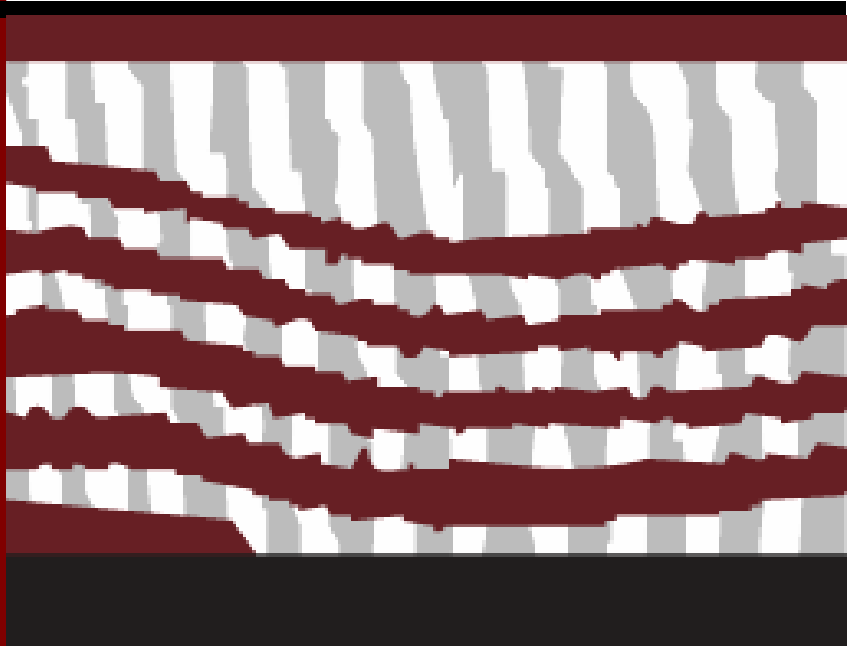


AIATSIS
Native Title Research Unit



**NATIVE TITLE PAYMENTS & BENEFITS:
LITERATURE REVIEW
AUGUST 2008**



AIATSIS
Australian Institute of Aboriginal
and Torres Strait Islander Studies

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Introduction

This paper reviews the current literature and information on native title agreements and seeks to identify and start to explore key research questions and issues related to the different types of native title agreements; the nature of payments and benefits received under native title agreements; the way in which these benefits are or could be provided and administered; who has responsibility for providing and administering them; and the potential and need for agreement benchmarking and an implementation framework. This paper highlights the need for further systematic research and cooperation within the native title sector in order to fully understand the scope and nature of native title payments and benefits.

Agreement making is almost universally put forward as a positive alternative to litigation.¹ Negotiating regional development benefits based on the recognition of Indigenous connection to land is seen as increasingly attractive in comparison to costly and time consuming litigation and connection processes. As the culture of native title agreement making grows, it will be increasingly important to understand how these agreements are constructed and the nature of benefits arising from them. There is extensive literature in relation to agreement making although very little of it provides a holistic overview of the value of outcomes and benefits from native title agreements.² The growing number of agreements does not necessarily reflect sustainable or equitable outcomes for Indigenous people.³

¹ McClelland, R 2008, paper delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008. http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum, at 18/08/08; Ruddock, P 2006, 'Native Title: The Government's Proposals for Reform' paper delivered at the Native Title Conference 2006, Darwin. http://ntru.aiatsis.gov.au/conf2006/download_docs/Papers/Philip_Ruddock.pdf at 18/08/08; Harvey, B and Fry E, 2002 'What cost native title?' presentation delivered at the MCA Sustainable Development Conference, Brisbane, 12 November 2003; Neate, G 2004 'Agreement-making and the *Native Title Act*' in Langton, Palmer, Tehan, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne. See also O'Faircheallaigh C 2004 'Evaluating Agreements Between Indigenous People and Resource Developers' in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton, for an extensive list of biographical details on this point.

² Please refer to NTRU, 2008, *Native Title Payments and Benefits Selected Bibliography*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies for full bibliographical details.

³ See Langton, M and Palmer L 2003, 'Modern Agreement Making and Indigenous People in Australia: Issues and Trends' *Australian Indigenous Law reporter* 8(1), pp. 1-31; Taylor J and Scamary B 2005, *Indigenous People and the Pilbara Mining Boom: A baseline for Regional Participation*, Research Monograph No 25, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra.

1. **Types of native title agreements**

This discussion seeks to identify the types of native title agreements currently being negotiated. The Agreements, Treaties and Negotiated Settlements (ATNS) database established and maintained by Melbourne University is the primary source of this information, however it should be noted that not all native title agreements are included in the database.

Within the native title context there are several different types of agreements, all of which have the potential to deliver a range of benefits to Indigenous parties. Types of native title agreements, which for the purposes of this paper are defined as agreements involving native title parties, may be categorised into two groups depending on whether or not they are made under provisions of the *Native Title Act 1993 (Cth)* (NTA) or outside this legislative regime as indicated in Table 1 below. Agreement types used in this table are taken from the ATNS database.

Table 1: Types of native title agreements

AGREEMENTS UNDER PROVISIONS OF NTA	OTHER NATIVE TITLE AGREEMENTS
Consent determinations	Commercial/Joint venture
Indigenous land use agreements (ILUAs)	Cultural heritage
Exploration agreements	Framework agreements
Future act agreements (often also ILUAs)	Funding agreements
Section 21 agreements	Indigenous partnerships
	Joint management
	Land transfers/use
	Lease
	Local government
	Memorandum of understanding
	Protocol
	Research
	Shared Responsibility Agreements (SRAS)
	Statement of Commitment/Intention
	Regional Partnership Agreements (RPAs)
	Template

Source: ATNS <http://www.atns.net.au/default.asp> at 11 August 2008

Consent determinations, recognising the rights and interests of Indigenous parties, are the most sought after native title agreements although they do not necessarily provide benefits other than the recognition of native title. Consent determinations may lead to ancillary agreements usually through ILUAs with State parties to provide funding for administration and opportunities for joint management. For example the settlement of the Gunditjmara native title claim in Victoria included a consent determination and a series of other agreements including:

- an ILUA to transfer freehold title of the Lake Condah Reserve to the Gunditj Mirring Traditional Owners Aboriginal Corporation;
- a cooperative management agreement in relation to Mt Eccles National Park, providing for a joint body, the Budj Bim Council, to be established to oversee daily management and advise the minister on the park; and

- a funding agreement for the Gunditj Mirring Traditional Owners Aboriginal Corporation for five years for the Gunditjmarra to manage their native title interests and other aspects of the settlement.⁴

In recent years, state and territory governments have entered into other large scale agreements with native title parties through state deeds. Examples include the Ord Final Agreement and Burrup Agreement which involved the surrender or extinguishment of native title.⁵ Some jurisdictions, in particular Victoria and Western Australia are also exploring alternative settlement agreements with native title parties.⁶ Such settlements may include several different types of agreements.

The Eastern Yalanji consent determination in Queensland has resulted in fifteen ILUAs relating to approximately 250,000 hectares of land.⁷ The potential scope of alternative agreements or comprehensive settlements has been explored in several papers, but such agreements have not yet been a strong feature of the settlement of native title claims in Australia.⁸

As at 11 August 2008 the National Native Title Tribunal (NNTT) had registered 341 ILUAs. Details on the number and type of ILUAs for each state and territory are provided in Table 2 below.

⁴ See http://www.atns.net.au/searchresults.asp?title=eastern+yalanjiandkeywords=andcategory=landsubjectmatter=andsubcategory=andlocation=andcountry=andOrder=Namehttp://www.dtf.vic.gov.au/domino/Web_Notes/newmedia.nsf/955cbeae7df9460dca256c8c00152d2b/2fe55f61a0cdcdf6ca2572b10002bf52!OpenDocument and <http://www.atns.net.au/agreement.asp?EntityID=4240>

⁵ see http://www.nativetitle.wa.gov.au/agreements_OrdFinalAgreement.aspx, http://www.nativetitle.wa.gov.au/agreements_BurrupMaitland.aspx see also Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, pp.12-15.

⁶ See <http://www.nativetitle.wa.gov.au/index.aspx?id=1902> and <http://www.landjustice.com.au/?t=3>

⁷ See <http://www.atns.net.au/searchresults.asp?title=eastern+yalanjiandkeywords=andcategory=landsubjectmatter=andsubcategory=andlocation=andcountry=andOrder=Name>

⁸ see Agius, P *et al* 2002 'Negotiating Comprehensive Settlement of Native Title Issues: Building a New Scale of Justice in South Australia' *Land Rights Laws: Issues of Native Title*, vol 2(20), pp 1-12. <http://ntru.aiatsis.gov.au/ntpapers/IP20v2.pdf> at 18/08/08 Agius, P *et al* 2004 'Comprehensive Native Title Negotiations in South Australia' in Langton, Tehan, Palmer, Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton; Bradfield, S. 2004 'Agreeing to Terms: What is a "Comprehensive" Agreement', *Land, Rights, Laws: Issues of Native Title*, vol 2(26), pp 1-17 <http://ntru.aiatsis.gov.au/ntpapers/ipv2n26.pdf> at 18/08/08; Bradfield, S 2006 'Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia' in Langton, Mazel, Palmer, Shain, Tehan (eds) *Settling with Indigenous People*, The Federation Press, Sydney.

