The Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

20 June 2011

Re: Inquiry into the Schedule 4 of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011

The Minerals Council of Australia (MCA) welcomes the opportunity to provide feedback on the proposed amendments to Schedule 4 of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011.

The Minerals Council of Australia is the peak national industry association for the Australian minerals industry and represents over 85% of minerals production in Australia. The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

In providing this submission to the Senate Committee inquiry, the MCA has not focussed on the details of schedule 4 and its full implications, but rather seeks to highlight that the amendments may have unintended consequences in relation to payments made

The MCA understands that the scope of the Schedule to the Bill relates to requirements for payers of compensation, such as insurance companies, to notify Centrelink of proposed payments of compensation which relate to recompense for private injury, where the recompense for private injury is described as any of the following:

> (a) a payment of damages;
> (b) a payment under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme;
> (c) a payment (with or without admission of liability) in settlement of a claim for damages or a claim under such an insurance scheme;
> (d) any other compensation or damages payment.

Given the breadth of this definition, the MCA is concerned that the inclusion of native title related payments may be an unintended consequence of section (d), specifically "any other compensation or damages payment".

Native title has provided a vision for Aboriginal people in shifting their attitude away from welfare dependency to financial independence and the ability to make lifestyle choices. Within the native title system opportunities for achieving economic improvement are by and large under the future acts process through negotiations with the extractive industry which is allowing native title groups to gain significant benefits and become more and more involved in the broader economy.

In defining the scope and nature of agreements, it is important to acknowledge that a range of different agreements are used within the minerals industry, each of which is established with different purposes and legal bases.

These agreements specifically provide compensation for impacts on native title rights and cultural heritage, as well as providing for benefit sharing and investment in community development, including through education, training and development. Accordingly, the ability to differentiate between compensation payments and benefit sharing arrangements

under these agreements would be highly complex both politically and administratively, and therefore an unrealistic proposition as is required under the current requirements of the Amendment Bill.

The mining industry interests in undertaking commercial negotiations for agreements include securing both land access and a long term social licence to operate. The interests for native title groups centre on leveraging their native title and procedural rights to grow intergenerational wealth and maximise the protection of culture and country. In most cases, payments made under agreements are fundamentally a cost of gaining access to land, irrespective of the different particular motivation for commencing negotiations.

Accordingly, mining agreements with Indigenous communities typically comprise a bundled and undifferentiated package of benefits, including:

1. Compensation for impairment of native title rights and interests;
2. Compensation for impacts on land owners;
3. Arrangements for heritage and environmental protection;
4. A commercial component for timely, active participation in various regulatory approval processes to facilitate land access for mining project development;
5. Compensation for impacts on nearby communities;
6. Benefit sharing; and
7. Investment in community development, including through education, training and employment.

In relation to these, it is commonly acknowledged that items 1,2 and 3 are the exclusive domain of native title groups or traditional land owners, items 5, and 6 are directed at benefit sharing with the broader Indigenous community, and items 4 and 7 span both of these groups, who may be more of less overlapping depending on the location of the project and the nature of its host community.

Importantly, these agreements made in relation to native title are typically communal benefits (including monies, in-kind contributions, possible equity holdings, assets and other tangible non-cash components) and are made to a legal entity which is established by the holders of native title in a region. As such the MCA considers that any alleged "injury" is therefore not a "private injury" as noted in the aforementioned definition. Further, given that the administration of these agreements and any distributions under these agreements is not managed by the minerals company, it is not possible for the minerals company as the provider of this compensation and benefits package to attribute benefits to individuals for the purposes of assessing such monies as income in relation to social security payments.

The MCA and National Native Title Council recently provide a joint response to the Treasury Consultation paper – *Native Title, Indigenous Economic Development and Tax* and the joint Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs' Discussion paper – *Leading Practice Agreements: maximising outcomes from native title benefits*.

In this submission the MCA and NNTC advocated for the establishment of the Indigenous Community Development Corporation (ICDC) as a new category of entity for tax purposes as an alternative entity for use when considering appropriate structures for the management of payments and benefits negotiated by Indigenous communities and groups, whether these benefits come from the public or private sector including agreements centred on the statutory entitlements of native title holders.

The MCA and NNTC consider that the development of an alternative category of entity for tax purposes would substantially enhance the effectiveness and efficiency of the existing system, including:

- shifting the language away from concepts of charity to concepts of community and economic development;
- creating greater flexibility within the taxation system for community specific approaches to managing funds for socio-economic development;
- providing a structure that encourages intergenerational and sustainable benefits;
- creating capacity to maximise the delivery of economic and social dividends with minimal administrative burden; and
- recognising the unique multifaceted challenge of Indigenous disadvantage.

The MCA and NNTC consider that an ICDC should have the right to make limited cash payments to Traditional Owners centred on areas of need, for example cultural business or aged care requirements.

Such payments could enable the industry and native title parties to ensure that agreements provide immediate benefits to those Traditional Owners who, because of age, are not in a position to share in the longer term benefits of the agreement. Further, the MCA and NNTC have advocated that such payments should be at the discretion of the native title group and be exposed to normal tax and welfare system impacts, once the quantum of those payments exceeds a designated threshold.

Accordingly, should the ICDC be established, the MCA considers that this would provide a potential vehicle by which to assess the distributions of benefits under agreements to individuals and any implications for income tax or social security purposes.

A copy of the MCA and NNTC submission outlining the structure and function of the ICDC model is attached.

The MCA welcome the opportunity to respond to proposed amendments to Schedule 4 of the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further Election Commitments and Other Measures) Bill 2011.

We trust that the Committee will give due consideration to ensuring that the Amendment Bill does not have unintended consequences on native title payments and other related matters, and look forward to opportunities to secure the support of the Economics Committee for the implementation of the ICDC model as a vehicle to drive improved economic development in Indigenous communities.

Yours sincerely

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Minerals Council of Australia

INDIGENOUS ECONOMIC DEVELOPMENT FROM MINING AGREEMENTS:

A RESPONSE TO:

THE TREASURY CONSULTATION PAPER
NATIVE TITLE, INDIGENOUS ECONOMIC DEVELOPMENT AND TAX;

AND

THE JOINT ATTORNEY-GENERAL AND MINISTER FOR FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS' DISCUSSION PAPER
LEADING PRACTICE AGREEMENTS: MAXIMISING OUTCOMES FROM NATIVE TITLE BENEFITS.

FOR AND ON BEHALF OF:
MINERALS COUNCIL OF AUSTRALIA
NATIONAL NATIVE TITLE COUNCIL

NOVEMBER 2010

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1 INDIGENOUS ECONOMIC DEVELOPMENT AND THE AUSTRALIAN MINERALS INDUSTRY

This Submission is made by the Minerals Council of Australia (MCA) in conjunction with the National Native Title Council (NNTC) in response to the Treasury Consultation paper – *Native Title, Indigenous Economic Development and Tax* and the joint Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs' Discussion paper – *Leading Practice Agreements: maximising outcomes from native title benefits*.

The MCA and NNTC have worked collaboratively over a number of years with the shared objective of enhancing the institutional and economic capacity for Indigenous Australians to be long-term contributors to, and drivers of, economic development in local and regional communities.

The MCA and NNTC fully support the overall goal of the Australian Government to improve economic development outcomes for Indigenous people and closing the gap between Indigenous and non-Indigenous Australians in key areas of Indigenous disadvantage. Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) around Australia are already engaged in strategies to optimise economic development opportunities for native title groups within their jurisdictions and are fully committed to assisting with initiatives that improve the lives of Indigenous people.

The NNTC sets out below the fundament principles for the payment of benefits as outlined in its submission to the Native Title Payments Working Group of February 2009:

- The NNTC is opposed to statutorily mandating how native title holders decide to invest or spend the benefits that they negotiate under agreements;
- It is imperative that native title holders' right to take responsibility for themselves and to make decisions that affect their own lives be enhanced and maintained;
- However, there is an identified need for new structures and incentives that meet the specific needs of native title and Traditional Owner groups, that:

    (a) do not trap native title groups into welfare models of distribution (or provide perverse incentives to enter such frameworks),

    (b) provide flexibility to achieve the diverse outcomes sought by native title groups, including economic and social outcomes and discourage the proliferation of structures,

    (c) allow(and perhaps provide incentives to) native title holders to utilise the benefits in ways that maximise the benefits of the funds and meet the intergenerational needs of the group, including accumulation.

