the protection of Indigenous areas of significance, biodiversity, and cultural heritage

v. the protection of Indigenous knowledge

vi. access and benefit-sharing through partnerships between the private sector and Indigenous communities

vii. non-discrimination and substantive equality

[37] Human Rights and Equal Opportunity Commission and United Nations Permanent Forum on Indigenous Issues, *Engaging the marginalised: Report of the workshop on engaging with Indigenous communities*, (2005). At: http://www.humanrights.gov.au/social_justice.

viii. access to information and support for localised engagement and consultation.[38]

c. *A human rights approach to development on Indigenous land* - These principles were developed by a forum of Indigenous people from Australia's major mineral resource regions, held in Alice Springs in May 2002. The forum was co-hosted by the Aboriginal and Torres Strait Islander Social Justice Commissioner and Professor Ciaran O'Faircheallaigh on behalf of Griffith University. The aim of the forum was to initiate a process by which Indigenous people may develop principles, based on human rights, addressing resource development on Indigenous land.

   The principles address issues such as recognition and respect, Indigenous involvement in environmental management, cultural heritage protection, and the need for developers to respect the integrity of Indigenous decision making processes. A central requirement is that developers obtain the prior informed consent of Indigenous communities affected by any development proposal. The issues covered in these principles are particularly important where the legal and policy frameworks for resource development on Indigenous land are inconsistent with Indigenous people's human rights. Adherence to the principles will assist in ensuring equity between Indigenous and resource development parties. These principles are contained at Appendix 2.

d. The OECD Guidelines for Multinational Enterprises[39] - The guidelines express the shared values of the governments of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises. They apply to business operations world-wide. While it is widely recognised that foreign investment is important for economic growth and that multinational enterprises contribute to economic, social and environmental progress, public concerns remain about the impact of their activities on home and host countries. The guidelines are not a substitute for, nor do they override, applicable law. They represent standards of behaviour supplemental to applicable law and, as such, do not create conflicting requirements. The guidelines reinforce the economic, social and environmental elements of the

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[38] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/pdf/NativeTitleReport2007.pdf (viewed 12 January 2009).

[39] The OECD Guidelines for Multinational Enterprises are recommendations on responsible business conduct addressed by governments to multinational enterprises operating in or from the 33 adhering countries. While many businesses have developed their own codes of conduct in recent years, the OECD Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting. The basic premise of the Guidelines is that principles agreed internationally can help prevent conflict and to build an atmosphere of confidence between multinational enterprises and the societies in which they operate. At: http://www.oecd.org/dataoecd/56/36/1922428.pdf (viewed 12 January 2009).

sustainable development agenda. In particular, provisions relating to the environment encourages multinational enterprises to raise their environmental performance through improved internal environmental management and better contingency planning for environmental impacts. Provisions relating to disclosure and transparency reflect the OECD Principles on Corporate Governance and encourage social and environmental accountability.

e. *Obligation to mediate in good faith* – As a result of the 2007 changes to the native title system (under the previous federal government), a new 'good faith' requirement has been inserted into the Native Title Act to encourage parties to act responsibly in native title mediation. The Attorney-General's Department have since produced *Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal Mediation.*[40] While these guidelines relate specifically to mediation of native title claims, these guidelines may also be useful in the promotion of good practice at the native title agreement-making table.

160. The Commission also notes that Indigenous groups and their representative organisations are developing their own protocols for good practice. For example, the Goldfields Land and Sea Council have developed their own Mining Policy, *Our Land is Our Future.* This policy aims to provide greater certainty for parties engaging in mining in the Goldfields region of Western Australia. The policy is underpinned by international principles contained in various UN Covenants as they relate to all development projects and other activities on traditional lands within their region, and includes:

    a. principles for mining-related decisions

    b. a procedure for obtaining mining-related decisions

    c. operational principles for mining related decisions

    d. an explanation of the relationship of the mining policy to Aboriginal rights

    e. review mechanisms.

161. The Commission asserts that if native title agreements are framed by the principles discussed in this submission they will form a stable and enduring basis for long-term sustainability.

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[40] National Native Title Tribunal, *Mediation Guidelines - Guidelines for the behavious of parties and their representatives in mediation in the National Native Title Tribunal Mediation.* At: http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Publications%20particular%20to%20business%20streams/Mediation%20Guidelines.pdf (viewed 12 January 2009).

(b) Small business development

162. The Commission agrees with the Working Groups' conclusion that a good agreement should include the development and support for Indigenous business ventures that aim to provide sustainable economic development opportunities that stimulate growth and financial opportunities beyond the life the mine.

163. However, in order for these opportunities to be successful, Indigenous people and their communities will require, in some instances, intensive community development support.