Table 2: Number and type of ILUAs

STATE/ TERRITORY	AREA AGREEMENTS	BODY CORPORATE AGREEMENTS	TOTAL
AUSTRALIAN CAPITAL TERRITORY	0	0	0
NEW SOUTH WALES	8	0	8
NORTHERN TERRITORY	80	5	85
QUEENSLAND	165	16	181
SOUTH AUSTRALIA	24	0	24
TASMANIA	0	0	0
VICTORIA	32	1	33
WESTERN AUSTRALIA	4	6	10
NATIONAL TOTAL	313	28	341

Source: National Native Title Tribunal <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx> as at 11 August 2008.

Accessing information about future act agreements is somewhat problematic as the NNTT does not maintain a register of future act agreements. Strelein notes that as at 31 December 2007 there were 158 future act determinations that involve a determination by consent and suggests that it is likely that consent was reached through an agreement involving payment of some kind.⁹ A search of the ATNS database using the agreement subcategory ‘future act agreement (native title act)’, returns 62 future act agreements (a further 77 of which are also ILUAs).

The ATNS database also includes information on exploration agreements made under the future act provisions of the NTA. The ATNS database contains only 26 such agreements (see Table 3 below for the number exploration agreements for each state and territory). It should be noted that the most recent agreement of this type in the ATNS database is dated 2005.

A number of agreements listed on the ATNS database also contain information on regional and template agreements. Regional agreements are made between Indigenous communities and other organisations, usually government and/or industry. These types of agreements are used to organise policies, politics, administration and/or public services for or by an Indigenous people in a defined, frequently large, territory of land, or land and sea. Regional agreements may be legally enforceable as contracts.¹⁰ There are also samples of template agreements available which include standard terms and conditions that can be applied to a range of individual agreements covering the same or similar issues.¹¹

⁹ Strelein, L 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 10.

¹⁰ See further <http://www.atns.net.au/glossary.asp> at 18/08/08.

¹¹ See further <http://www.atns.net.au/glossary.asp> at 18/08/08.

Table 3: Number of exploration agreements

STATE/ TERRITORY	TOTAL
AUSTRALIAN CAPITAL TERRITORY	0
NEW SOUTH WALES	1
NORTHERN TERRITORY	6
QUEENSLAND	1
SOUTH AUSTRALIA	6
TASMANIA	0
VICTORIA	0
WESTERN AUSTRALIA	12
NATIONAL TOTAL	26

Source: ATNS <http://www.atns.net.au/default.asp> at 11 August 2008

During the term of previous Howard government, Regional Partnership Agreements (RPAs) and Shared Responsibility Agreements (SRAs) emerged as a common form of agreement between Indigenous groups and government. This form of agreement superceded the previous Community Partnerships Agreements. As at 17 August 2008 the ATNS database included information about 7 RPAs and 268 SRAs.¹² Whilst these agreements are not specific to native title, some native title parties are involved in such agreements.

¹² <http://www.atns.net.au/browse.asp?Country=Australia> at 17 August 2008

2. The type of benefits provided by native title agreements

It is difficult to make definitive statements about the nature of agreements reached, because native title agreement making is taking place privately in a range of circumstances and jurisdictions.¹³ The ATNS database includes information about 1062 Australian agreements, however full text documents are only available for 26 of these, highlighting the difficulties in accessing detailed information about the content of agreements.¹⁴ A definitive study of ‘best practice’ would require a detailed commercial, legal, economic and social analysis.

An examination of the benefits included in ILUAs provides a useful starting point to consider the range of benefits currently provided by native title agreements. As at 17 August 2008 the ATNS database contained subject matter information for 318 of the 341 registered ILUAs. The range of subject matter covered by ILUAs is shown in Appendix 1: ILUA Summary.¹⁵ The most common types of benefits included in ILUAs are listed in Table 4 below.

Table 4: Benefits included of ILUAs

BENEFITS	NUMBER	PERCENTAGE
Recognition	72	22.6%
Compensation and other payments	49	15.4%
Employment education and training	13	4.0%
Environmental management/cultural heritage	100	31.4%
Community assistance programs (eg health services/sports & recreation)	7	2.2%

Source: ATNS <http://www.atns.net.au/default.asp> at 17 August 2008

It should be noted however that the content of ILUAs does not really provide a snapshot of the content of all native title related agreements. The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account conducted an Indigenous Land Use Agreements inquiry in 1999-2001. The Committee’s report and submissions to the inquiry identify the limitations of this highly regulated regime and indicate that many proponents and native title representative bodies (NTRBs) prefer to enter into other common law agreements outside the ILUA provisions of the NTA.¹⁶ The NNTT indicated that ILUAs are primarily used to address the authorisation of future

¹³ This has been widely noted: O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25, 2004, 1-12.

¹⁴ <http://www.atns.net.au/browse.asp?Country=Australia> at 17/08/08.

¹⁵ The NNTT and ATNS databases provide information about the subject matter contained in ILUAs and the NTRU maintains a ILUAs summary document collating this information: http://ntru.aiatsis.gov.au/research/ilua_summary.html.

¹⁶ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account 2001 Nineteenth Report: Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements go to: http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/1999-02/report_19/report/contents.htm, see Chapters 2 4, 6 and 7 and submissions from the Minerals Council of Australia, the Northern Land Council and Goldfields Land Council. In this document the abbreviation NTRB is used to refer to both native title representative bodies and native title service providers.

acts.¹⁷ Given that many ILUAs are negotiated with Indigenous groups that are yet to achieve a native title determination and that it is possible for ILUAs to include clauses to the effect that native title is neither acknowledged nor denied, it is unlikely that ILUAs will set the highest standard for agreement making and set the benchmark for other agreements.¹⁸

It is clear that a number of Indigenous peoples are creatively engaging in agreement making to gain a range of benefits for their communities. Typically, these include:

- recognition;
- payments and compensation;
- employment, education and training;
- assistance with establishing and operating Indigenous businesses;
- environmental management and heritage protection; and
- community assistance programs.¹⁹

The focus of many agreements is facilitating business and service delivery within Indigenous communities especially in relation to accelerating employment and training; education; health; and other social outcomes.²⁰ The discussion below focuses on the benefits included or sought in native title agreements.

2.1 Recognition

It is clear that regardless of the benefits received, recognition of native title is still of primary importance to Indigenous parties. While proponents do not have the ability to confer rights and interests, agreement provisions recognising a particular group's rights and interests serve to protect existing rights, increasing the potential for future recognition by other parties.²¹ The positive recognition of Indigenous rights and interests is important given that there have been

¹⁷ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account 2001 Nineteenth Report: Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements, hyperlink provided in 14 above, see Chapter 2 and submissions from the NNTT.

¹⁸ As indicated in Table 1 above of 341 registered ILUAs, 313 of these are area agreements and only 28 (8.2 per cent) are body corporate agreements, suggesting that most ILUAs have been negotiated with Indigenous parties that have not yet had a determination of native title, see also Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account 2001 Nineteenth Report: Second Interim Report for the s.206(d) Inquiry - Indigenous Land Use Agreements, hyperlink provided in 14 above.

¹⁹ O'Faircheallaigh C 2004 'Evaluating Agreements Between Indigenous People and Resource Developers' in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton; ACIL Consulting and Indigenous Support Services 2001, *Agreements between Mining Companies and Indigenous Communities*, http://www.aciltasman.com.au/images/pdf/ISSReport_Indigenous_agreements.pdf.

²⁰ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

²¹ O'Faircheallaigh C 2004 'Evaluating Agreements Between Indigenous People and Resource Developers' in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton; Strelein, L, 2004 'Symbolism and Function: From Native Title to Aboriginal and Torres Strait Islander Self-Government', in M. Langton, M. Tehan, L. Palmer & K. Shain, *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press.

agreements requiring Indigenous groups to reduce or surrender current rights, deny the existence of their rights and interests on country, limiting the exercise of rights and interests and limiting the potential for the rights and interests to be recognised in the future, such as an objection to a future application for the determination of native title.²²

The importance of recognition cannot be underestimated. The Alternative Settlements Framework proposed by the Western Australian Government would have required native title claimants to surrender native title rights and interests as a precondition to entering into an alternative settlement.²³ The proposal was criticised because native title claimants would find it difficult to surrender any possible native title rights and interests and the subsequent relinquishment of any procedural rights would be a significant barrier to the implementation of such a standard.²⁴

2.2 Compensation

A 2001 review of 140 agreements between mining companies and Indigenous communities found that 25 per cent of provisions found in agreements involve payments including: lump sum payments, soft loans, royalty equivalents, equity in companies and rents and lease payments.²⁵

Compensation for the loss of enjoyment of native title rights and interests is a common form of payment. However, the value of payments or compensation can vary considerably depending on the actual terms of the agreements. The Government of South Australia has noted the lack of precedents established by the courts in relation to levels of compensation payable for acts affecting native title. This has proved to be a difficulty for the Government in negotiating appropriate amounts of compensation within an ILUA. It has noted that as a consequence, all compensation payments made in ILUAs are required to be matters of commercial negotiation.²⁶

²² See for example the Burrup Agreement reached between the Ngarluma Yindjibarndi native title claimants and the Western Australian State Government which involved the surrender and permanent extinguishment of native title on industrial land on the Burrup and Maitland Estates. See further the Yamatji Marla Barna Baba Maaja Aboriginal Corporation submission to the Senate Inquiry into Native Title Representative Bodies http://www.aph.gov.au/SENATE/committee/ntlf_ctte/rep_bodies/submissions/sub29.pdf at 18/08/08.