    (d) do not abrogate the responsibilities of local, state and/or federal governments in the provision of services.

The MCA and NNTC, recognise the rights and interests of native title groups to benefit from the settlement of native title as well as their right to economic independence and autonomy in decision making. These are fundamental principles to build a sustainable relationship between government, industry and native title groups.

The MCA and NNTC also recognise that minerals development is a key industry that supports Indigenous economic development. This is a product of:

- the economic contribution of the sector, which accounts for around eight per cent of GDP, more than 50 per cent of Australia's exports of goods and services and also contributes a significant share of State and Federal revenues under existing taxation and royalty arrangements;
- the industry's direct relationships with Indigenous Australians given that more that 60% of our operations neighbour Indigenous communities;
- the minerals industry is the largest private sector employer of Indigenous Australians and seeks to support Indigenous enterprise development, including through procurement policy; and

- the nature of mining agreements related to the native title rights of Traditional Owners and land access arrangements for mining companies, which deliver ongoing economic benefit to native title groups and Indigenous communities.

To this end, the MCA and NNTC have jointly:

- proposed a suite of technical amendments to improve the efficiency and effectiveness of the native title system;
- demonstrated the need for more effective capacity building arrangements for the native title system, and specifically for Prescribed Bodies Corporate;
- developed a position statement on Indigenous economic development that provides recommendations to deliver improved opportunities for employment and economic development; and
- designed an alternative Indigenous economic and taxation vehicle, the Indigenous Community Development Corporation (ICDC), to drive enhanced economic development outcomes from the economic benefits provided for in mining agreements, including those under the *Native Title Act* 1993.

In undertaking this work, the MCA and NNTC have concluded that ineffectual policy development by both Federal and State Governments as well as the lack of capacity by parties to monitor and fulfil their obligations under agreements are fundamental to the ongoing failure of Indigenous Australians to fully capitalise on the economic development opportunities presented by minerals development. One of the key problems being the lack of coordination and cooperation by Federal and State Governments at the local and regional level.

Native title has provided a vision for Aboriginal people in shifting their attitude away from welfare dependency to financial independence and the ability to make lifestyle choices. Within the native title system opportunities for achieving economic improvement are by and large under the future acts process through negotiations with the extractive industry which is allowing native title groups to gain significant benefits and become more and more involved in the broader economy. Other opportunities within the broader private sector are also having an increasing and positive impact for Indigenous Australians, not only through the Generation One program, but NTRBs/NTSPs are negotiating their own frameworks with organisations that includes employment and economic benefits for native title groups and Indigenous communities.

Accordingly, we welcome the opportunity to explore with Government a range of policy and governance reforms to better position Indigenous Australians to capture the full extent of direct and indirect economic opportunities presented in those remote and regional communities where mining is a major economic catalyst.

1.1 The role of Agreements

A clear opportunity exists to leverage the increased economic activity associated with mineral wealth to enhance the social and economic capacity whereby Indigenous people can become long term contributors to, and drivers of, regional and community development.

Specifically, the MCA and NNTC consider that provided a broader framework of policies and social and physical infrastructure is in place to support Indigenous economic development, that payments made under native title agreements provide a platform for the long term investment of such monies to ensure sustainable, intergenerational benefits to Indigenous communities.

In defining the scope and nature of agreements, it is important to acknowledge that a range of different agreements are used within the minerals industry, each of which is established with different purposes and legal bases. These agreements specifically provide compensation for impacts on native title rights and cultural heritage, as well as providing for benefit sharing and investment in community development, including through education, training and development.

The mining industry interests in undertaking commercial negotiations for agreements include securing both land access and a long term social licence to operate. The interests for native title groups centre on leveraging their native title and procedural rights to grow intergenerational wealth and maximise the protection of culture and country. In most cases,

payments made under agreements are fundamentally a cost of gaining access to land, irrespective of the different particular motivation for commencing negotiations.

Accordingly, mining agreements with Indigenous communities typically comprise a bundled and undifferentiated package of benefits, including:

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In relation to these, it is commonly acknowledged that items 1,2 and 3 are the exclusive domain of native title groups or traditional land owners, items 5, and 6 are directed at benefit sharing with the broader Indigenous community, and items 4 and 7 span both of these groups, who may be more of less overlapping depending on the location of the project and the nature of its host community.

The long terms social licence to operate interests of mining companies creates a driver for commercial negotiations to include details on governance arrangements for the management of, and criteria for the distribution of financial benefits. The objective here is to ensure that both current and future generations of the native title groups share in the benefits of resource development.

1.2 The role of Government

In determining the appropriate role for Government it is important to establish a formal position on the nature of native title as private property and the nature of the benefits flowing from resource agreements. On the one hand, benefits from native title agreements should provide opportunities for the whole community and not just the native title holders. On the other hand, it has been argued that native title is a private right.

An important principle of equity is established by the fact that no other Australian citizen is expected to share the benefits of a commercial agreement for the acquisition of, or access to, their land.

The MCA and NNTC consider that the benefits in mining agreements are best characterised as private money arising from private commercial negotiations. Accordingly, the MCA and NNTC consider that there is no formal role for Government in relation to:

- the actual negotiation of agreements between native title groups and industry;
- the review of agreements to assess the nature of the agreement, the quantum of benefits its provides or the perceived sustainability of the agreement based on criteria, including the implementation arrangements;
- the prescribing of model clauses or specific governance measures to be included in an agreement; or
- determining whether the nature of the agreement meets defined criteria requisite to accessing specific taxation arrangements, excepting those standard requirements established by the Australian Taxation Office (ATO), as modified in the way proposed by this submission.

Instead, the MCA and NNTC consider that the core role for Governments in ensuring that the economic opportunities from mining related agreements are fully realised centres on:

- ensuring that there is appropriate capacity in the native title system to support the development of agreements based on fair negotiations and a level playing field in terms of access to technical and specialist advice;

- ensuring that core government infrastructure and service delivery is accessible by all Indigenous communities, including education and training; health; communications; transport and housing, to ensure that the benefits of agreements are not required to be spent on fulfilling the responsibilities of governments;
- supporting Indigenous economic development through tax incentivisation, capacity building and supporting leading practice.

Another consideration is the need to recognise the different roles of state and federal governments within the native title system. Whilst it may be opportune to improve the system at the federal level, any gains are dependent on behavioural and attitudinal change at the state level, particularly in relation to negotiated agreements and the resolution of native title claims. Such improvements should be done with full understanding of the impact that changes may have at the state level.

2 ECONOMIC DEVELOPMENT AND THE TAX/SOCIAL POLICY INTERFACE

There is broad recognition among industry and Government that the current social and economic policy framework in Australia has failed to create sufficient progress towards economic independence for Indigenous communities.

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

It is also clear that even with the most positive and aggressive local Indigenous employment practices, mining companies will not alone be able to absorb the present level of Indigenous unemployment in all parts of remote and regional Australia, let alone provide the labour market demand for emerging generations.

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

In addition to this, there are a number of impediments to ensuring that those native title groups, who receive compensation and benefits under mining related agreements, are fully supported by the taxation and broader policy framework in Australia to maximise economic development outcomes.

The tax treatment of payments from mining agreements (for both the payer and payee) is highly complicated, particularly in the native title context. Under current arrangements, an array of different CGT, GST and income tax outcomes are possible and dependent upon things such as:

- Whether native title is extinguished or not;
- Whether the payments are of a capital or revenue nature; and/or
- Whether the payments are 'compensation' or an alternative type of payment.

Depending on the specific circumstances of particular cases, the tax consequences can be radically different and can greatly affect the material value of the agreement, its structure and complexity. Importantly, these matters can also have implications for the costs of implementation of the agreements and the types of benefits provided.

2.1 Current taxation of benefits and proposals for reform

On 13 February 1998, proposed amendments to the *Income Tax Assessment Act 1936* (ITAA36) and *Income Tax Assessment Act 1997* (ITAA97) were announced. These were designed to clarify the taxation implications of Native Title.[1] The proposed amendments acknowledged that compensation payments received for the extinguishment or surrender of

[1] Taxation Implications of the Native Title Act and Legal Aid for Native Title Matters by the Treasurer, the Honourable Peter Costello MP and the Attorney General the Honourable Darryl Williams AM QC MP.