164. The Commission acknowledges that the Government has provided a number of programs to support Indigenous business development in the past. However, a national survey conducted by the Australian Human Rights Commission in 2006, illustrated that such programs are not being accessed by those seeking this type of support. Additionally, of the entities and groups with a potential role to progress economic development on land, our survey found that less than 50 percent of NTRBs and Traditional Owners were accessing government funds. While Traditional Owners as individuals may be less resourced to seek funding, it is concerning that only 44 percent of the NTRB survey respondents were receiving land development funds or funds for projects on land. The Commission received survey responses from all but two of the NTRBs operating in Australia at the time, so the survey reflected an accurate representation of actual activity. One Traditional Owner stated:

> We did not know there were so many potential funders and we live in Victoria, what about those people in remote communities? It is difficult to understand, time consuming to submit to all the different agencies, if we had one regional agreement or treaty over our traditional lands and waters which goes over two states then we would be able to access these departments and have a proper plan that brings in all our aspirations for our people including economic development. We are flat out just protecting our culture and land from getting destroyed.[41]

165. Further the Commission consulted with the various government funding providers to obtain information about the extent of Indigenous access to funding programs.[42] These consultations found that:

    a. The Department of Employment and Workplace Relations provided no information on the applications received for funding support from the Indigenous Small Business Fund or the Emerging Indigenous Entrepreneurs Initiative.

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[41] Traditional Owner from the Yorta Yorta Nation Aboriginal Corporation, Survey Comment, *HREOC National Survey on Land, Sea and Economic Development 2006.*

[42] The Commission surveyed seven Australian Government departments and two statutory authorities with responsibility to administer 33 national Indigenous economic development programs. Information from the 33 programs was for the 2005-06 financial year.

b. The Department of Industry, Tourism and Resources advised that no information was available for funding applications to the Indigenous Partnership Program, while they approved 6 out of 6 applications to the Australian Tourism Development Program; and 6 out of 34 applications to the Business Ready Program for Indigenous Tourism.

c. The Department of Communication, Information Technology and the Arts advised that 53 out of 102 applications succeeded in obtaining funding from the National Arts and Crafts Industry Support Program.

d. Indigenous Business Australia advised that 86 out of 110 applications for funding from the Indigenous Business Development Program were successful, while 33 out of 81 applications for funding from the Loans and Joint Capital – IBA Investments program were successful.

e. The Indigenous Land Corporation advised that 38 out of 62 applications for funding from the Land Management Programs funds were successful.[43]

166. The Commission is of the view that before any economic development strategies are implemented in remote areas in particular, it is necessary to ensure that they have good governance systems and competent personnel.

167. Communities that are well resourced and well organised may be able to leverage additional benefits for Indigenous residents. Coastal communities on fertile land may also be attractive to investors and attract external business interests. However, it appears that Government assistance is available primarily to those individuals and communities that have other comparative advantages or to non Indigenous businesses and investors who want to access Indigenous lands for economic gains.

168. The Commission is concerned that it is more than likely that without reform, communities on marginal land with no history of enterprise development will continue to find themselves economically isolated.

169. The Commission argues that the IEDS must be targeted to Indigenous communities most in need; that is, where there is compound disadvantage, including:

a. poor governance or a lack of governing bodies

b. low levels of English literacy

c. reduced access to education and training relevant to support employment

[43] For further information about the results of this survey see the *Native Title Report 2006*. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_5.html (viewed 7 February 2009).

d. marginal land that has not provided income to date and is unlikely to do so in the future

e. poor community infrastructure.

170. Further, as discussed above, the Governments Indigenous Coordination Centres (ICCs) Business Solution Brokers should be providing assistance to those Indigenous groups who are implementing agreements. Particularly, where business and community development opportunities have been identified as an outcome of an agreement. They have a particular role to assist Indigenous communities to access various funding programs that would support their developing business and to provide advice when required to ensure minimise the risk of the business failing and to facilitate agreement outcomes.

(c) Work ready assistance

171. Again, the Commission agrees with the Working Group's position that a sustainable agreement provides for and supports Indigenous employment. However, there is a clear lack of appropriate education and training, and in many remote Indigenous communities, basic infrastructure to allow for the development of the skills required to take up employment is not available or accessible.

172. The Commission also agrees that the Government has a role in assisting Indigenous people to access employment opportunities through providing more 'work-ready' assistance for Indigenous people to gain mining related employment such as building skills and capacity to take up employment opportunities as they arise.

173. The Commission notes that the Working Group recommended that the Australian and State and Territory Governments should commit to a target of work-ready Indigenous people who can be employed in mining and associated industries. However, the Commission is concerned that the Government's focus is restricted to the mining and associated industries.

174. The Discussion Paper considers option for outcomes from land agreements including the development of Indigenous businesses. The Commission suggests that in order the IEDS to be effective, the scope for work readiness, employment and training, must be much broader.

175. For example, the Commission recommends that on approval of a mining lease on Indigenous lands, Governments (including TAFE institutions and other Registered Training Providers) work with the Indigenous representative bodies and the Traditional Owners to conduct a skills analysis of that community and identify the skills development required as early as possible to meet the needs of any future development or agreement-making in that area. This may even occur prior to the commencement of the negotiation of any agreement.