²³ Western Australian Government, 2006, *Alternative Settlements Framework*, http://www.nativetitle.wa.gov.au/uploadedFiles/Alternative_Settlements/Issues%20paper.pdf at 19/08/08.

²⁴ Western Australian Government, 2006, *Alternative Settlements Framework*, http://www.nativetitle.wa.gov.au/uploadedFiles/Alternative_Settlements/Issues%20paper.pdf at 19/08/08.

²⁵ ACIL Consulting and Indigenous Support Services 2001, *Agreements between Mining Companies and Indigenous Communities*, http://www.aciltasman.com.au/images/pdf/ISSReport_Indigenous_agreements.pdf.

²⁶ See Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2006 *Report on the operation of Native Title Representative Bodies*, Canberra http://www.aph.gov.au/SENATE/committee/ntlf_ctte/rep_bodies/report/index.htm at 18/08/08 [3.65] and see O'Faircheallaigh C 2004 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples', *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25, 2004, 1-12 regarding valuing commercial negotiations.

Royalty and equity payments are thought to create an opportunity for close partnerships between the proponent and the Indigenous parties involved as it will be in the Indigenous parties' interests to ensure that elements of matters such as heritage clearances are handled in a timely fashion. Indigenous groups provided with such benefits are also likely to have a greater involvement and community understanding of the project. The downside for Indigenous parties is that they not only face the added pressure of potential conflicts of interest, but in circumstances where the project fails or the proponent makes a loss they may receive limited or no payments.

In addition to the financial benefits contained within agreements, proponents often make significant financial contributions to the negotiation of agreements by providing resources for:

- cultural heritage surveys to obtain the necessary clearances;
- elements of the consultation process, including independent facilitation and meeting costs;
- studies to identify Indigenous stakeholders;
- information dissemination about a project;
- independent legal advice;
- independent advice in other areas, including anthropology;
- community planning and development,
- establishment and management of trusts; and
- financial advice in relation to compensation payments.²⁷

Interestingly, the ILUA process sets the standard for compensation at the lowest common denominator. Of the 49 ILUAs including compensation provisions, 38 relate to mining or pipelines.²⁸ With regard to compensation in ILUAs, under s.24EB of the NTA registration of an ILUA restricts compensation such that any native title party bound by the ILUA or entitled to benefit from the ILUA is not entitled to any compensation for the act other than compensation provided for within the ILUA.²⁹

2.3 Financial payments

Financial payments are a major component of many native title agreements, in particular agreements relating to exploration and mining activity. O'Faircheallaigh highlights the importance of financial benefits not just because of the often large sums of money involved, but because unlike other benefits often included in native title agreements such as employment, training and

²⁷ ACIL Consulting and Indigenous Support Services 2001, *Agreements between Mining Companies and Indigenous Communities*: http://www.aciltasman.com.au/images/pdf/ISSReport_Indigenous_agreements.pdf see also submissions by the Minerals Council of Australia to various parliamentary inquiries, for example: http://www.aph.gov.au/senate/committee/ntlf_ctte/completed_inquiries/1999-02/report_19/submissions/sub10.pdf and http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sub20.pdf.

²⁸ Subject matter as defined by NNTT.

²⁹ Strelein, L. 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 8.

education provisions, financial payments are most likely to be realised.³⁰ Detailed information about financial payments contained in native title agreements is generally not publicly available, although often large scale agreements are an exception to this.³¹

Financial benefits for Indigenous parties may be acquired through a range of other mechanisms including:

- individual payments for heritage surveys and clearances;
- soft loans;
- rent and lease payments;
- land transfers (particularly in agreements in townships); and
- identification as preferred tenders or service providers.³²

Agreement provisions may also provide financial assistance for the administration of native title corporations or the administration of the particular agreement. As discussed in Section 2.2 above, proponents also often provide resources for the negotiation of agreements, thus attempts to identify the value of financial benefits in native title agreements, need to consider the three stages of the process:

- agreement negotiation;
- agreement content; and
- agreement implementation.

2.4 Employment, education and training

Employment and education is a high priority for Indigenous people and therefore there is pressure for agreements to contribute to improved employment and education outcomes.³³

Employment, education and training can be both a direct and indirect outcome of agreements. Indigenous employment not only creates a local workforce but also has potential to link with other existing government programs. The Memorandum of Understanding (MOU) between the Federal Government and the Minerals Council of Australia signed in 2005 is one such example. The purpose of the MOU is to formalise a partnership to work together with Indigenous communities and assist them in taking up social, employment and business opportunities. The initiative operates through Regional Partnerships

³⁰ O’Faircheallaigh, C. 2003 ‘Financial Models for Agreements between Indigenous Peoples and Mining Companies’ *Aboriginal Politics and Public Sector Management Research Paper No. 12*, Centre for Australian Public Sector Management, Griffith University, Queensland.

³¹ See for example http://www.nativetitle.wa.gov.au/agreements_OrdFinalAgreement.aspx and http://www.nativetitle.wa.gov.au/agreements_BurrupMaitland.aspx

³² For example, the Lhere Artepe ILUA included land transfers. See also CIL Consulting Indigenous Support Services 2001 *Agreements between Mining Companies and Indigenous Communities*. A Report to the Australian Minerals and Energy Environment Foundation, ACIL Consulting and ISS and also Goldfields Land Council draft distribution policy http://www.glc.com.au/pu_xx/IS%20Distribution%20Policy.pdf.

³³ Strelein, L and Tran, T. 2007. *Senior Professional Officers Workshop: Taxation, Trusts and the Distribution of Benefits*. Native Title Research Report No. 1/2007, Native Title Research Unit, AIATSIS, Canberra.

Agreements (RPAs) in predominantly Western Australia with one in Queensland and another in the Northern Territory. The RPAs aim to address barriers to employment including:

- coordination motivation and mentoring;
- driver licensing;
- child care;
- drug and alcohol issues;
- housing;
- youth issues; and
- numeracy and literacy.³⁴

Andrew Forrest from the Fortescue Metals Group has also announced that the Australian Employment Covenant will sign up companies to employ a total of 50,000 Indigenous people within the next two years.³⁵

However such agreements are specific to mining activity only and may not be an option for Indigenous groups living in areas such as south east Australia. Mining represents one of the few sources of immediate wage and employment growth. For example in the Pilbara region, the growth in Indigenous engagement with the mining industry has led not only to mining growth in the region but also employment and training. In some instances this is not the result of the direct terms of the agreement but the flow on affects of development in particular area. Some companies have earmarked specific numbers of jobs within agreements in addition to training and mentoring programs. While this has created opportunities for Indigenous people in the Pilbara region through highly paid apprenticeships, this also make further tertiary education in traditionally 'white collar jobs' less attractive to younger Indigenous people living in these remote areas.³⁶ This presents a challenge to native title groups, in areas such as the Pilbara, who have little investment in the long term education and the social infrastructure of their communities.³⁷

Langton and Mazel argue that despite the economic value of some agreements in the Indigenous domain, there continues to be poor measures of their financial and economic impacts on top of growing complaints that Indigenous people are in fact missing out on the benefits of the 'mining boom'.³⁸

There has been strong criticism of agreements that make gratuitous commitments to employment with clauses such as: 'the company will use its best endeavours to employ X per cent of the workforce from the Indigenous community, provided they have the appropriate qualifications and expertise'.

³⁴ Minerals Council of Australia, 'Minerals Council of Australia Policies and Programs on Indigenous Employment and Leadership' paper presented to the *Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries*, Broome, 2007.

³⁵ Shanahan, Leo, 2008, 'Forrest's plan to create 50 000 jobs for Aborigines' *The Age* (Melbourne, 4 August 2008).

³⁶ Darren Injie, *Native title trusts in the Pilbara*, presentation delivered at the National Native Title Conference, Perth, 3-5 June 2008.

³⁷ Other forms of severe social dysfunction in these regions associated with the 'fly in, fly out' mining culture has been reported in anecdotal evidence.

³⁸ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

Such provisions have proved unenforceable and unmeasurable without clear implementation plans, funding or resources allocated to achieving this commitment.³⁹ Moreover parties have found difficulty in meeting employment targets without additional programs for education, training and work readiness, in particular to overcome literacy and numeracy problems faced by many Indigenous people.

The provision of education should remain the primary responsibility of the government.⁴⁰ There are a number of underlying reasons for poor education levels including:

- remoteness and social issues;
- lack of skilled and motivated teachers;
- inappropriate curricular de-motivating students and failing to equip them to move into training programs; and
- cultural obligations interfering with work and training.⁴¹

It has been argued that these factors cannot be overcome through agreements and money alone without longer term investment and strategies to combat existing problems in education.⁴² However a number of agreements target education and employment benefits by allocating funds directly to support a trust fund for education or specific measures such as scholarship support and initiatives to improve attendance.⁴³

2.5 Assistance with establishing and operating Indigenous businesses

Indigenous groups have articulated a keenness to pursue business activities over their native title lands because of the potential employment and economic growth in the region.⁴⁴ Business support can range from general support to specific provisions relating to business development. For instance, Indigenous parties may be considered as preferred tenderers, however, such measures need

³⁹ See O’Faircheallaigh, C. 2004 ‘Evaluating Agreements between Indigenous Peoples and Resource Developers’, in Langton M et al (eds) 2004 *Honour Among Nations?*, Melbourne University Press, Australia.

⁴⁰ ACIL Consulting and Indigenous Support Services 2001, *Agreements between Mining Companies and Indigenous Communities*, go to:
http://www.aciltasman.com.au/images/pdf/ISSReport_Indigenous_agreements.pdf.