Native Title under existing taxation treatment are regarded as compensation for the loss of a capital asset that pre-dates the capital gains tax (CGT) regime and should be exempt. The proposed tax treatment was to ensure that these payments would be exempt from CGT and income tax irrespective of the form in which the payment is made (i.e. lump sum, in kind or periodic payment).

In relation to amounts paid for the temporary impairment or suspension of Native Title rights, that is, where Native Title is deemed not to be extinguished, payments would be taxed in the hands of individual taxpayers at their marginal rate (which would prove very difficult). The amendments proposed to introduce a form of withholding tax arrangement at a rate of perhaps 4% (as per the Mining Withholding Tax). However, the legislative amendment to ITAA 36 and ITAA97 were never introduced.

The contemporary practice of interpreting the tax treatment of native title has become bogged down because of the difficulties of defining native title issues against traditional categories of tax law. An AIATSIS report summarised findings in this regard:

> *The tax treatment of native title 'events' turns on a few key conceptual issues. Firstly, whether native title groups are engaging in activities that extract consideration, or whether they are receiving compensation. This is the key determinant for the application of CGT. From here, the tax treatment depends on the distinction between income and capital and the underlying purpose of the payment or compensation — that is, what is the payment trying to replace.*[2]

Maximising the effectiveness and efficiency of benefits from native title agreements is fraught with difficulties due to different taxation treatments depending on the characterisation of the payments and the tax status of the entity receiving the payment. This is a problem at both an income tax and CGT level. The 'right' treatment remains unresolved.

Further to the difficulties outlined above relating to different taxation treatments depending on the characterisation of payments and the tax status of the entity receiving the payment, an added complexity for agreements generally is that there are "mixed" agreements where one part of the agreement may be related to or derived from statutory entitlements and the remainder designed to address the provision of benefits to a much broader class of Indigenous people who may have no statutory entitlements.

There is a clear policy imperative to treat compensatory native title payments in a fair and consistent manner in line with other forms of compensatory payments. There is also an imperative to streamline and simplify the treatment of community benefit payments. However, consideration should be given to how this aligns with broader approaches to maximise the benefit to Indigenous communities from any negotiated agreement, particularly how this aligns with the Government's 'Closing The Gap' agenda.

The MCA and NNTC therefore support the application of full tax-exempt status to funds under native title agreements because they are compensatory in nature due to the fact that the agreement results in the impairment or extinguishment of native title. The Right to Negotiate under the *Native Title Act 1993* means that native title groups can have a say over how an activity proceeds, however they do not have a say over whether the activity goes ahead. In effect, native title groups do not have the power of veto, thereby ensuring that the impairment or extinguishment of native title is compulsory resulting in the requirement for compensation.

2.2 Limitations of existing models and proposals in the Treasury Discussion paper

The MCA and NNTC consider that there are a number of barriers in the existing taxation system to achieving our shared goal of economic independence for Indigenous communities, including that:

- while tax concessions designed to encourage long-term accumulation of funds currently exist (including superannuation, the Future Fund and a range of private foundations), similar concessions are not available to encourage the accumulation of funds for the sustainable future of Indigenous communities;

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

- while tax deductibility or access to upfront capital expenditure or ongoing tax losses is recognised for a range of essential expenditure such as capital works or research and development, no such recognition is provided for expenditure on capacity building in Indigenous organisations, key to ensuring the necessary skill base and governance arrangements for the effective, long-term management of funds held; and
- while existing tax legislation recognises many worthwhile causes through specific categories of tax-exempt status that do not fit within the legal definition of charities (such as conservation organisations), no such category exists for traditional owner or broader Indigenous trusts.

The MCA and NNTC consider that there is a need for significant reforms to the existing legal and financial arrangements to improve the long-term investment of such monies to ensure that intergenerational and sustainable benefits accrue to those communities through what is a significant investment of funds, and a significant opportunity to engage in activities to drive localised economic development.

Native Title Payments and the Minerals Resource Rent Tax

There is a strong nexus between native title payments and the Minerals Resource Rent Tax project. Accordingly, as mentioned by Minister Macklin in her speech to the Native Title Conference 2010, the MCA and NNTC agree that native title access agreement payments should be deductible expenditure for MRRT purposes. The MCA and state industry bodies have argued to the Policy Transition Group examining the introduction of the MRRT that there is a distinction between different payments. Mining companies may negotiate private royalties with owners of the land on which mining or exploration activities are being carried out. In such circumstances these royalties are payable by negotiation with the land owner and the company seeking to carrying on exploration or mining activities. Thus consistent with the position adopted for the purposes of the PRRT regime, industry recognises that these private royalties are unlikely to be deductible for MRRT purposes. However, where companies are required to pay compensation to landholders for impacts on their property rights or the economic productivity of the land (for example compensation Indigenous communities or farmers for loss of economic and/or agricultural productivity in areas of their lands subject to mineral exploration), this would be deductible expenditure under an MRRT

In addition to impediments inherent in the taxation system, which limit the ability of Indigenous communities to accrue sustainable and intergenerational benefits, there are also a range of policy issues which fail to provide the necessary enabling environment to support the growth of Indigenous businesses.

Specifically, little or no support has been given to the development of sustainable Indigenous enterprises in remote and regional communities, given both the lack of fit with existing Government programs and investment strategies and the lack of incentives for private investment in this area. Direct support programs which do exist within Government there have been historical failures due to their poor implementation, lack of capacity building and mentoring support arrangements and the high administrative burden placed on recipients.

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

- While tax exemption to encourage venture capital is granted for specific emerging industries or businesses, including a tax exemption for non-residents, no clear venture capital opportunity exists to encourage Indigenous enterprise development;
- While a range of Government funded venture capital products and sectoral grant schemes and development funds exist (e.g. Small Business Incubator Program; Business Ready Program for Indigenous Tourism) the application guidelines for these funds are overly onerous and prescriptive, and their eligibility criteria is too narrow to support the diversity of Indigenous enterprise development necessary to facilitate the development of real economic opportunities for a significant number of Indigenous people and communities.
- The existing institutional and governance arrangements of Indigenous Business Australia (IBA), particularly in relation to the Indigenous Business Assistance and Indigenous Equity and Investments are overly onerous, require emerging businesses to meet equivalent hurdles that are required by mainstream investment options such as banks, and have tended to favour investment in businesses that would be sustainable and economically viable

even without investment by IBA and therefore do not add significant value in facilitating the development of emerging Indigenous enterprises; and

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

The MCA and NNTC consider that the development of structures which address areas of inconsistencies and impediments to leveraging increased participation in the mainstream economy by Indigenous Australians are fundamental to achieving better outcomes from the tax and broader policy interface and to providing Indigenous Australians with sustainable futures centred on economic independence and the growth of intergenerational wealth.

From a practical view, industry endorses the Treasury discussion papers'' goal that providing an income tax exemption to a native title group should not mean that businesses would be denied a deduction in respect of payments they may make under a native title agreement. As the discussion paper suggests "such payments could still be considered to have been necessarily incurred by the business in carrying on its affairs".

Many of the issues raised above, while integral to the issues which the Treasury paper seeks to address, currently fall outside of the scope of this consultation process. The MCA and NNTC would welcome the opportunity for a subsequent dialogue with Government regarding the systemic failures in the direct grant and direct programs offered by Government in this space, and the opportunities presented by the Indigenous Community Development Corporation to assist Indigenous enterprise development and broader regional economic outcomes.

2.2.1 Charitable Trusts

Currently, charitable trusts are commonly used for holding benefits from negotiated agreements to both maximise the value of the benefits and to avoid some of the difficult definitional issues in current taxation arrangements. However, charitable trusts and funds are not a neat fit, particularly for agreements centred on the statutory entitlements of native title holders.

Charitable funds access income tax exemption through endorsement as a tax concession charity. A charitable fund is a fund established solely for purposes that the law regards as charitable. Charitable purposes are:[3]

- the relief of poverty
- the relief of the needs of the aged
- the relief of sickness or distress
- the advancement of religion
- the advancement of education
- the provision of child care services on a non-profit basis, and
- other purposes beneficial to the community.