176. Additionally, whether an agreement is in place or not, resources may indirectly be going into the communities involved and may still provide opportunities for Indigenous employment in other areas outside of the mine. Therefore, the focus of education, training and employment initiatives must be broader than just within the mining operation and extend to the operation of the community.

177. The Commission's consultations with the various government funding providers found that:

    a. The Department of Employment and Workplace Relations provided no information in their response on the funding provided to Indigenous communities under the Structured Training and Employment Projects program; the Indigenous Employment Centres; Wage Assistance; Corporate Leaders for Indigenous Employment Project; CDEP Placement Initiative; or the Indigenous Community Volunteers program.

    b. The Department of Environment and Heritage advised that no information was available about the applications received or funded by through the Indigenous Land Management Facilitator Program, while 70 of the 131 applications to the Indigenous Heritage Program were successful; 30 applications to the Indigenous Protected Area Program where successful, but no advice was provided on how many applications in total was provided; and no applications for Environmental Education Grants were received.

(d) Capacity – leadership training, mentoring scheme

178. As indicated above, the Commission agrees that the need to build capacity of Traditional Owners and Indigenous communities to effectively engage in successful negotiations concerning their lands and waters is crucial to sustainable development.

179. The Discussion Paper promotes a mentoring program that could assist the community build the capacity of Indigenous peoples to implement outcomes and create sustainable business opportunities. It suggests that a program such as this would include business leaders from non Indigenous organisations and key individuals within Indigenous organisations, and assist the community with business strategy and project planning.

180. The Commission supports this as an option that would contribute to the capacity of the community.

181. However, the Commission is concerned about the suggestion that the mentoring scheme should involve mining company executives. The Discussion Paper suggests that a mentoring scheme which has mining company executives as mentors would provide an 'independent view' as to corporate governance responsibilities. However, this could lead to conflict of interest.

182. The Commission is of the view that the priority for mentoring is the development of skills and commercial experience, and many industries could provide such mentoring. It would be more appropriate that mentors who were not managing, and thus did not have an interest in, the outcomes of the negotiations be engaged to provide this support. As discussed above, some programs already exist that could provide such mentoring, including Indigenous Community Volunteers, and the ICC Business Solution Brokers.

183. Although as mentioned in the Discussion Paper, the Commission agrees that there may be a need for a cross cultural exchange within a commercial context, but argues that this should be separate from the mentoring and capacity building of the Indigenous community members. The parties to the Argyle Participation Agreement saw the value in such an exchange and included cross cultural awareness as a crucial element of relationship building and the negotiation process.[44]

(e) Improving capacity – NTRBs and PBCs

184. The Commission notes that a factor which has significantly impacted on the ability of native title claimants and other parties to negotiate and reach outcomes though the native title system has been the resourcing of NTRBs and Native Title Service Providers.

185. The Commission argues that Indigenous stakeholders must be central participants in setting the development goals and agendas for their communities. The ultimate success of these goals is dependent on the active participation of Indigenous peoples.

186. Therefore, ensuring that native title claimants are sufficiently resourced to fully and effectively participate in the processes involved in securing outcomes from native title will be crucial to maximising benefits - whether it be through a determination of native title or through negotiated agreements. Sufficient resourcing must be provided to Native Title Representative Bodies to guarantee that claimants have access to the best possible legal, financial and other advice required to secure their interests.

187. The Commission argues that sufficient resources must be available to ensure that the capacity for claimants are fully engaged in decisions that will have a long-lasting affect on their lives and the lives of their families.

188. Further, as is widely acknowledged, yearly funding cycles and re-recognition periods is also a significant impediment to the capacity of Representative Bodies.

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[44] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Australian Human Rights Commission, Sydney. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_5.html (viewed 7 February 2009).

189. Not only is it vital to ensure that the Native Title Representative Body system is functioning effectively, it is also crucial to ensure that those Indigenous Corporations that are actively engaged in native title processes are also provided with resources. The Commission is concerned about two categories of Indigenous Corporations.

190. The first is Registered Native Title Bodies Corporate or Prescribed Bodies Corporate. While the previous Government in its 2007 changes provided mechanisms through which these corporations could gain support, either directly from FaHCSIA or through their Native Title Representative Body, FaHCSIA have stated that the provision of funding support for PBCs beyond their initial establishment phase has been limited by the high level of demand for resources by the Native Title Representative Bodies and the level of funds available to the program.[45] So in real terms the improvement to PBC support since these changes were introduced has been minimal to date with only 10 out of 57 registered PBCs receiving funding to a total of $380,000 which was sourced from funds allocated to their Native Title Representative Bodies.[46]

191. The second category of corporation, are those Indigenous Corporations that deal with native title issues but are not registered to undertake this specific purpose. These are corporations that native title claimants are forming in order to utilise the procedural rights afforded under the Native Title Act or to prepare for a determination. However, these corporations often also carry out other dealings associated with their lands before a native title determination has been made. As these corporations are not yet Registered Native Title Bodies Corporate, because there is no determination of native title, there is no funding available through the Australian Government for these corporations. Yet these corporations are essential to the protection of native title rights and interests prior to a determination, and fulfilling any legal obligations contained in native title agreements.