⁴¹ ACIL Consulting Indigenous Support Services 2001 *Agreements between Mining Companies and Indigenous Communities*. A Report to the Australian Minerals and Energy Environment Foundation, ACIL Consulting and ISS and also Goldfields Land Council draft distribution policy
http://www.glc.com.au/pu_xx/IS%20Distribution%20Policy.pdf.

⁴² Langton, M and Mazel, O, ‘Poverty in the Midst of Plenty: Aboriginal People, the ‘Resource Curse’ and Australia’s Mining Boom’ (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

⁴³ Gerrard, W and Griffiths C, 2007 *The Miriuwung Gajerrong Ord Stage II Agreement and native title determination* presentation delivered at the National Native Title Conference 2007, Cairns, 7 June.

⁴⁴ Discussion of specific measures for Indigenous economic development is beyond the scope of this literature review. However there is extensive research and inquiry into how this can occur over native title lands. See also House Standing Committee on Aboriginal and Torres Strait Islander Affairs *Inquiry into developing Indigenous enterprise*, go to:
<http://www.aph.gov.au/house/committee/atsia/indigenouenterprises/index.htm> at 19/08/08. See also Bauman T and Tran T 2007, *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes Canberra 11-13 April 2007 Native Title Research Report 3/2007*, Native Title Research Unit, AIATSIS, Canberra http://ntru.aiatsis.gov.au/major_projects/pbcworkshopreport_final.pdf at 18/08/08.

to be coupled with other initiatives and good faith on the part of the proponent or Government body reaching the agreement. In many cases Indigenous groups have limited access to capital, and lack training, expertise and a competitive advantage to pursue such opportunities.

Ngarda Civil and Mining (NCM) is an oft cited example of a successful Indigenous business venture. NCM was established formally in 2001 as a joint venture between Henry Walker Eltin, Ngarda Yarndu Foundation and Indigenous Business Australia. Its main shareholder is the Ngarda Ngarli Yarndu Foundation representing the Indigenous community in the Ngarda Ngarli Yarndu region in the Pilbara. The company does not directly pursue mining but provides services ancillary to mining and aims to provide employment opportunities and training for the local Indigenous population.

Coalroc is another example of successful Indigenous businesses which joined the Upper Hunter Wonnurua Council to form the company Yunaga Mine Services in 2003. The new company performs reclaim work, fencing, wash plant maintenance, and on-site labour replacement. The company has been expanded to servicing the Bowen Basin and is continuing with its employment of local Indigenous people.⁴⁵ The company has a six month training program run in conjunction with a private firm. There has been interest from about 30 local Indigenous people and aims to develop trainees for the Central Queensland region. Coalroc has also developed an MOU with the Barada Barna Kabalbara Yetimarla group to establish Dugine Mine Services.

The agreement between Newmont and the Gnaala Karla Booja People also includes the development and contracting with Indigenous-owned business enterprises and a commitment to work to provide educational opportunities for the Noongar People through scholarships, internships and apprenticeships.⁴⁶

There are also a number of business incubators (both Indigenous⁴⁷ and non indigenous specific) which provide services such as business facilitation, support, mentoring and training. Some firms also provide low cost financing for approved business projects.

Despite such examples, only 9 of the 318 ILUAs (2.8 per cent) include provisions relating to economic development. It seems that economic development is ancillary to any native title agreement as opposed to mandated through specific measures that aim to promote the long term economic prosperity of a particular Indigenous party. This is reflective of the fact that economic rights have only received limited recognition in native title determinations. This is discussed further in section 3.

⁴⁵ See 'Mining companies dig deep to employ Indigenous workers' *Indigenous Employment in Action*, issue 3, 2006, Department of Employment and Workplace Relations http://www.workplace.gov.au/NR/rdonlyres/A36CE61E-057D-42BB-B703-DFD4897A5DE2/0/IEA_issue3_06.pdf at 18/08/08.

⁴⁶ See further *Beyond the mine, the journey towards sustainability*, Newmont Gold Company <<http://www.beyondthemine.com/2006/?l=4andpid=4andpt=93andparent=16andid=3>> at 18/08/08.

⁴⁷ See for example Indigenous Business Incubator operating from the Darebin Enterprise Centre <<http://www.indigenousbusinessincubator.com.au/Home/home/Home>> at 18/08/08.

2.6 Environmental Management and Heritage Protection

One of the important aspects of exercising native title rights and interests is to protect country by managing the impact of development activity. Cultural heritage has two critical elements: the level of protection and the availability of resources to ensure this protection. O’Faircheallaigh suggest that environmental management provisions should maximise the ability of Indigenous parties to minimise adverse affects on country and influence the ways in which proponents and regulatory authorities manage environmental impacts.⁴⁸

Cultural heritage regimes generally predate the NTA, however some legislative regimes have recently been reviewed and amended in alignment with the NTA.⁴⁹ Every jurisdiction in Australia has legislation offering cultural heritage protection although the ability of Indigenous parties to enforce protective measures varies across jurisdictions. O’Faircheallaigh argues that agreement provisions relating to cultural heritage protection are of beneficial value to Indigenous parties ‘to the extent that they provide additional protection’ to that offered by the relevant legislative regime.⁵⁰

There is some difficulty in defining a cultural heritage outcome and there is a large degree of variation between agreements and outcomes based on:

- the period of notification of a proposed work program to native title parties;
- whether the survey team is appointed by the company or the Indigenous party;
- whether the Aboriginal survey team is paid a daily rate for their work and all costs are borne by the company;
- the cultural heritage legislation in place and whether there are limitations to the exercise of traditional rights and interests under the legislation; and
- provisions for the protection of the intellectual property of NT parties.⁵¹

At the lower end of agreements this may mean that despite making their time and knowledge available to developers some native title groups would not be receiving any greater protection of their cultural heritage above and beyond what is available under existing cultural heritage legislation.⁵²

The scope of heritage agreements can also vary. For example, some heritage agreements exist over particular areas and are signed by one Indigenous party and the State government. In other instances, such as in Western Australia, there is a State Heritage Agreement which applies to over 300 000 square kilometres

⁴⁸ O’Faircheallaigh C 2004 ‘Evaluating Agreements Between Indigenous People and Resource Developers’ in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton, pp. 315-317.

⁴⁹ See for example the [Aboriginal Cultural Heritage Act 2003 \(Qld\)](#) and the [Torres Strait Islander Cultural Heritage Act 2003 \(Qld\)](#) and the [Aboriginal Heritage Act 2006 \(Vic\)](#).

⁵⁰ O’Faircheallaigh C 2004 ‘Evaluating Agreements Between Indigenous People and Resource Developers’ in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton, pp. 315-317.

⁵¹ O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25, 2004, 1-12.

⁵² O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25, 2004, 1-12.

in the Goldfields region which includes a template heritage agreement for exploration in the area. The agreement establishes daily rates for Aboriginal assistance as well as funding for offices.⁵³

There are some emerging issues associated with cultural heritage. Cultural heritage can be understood as the gateway for non-Indigenous access to land. However, its subsequent alignment with the NTA has the potential to create conflict in Indigenous roles in cultural heritage as well as provide potential benefits. Internationally, cultural heritage is defined broadly and includes cultural expression and diversity, socio economic rights, human rights,⁵⁴ mandated consultations and an independent heritage body,⁵⁵ property rights and a specific lands tribunal dealing with cultural heritage.⁵⁶ Godden notes that there is scope for a broader definition of cultural heritage beyond the specific procedural regimes that are already in place.⁵⁷

2.7 Community assistance programs

In general, mining companies seek to provide benefits that will be shared by the whole Indigenous community and given the lack of services and infrastructure in many remote Indigenous communities the provision of benefits to support health services, sports and recreation activities.

The Ord Final Agreement is one of the larger agreements reached with the specific support of the Western Australian Government and aims to compensate the Miriung Gajerrong people for damage caused to their communities following the original Ord Development Scheme. The agreement has a specific focus on community development and aims to ensure that the Miriung Gajerrong people will not only receive compensation but also develop their capacity to engage with the local economy, have direct involvement in land management. There are also specific financial benefits that are held in trust for

⁵³ Wyatt, B, 2005, 'Agreement – the key to sharing Australia's wealth' presentation delivered to the *Human Face of Native Title* National Native Title Conference, Coffs Harbour, 3 June 2005.

⁵⁴ See the 1972 Stockholm Declaration; Our Common Future (Brundtland report) - Sustainability; Convention for the Protection of the World Cultural and Natural Heritage 1972; United Nations Convention on Biological Diversity Framework Convention on Climate Change 1992 (supplemented in 1997 by the Kyoto Protocol). The implications of these conventions have been discussed in Godden, L, 2007, 'Cultural Heritage and Environmental Issues in Agreement Making' presentation delivered to the *Mining Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries*, Cable Beach Resort, 9-10 July 2007.

⁵⁵ *National Historic Preservation Act* (US); see also Godden, L, 2007, 'Cultural Heritage and Environmental Issues in Agreement Making' presentation delivered to the *Mining Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries*, Cable Beach Resort, 9-10 July 2007.

⁵⁶ *Resource Management Act 1991 (2001 and 2005)*, *Historic Places Act 1993*, the *Conservation Act 1987*, the *Protected Objects Act 1975*, the *Reserves Act 1977* (NZ); see also Godden, L, 2007, 'Cultural Heritage and Environmental Issues in Agreement Making' presentation delivered to the *Mining Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries*, Cable Beach Resort, 9-10 July 2007.