Beneficial purposes under this final point have been expanded by legislation to include a variety of activities deemed to be beneficial to the community.

In the application of tax by the ATO, if the recipient is a charitable trust or other entity endorsed by the ATO as tax exempt then the characterisation of the payment itself for tax purposes is not relevant. Once endorsed by the ATO, a charitable trust is exempt from income tax and capital gains tax regardless of the source of the funds. This includes income earned on trust investments. To maintain ATO endorsements, charitable trusts must comply strictly with their charitable trust deed and operate for charitable purposes only.

The attraction of charitable trusts is that by exempting the entity into which payments flow, there is no need to determine the nature of the payments or differentiate elements of the package as compensation or some other form of benefit. For

[3] http://www.ato.gov.au/nonprofit/content.asp?doc=/content/62731.htm

industry, there is also a demonstrable element of funds 'doing good' in the community and therefore in itself an investment in their reputation and social responsibility.

However, the use of charitable trusts for community benefit payments from resource agreements poses a number of taxation and structural difficulties, including:

- A charitable trust seeking to meet the community benefit arm of the definition must be applied for the benefit of the 'public' or an appreciable section of it. A trust restricted to a native title group or groups (particularly those identified by kinship) would ordinarily fail this test according to the ATO;
- Many Indigenous communities wish to apply their benefits to more than one tax exempt purpose (eg health, education, culture, environment) and the ATO will not currently permit registration in that case;.
- There is no clear statutory definition of activities or expenditure that is charitable in purpose and there is a great deal of confusion over what purposes can be funded and how to fund them. This can place significant pressure on trustee decisions and may necessitate custodial trustees to be put in place at additional cost;
- The ATO has difficulty with the accumulation of funds within charitable trusts for future generations to enjoy. Very limited accumulation of benefits is permitted and there are no clear guidelines for doing so. Disappointingly, the ATO may seek to limit the tax concession charity status to a relatively short period (e.g. 10 years), requiring a subsequent review by the ATO to extend the TCC status of the trust. This hinders the ability of Traditional Owners to provide for future generations. This is particularly important in the native title context where agreements affect intergenerational rights;
- In circumstances where charitable trusts are constructed for a broader community purpose this can be in direct conflict with the role of Traditional Owners as native title holders. Specifically, their right to be involved in the management and administration of those benefits, against the needs of the broader community for charitable assistance;
- Individual payments are not provided under a charitable trust unless in the limited context of genuine poverty relief for the provision of goods. Some native title groups maintain that they should have a right to access and enjoy some financial comfort from the payment of benefits, particularly for their Elders. Individual payments are also an issue in administering funds for cultural business such as funerals and ceremonies;
- Restrictions on the use of funds for charitable purposes discourages and in some ways deprives beneficiaries that gain economic independence from supporting businesses and enterprise development or employment and training opportunities within a broad 'community development' framework; and
- There is also the possibility that agreement benefits, how they are structured and their subsequent distribution, can impact welfare entitlements.

Despite the many different types of tax exempt entities recognised in the ITAA97, there is no current class of exempt entity that specifically addresses the systemic and interrelated socio-economic challenges faced by Indigenous communities to assist them to reach individual and community economic independence, particularly in the context of maximising the benefits of resource agreements. Indigenous trusts are forced to rely upon the concept of charitable trusts and institutions as the only path to exempt status.

Charity in relation to philanthropy, as it is inferred by the ATO, is difficult to reconcile for Indigenous communities seeking to take responsibility for their own well being in the absence of any extensive not-for-profit or charity sector operating in many remote and regional areas. Their community values will comprise values of altruism, poverty relief and charitable purposes but must also extend towards economic independence, self reliance, recognition of family networks, traditional law and custom and self preservation.

Despite the limited human and financial resources, a range of trusts and other entities have been created and are currently in use by Indigenous communities which must traverse (not always successfully) the "charities definition minefield", in addition to working to achieve the stated aims of the community for growth and sustainable development. The legal expression of these structures could also be seen to reinforce stereotypes, prejudice and attitudes around welfare and charity for Indigenous peoples.

2.2.2 Withholding Tax

The MCA and NNTC note that in 1998 the then Howard Government proposed a Native Title Withholding Tax, however this proposal was never enacted.

While the concept of a withholding tax is administratively simple, and does not generate any further tax implications for any recipients of the funds held or distributed under the Agreement, it is not supported by the MCA and NNTC as an appropriate vehicle for native title related payments.

The most significant failing of a withholding tax approach is that in treating each payment under the Agreement equally, it fails to recognise that a significant proportion of distributions under the Agreement would currently be tax exempt (monies or assets) as they are compensatory in nature and for community purposes, or some monies or assets paid to individuals where there is a community benefit and a limited personal benefit (e.g. housing, transport and communication devices) and where not tax exempt, the effective rate of tax paid by different individuals and entities in different circumstances will vary widely.

The concept of a withholding tax is also contrary to the overall principle applied by the MCA and NNTC in developing its policy in this area, specifically, that payments related to native title should be tax-exempt.

3 A MORE EFFECTIVE APPROACH – THE INDIGENOUS COMMUNITY DEVELOPMENT CORPORATION

The proposal for an Indigenous Community Development Corporation (ICDC) model aims to create a new category of entity for tax purposes as an alternative entity for use when considering appropriate structures for the management of payments and benefits negotiated by Indigenous communities and groups, whether these benefits come from the public or private sector including agreements centred on the statutory entitlements of native title holders.

The MCA and NNTC consider that the development of an alternative category of entity for tax purposes would substantially enhance the effectiveness and efficiency of the existing system, including:

- shifting the language away from concepts of charity to concepts of community and economic development;
- creating greater flexibility within the taxation system for community specific approaches to managing funds for socio-economic development;
- providing a structure that encourages intergenerational and sustainable benefits;
- creating capacity to maximise the delivery of economic and social dividends with minimal administrative burden; and
- recognising the unique multifaceted challenge of Indigenous disadvantage.

3.1 Scope and objectives of the ICDC model

The proposed Indigenous Community Development Corporation would, in summary:

- be incorporated using a model constitution with appropriate governance and integrity measures included;
- be approved by the Minister and placed on a register of ICDCs;
- recognise and respect the fundamental connection between native title groups and their ICDC;
- have a Future Fund for accumulation for future generations;
- allow a reasonable level of individual payments for Traditional Owners provided that payments are consistent with the purposes of the ICDC;
- be a new class of tax exempt entity and Deductible Gift Recipient ("DGR") that attracts a range of tax exemptions and concessions; and
- still be subject to compliance with the appropriate incorporating legislation (i.e. Corporations Act, CATSI Act, or Trustees Act).

The purpose of an ICDC would be to accept benefits from agreements on a tax free basis to be applied for the following key objectives:

- **Conduct Baseline Community Activities**: Addressing the economic and social disadvantage of Indigenous Communities through activities in the areas of Law & Culture, Health and Education, Employment and Training, Poverty, Elders Aged Care, Community Projects, Environmental and Land Care. The MCA and NNTC advocates that these benefits should be determined by the group and should be used to complement the responsibilities of local, State and Federal governments in their provision of services.

- **Conduct Support Activities**: The ICDC model would allow for the provision of assistance and programs that contribute to Closing the Gap; through supporting individuals and families to participate in the mainstream economy, including; individual superannuation, and individual home ownership, subsequently assisting Indigenous economic development across communities, including through supporting Indigenous enterprise development. For example, the ability to make tax exempt payments towards individual superannuation in a manner that provides a pension stream for Elders goes some way to providing the financial security that all Australians strive for.

- **Accumulate for future delivery of above**: A requirement to accumulate a percentage of benefits to meet the needs of future generations. The amount to be accumulated should be based on the advice of professional investment managers.

3.2 Structure of the entity and governance arrangements

The introduction of a new category of tax exempt entity represents an important step forward in providing a framework that will support and enhance opportunities for economic prosperity for Indigenous Australians. The details of the framework are critical and we outline below a number of essential features that should make up the overall package applicable to an ICDC.