192. The Commission argues that NTRBs and PBCs are essential to the operation of the native title system. Any changes that would increase their effectiveness in representing their Indigenous constituents and managing the rights, interests and benefits derived from the system would be welcome.

193. Various Native Title Reports make recommendations about resourcing of these bodies.[47] A detailed response to the importance of appropriate resourcing for NTRBs and Native Title Service Providers is also provided in

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[45] G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.
[46] G Roche, Manager, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.
[47] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, 2007, chapter 3.

the Commission's submission to the Government's discussion paper on native title amendments.

(f) The Government's role in providing infrastructure

194. The Commission argues Government's role in providing infrastructure is crucial to ensuring the success of the IEDS and agreement-making.

195. The Government must be innovative in its approach to development on land and ensure accessibility to all avenues of funding and support to ensure the most beneficial outcomes are achieved. This will be particularly important in light of the global economic challenges we face now and in the future. Australia may no longer be able to depend on the mining boom to fund essential services and basic human rights for Indigenous communities.

196. With regard to the points raised in section 7.3 of this submission, the Commission recommends that:

a. The Government and native title parties to agreements work together to develop a set of guidelines for making native title agreements that are aimed at economic and social development and underpinned by a human rights based approach to development. The guidelines should:

    i. respond to the group's goals for economic and social and cultural development

    ii. provide for the development of the group's capacity to set, implement and achieve their development goals

    iii. utilise to the fullest extent possible the existing assets and capacities of the group

    iv. build relationships between stakeholders, and ensures the fullest participation of Indigenous peoples in the negotiating process

    v. integrate activities at various levels to achieve the development goals of the group.

b. Where a mining lease has been granted, the Government and NTRBs work with the Indigenous group to identify as early as possible the enterprise aspirations of Traditional Owners and assess their capacity to engage in economic development by:

    i. consulting with the Traditional Owners and their communities

    ii. auditing the existing resources

    iii. auditing the groups access to government resources

    iv. specifically targeting resources to communities according to their relative disadvantage.

c. The Government direct ICCs and other agencies responsible for supporting and facilitating business development in Indigenous communities, to work with Indigenous land corporations (including representative bodies) to:

    i. Develop a communication strategy to inform all Indigenous Australians of economic development policy, programs, initiatives, and potential sources of funding.

    ii. To work with Indigenous parties to agreements to assist with applications for funding that leverage economic development projects and opportunities, and coordinate appropriate training and development to support economic development and the full implementation of agreements.

d. In order to increase the efficiency and effectiveness of the native title system as a whole, the Government must include in the native title budget sufficient ongoing funds required to promote a level playing field and sustainability of outcomes from the outset.

7.4 Tax options

197. The Commission agrees that there are various aspects of the tax treatment of Indigenous entities established for native title reasons[48] which could be clarified and amended.

198. As the law stands, there are certain tax concessions available to Indigenous entities depending on the structure and purpose of the entity. The result is that there is inconsistent treatment across Indigenous entities. In addition, entities are structured in order to obtain tax concessions, rather than in a way that is best suited to its purpose and which are easy to govern and run. This creates unnecessary complexity and burden for Indigenous organisations which are already under-resourced, and in many cases are already struggling with reporting requirements and building their capacity.

199. The Commission argues that Indigenous entities are a sector of the community which should clearly and unambiguously receive tax concessions as discussed below. After all, benefits flowing from the native title system are compensation for dispossession and the colonisation of this country.

[48] For simplification, this section of the submission will refer to 'Indigenous entities' as those created to: use the procedural rights afforded under the Native Title Act; receive and administer benefits achieved through negotiations undertaken via procedural rights afforded under the Native Title Act; or hold native title rights and interests. These entities may be structured in various ways, and can be regulated by various and overlapping provisions in the Native Title Act, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* and the *Corporations Act 2001*. PBC regulations also regulate some of these bodies.

200. The preamble to the Native Title Act acknowledges that Indigenous people were progressively dispossessed of their lands. The preamble states that:

> This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal and Torres Strait Islanders concerning the use of their lands…As a consequence, Aboriginal and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.[49]

(a) Compensation

201. The Commission notes that Australia's tax law provides that compensation is not taxable, unless it is compensation for a loss of income.[50] On this basis, benefits received through the native title system should not be taxed as they constitute compensation for dispossession of land, use of land, and the destruction of culture – not a loss of income.

202. However, benefits flowing from the native title system and the agreements made under it, are not always formally classified by the parties as compensation. The result is that some benefits may be classed as income or capital gains and are taxed accordingly.

203. Consequently, although benefits that flow to native title claimants through the native title system should not be taxed, the tax treatment is not always clear or consistent.