⁵⁷ Godden, L, 2007, 'Cultural Heritage and Environmental Issues in Agreement Making' presentation delivered to the *Mining Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries*, Cable Beach Resort, 9-10 July 2007.

the benefit of the community with a focus on wealth generation as well as the provision of some social services.⁵⁸

The Burrup and Maitland Industrial Estates Agreement is another large scale agreement reached with the Western Australian Government. The agreement provides for the compulsory acquisition of the native title of the Ngarluma Yindjibarndi, Yaburara Mardudhunera and Won-goo-tt-oo Peoples in order to allow for mahoe development. An additional Deed that provides further Aboriginal heritage protection through State Government funded surveys and studies, a benefits package for the Aboriginal groups, an Aboriginal employment obligation on proponents and the contracting of a service provider to facilitate Aboriginal training and employment.⁵⁹

The Gnaala Karla Booja people's community partnership agreement over the Boddington Gold Mine with Newmont is one such example⁶⁰ which requires the Boddington gold mine to provide pre-vocational training and subsequent job opportunities with the goal of ensuring direct employment of a minimum of 100 Indigenous employees throughout the life of the mine. The mine will also provide annual financial assistance to the Gnaala Karla Booja People starting in 2009. The mine will also develop and contract with Indigenous-owned business enterprises and work to provide educational opportunities for the Noongar People through scholarships, internships and apprenticeships.

While the terms of the agreement could arguably fall within the categories discussed above, the parties framed the agreement within a social development context to highlight the importance of working towards longer term holistic approaches.⁶¹

2.8 Indirect benefits

The benefits that are obtained through native title agreement making, whilst seemingly tangible, are also inextricably interrelated to the aspirations of the a local Indigenous community to overcome disadvantages and see real community development as well as the opportunity to engage with government and other stakeholders in decisions that affect a particular community's lands.⁶²

Agreements have the potential to:

- provide a process for parties to build relationships and redefine future interactions

⁵⁸ See further http://www.nativetitle.wa.gov.au/agreements_OrdFinalAgreement.aspx at 18/08/08.

⁵⁹ See further [http://www.nativetitle.wa.gov.au/uploadedFiles/Agreements/Land_Use_Agreements/FACT_SHEET_BURRUP_AND_MAITLAND_INDUST%2%80%A6\(1\).pdf](http://www.nativetitle.wa.gov.au/uploadedFiles/Agreements/Land_Use_Agreements/FACT_SHEET_BURRUP_AND_MAITLAND_INDUST%2%80%A6(1).pdf) at 18/08/08.

⁶⁰ See further *Beyond the mine, the journey towards sustainability*, Newmont Gold Company <<http://www.beyondthemine.com/2006/?l=4andpid=4andpt=93andparent=16andid=366>> at 18/08/08.

⁶¹ O'Faircheallaigh, C. 2004 'Evaluating Agreements between Indigenous Peoples and Resource Developers', in Langton M et al (eds) 2004 *Honour Among Nations?*, Melbourne University Press, Australia.

⁶² Bauman T and Tran T 2007, *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes Canberra 11-13 April 2007 Native Title Research Report 3/2007*, Native Title Research Unit, AIATSIS, Canberra http://ntru.aiatsis.gov.au/major_projects/pbcworkshopreport_final.pdf at 18/08/08.

- provide formal recognition and standing to a local or regional Indigenous group
- include discussions of the social and economic conditions of the local Indigenous group; and
- incorporate traditional decision making processes.⁶³

3. The manner in which the benefits should be provided

3.1 Compensation and Financial Models

Whilst there is quite an extensive body of literature dealing with the subject of native title agreement making, there has been little analysis of native title financial payments. In addition, O’Faircheallaigh (who has conducted the most extensive research on agreement making between Indigenous parties and the mining industry) notes that whilst there is a large general literature on financial models for taxation of natural resources, much of this is not very accessible to native title parties as it is highly technical and is not written within the context of agreement making between Indigenous groups and mining companies.⁶⁴

O’Faircheallaigh seeks to address this providing an overview of six alternative financial models for the payment of benefits to Indigenous groups including:

- single up-front payment;
- fixed annual payments;
- royalties based on output (unit royalties);
- royalties based on value of mineral output (*ad valorem* royalty);
- profit based royalties; and
- equity participation or shareholding.⁶⁵

Appendix 2: Financial Models for Agreements between Indigenous Peoples and Mining Companies, summarises the potential benefits and disadvantages of these alternate models for Indigenous parties. In reality it is common for agreements to incorporate a combination of different financial models and this has important implications for the administration and distribution of benefits (see Section 4 below). Some agreements continue to provide for direct cash

⁶³ Langton, M and Mazel, O, ‘Poverty in the Midst of Plenty: Aboriginal People, the ‘Re–source Curse’ and Australia’s Mining Boom’ (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31. Refer to the article for further specific references on each of these points.

⁶⁴ O’Faircheallaigh, C. 2003 ‘Financial Models for Agreements between Indigenous Peoples and Mining Companies’ *Aboriginal Politics and Public Sector Management Research Paper No. 12*, Centre for Australian Public Sector Management, Griffith University, Queensland see also O’Faircheallaigh, C (2006) Mining Agreements and Aboriginal Economic Development in Australia and Canada, *Journal of Aboriginal Economic Development*, Vol 5, No 1, 74-91; O’Faircheallaigh, C. (2007) ‘Managing Financial benefits from Mining Projects in Australia’, Presentation to a Forum ‘Power, revenues and benefits: Ensuring fairness now and across generations’, Fort Good Hope, Northwest Territories, 4-6 June. For a list of O’Faircheallaigh’s papers see: <http://www.griffith.edu.au/school/gbs/ppp/staff/ciaran_ofaircheallaigh.html>.

⁶⁵ O’Faircheallaigh, C. 2003 ‘Financial Models for Agreements between Indigenous Peoples and Mining Companies’ *Aboriginal Politics and Public Sector Management Research Paper No. 12*, Centre for Australian Public Sector Management, Griffith University, Queensland, p. 16.

payments to individuals.⁶⁶ In particular Indigenous elders may receive payments in recognition of their long struggle for native title recognition. Such payments also recognise that elders are unlikely to reap the benefits of longer term benefit arrangements and have suffered the long term effects of dispossession. Whilst the practice of providing direct cash payments has been broadly discredited and many proponents may refuse to make such payments, preferring to contribute funds for community purposes, there continues to be a demand for direct financial payments to Indigenous parties.⁶⁷

O’Faircheallaigh makes the point that the benefits derived from financial payments need to be evaluated, not just in terms of the total amount of monies received, but through an analysis of how monies are invested or spent and what outcomes these funds have for communities.⁶⁸ Similarly, Altman emphasises the importance of seeking to establish steady income streams for Indigenous communities so that financial benefits provided by negotiated agreements may be used to raise development finance.⁶⁹

3.2 Alternative financial benefit models: Aboriginal land rights regimes

In seeking to examine the manner in which native title benefits are provided it is useful to consider analysis of the provision of benefits under the *Aboriginal Land Rights (Northern Territory) Act (Cth) 1976 (ALRA)*. It needs to be understood that comparatively speaking, the types of financial outcomes arising from the right to negotiate provisions of the *Native Title Act 1993 (Cth)* are considerably more modest when compared to outcomes achieved under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* and the *Mineral Resources Act 1989 (QLD)*.⁷⁰ This is due to the limitations of the native title legislative regime as opposed to the number of years that a legislative regime has been in operation.⁷¹

The Centre for Aboriginal Economic Policy Research has conducted extensive research on this topic and published many relevant papers.⁷² Under the ALRA

⁶⁶ Strelein, L. 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 22

⁶⁷ see 50 above and also ACIL Consulting Indigenous Support Services 2001 *Agreements between Mining Companies and Indigenous Communities*. A Report to the Australian Minerals and Energy Environment Foundation, ACIL Consulting and ISS and also Goldfields Land Council draft distribution policy http://www.glc.com.au/pu_xx/IS%20Distribution%20Policy.pdf.

⁶⁸ O’Faircheallaigh, C. 2004 ‘Evaluating Agreements between Indigenous Peoples and Resource Developers’, in Langton M et al (eds) 2004 *Honour Among Nations?*, Melbourne University Press, Australia.

⁶⁹ Altman, J 2002 ‘Generating finance for Indigenous development: economic realities and innovative options’, *CAEPR Working Paper No. 15/2002*, ANU, Canberra.

⁷⁰ O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25/2004.

⁷¹ O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25/2004.