- **Opt In Arrangement:** It is critical that any new framework is made available as an opt-in arrangement for use where the circumstances deem it appropriate. A simple tax-free rollover to permit existing structures to migrate to the ICDC model at any time would be advantageous. The MCA and NNTC consider that such arrangements should not have a 'sunset clause' arrangement as existing funds may wish to only opt-in in future years if a future event warrants it.
- **Traditional Owners:** The ICDC framework will recognise the Traditional Owners from whose traditional lands the benefits have accrued, will respect their traditional and native title rights, and will further value and respect Traditional Owners' role in decision making processes.
- **Objects and Purpose:** An ICDC must be capable of operating for multiple objects to avoid a proliferation of entities. An agreed list of objects would be developed which would include all existing charitable purposes. Collaboration between an ICDC and the public and private sectors including other ICDCs should be encouraged and rewarded. Activities must be aimed at finding a balance between individual, local and regional benefit and a balance between projects for community and projects for individuals.
- **Model Constitution:** There must be a model constitution, trust deed or rule book containing the fundamental requirements necessary to ensure a robust, transparent and flexible corporate structure covering the following areas:
  - Decision Making Processes
  - Integrity Measures including external auditing
  - Capacity Measures
  - Investment Plan / Distribution Plan
  - Professional Investment Managers
  - Consideration of the appointment of Independent experienced Board Directors
  - Public disclosure
- **Register of ICDCs:** Having a register of ICDCs enables a way of providing the model constitution, maintaining standards, capturing information regarding activities and the success of ICDCs, sharing information between ICDCs and delivering governance training and other support. This provides a level of oversight not currently applicable to charitable trusts and represents a positive step forward.
- **Built In Accumulation:** The concept of accumulation is well recognised within the philanthropic community as a means by which a benefactor can accumulate a large capital amount to be preserved, with the income generated from that preserved amount available for the trustees to use to further the specified trust purpose.

  The ICDC should have an obligation to accumulate funds towards a future fund to support ICDC's activity for future generations where the average annual revenue stream from the agreement is above an indeitifed threshold based on the needs of the group and the advice of an investment professional. For amounts generated below the identified threshold, accumulation is at the discretion of the trust administrators. Further, the future fund would:
  - have Accumulation Guidelines providing indicative minimum and maximum level requirement;
  - be held by a qualified professional institution on behalf of the ICDC for asset protection purposes; and
  - have an approved customised Accumulation Plan, designed to take account of the particular facts, circumstances, and predicted income flows etc.

- **Activities:** The ICDC will include a list of approved community activities and a list of approved associated activities acceptable to the ATO. These will further provide inspiration and support for the ICDC and its members to achieve their goals.
- **Sub-Fund Capacity:** An ICDC should be in a position to accommodate and hold funds for smaller groups and individuals and be the recipient of multiple funding sources. This offers an opportunity to maximise the governance framework and administrative structures and to avoid duplication. Further, the concept of 'sub funds' or regional trust models also enables groups to pool wealth and to gain economies of scale in administration and expertise.
- **Individual Payments:** An ICDC should have the right to make limited cash payments to Traditional Owners centred on areas of need, for example cultural business or aged care requirements. Such payments could enable the industry and native title parties to ensure that agreements provide immediate benefits to those Traditional Owners who, because of age, are not in a position to share in the longer term benefits of the agreement. Such payments should be at the discretion of the native title group and be exposed to normal tax and welfare system impacts, once the quantum of those payments exceeds a designated threshold. Further, individual payments may be permitted for Associated Activities if tied to a personal financial plan i.e. superannuation.
- **Economic Development:** An ICDC should be encouraged to assist and support, but not necessarily participate directly in economic development activities. The very nature of business and commerce is that it carries risk and requires decision making against a set of parameters that do not always sit comfortably with community purposes. Indigenous economic development is critical and ICDCs should play an active role in the support, development and encouragement of such activities. The nature of this support may include the provision of capital assistance grants, education and training and capacity building.

  The MCA and NNTC consider that the role of an ICDC does not extend to the actual conduct of commercial activity. Community organisations are well placed to support the growth and development of commercial activities but the actual conduct of those commercial activities can often complicate and frustrate the ability of the community organisation and its governing body to fulfil its goals and visions for the entire community.

3.3 Examples of how ICDC's might operate

The size, nature and location of native title groups vary greatly. Some groups are defined by geographical location, whilst others come about by virtue of kinship lines and connection to country. Yet other Indigenous communities operate and reside within urban areas. Some groups are a combination of all of these elements. The needs of various Indigenous communities and groups will be different but the ICDC model will provide one alternative to meet these varying needs.

Example 1: ILUA

A major Indigenous Land Use Agreement between a mining company and a large regional Indigenous group in an undeveloped area of Australia having some three to five native title groups. There is an expected annual payment of $1.8 million to be paid over 30 years.

There is no current institutional capacity within the Indigenous group and so there is a need to establish an appropriate organisation to; represent the interests of the group, manage the mining benefits for current and future generations, allocate benefits towards community purposes and community projects including economic development yet retain the ability to make modest individual direct payments to members of the native title groups.

An ICDC, being a public company limited by guarantee and fitting within the proposed new Deductible Gift Recipient (DGR) and tax exempt category, will be tax exempt and receive the mining payments without any tax impost. The ICDC can attract quality staff with the ability to offer FBT exempt benefits. The constitution would require a board of directors with representation of the members from the native title groups in a manner that is representative of the decision making processes within that group together with some independent skilled and experienced Directors working together to develop and improve governance and decision making within that board.

The constitution will permit the keeping of a fund into which the mining payments are made and provide that that fund has the necessary protections to ensure the fund is well managed, well invested and applied in the best interests of the corporation. The corporation's constitution would permit payments to individual members of that corporation but at a modest

level. The corporation's objects will include supporting Indigenous economic development as well as associated activities. It would not be restricted by the concept of charity.

The ICDC represents one legal entity that can complete the tasks currently undertaken by three or four legal entities: e.g.: a Prescribed Body Corporate (PBC) (or multiple PBCs); a trustee company, a charitable trust, a community organisation (and in some cases multiple versions of the same). The proportion of benefits spent on administration of activities and the resourcing demands on individuals engaged with the ICDC would be substantially less than those required under a multi-entity arrangement.

Example 2: Small Scale Community

Within an urban area, a group of individuals may wish to establish an ICDC to assist and promote the growth and development of Indigenous persons living within that urban area in a variety of ways which may include scholarships at school or university, start up low cost loans for housing, TAFE courses, financial planning education, support for traditional law and culture and support for engagement in conservation and land management issues. Some of these objects and purposes may be charitable and some will not be. There is no one entity that can cover all of these activities.

An ICDC would be ideal for this purpose. A further example is the Yachad Accelerated Learning Centre which has struggled to obtain appropriate tax exempt status because it does not fit within any existing categories for tax exemption yet it is well recognised that what it is offering is beneficial to the community particularly the Indigenous communities of Australia.

3.4 Tax considerations/Issues

Native title agreements have been negotiated to date on the basis that they are compensatory in nature and therefore are free from tax as not being either income or a capital gain. If payments are not deductible for MRRT and income tax purposes, not only will existing agreements result in a greater financial burden than currently assumed but may also have a direct impact on the quantum of funds secured under native title agreements. In many cases, native title agreements negotiated to date have involved payments to a tax-exempt vehicle such as a charitable trust established by the native title group, with the support of both parties to an agreement. However, as discussed, this approach has serious limitations.

A serious issue of inequity would arise between those native title claimants who have had claims processed and payments made in the past, with those currently in negotiations as well as future negotiations, if the Government was to adopt the position that payments made in future to an ICDC are taxable whereas payments to charitable trusts are not. Such an approach would encourage the continued use of charitable trusts, which are not generally well suited to the purpose, and discourage the use of a more effective vehicle.

As outlined above, the MCA and NNTC support the application of full tax-exempt status to funds under native title agreements. We also consider that such status should be supported by a specific entity or vehicle for any accumulations or distributions funds which enhances the governance measures associated with the entity, while also providing capacity building support.