204. One complicating factor is that there have been no successful compensation applications under the Native Title Act to date. As a result, there is no precedent for the value of compensation that should be payable.

205. The Commission considers that benefits derived from the native title system are compensation and should be treated by the tax law as such. However, the Commission recognises that there may be inherent difficulties for parties in defining benefits as compensation. Therefore, the Commission considers that the clearest and most appropriate response would be for the Government to consider creating a new category of tax treatment specifically for Indigenous entities.

206. Some of the tax concessions that Indigenous entities should receive, and the complications with receiving those concessions under the current law, are discussed below.

(b) Charitable status

207. The Commission notes that some Indigenous entities have sought income tax exemption and other GST concessions through forming a trust and seeking charitable trust status under the law.

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[49] *Native Title Act 1993* (Cth), preamble.
[50] In which case it is taxed as if it were income.

208. Charitable status is still defined by the common law and many Indigenous entities fulfil that definition. However, there are a number of elements of the law of charities that lead the Commission to conclude that it is not always an appropriate structure for Indigenous entities seeking the tax concessions they are entitled to. These include:

    a. Indigenous entities may not always be 'not-for-profit'. This is because the Native Title Act may require that the members of the organisation, and those that benefit from it, are all of, and only, members of the native title claim group. For these reasons, aspects of the existing law, prevent some Indigenous entities from satisfying the requirement that charitable trusts be 'not-for-profit' as if the entity was wound up, the remaining benefits must be distributed to the native title claim group members, not to another like minded entity.

    b. The potential incompatibility between pursuing a charitable purpose and economic development. The law provides that the primary purpose of a charity must be pursuing its charitable purpose. Many Indigenous entities want to pursue economic development which may or may not further their charitable purpose. What level of economic development the law allows an entity to pursue, while still maintaining charitable status is still unclear. This aspect could also hinder the Government's view that native title should be used to leverage economic development.

    c. Charitable purpose. Some aspects of an Indigenous entity's activities may be pursuing purposes that are not considered charitable under the common law.

    d. Accumulation of investment income. It is unclear what level of income can be accumulated by a charity for it to still be considered to be pursuing its charitable purpose. As Indigenous entities, particularly those set up for the purpose of managing native title rights and interests, are intended to either exist in perpetuity or for a long time, this may not be appropriate. In addition, as Indigenous entities may receive a large sum in compensation, they will require the option to invest a large proportion of the money they receive to benefit future generations.

(c) PBI status

209. The Commission argues that the Government should consider whether the concessions afforded to Public Benevolent Institutions (PBIs) should also be afforded to Indigenous entities. PBIs are entities which are relieving poverty in a direct way, for example, through providing housing. They receive many tax concessions including significant Fringe Benefits Tax (FBT) exemptions.

210. The Discussion Paper raises the question about what services governments should be providing to communities. At the moment, there is no commitment from Government as to what services they will provide to remote and regional communities, the population of which may only number a few hundred. In addition, various studies have provided evidence of the abysmal

living conditions in many of these communities. For example the *Aboriginal and Torres Strait Islander Health Performance Framework Report Summary 2008*, found that there are still significant disparities in health status between Aboriginal and Torres Strait Islander peoples and other Australians, and that these disparities are evident across the life cycle. Including from lower birth weight, earlier onset of some chronic diseases, much higher occurrence of a wide range of illnesses, higher prevalence of many stressors impacting on social and emotional wellbeing, higher death rates and lower life expectancy.[51]

211. The result of this is that many Indigenous entities operating in small remote communities are doing the job of government through providing essential services such as shelter and housing, sewerage and even dialysis machines.

212. Because some of these services are directly relieving poverty, some Indigenous entities may be able to structure their affairs so that they can receive PBI status for aspects of their work. However, as the communities may be very small, these concessions mat not be available to some organisations as they may not be considered to be working for the relief of poverty for the 'broader community'.

213. Additionally, some organisations will also be providing services that other communities are already provided, but by virtue of remoteness are not being provided by government, yet are equally as urgent and necessary for the lives of those living there.

214. For these reasons, the requirements under the law for receiving PBI status may not be satisfied by a number of Indigenous entities which are undertaking comparable work.

215. The Commission considers that another mechanism (perhaps the creation of separate tax treatment as mentioned above) should provide that the concessions that PBIs are extended to Indigenous entities.

216. Finally, the Commission notes that the Fringe Benefits Tax exemptions provided under such a scheme would assist Indigenous entities in a number of ways, including by assisting them to reduce their operation costs and attract better skilled staff to these organisations which struggle to get appropriate personnel. This is another urgent need which has been identified by Government.

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[51] Department of Health and Ageing, *Aboriginal and Torres Strait Islander Health Performance Framework Report Summary 2008,* Commonwealth of Australia 2008. At: http://www.health.gov.au/internet/main/publishing.nsf/Content/20D72449D401E1EBCA25722C0013BA98/$File/HPF%20Report%20Summary%202008_Print.pdf (view 12 January 2009).