⁷² See for example: Altman, J, and Levitus, R, 1991 ‘The Allocation and Management of Royalties Under the Aboriginal Land Rights (Northern Territory) Act: Options for Reform’ *CAEPR Discussion Paper No 191*, ANU, Canberra. Altman, J 1994 ‘Implementing native title: economic lessons from the Northern Territory’ *CAEPR Discussion Paper No. 64/1994*; ‘Aboriginal economic development and land rights in the

statutory royalty equivalents are paid into the Aboriginals Benefit Account (ABA) to be used 'to or for the benefit of Aboriginals living in the Northern Territory'. Payments from the ABA fall under three broad categories: Aboriginal land council funding payments to Aboriginal councils or incorporated Aboriginal associations in the areas affected by mining operations and discretionary grants.⁷³ Under the ALRA Aboriginal groups also have the right to negotiate above the statutory royalty and Altman notes that all ALRA mining agreements since 1978 (when the financial provisions of the ALRA commenced) have included both statutory royalty equivalents and negotiated mining payments.⁷⁴ Altman highlights inefficiencies in the ALRA system and suggests that the absence of automatic royalty-equivalent payments within the native title system may encourage more active Indigenous involvement in resource development projects with the potential to deliver broader benefits to communities affected by resource development.⁷⁵

The Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report 2005 provides an extensive review of different land rights regimes in Australia, not just in regard to mining royalties, but also through consideration of options for the lease and sale of Indigenous held lands.⁷⁶

3.3 Commercial rights and economic agency

Much of the existing literature on native title agreements focuses on the potential of mineral resource agreements to deliver financial and other benefits to Indigenous parties. To date there has been little consideration given to the potential of other natural resource agreements to deliver such benefits. There has been limited recognition of commercial rights over exclusive possession native title lands, however the courts and equally state respondents have been reluctant to explicitly recognise commercial rights in a native title determination.⁷⁷

Northern Territory: Past performance, current issues and strategic options' *CAEPR Discussion Paper No. 126/1996*; 'Financial aspects of Aboriginal land rights in the Northern Territory' *CAEPR Discussion Paper No. 168/1998*, ANU Canberra and Altman J and Pollack D 1998 'Financial aspects of Aboriginal land rights in the Northern Territory, *CAEPR Discussion Paper No. 164/1998*, ANU Canberra and <http://www.aph.gov.au/house/committee/atsia/reeves/sub30.pdf>, for a complete listing of CAEPR publications go to: <http://www.anu.edu.au/caepr/discussion.php> and <http://www.anu.edu.au/caepr/working.php>.

⁷³ Altman, J. 1994 'Implementing native title: economic lessons from the Northern Territory' *CAEPR Discussion Paper No. 64/1994*, ANU, Canberra, pp5-7, see also the discussion of mining in Chapter 1 of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 2005 *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, Sydney, pp. 23-24.

⁷⁴ Altman, J 1993 *Aborigines and Mining Royalties in the Northern Territory*, Australian Institute of Aboriginal Studies, Canberra.

⁷⁵ Altman, J. 1994 'Implementing native title: economic lessons from the Northern Territory' *CAEPR Discussion Paper No. 64/1994*, ANU, Canberra p. 14

⁷⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner 2005, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission, Sydney.

⁷⁷ See Aboriginal and Torres Strait Islander Social Justice Commissioner 2004, *Native Title Report 2004*, Human Rights and Equal Opportunity Commission, Sydney pp: 2-5 for a discussion of the impact of the inconsistency of incidents test and *Western Australia v Ward and others* [2002] HCA 28 (8 August 2002); see also Strelein. Recent discussions between AIATSIS, MLDRIN and CSIRO have mapped out a research agenda on the impacts and opportunities of climate change and ecological change along the Murray River. The project will seek additional funding in order to draw existing Indigenous knowledge of ecologies,

The Aboriginal and Torres Strait Islander Social Justice Commissioner notes that the NTA does not preclude the possibility that commercial native title rights and interests may be recognised.⁷⁸ Evidence from other jurisdictions highlights the potential of commercial rights in the form of quotas, licences and leases to significantly improve the economic development capacity of Indigenous communities. For example in Canada and New Zealand commercial access to forestry and fishing resources has delivered significant benefits to Indigenous groups.⁷⁹ A landmark report examining Maori in the New Zealand economy identifies the compensation provided as part of the settlement of the *Treaty of Waitangi* claims to fisheries as the foremost factor affecting an increase in the Maori economic base.⁸⁰ Under the *Maori Fisheries Act 1989* and the *Treaty of Waitangi Fisheries Settlement Act 1992* Maori were provided with large quantities of fishing quota and cash to help purchase companies.⁸¹

The Centre for Aboriginal Economic Policy Research has published several papers examining options for improving Indigenous economic capacity.⁸² Altman and Dillon propose a profit-related investment scheme for the Indigenous estate and identify five potential commercial development opportunities that don't rely on mining:

- trade in carbon credits;
- commercial enterprise in jointly managed national parks;
- tradeable licences;
- addressing under-capitalised indigenous enterprises; and
- tourism development and services.⁸³

climates and resources across the region together Indigenous experience and priorities with the government's agenda on innovation, industry, science and research: Weir, J, 2008, convenor, 'Climate Change Forum: Impacts on Indigenous Peoples of the Murray Darling Basin', Melbourne University, Melbourne, 15 May.

⁷⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner 2008, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, Sydney, see Chapter 10, pp:213-232.

⁷⁹ See for example on the British Columbia Ministry for Forests and Range website Agreements with First Nations Forest and Range Agreements: http://www.for.gov.bc.ca/haa/FN_Agreements.htm; Durette, M. 2007 Indigenous property rights in commercial fisheries: Canada, New Zealand and Australia compared CAPER Working Paper No. 37/2007, ANU, Canberra; Sutherland, J 2000 'The Coexistence of Sustainable Development and Aboriginal Fishing Rights in Canada', Indigenous Law Bulletin 2000 ILB 133 <http://www.austlii.edu.au/au/journals/ILB/2000/133.html> and Office of Treaty Settlements n.d. *Healing the Past, Building a Future: A Guide to the Treaty of Waitangi Claims and Negotiations with the Crown, Part Three: Settling Redress* Second edition Wellington, New Zealand <http://nz01.terabyte.co.nz/ots/DocumentLibrary/RedBookPart3.pdf>.

⁸⁰ Te Puni Kokiri, 2000 *Maori in The New Zealand Economy*, 2nd edition, Ministry of Maori Development, New Zealand.

⁸¹ see Kauffman, P 2004 (ed) *Water and Fishing: Aboriginal Rights in Australia and Canada*, Aboriginal and Torres Strait Islander Commission, Canberra, p. 2

⁸² For a list of CAPER Discussion Papers go to <http://www.anu.edu.au/caepr/discussion.php> see for example Altman J and Dillon, M 2004 'A profit-related investment scheme for the indigenous estate', CAPER Discussion paper No. 270/2004; also CAEPR Working Papers <http://www.anu.edu.au/caepr/working.php>, see for example Altman, J 2002 'Generating finance for Indigenous development: Economic realities and innovative options', CAEPR Working Paper No. 15/2002;

⁸³ Altman J and Dillon, M 2004 'A profit-related investment scheme for the indigenous estate', CAPER Discussion paper No. 270/2004, ANU, Canberra. See also Morrison, J 2007 'Potential for partnerships around innovative economic development in natural resource management', presentation to the Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the Resource Extraction Industries, Broome, July.

The Australian Labor Party's pre-election Indigenous economic development statement identifies commercial forestry projects and carbon trading as having potential to deliver improved opportunities for employment and economic development.⁸⁴

3.4 Indigenous economic development

There is a growing literature specifically focussing on native title and Indigenous economic development. The Aboriginal and Torres Strait Islander Social Justice Commissioner's 2004 Discussion Paper titled *Promoting Economic and Social Development through Native Title* considered the potential of native title to deliver economic and social outcomes.⁸⁵ The Commissioner's *Native Title Report 2004* sets out principles of native title agreement making to maximise social and economic development.⁸⁶ The *Native Title Report 2006* reviews findings of a national survey of traditional owners on land, sea and economic development and a related survey of Australian government departments and statutory authorities.⁸⁷ Survey respondents identified assistance for traditional owners with business planning; long term funding and employment and training as the three most important resources required to progress development on land.⁸⁸

Several papers examine options for increasing private investment in Indigenous businesses.⁸⁹ Gunya Australia proposes the introduction of a government supported Indigenous Economic Development Scheme to encourage the corporate and private sector to invest capital and business acumen in the development of Indigenous cottage industries in return for government tax incentives.⁹⁰

Two recent symposiums convened by the Agreements, Treaties and Negotiated Settlements Project addressed various aspects of Indigenous economic development within the context of agreement making. The *Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries* was held in July 2007. Presentations and discussions at this symposium focussed on: negotiating for the implementation of sustainable outcomes; employment, business

⁸⁴ http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf.

⁸⁵ http://www.humanrights.gov.au/social_justice/nt_report/ntreport04/pdf/ntr-04-app01.pdf.

⁸⁶ The Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Reports* are available on the HREOC website go to: http://www.hreoc.gov.au/social_justice/nt_report/index.htm.

⁸⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner 2007, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission, Sydney.

⁸⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner 2008, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission, Sydney, pp. 27-29.