Accordingly, the MCA and NNTC consider that the taxation arrangements for ICDC's should be structured to provide for the following tax treatment:

- Tax exempt status to ensure that all available funds are maximised for use by the ICDC;
- DGR status to ensures that the private and corporate philanthropic sector can provide tax deductible support to an ICDC. In addition, a DGR has a number of taxation benefits at a local, state and federal level, therefore the ability to be classified as a DGR should not be overlooked;
- FBT exemption status to ensure that the ICDC can offer market competitive salaries to attract skilled and talented employees essential to assist good administration;
- ATO ruling on permitted activities to provide legal certainty regarding distribution policies;
- ATO ruling that payments and benefits received through the ICDC are not taxable in the hands of the individual except payments that are not consistent with the objectives of the ICDC;

- DEEWR ruling regarding social security for the purposes of section 1207P of the Social Security Act 1991 (Cth) which ensures that proceeds or benefits received from an ICDC in accordance with its rules are not counted towards the Means Test Treatment of Private Trusts – Excluded Trusts for social security purposes except unfettered/untied payments. The loss of welfare benefits, in the short term, represents a major impediment to bridging the gap from poverty to mainstream. A willingness of native title groups to utilise their own benefits towards bridging this gap should not result in an immediate penalty of the loss of welfare benefits. This concession could be reviewed in 10 years.

The MCA and NNTC consider that it is critical that Taxpayers receive certainty from the tax system. In this particular case, the corporation requires certainty as a payer that a tax deduction is guaranteed in the year a payment is incurred.

3.5 Issues for further consultation in developing the ICDC model

The ICDC model outlined in this submission is the product of significant discussions between a wide range of Indigenous, Industry, Government and Academic stakeholders. However, the MCA and NNTC recognise that the ICDC model would need to be subject to a broad phase of engagement prior to its adoption. Accordingly, key issues for further consideration in the process are outlined below.

3.5.1 Native title holders or 'Indigenous community'

The ICDC model aims to reflect that negotiated agreements must include Traditional Owners, where there are statutory entitlements relating to native title, but that they are not exclusive to Traditional Owners, where an agreement includes Indigenous peoples in a community who do not have statutory entitlements applicable to the relevant area.

It has been noted that an approach based on native title, or traditional ownership, has the following advantages: the technical legal difficulties in the treatment of native title for tax purposes is an important policy imperative that will drive reform in this area. In addition, native title groups have been those most disadvantaged by the charity laws given the rulings in relation to kinship (though noting accumulation problems and appropriateness of purposes affects all such trusts).

Further to this, however, some mining companies and Indigenous individuals, and indeed the Commonwealth Minister, have advocated the view that resource agreements should benefit the whole local community regardless of their status as native title holders. This reflects the fact that the native title process, and ILUAs in particular, are used to negotiate agreements that incorporate both legal interests and social licence matters.

In practice in Australia, as outlined above, an increasing number of agreements although triggered by native title or statutory rights also include provisions for benefits to Indigenous people without these entitlements. These agreements have a framework involving a statutory base or definition of native title group, however, there may be a need for further discussion of who can register a corporation under this model.

3.5.2 Economic development activities v social/community benefit activities

The MCA and NNTC note that a number of native title groups have used funds from resource agreements for the purposes of providing primary health care and other social or community purposes, for example for kidney dialysis or a community nurse. There has been strong criticism from some quarters at the use of such funds for what may be referred to as 'citizenship entitlements'. This debate is complex. Some groups have clearly identified a link between providing these services in remote areas in order to keep elders on country and maintenance and continued enjoyment of native title. Nevertheless, the concern about proceeds from rare economic opportunities being primarily expended on services normally provided by Governments should be carefully considered and weighed against the most appropriate development models for the particular group or community.

The ICDC model as proposed, focuses on community development activities rather than direct economic activities. This is in keeping with the tax status sought – other categories of which are focussed on community or benevolent purposes. Early

discussions of the model[4] included economic development in the purposes, but the model now includes only support (or springboard) activities. This responds to concerns expressed by some that economic activities should be part of the normal tax system and avoid accusations of special or preferential treatment. Some Indigenous participants in the discussion have expressed reservations about seeking any exempt tax status at all. However, the MCA is of the view that, as so many other groups receive beneficial tax treatment specific to their needs, this is a matter of being treated as equally deserving; not uniquely deserving. Moreover, where individuals receive large personal discretionary payments under agreements, the ICDC model would not capture them and those payments would be taxed in accordance with ordinary principles.

The model is not intended to preclude the use of other models or pathways to achieving the same outcomes, but rather it provides another option for the parties to consider based on their particular circumstances. This highlights the importance of the 'opt in' arrangement proposed. Communities wishing to pursue economic opportunities are also expected to engage with the normal tax environment. To this end, the model as proposed here does not resolve all of the issues and questions surrounding the taxation of native title.

3.6 Comparative analysis of the ICDC model and the Treasury Indigenous Community Fund proposal

Features	**Indigenous Community Fund (proposed by Treasury)**	**Indigenous Community Development Corporation**
Structure	Proposed options: Aboriginal Corporation (incorporated under CATSI) or discretionary trust. Treasury open to submissions on structure. No consideration of options for community model vs regional model	Can be: company under Corporations Act (Company limited by guarantee); Aboriginal Corporation under CATSI, trust or incorporated association. Model constitution is proposed. Regional model recognised to allow aggregation where there is either a lack of expertise to manage funds, numerous small funding amounts or a preference to aggregate funds regionally.
Governance	Very little information on this. Statements in the consultation paper include: Ensure groups for whom the fund is established play an active role in directing the uses of the fund. Possible requirement for qualified independent directors.	Incorporated model will require board of directors and members of the company. Proposal requires the governance framework to recognise Traditional Owners and will respect Traditional Owners in decision making processes. It also proposes professional investment managers and provides options for the appointment of independent experienced directors.
Purposes	For the benefit of a native title group, a number of such groups and/or Indigenous Australians more generally. This general purpose includes more specific activities such as: • accumulation of assets for current and future generations of specified native title holders • protection of the environment • protection, maintenance and advancement of Indigenous cultural heritage • supporting education and training • other purposes beneficial to all of	Key objectives: • conduct community activities addressing economic and social disadvantage through activities in law and culture, health and education, employment and training, poverty, aged care, community projects and environmental and land care • conduct support activities towards closing the gap including, superannuation, home ownership, assisting economic development • accumulate for future delivery of the above which is proposed to be an identified percentage of agreement benefits for the

[4] Adam Levin, 'Improvements to the Tax and Legal Environment for Aboriginal community organizations and trusts', Discussion Paper, Jackson McDonald Lawyers, August 2007.

	those for whom the fund was established • administration and governance of the fund. • Payments can be made to individuals or other entities. • Treasury requests further input into the activities the ICF may undertake and how this can be built into the legislative statement of purpose.	life of the agreement. • activities should be aimed at finding a balance between individual, local and regional benefit and a balance between projects for community and projects for individuals. • Framework will include a list of approved community activities and a list of approved associated activities.
Economic Development	Economic development is not specifically referred to as one of the activities of ICF despite the current FaHCSIA consultation on 'Indigenous Economic Development Strategy" which refers, at part 5.3, to "Native title agreements can generate financial assets that could be used more effectively to support economic development and provide sustainable investment for current and future generations." ICF purposes refer to 'other purposes beneficial' which may include economic development. Treasury notes that the use of tax incentives for economic development risk promoting tax benefits of the investor rather than the underlying viability of the business and could result in a range of undesirable consequences. This statement is in the context of DGR status but may represent Treasury's thinking for any tax concession.	ICDC purposes refer to 'community activities addressing economic disadvantage…through education, employment and training' and conducting support activities towards closing the gap including assisting economic development'. ICDC should assist and support but not necessarily participate directly in economic development activities. ICDCs should play a role in support, development and encouragement but not engage in the conduct of a commercial activity. Recognition that the nature of business and commerce carries risk and requires decision making against a different set of parameters to those required for community purposes and the ICDC should be structured to manage this risk.
Distributions to Individuals	The purpose would not necessarily rule out a payment to an individual. The consultation paper gets confused at this issue as to the tax treatment of any payment to an individual in the hands of the individual. The ability to pay an individual is within the proposed purposes and the ICF will only be able to make such a payment if it is within the purposes of the ICF. The statements relating to the tax treatment to the recipient is not dependent on whether a payment is supported by the ICF's purposes.	ICDC should have the right to make limited distributions, including assets and cash payments centred on areas of need such as cultural business, or health or aged care requirements. Such payments enable immediate benefits to be provided to those Traditional Owners who are not in a position to share in the longer term benefits. Further individual payments may be permitted if tied to a personal financial plan e.g. superannuation. ICDC paper recognises that some payments to individuals (over a specified quantum) may affect welfare payments.
Accumulation	Accumulation is required for current and future generations. If the ICF is a trust then it does not deal with the rule against perpetuities referred to on page 6 of the consultation paper which limits trusts generally to 80 years unless it is charitable. No further guidance is given as to this and whether it is possible to 'do nothing'	Obligation to accumulate funds for a future fund to support ICDC's activities for future generations where the income stream from the agreement is greater than an amount as identified by expert financial adviser. There should be: accumulation guidelines with a prescribed minimum and maximum; funds held by qualified professional institution and an approved customised accumulation plan.