(d) DGR status

217. Another tax concession which is sometimes available to Indigenous entities is Deductible Gift Recipient status (DGR status).

218. The Commission notes that although the tax law provides a number of categories of organisations which can receive DGR status, organisations aimed at reducing the disadvantage in Indigenous communities is not one of them. The Commission understands that many larger Indigenous organisations may receive DGR status through one of the existing categories in the law, however smaller organisations which work directly in smaller Indigenous communities may have more difficulty obtaining DGR status.

219. Once again, this is an area of the tax law which applies inconsistently to Indigenous entities and should be clarified.

220. The Commission is of the view that adding a new category to those organisations which can receive DGR status would be beneficial. Affording Indigenous entities DGR status will further the Government's commitment to encouraging and facilitating Indigenous economic development, by encouraging and providing those organisations with greater income through encouraging public donations.

221. The relationship between the tax law and native title law is complex. The native title system is unique, and deserves special consideration by Government.

222. The Commission recommends that the relationship between native title and tax law should be comprehensively reviewed by the Treasurer, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs. The Commission would like the opportunity to provide further and more detailed comment when further consultation is undertaken.

223. The Commission notes that there are examples of specific concessions or regulatory frameworks being established to address the specific circumstances of Indigenous peoples – such as *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). These are classified as special measures or as distinctions that are not discriminatory because the purpose is to address the significant social and economic disadvantage experienced by Indigenous peoples. Tax concessions for Indigenous entities should attract similar status as a special measure.

7.5 Statutory schemes

(a) How might such legislative schemes operate to deliver meaningful benefits to Indigenous communities?

224. According to the Discussion Paper, the Governments intention is to deliver better outcomes while avoiding undue Government interference or

regulation of financial transfers through private agreements and the legal complexities that would ensue.

225. The Commission argues that the introduction of further statutory schemes would increase the amount of government regulation of the system. Particularly if the focus of any scheme is on the outcomes of the agreements between native title stakeholders and the mining industry. The Commission argues that the priority should be to provide the necessary resources required to address the gaps that exist in the current system.

226. The Commission further notes that Indigenous landowners should be treated similarly to non-Indigenous landowners, namely in a non-discriminatory, fair and just manner.

227. Further, if the Government proceeds with legislative or policy change relating to the proposals set out in the Discussion Paper, such legislation or policy must be consistent with the provisions of the *Racial Discrimination Act 1975* (Cth).

228. The Commission observes that the discussion around legislative guidelines and regulatory models provides for regulation only of Indigenous peoples engagement and the benefits they receive. There is no discussion about corporate social responsibility or the regulation of the industries seeking access to the lands, waters and natural resources on Indigenous lands.

229. The Commission notes that the Discussion Paper suggests that a legislative scheme could be designed to prescribe a minimum level of statutory benefits to be provided under native title agreements, and that such a scheme would have the benefit of providing for minimum rights that could not be easily reduced or contracted away.

230. While the Commission considers minimum standards a positive move towards achieving a system that provides for standardised benchmarks. The Commission is concerned that a minimum standard will encourage parties to only provide the minimum – even in circumstances where they are in a position to offer higher than the minimum, and the affect on the exercise and enjoyment of Indigenous peoples human rights, and the impact to their lands and waters, should be reflected in greater compensation.

231. The Commission also highlights the fact that the minimum or maximum payments available from agreements will be influenced by the market and may not provide a stable benchmark. This is particularly relevant in the current global financial crisis.

232. The Commission recommends that:

    a. Any minimum standard or set of criteria must be set in the context of human rights principles, and relate specifically to the conduct of the negotiations. For example, principles such as free, prior and informed consent; good faith negotiations; and monitoring, assessment and review provisions should be regarded as a minimum standard.

b. A minimum standard of benefits should be defined in terms of categories, and must include as a minimum:

    i. employment, education and training that is based on a minimum percentage of employment, and include specific targets

    ii. business investment and development including support and mentoring of business aspirations, access to advice on investment opportunities, and a first option tendering process to Traditional Owners for company contracts

    iii. the protection and maintenance of cultural heritage

    iv. environmental protection and rehabilitation of lands affected by the mining operation

    v. committed resources to ensure the full implementation of the agreement

    vi. community development

    vii. sufficient resources to build the capacity and governance of Indigenous organisations charged with implementing the agreements and managing the benefits.

c. access to market information will also be vital for Indigenous groups to be able to determine whether they have a good agreement on the table – that the offer is based on current market value, considers the expected gain from the life of the mine, the cost to rehabilitate the lands and waters after the mine, and the impact on Indigenous culture and heritage.

d. any statutory or regulatory schemes must not compromise the self-determination of Indigenous peoples, as a minimum it must facilitate it. Reporting should be required as part of the agreement as to how this is being achieved.

8 Appendices

233. Appendix 1 – *Engaging the marginalised: Partnerships between indigenous peoples, government and civil society* – attached. Available online at: http://www.humanrights.gov.au/social_justice.