⁸⁹ See for example Altman, J2002 'Generating finance for Indigenous development: economic realities and innovative options' CAEPR working paper no. 15/2002

<http://online.anu.edu.au/caepr/Publications/WP/CAEPRWP15.pdf> and Gunya Australia 2007, Indigenous Economic Development Scheme, Discussion paper: http://www.gunya.com.au/acrobat/gunya_discussion_paper_august_07.pdf

⁹⁰ Gunya Australia 2007, Indigenous Economic Development Scheme, Discussion paper: http://www.gunya.com.au/acrobat/gunya_discussion_paper_august_07.pdf

opportunities and economic development; project participation models for financial management and distribution; the institutional environment of resource extraction projects and native title; standards of agreement-making and human rights compliance; corporate and government policies and programs; international case study examples.⁹¹

Within the context of the current Australian resources boom, Langton and Mazel highlight the importance of ensuring that agreements between Indigenous parties and mining companies promote capacity and institution-building to transfer wealth generated by mining to Indigenous communities to provide a secure financial base, ongoing employment and skills development opportunities and the establishment of non-mining related commercial enterprises.⁹² This symposium provided an opportunity to examine successful models such as Ngarda Civil and Mining and the Gelganyum Trust.⁹³

The *Indigenous Communities, Economic Development and Tax Policy Symposium* was held in February 2008. Presentations and discussion at this symposium focussed on: macro issues in economic reform; impediments and challenges to economic development; legal structures and economic development; policy, agreement implementation and economic benefits; tax regimes, models and options and policy directions.⁹⁴ Some of the issues considered by participants at the symposium are considered in Section 4 below. In addition the House of Representatives Stranding Committee on Aboriginal and Torres Strait Islander Affairs is currently conducting an inquiry into developing Indigenous enterprise.⁹⁵

3.5 Who provides benefits

The native title agreement making literature highlights the role of industry in providing financial benefits to Indigenous peoples. O'Faircheallaigh has examined the role of government in contributing to financial payments contained in agreements and concludes that: government has not been a significant contributor to financial aspects of agreements; government's have not generally been willing to sacrifice revenue from statutory royalties; government contributions in the form of service provision and infrastructure do not arguably represent a net benefit to Indigenous communities beyond citizen entitlements and contributions from government have the potential to create a

⁹¹ Papers and presentations from the Symposium are available through a password protected website, some papers have been published in a special edition of the *Journal of Energy and Natural Resources Law* Vol. 6 No. 1 2008 available through the ATNS website: <http://www.atns.net.au/jerl.pdf>.

⁹² Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

⁹³ Taylor, B and Hughey, B 2007 Case Study: Ngarda Civil and Mining; Hall, T and Pinday, H 2007 Case study: Gelganyem Trust, presentations to the Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries, Broome, July.

⁹⁴ Papers and presentations from the Symposium are available through a password protected website.

⁹⁵ <http://www.aph.gov.au/house/committee/atsia/indigenouenterprises/index.htm>

financial package acceptable to Indigenous parties and thus enable agreements to be reached.⁹⁶

⁹⁶ O'Faircheallaigh, C. 2003 'Financial Models for Agreements between Indigenous Peoples and Mining Companies' *Aboriginal Politics and Public Sector Management Research Paper No. 12*, Centre for Australian Public Sector Management, Griffith University, Queensland pp. 17-18.

4. The manner in which benefits should be administered

4.1 Who administers native title benefits?

The negotiation and administration of native title agreements, and thus native title benefits is heavily reliant on the expertise of those who represent Indigenous parties in negotiations resulting in significant unevenness in the system. Within the current native title agreement making environment Indigenous parties are generally represented by staff of native title representative bodies and service providers (NTRBs). As indicated in Table 1 above of 341 registered ILUAs, 313 of these are area agreements and only 28 (8.2 per cent) are body corporate agreements, suggesting that most ILUAs have been negotiated with Indigenous parties that have not yet had a determination of native title. Such groups are often particularly dependent upon the NTRB system and the capacity of NTRB staff to identify appropriate benefits, negotiate, and administer these benefits.

When a determination of native title is made native title holders are required to establish a body corporate to hold the title. These corporations, known as prescribed bodies corporate (PBCs) or registered native title bodies corporate are responsible for managing native title matters, including the negotiation and administration of agreements.⁹⁷ In anticipation of a native title determination and to assist in the administration of benefits arising from pre-determination agreements, some native title groups choose to incorporate prior to a native title determination. There is no prescribed legal form for such corporations and in some instances these corporations may become PBCs whilst in others a trust or business that will remain separate from any future PBC may be created.

O’Faircheallaigh has found that agreements negotiated with NTRB involvement have better outcomes. However NTRBs are struggling to develop the specific capacity and expertise required for the emerging roles related to the negotiation and administration of agreements.⁹⁸

The AIATSIS Native Title Research Unit has examined the relationships between NTRBs and PBCs and found the capacity of PBCs to operate independently is tempered against the relative capacity of NTRBs to provide support services, expertise and infrastructure combined with the economies of scale enjoyed by regional organisations.⁹⁹ The capacity of PBC to implement agreements also relies on the inclusion of sufficient funds in agreements for

⁹⁷ PBCs are nominated by the claim group and determined by the Court. PBCs become RNTBCs when they are registered with the NNTT on the Register of Native Title Bodies Corporate. In this paper the abbreviation PBC is used to refer to both prescribed bodies corporate and registered native title bodies corporate.

⁹⁸ See Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2006 *Report on the operation of Native Title Representative Bodies*, Canberra http://www.aph.gov.au/SEnate/committee/ntlf_ctte/rep_bodies/report/index.htm at 18/08/08 and Potok, R 2005 *A report into the professional development needs of Native Title Representative Body lawyers*, Castan Centre for Human Rights Law, Monash University, Melbourne.

⁹⁹ Strelen, L and Tran, T 2007 ‘Native Title Representative Bodies and Prescribed Bodies Corporate: native title a post determination environment’, *Native Title Research Report No. 2/2007*, AIATSIS Canberra.

implementation which rarely occurs.¹⁰⁰ However despite the heavy reliance on NTRBs, the NTRU's research highlights the fact that many do not have the necessary resources or complement of skills to meet needs of PBCs particularly with regard to organisational governance, decision-making, submission writing, financial management, taxation issues and business development.¹⁰¹ Lack of resources, capacity and expertise, combined with ineffective governance structures and decision-making processes pose serious risks to the implementation and longevity of native title agreements.¹⁰²

NTRBs have been working with capacity building and support programs such as AIATSIS and the Aurora Project to develop knowledge and understanding and best practice in this area. Legal masterless linkages and email networks have been created to up skill NTRB staff and experts in other areas to cross the areas of expertise.

Currently many NTRBs rely on consultants and pro bono legal advice to assist with these matters and the need to monitor and assess the quality of this advice and assistance has been raised by several NTRBs.¹⁰³ A report on the professional development needs of NTRB lawyers made several recommendations to expand the pool of external legal practitioners engaged in native title matters and build stronger networks between the NTRB and private legal sectors.¹⁰⁴ However the demand for advice, assistance and expertise extends beyond legal matters and there is a need to identify and evaluate the capacity of existing organisations within the Indigenous sector such as the Indigenous Land Corporation and Indigenous Business Australia as well as mainstream government programs, and the private sector (eg Plan B Trustees) to provide pre and post agreement support to Indigenous parties.¹⁰⁵

Some NTRBs have suggested the creation of regional trust structures to manage the financial benefits arising from native title agreements; as well as providing economies of scale and administrative efficiencies such structures may also

¹⁰⁰ see O'Faircheallaigh, C 2002 'Implementation: the forgotten dimension of agreement making in Australia and Canada, *Indigenous Law Bulletin* 5 (20) available online at: <http://www.austlii.edu.au/au/journals/ILB/2002/60.html>

¹⁰¹ Strelan, L and Tran, T 2007 'Native Title Representative Bodies and Prescribed Bodies Corporate: native title a post determination environment', *Native Title Research Report No. 2/2007*, AIATSIS Canberra.

¹⁰² See Bauman, T 2006 *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*. Indigenous Facilitation and Mediation Project Report No. 6, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

¹⁰³ See Strelein, L and Tran, T 2007 'Taxation, trusts and the distribution of benefits under native title agreements, *Native Title Research Report No.1/2007*, AIATSIS, Canberra. The Native Title Research Unit together with the Aurora Project is coordinating the provision of advice requests from NTRBs to a pro bono legal panel. There is a high demand for native title specific advice relating to corporate structuring and taxation issues. In addition the NTRU has held workshops for NTRB Legal staff and the Aurora Project runs training focusing on native title specific issues.

¹⁰⁴ Potok, R 2005 *A report into the professional development needs of Native Title Representative Body lawyers*, Castan Centre for Human Rights Law, Monash University, Melbourne. In 2007 the NTRU and the Aurora Project launched an initiative to co-ordinate the provision of advice requests from NTRBs to a pro bono legal panel, see http://ntru.aiatsis.gov.au/major_projects/taxation_trusts.html#probono.

¹⁰⁵ See Bauman, T and Tran, T 2007, 'First National Prescribed Bodies Corporate Meeting: issues and Outcomes, Native Title Research report No. 3/2007, AIATSIS Canberra.

provide opportunities to pool financial resources for investment and business development purposes.¹⁰⁶ Accordingly such organisations would also have increased capacity to seek and engage external expertise and investment power. The success of regional trusts would be highly dependent upon establishing effective governance and decision-making processes. Similarly Plan B Trustees propose using a Group Participation Agreement to reduce administration time and costs, eliminate duplicate trusts and maximise cost efficiencies.¹⁰⁷

One of the challenges of establishing appropriate corporate structures to manage and administer benefits arising from native title agreements relates to ensuring that such structures reflect the particular governance and decision-making approaches of the native title group rather than the terms of the agreements for which they are being created.¹⁰⁸ Bauman has conducted extensive research around the subject of decision-making and negotiation within the context of native title.¹⁰⁹ Bauman emphasises the importance of process in seeking to achieve sustainable outcomes and establishing appropriate decision making and conflict management frameworks and institutions for the management of native title rights and benefits.¹¹⁰

4.2 Distribution of benefits

There are continued issues relating to the distribution of compensation payments and their taxation treatment. Compensation arrangements need to clearly define the rights of parties to the agreements and how funds will be invested and distributed.¹¹¹

¹⁰⁶ Strelein, L. 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra.

¹⁰⁷ Williams, P 2008 'Native Title Trusts' presentation to the Native Title Conference 2008, Perth, 5 June and Lubich, C 2008 'Investing for Native Title Groups' presentation to the Native Title Conference 2008, Perth, 5 June.