	but accumulate for a number of years.	If the structure is a trust rather than incorporated then the issue of perpetuities exists unless it is charitable.
Specific to native title payments?	Consultation question. Paper refers to payments from native title agreements and investment.	Principally yes, but the paper also refers to the ability of ICDC to be the recipient of multiple funding sources and the suggestion of DGR status is for wider private and philanthropic support. The ICDC is therefore possibly also an option for Indigenous communities even if there are no native title benefits.
Taxation	ICF is to be income tax exempt. Consultation on whether indigenous organisations which carry out activities over multiple DGR categories should be DGR. It is not suggested the ICF which can have purposes wider than multiple DGR purposes could be DGR. This would require the establishment of another entity.	ICDC is to be income tax exempt, DGR and FBT exempt. Payments to individuals are not to affect welfare benefits unless over a specified quantum.
Transition	Anticipates that existing funds, charitable or otherwise, may want to transition to an ICF.	Anticipates a tax free rollover to permit existing structures to migrate to the ICDC model

3.6.1 Why a novel approach can be justified

The ICDC model differs from the approaches currently under consideration in four key ways.

Firstly, it seeks to ensure the intergenerational sharing of benefits from agreements by enabling limited distributions to individuals for specific purposes, to ensure that individuals can share in the short term, while also requiring minimum levels of capital accumulation, to ensure that future generations have a secured benefit;

Secondly, it provides Indigenous communities with the ability to make a choice in relation to the structure for their incorporation (a company limited by guarantee under the *Corporations Act*, an Aboriginal Corporation under *CATSI Act* or a trust or to incorporate as an association) and also to structure the ICDC around one of two models - a community model for a group which has a significant capital base, skills and consensus to manage an ICDC directly, or a regional approach where any of those elements may not be as well developed, or where the community prefers to use an independent entity to manage the ICDC;

Thirdly, given the opt-in nature of the ICDC, the additional taxation benefits and administrative simplicity of the ICDC are also linked to measures which will improve governance, including the need to align with the requirements of the model constitution, proposals for experienced independent directors and professional investment managers to be involved, and the increased transparency and reporting arrangements which will contribute to broader awareness of contemporary practice in agreement making; and

Lastly, it specifically enables the benefits of agreements to be used in manners which support economic development in communities, including the growth of Indigenous local enterprises, without directly undertaking an economic activity itself. In this way, the risk exposure of the monies held in the ICDC is minimised, while the opportunities for it to be a catalyst for broader economic activity in a region are maximised.

While the ability to include activities related to economic development is considered by some in Government to be beyond the scope of the range of activities for which tax exempt status can be secured, the MCA and NNTC note that there is an existing body of case law in the United Kingdom, Australia and New Zealand which supports the concept that economic development, including job creation and business incubation, is consistent with the requirements of the fourth head of charity as being beneficial to the community, particularly where it is undertaken in rural or impoverished regions.

Additionally, in 1999, the UK Charity Commission specifically recognised economic development as a new category of charitable purpose where activities relate to the improvement of physical, social and economic infrastructure and by assisting people who are otherwise disadvantaged as a result of their social and economic circumstances[5].

The special disadvantage of Indigenous Australians is well recognised by the Australian Government.

The MCA and NNTC consider that possibly the most tangible short term benefits of the ICDC model relate to the high degree of clarity and certainty for those who choose to adopt this structure, resulting from the provision of comprehensive guidance relevant to Indigenous communities regarding the full range of tax exempt activities they can undertake.

Importantly, these activities are framed within the context of community development, rather than charity or welfare based.

Essentially the ICDC would enable the monies received from agreements to work more effectively for Indigenous communities by enabling them to maximise the long term sustainability of the funds, while also ensuring that short term community needs are met, and that opportunities for local economic diversity are realised.

In terms of the revenue implications for Government from the adoption of the ICDC, the MCA and NNTC consider that any changes would be negligible, and when viewed within a broader budgetary context, the proposal may in fact be revenue neutral. This is due to:

- Contemporary practice and existing case law suggests that the full range of activities of the ICDC could be undertaken through a range of existing tax arrangements, including the charitable purpose or the Foundation for Rural and Regional Renewal (FRRR);
- The provision of clear guidance for Indigenous communities on the full range of initiatives which can be undertaken within the context of the ICDC would encourage innovation and a diversification of the purposes to which agreement monies are currently directed beyond the more traditional focus on education scholarships, community assets and cultural purposes, thereby offsetting a number of direct programs which currently exist;
- The ability to structure the full range of activities which currently requires multiple trust arrangements or other multi-entity structures under the ICDC would reduce the compliance burden on communities in managing these funds, and therefore reduce administration costs, and would also reduce the compliance monitoring requirements of the ATO;
- The application of benefits from agreements to support venture capital and business incubation would lead to increased economic activity in Indigenous communities, transitioning people from being welfare recipients to participating fully in the mainstream economy, and thereby increasing the taxation base in these communities;
- An increase in the level of economic normative behaviour in Indigenous communities would contribute to meeting the 'Closing the Gap' objectives thereby reducing core Government expenditure across a range of services including the criminal justice system, health, housing and education and training.[6]

To provide further evidence to support these claims, the MCA is currently supporting a study into the economic opportunities presented by the ICDC model and the implications it has for the taxation system, government expenditure on direct programs and the level of economic activity in remote and regional Australia.

[5] RR-2 Promotion of Urban and Rural Regeneration, March 1999 in Promotion Economic Development as a Charitable Purpose: Comparison between United Kingdom, Canada, Australia and New Zealand, Dr Donald Poirier, LLD; Donald.poirier@charities.govt.nz

[6] Report by Access Economics for Reconciliation Australia (funded by the MCA and NAB): *An overview of the economic impact of Indigenous disadvantage*, August 2008.

4 OTHER MEASURES TO SUPPORT EFFECTIVE ECONOMIC DEVELOPMENT FROM MINING AGREEMENTS

4.1 Capacity Building

The MCA and NNTC consider that capacity building is necessary to ensure that Indigenous communities are well positioned to engage in the economic development activities associated with mining agreements, including direct employment and enterprise development activities, and to support the implementation of sustainable benefits for future generations.

Accordingly, the MCA and NNTC advocate that the Federal Government should support Indigenous-specific capacity building programs and activities in the critical areas of governance, conflict resolution, enterprise facilitation, careers and Indigenous employment, community development and in the capacity of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) to discharge their statutory responsibilities and facilitate the successful implementation of agreements. The additional benefit of supporting new and innovative ideas will encourage further participation in the broader Australian economy.

4.1.1 A 'market place' of ideas for Agreements

The MCA and NNTC do not support the proposal for the establishment of a new statutory review function for agreements to assess agreements against a suite of criteria defined as leading practice and to determine whether they deliver an appropriate level of sustainable benefits to Indigenous communities.

As mentioned previously in this submission, the MCA and NNTC consider that agreements are commercial negotiations, and therefore do not envisage any role for Government in determining their focus, quantum or intended outcomes. In addition, we do not support any review function being linked to the ability to participate as a specific tax exempt vehicles such as the ICDC – we consider that the only review process in this instance should be undertaken by the ATO and then only specifically in relation to the administration of the tax law.

We would also note that the concept of a statutory review of agreements fails to recognise that the most effective agreements are those which have been designed to meet the specific needs of the parties to the Agreement, and in which the parties themselves take an active role in ensuring that the other party is held to account for their relevant actions under the Agreement.