234. Appendix 2 - *Development and Indigenous Land: A Human Rights Approach* – attached

8.1 Appendix 2

Development and Indigenous Land: A Human Rights Approach

These Principles were developed by a forum of Indigenous people from Australia's major mineral resource regions, held in Alice Springs in May 2002. Participants had a depth of experience and expertise in areas across the country, but the process did not make any claim to represent a national Indigenous view. The forum was co-hosted by the Aboriginal and Torres Strait Islander Social Justice Commissioner (Dr Bill Jonas) and Professor Ciaran O'Faircheallaigh on behalf of Griffith University and facilitated by Indigenous lawyer, Robynne Quiggin. The aim of the forum was to initiate a process by which Indigenous people may develop principles, based on human rights, addressing resource development on Indigenous land.

The Principles are informed by the forum participants' experience of the impact of mining on their communities. The process was not intended to produce rules to be applied uniformly by all Indigenous communities. Rather the Principles, based on the human rights of equality, protection of culture, and self-determination, provide a foundation on which Indigenous people may build their own positions regarding the relationship between their communities and Developers. The participants welcome the extension and adaptation of these Principles to other forms of development and impact on Country.

The Principles address issues such as recognition and respect, Indigenous involvement in environmental management, cultural heritage protection, and the need for developers to respect the integrity of Indigenous decision making processes. A central requirement is that developers obtain the prior informed consent of Indigenous communities affected by any development proposal. The issues covered in these Principles are particularly important where the legal and policy frameworks for resource development on Indigenous land are inconsistent with Indigenous people's human rights. Adherence to the Principles will assist in ensuring equity between Indigenous and resource development parties.

PREAMBLE

The principles in this document concern the relationship between Traditional Owners and custodians, on the one hand, and Developers on the other, and are based on the human rights of self determination and development, equality and non-discrimination, and protection & maintenance of culture. The relevant parts of international treaties which enshrine these rights and to which Australia is a signatory are scheduled to this document.

Human rights have been expressed in the Universal Declaration of Human Rights (UDHR), which represent a manifesto for ethical behaviour between peoples, governments and private economic interests. The principles outlined below are specific standards, based upon the UDHR and other sources of human rights principles, for ethical conduct between Developers and Indigenous communities.

The core values that underpin the principles in this document are the values of recognition and respect. Particular aspects of recognition and respect are stated in the first two headings of this document as principles in their own right, but they are also reflected in all of the other principles in this document.

All Developers should recognise that colonisation continues to impact upon the social, economic and environmental conditions and lifestyles of Indigenous peoples throughout Australia. However, Developers should also recognise that Traditional Owners and custodians throughout Australia retain connection to Country and also recognise the economic importance of their traditional lands to produce sustainable outcomes for future generations.

Developers must respect the rights of traditional landowners to negotiate agreements over proposed and existing Developments on Country. Developers must respect the right of Traditional Owners and custodians to veto Development proposals.

Developers must fully disclose their profile and projects both nationally and internationally as single entities and joint venturers.

Developers must comply with international standards on labour, human rights, sustainable development and the environment for the express purpose of ensuring that Traditional Owners and custodians are able to practice their traditional laws and customs and exercise the full range of connection to Country.

In the application of the following principles, the differential impact of Development on Traditional Owners and custodians including elders, men, women, and children must be recognized and addressed.

Developers and Traditional Owners and custodians will respect the confidentiality of the other party. Developers must respect the confidentiality of Traditional Owners and custodians particularly in the receipt and use of Indigenous information, and throughout any negotiations and dealings with Traditional Owners and custodians.

The principles in this document apply to all Developments, regardless of when they were initiated.

The principles in this document may also be relevant to other forms of resource development.

Definitions

The word 'Development(s)' in this document means any exploration for or extraction of minerals (including oil, petroleum and gas) and all associated activities, such as construction of infrastructure, undertaken on Country.

The word 'Developer(s)' in this document means any party or organisation that seeks to undertake Development on the Country of Traditional Owners and custodians.

The word 'Country' in this document includes land, water, sea, and sky.

Recognition
The Developer must recognise:

- Traditional Owners' and custodians' cultural practices, traditional and ongoing spiritual and religious connection to Country
- Traditional Owners and custodians as owners of Country, regardless of Western law
- Traditional Owners' and custodians' values in relation to their culture;
- the cultural responsibilities of Traditional Owners and custodians in employment conditions
- the impairment and disruption of enjoyment, use and access to Country due to impact of Development, and provide appropriate compensation in all cases of such impairment
- the right of Traditional Owners and custodians to work with consultants of their choice
- that Traditional Owners and custodians are responsible for Indigenous heritage on Country and are owners of their cultural and intellectual property
- the right of Traditional Owners and custodians to enjoy economic benefit arising from Development on Country
- that Traditional Owners and custodians are the ultimate decision makers on Country and therefore must be involved in all decisions made
- the cultural diversity of Indigenous people throughout Australia.