The MCA and NNTC consider that rather than seeking to specify those aspects of agreements which determine that they are leading practice, or establishing any specific review function to assess the sustainability of agreements, that Government would be better placed by focusing on a range of capacity building initiatives, particularly in areas that provide support for the monitoring and compliance of agreements by all parties to agreements.

The MCA and NNTC would therefore support the idea of developing a leading practice agreements toolkit on the basis that it provides parties with practical guidance and resources to assist with the design and implementation of native title agreements. More specifically, the MCA and NNTC would support the Government establishing a single access point to provide accessibility for all Indigenous communities, industry and government to a 'marketplace of ideas' on how to negotiate and implement effective agreements which in turn drive economic development opportunities and intergenerational benefits.

Given that model clauses are overly restrictive, and leading practice materials are often out of date by the time they are collated, the 'marketplace of ideas' would instead focus on providing contemporary materials and showcasing innovative approaches. Key aspects to be included in this central capacity building resource would include:

- An accessible and searchable database of Registered ILUAs and registered Future Act Agreements as well as other Agreements relating to ICDCs or offered by the parties, recognising the need to protect commercial in confidence elements (possibly building on the Agreements Treaties and Negotiated Settlements Database);
- Information and resources in relation to the establishment of corporate and tax structures, including specific guidance on the structure and requirements of the ICDC model;

- Information on emerging international practices in agreement making and economic development activities derived from the benefits in Agreements; and
- A gateway to mainstream and Indigenous Government services to support education, training, employment and enterprise development.

4.1.2 Resourcing of Native Title Representative Bodies/ Native Title Service Providers and Prescribed Bodies Corporate

The MCA and NNTC continue to advocate to Government the need for provisions that aid in the resourcing and operability of NTRBs/NTSBs and Prescribed Bodies Corporate (PBCs). As we have previously articulated to Government, we consider that the effectiveness of these Indigenous representative organisations is being hampered by both inadequate resourcing and overly restrictive operating parameters.

In particular, the underfunding of NTRBs/NTSPs is delaying the negotiation of agreements and therefore the benefits received by Indigenous communities. This has been particularly problematic in Western Australia through the removal of funding by the State Government for individual NTRBs/NTSPs to carry out their future act activities more effectively and efficiently. In addition, we consider that NTRBs/NTSPs should be provided with a greater degree of flexibility for expenditure of government monies, and their broader role as a potential contributor to regional economic development recognised.

The MCA and NNTC consider that NTRB/NTSP resourcing issues could be addressed through:

- the provision of a core pool of funds from government to enable NTRBs/NTSPs to meet their civil society/capacity building roles in engaging in both the claims resolution and future acts processes;
- government providing NTRBs/NTSPs with a greater degree of flexibility for expenditure of government monies allocated, whilst still having some broad parameters to enable them to redirect unspent funds to other relevant business or activities, thus enabling more effective resourcing within the context of a revenue neutral outcome;
- government facilitating continued access for NTRBs/NTSPs to discretionary grants for additional activities related to their core functions or broader regional development roles, including under the MCA and Federal Government MoU on Indigenous Employment and Enterprise Development; and
- partnered funding assistance; while industry considers that some costs associated with the activities of NTRBs/NTSPs are appropriately met by industry, this is only where these relate specifically to additional matters directed at resolving commercial issues, and not to capacity to engage with industry.

Improved resourcing of PBC's is also critical and could be addressed through:

- core funding capacity being provided by government to ensure that PBCs have the capacity to undertake independent negotiations with industry, or to facilitate the development of independent Indigenous enterprise;
- the Federal Government and State Governments reconciling funding responsibility for PBCs as part of the current State and Territory engagement process relating to the native title system reforms;
- the Federal Government committing to the provision of transitional funding for PBCs until this matter is resolved, given that these organisations are formed under Federal Statutes;
- partnered funding assistance currently provided by the ability to charge a fee for service; while industry considers that there are some costs associated with the activities of PBCs that are appropriately met by industry, this is only where these relate specifically to additional matters directed at resolving commercial issues, and not capacity to engage with industry, and where they do not compromise the independence of negotiations; and
- the transition of PBCs to being self-supporting, through the establishment of properly functioning rural and remote economies that are not entirely reliant on revenues from third party access for mining, fishing or agriculture.

4.2 Improving the efficiency and effectiveness of the native title system

The MCA and NNTC approach to reforms to the *Native Title Act 1993* and administrative processes ('the native title system') is informed by the following underlying platform of principles:

- emphasis on building mutually beneficial relationships, desirably devoid of legal rancour and divisiveness, founded in mutual respect and consideration for Indigenous Australians' rights in law, interests and special connections to land and waters in Australia;
- legislation, rather than a means in itself, provide an enabling framework for mutually beneficial relationships;
- management reform of the existing native title system with prospect of mutually better outcomes is preferred to structural reform;
- consideration of legislative changes should favour addressing technical/procedural aspects of the native title system, to improve efficiency, operability and accountability, without diminishing the rights of native title groups or proponents, to the mutual benefit of all parties;

4.2.1 Indigenous Land Use Agreements

Indigenous Land Use Agreements (ILUAs) are the central agreement making process under the *Native Title Act 1993*. ILUAs have the advantage that they must be registered under the Native Title Act and that a range of steps must be taken that assist in ensuring due process in the negotiation of the ILUA.

ILUAs provide a means by which greater certainty can be achieved through agreements with native title parties than might otherwise be possible. However, despite the obvious attraction of ILUAs, only limited numbers have been registered in circumstances where other options are available. This is partly the product of the inflexible nature of ILUAs once completed, and that the process for concluding an ILUA is resource intensive and cumbersome.

Accordingly, the MCA and NNTC support the ongoing review of the provisions and operations of Indigenous Land Use Agreements (ILUAs). We believe that the focus of these reviews should centre on the following key issues:

- simplification of the mechanism for concluding ILUAs to reduce the related resource burden for industry and other stakeholders;
- the establishment of a formal mechanism for the amendment of ILUAs in accordance with other lawful mechanisms prescribed in relation to the ILUA, thereby enabling parties to negotiate amendments to the ILUA without requiring it to be registered for a second time;
- provisions to ensure the effective resolution of any issues that may arise as a result of the application of the amendment mechanism, which may be perceived, or have the potential to, derive an unfair or unjust outcome;
- clear provisions to enable the assignment or novation of the rights and obligations of a party to an ILUA to a third party, generally and specifically for the assumption of liability for the performance of an ILUA by the PBC;
- clarification of a formalised framework approach to the registration of an ILUA, including through:
    - prescribing a means of notification which if followed will result in a presumption that all persons who "hold or may hold" native title have been notified of the opportunity to consider the proposed ILUA and identify themselves as potential native title holders; and
    - deeming that any person who is neither a member of a registered native title claimant group or who responds to the notice is not a person who "may hold" native title for the purposes of the registration of the relevant ILUA.

With respect to the reforms to the *Native Title Act 1993* to streamline the administrative arrangements relating to ILUAs, the MCA and NNTC note that we support the following key changes:

- Amendments to the length of the notification period, particularly for area and alternative procedure ILUAs to shorten the period, subject to these amendments not truncating the ability of Indigenous people to be apprised of what is being notified; and
- Enabling minor amendments to be made to ILUAs without any requirement for them to be re-registered – by this we mean that amendments can be made to any aspect of an ILUA which does not have a material impact on the native title rights which required the initial registration.

4.2.2 Good Faith Negotiations

The MCA and NNTC support the proposal to clarify the good faith requirements under the *Native Title Act 1993* to provide clarity on what negotiation in good faith entails and to encourage parties to participate effectively in future act discussions

under the right to negotiate provisions. However, additional clarity should not substantively increase the burden on parties involved in right to negotiate matters by requiring them to act other than in their own interests or purport to mandate an agreed outcome.

Specifically, the MCA and NNTC support the alignment of the good faith requirements of the *Native Title Act 1993*with s228 of the *Fair Work Act 2009* - i.e. keeping it as efficient and effective as possible. These amendments would require parties to engage in discussions in good faith ensuring a focus on the process of the negotiations, but not compel them to reach an agreement from those discussions.