Respect

The Developer must respect:

- Traditional Owners' and custodians' decisions, decision-making, and dispute resolution processes
- Traditional Owners' and custodians' time frames to ensure inclusiveness for decisions that are subject to cultural ceremonies and law, climatic and geographical conditions
- the collective and communal nature of Indigenous rights
- the status of Traditional Owners and custodians - the Developer must provide its representatives with the authority to negotiate and make decisions
- the Traditional Owners and custodians by providing notice of future projects as early as possible in the life of that project, and well in advance of any relevant statutory periods
- all relevant persons and groups in a community (including traditional elders, custodians of sites, Traditional Owners and custodians of stories/songs, men's and women's businesses) in traditional decision making about Indigenous heritage and what happens on Country
- the information and knowledge of Traditional Owners and custodians, and the Developer must apply mutually agreed principles in protecting that information and knowledge.

Prior Informed Consent

Traditional owners and custodians have a right to make informed decisions, which may include decisions that Development will not proceed. The Developer must:

- ensure that Traditional Owners and custodians have all information in relation to proposed projects in a timely and comprehensive manner and in an understandable form;
- fully disclose to Traditional Owners and custodians, information on the Developer's projects, practices and policies (including Indigenous policies); and
- provide resources and funding for Traditional Owners and custodians to undertake impact assessment as an integral part of project approval processes and of project operations.

Internal Decision Making Processes

The Developer must

- respect Traditional Owners' and custodians' decisions and decision making processes in relation to representation
- refrain from participating in Traditional Owners' and custodians' decision making structures, unless by Traditional Owners' and custodians' invitation and without inducement.

Economic Development and Benefits

Traditional owners and custodians have the right to guaranteed effective participation in all economic development and benefits, which are sustainable and durable benefits, including:

- permanent and meaningful employment
- training, education, and capacity building
- business opportunities
- royalties
- equity in the operation
- generation of spin-off (secondary) economic opportunities

with the Developer and any of its contractors or joint venturers.

Independent Monitoring and Performance Benchmarks

The Developer must:

- negotiate outcome-focused benchmarks with full participation of Traditional Owners and custodians
- agree to independent monitoring of performance based on the agreed benchmarks

- ensure timely reviews of agreements and other relevant development activities
- negotiate, with the full participation of Traditional Owners and custodians, a code of conduct to apply to all employees and contractors, and covering areas such as cross cultural relations, responsible use of alcohol, and fraternising with local people - the code must be supplemented by staff training including localised delivery of cross-cultural training.

Indigenous Involvement in Environmental Management

The Developer must:

- comply with environmental laws and industry codes of practice
- ensure that Traditional Owners and custodians are able to practice their traditional laws and customs and exercise the full range of connection to Country
- integrate Indigenous knowledge and land management practices into rehabilitation plans and works
- provide financial guarantees including, secured funds to manage closure issues, in the immediate and long term
- set environmental management standards with the full participation and agreement of Traditional Owners and custodians.

Cultural Heritage Protection

The Developer must:

- establish appropriate cultural heritage protection to the standards required by Traditional Owners and custodians
- provide resources and funding on a basis agreed with Traditional Owners and custodian to undertake heritage assessments and develop management plans on the basis of the agreed standards
- provide resources and funding for cultural awareness training by Traditional Owners and custodians at all levels of the Developer's organisation.

Resourcing

The Developer must provide resources and funding to:

- allow fair and equitable negotiations; and
- ensure effective implementation of all stages of agreements with Traditional Owners and custodians.

Schedule of Relevant Human Rights Principles

The right to self-determination is enshrined in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 1 provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The right to development is enshrined in articles 1 of the Declaration on the Right to Development which provides:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The right to racial equality and non-discrimination is enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 of ICERD provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service

(d) Other civil rights, in particular:

(i) the right to freedom of movement and residence within the border of the State
(ii) the right to leave any country, including one's own, and to return to one's country
(iii) the right to nationality
(iv) the right to marriage and choice of spouse
(v) the right to own property alone as well as in association with others
(vi) the right to inherit
(vii) the right to freedom of thought, conscience and religion
(viii) the right to freedom of opinion and expression
(ix) the right to freedom of peaceful assembly and association

(e) Economic, social and cultural rights, in particular:

(i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration
(ii) the right to form and join trade unions
(iii) the right to housing
(iv) the right to public health, medical care, social security and social services
(v) the right to education and trainin
(vi) the right to equal participation in cultural activities

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

The Committee on the Elimination of Racial Discrimination has issued general recommendation 23 on how the Convention should apply to Indigenous people. This provides (among other things):

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.

4. The Committee calls in particular upon States parties to:

(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;

(b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;

(c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;

(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;

(e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

The right to protection and maintenance of culture is contained in Article 27 of ICCPR which provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Human Rights Committee's General Comment 23 on Article 27 of ICCPR states (among other things):

> The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

The right to freedom of religion is enshrined in article 18(1) of the ICCPR, which states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.