¹⁰⁸ Strelein, L and Tran, T 2007 'Taxation, trusts and the distribution of benefits under native title agreements', *Native Title Research Report No.1/2007*, AIATSIS, Canberra.

¹⁰⁹ See Bauman, T. and R. Williams. 2005. *The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land*. Report No. 1. Indigenous Facilitation and Mediation Project, Native Title Research Unit, AIATSIS Canberra; Kingham, F. and Bauman, T. 2006. *Native title mediation: issues identified, lessons learnt: proceedings and findings of IFaMP workshops with native title Indigenous and non-Indigenous mediators, February and March 2005*. Report No 5. Indigenous Facilitation and Mediation Project. Native Title Research Unit, AIATSIS, Canberra; Bauman, T. 2006. *Final Report of the Indigenous Facilitation and Mediation Project July 2003/04 – June 2006: research findings, recommendations and implementation*. Indigenous Facilitation and Mediation Project. Native Title Research Unit, AIATSIS, Canberra and Bauman, T 2005 'Whose Benefits? Whose Rights? Negotiating rights and interests amongst native title parties' *Land, Rights, Laws: Issues of Native Title* Vol. 3 No. 2, AIATSIS, Canberra see also the Indigenous Facilitation and Mediation project website: <http://ntru.aiatsis.gov.au/ifamp/index.html>.

¹¹⁰ Bauman, T. and R. Williams. 2005. *The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land*. Report No. 1. Indigenous Facilitation and Mediation Project, Native Title Research Unit, AIATSIS Canberra and Bauman, T 2005 'Whose Benefits? Whose Rights? Negotiating rights and interests amongst native title parties' *Land, Rights, Laws: Issues of Native Title* Vol. 3 No. 2, AIATSIS, Canberra.

¹¹¹ ACIL Consulting Indigenous Support Services 2001 *Agreements between Mining Companies and Indigenous Communities*. A Report to the Australian Minerals and Energy Environment Foundation, ACIL

Best practice would involve the development of distribution policies and appropriate organisational structures for the management of native title financial payments prior to entering into any agreements.¹¹² Strelein suggests that best practice would involve the development of distribution policies and appropriate organisational structures for the management of native title financial payments prior to entering into any agreements.¹¹³ However, such pre-planning is rarely implemented and in practice NTRBs and Indigenous parties often enter into the agreement making processes without a clear distribution policy or effective governance and corporate structures to administer benefits. Chalk and Fitzgerald identify the importance of ensuring that the details of how trusts will operate, and to what purpose be defined before any monies are received.¹¹⁴

Distribution policies generally cover the following categories:

- administration
- investment/accumulation for future generations
- business and economic enterprises
- social/community capital and infrastructure (including funeral funds, health services and education scholarships)
- benefits to current native title holders.¹¹⁵

The issue of intergenerational benefits is particularly relevant to native title agreements as native title rights are an intergenerational asset. Strelein argues that consideration of intergenerational benefits raises economic and philosophical questions about how future generations of native title holders might best benefit from native title agreements.¹¹⁶ In particular, is ‘development’ best achieved by immediate distribution or for education of young people or improving the health and living standards of the community; or creating economic and commercial success with employment and growth trickling down. Some agreements seek to address all of these. Others focus on one strategy. The best strategy may differ for different groups.¹¹⁷

Consulting and ISS; Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 8; Strelein, L and Tran, T. 2007. *Senior Professional Officers Workshop: Taxation, Trusts and the Distribution of Benefits*, Native Title Research Report No. 1/2007, Native Title Research Unit, AIATSIS, Canberra.

¹¹² See Bauman, T 2005 ‘Whose Benefits? Whose Rights? Negotiating rights and interests amongst native title parties’ *Land, Rights, Laws: issues of Native Title* Vol. 3 No. 2, AIATSIS, Canberra; Chalk, A and Fitzgerald, J 2007 ‘Native title, land rights and economic development’, paper presented at the Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries, Broome, July; and Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 21.

¹¹³ Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 21.

¹¹⁴ Chalk, A and Fitzgerald, J 2007 ‘Native title, land rights and economic development’, paper presented at the Mining, Petroleum, Oil and Gas Symposium: Indigenous Participation in the Resource and Extraction Industries, Broome, July.

¹¹⁵ see Goldfields Land Council draft distribution policy http://www.glc.com.au/pu_xx/IS%20Distribution%20Policy.pdf and Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 21 and also http://www.gordonfn.ca/resfiles/Forum_IBA'S_indd.pdf

¹¹⁶ Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 23.

¹¹⁷ Sen, Amartya, 2001 *Development as Freedom*, Oxford University Press.

Consideration should also be given to including provisions in long term agreements for re-negotiation of certain aspects of the agreement at agreed intervals. Further research is required in order to investigate a sustainable capital base to allow for intergenerational distribution of benefits.¹¹⁸

A range of corporate structures to manage benefits and distributions may be created within the context of native title agreements making including tax-exempt charitable trusts, non-charitable trusts, taxable entities including corporations, partnerships and unit trusts. Within the native title sector there is currently much discussion about the advantages and disadvantages of various corporate structures.¹¹⁹

4.3 Native title payments and taxation issues

Recently there have been several publications examining deficiencies in the current tax treatment of native title payments and alternative models to create incentives for investment and maximise the benefit of native title payments have been proposed.¹²⁰ When determining how benefits from a native title agreement are to be managed, many groups are concerned about the impact on members' social security or other entitlements and potential problems of self assessment and reporting of changes in income and assets.¹²¹ Strelein notes that uncertainty within the current tax environment raises serious concerns about non-compliance with regard to native title payments.¹²²

Levin proposes tax reform to establish a new category of tax exempt deductible gift recipient called Aboriginal Community Foundations for use by Aboriginal communities (that does not entrench concepts of welfare and poverty).¹²³

¹¹⁸ see Lubich, C 2008 'Investing for Native Title Groups' presentation to the Native Title Conference 2008, Perth, 5 June and also Nish, S, 2008 'Tax effective accumulation of intergenerational capital', presentation to the Indigenous Communities, Economic Development and Tax Policy Symposium, Melbourne February.

¹¹⁹ See for example Levin, A 2007, 'Improvements to the Tax and Legal Environment for Aboriginal community organizations and trusts', Discussion Paper, Jackson McDonald Lawyers, August 2007; Nish, S, 2008 'Tax effective accumulation of intergenerational capital', presentation to the Indigenous Communities, Economic Development and Tax Policy Symposium, Melbourne February; Stewart, M 2008 'Tax Structures and Incentives for Commercial Activities' paper presented at the Indigenous Communities, Economic Development and Tax Policy Symposium, Melbourne February; Strelein, L and Tran, T 2007 'Taxation, trusts and the distribution of benefits under native title agreements', Native Title Research Report No.1/2007, AIATSIS, Canberra; and Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra.

¹²⁰ See Levin, A 2007, 'Improvements to the Tax and Legal Environment for Aboriginal community organizations and trusts', Discussion Paper, Jackson McDonald Lawyers, August 2007; Gunya Australia 2007, Indigenous Economic development Scheme, Discussion paper:

http://www.gunya.com.au/acrobat/gunya_discussion_paper_august_07.pdf

; Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra.

¹²¹ Strelein, L and Tran, T 2007 'Taxation, trusts and the distribution of benefits under native title agreements', Native Title Research Report No.1/2007, AIATSIS, Canberra pp. 9-10.

¹²² Strelein, L. 2008 *Taxation of Native Title Agreements, Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra.

¹²³ Levin, A 2007, 'Improvements to the Tax and Legal Environment for Aboriginal community organizations and trusts', Discussion Paper, Jackson McDonald Lawyers, August 2007

Strelein examines existing and proposed taxation regimes including: social security means testing exemption; mining withholding tax; native title withholding tax; tax exemption; Levin's Aboriginal Community Foundation proposal; Leibler's Aboriginal Development Corporation model and Gunya Australia's Indigenous Economic Development Scheme.¹²⁴ Strelein identifies policy priorities as:

- resolving the capital/revenue and compensation uncertainty around native title and the non-extinguishment principle;
- minimising the flow-through effects on social security of the distribution of benefits to individuals or allocation of interests to beneficiaries;
- identifying the extension of any exemption to future use of benefits; and
- maximising and fostering Indigenous economic development and growing Indigenous assets.¹²⁵

Strelein also proposes four options for tax reform:

- Sovereign immunity for taxation within the native title determination area.
- A zero rated native title withholding tax could apply to a class of native title agreements, including any agreement that involves a process under the NTA.
- Payments for loss or impairment of native title and the exercise of native title rights and interests could be defined as compensatory and specifically exempted from the Income Tax and GST regimes, including interest and revenue generated from those funds.
- A new tax vehicle or tax exempt class of entities under Division 50 and 30 could be formulated (which would either specifically or by definition include PBCs) that recognises Indigenous economic development, accumulation and distribution needs of native title groups.¹²⁶

Whilst many of the above mentioned proposals emphasise the need for tax reform, there are also concerns that making amendments to the current tax system could have unforeseen and unintended consequences. Nish and Stewart provide options within the current tax regime and argue that taxable entities should be considered for managing the distribution of income and assets from native title agreements.¹²⁷ Agius proposes a model that involves a top level tax-

¹²⁴ Strelein, L. 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra pp 52-63; and also Adam Levin, 'Improvements to the Tax and Legal Environment for Aboriginal community organizations and trusts', Discussion Paper, Jackson McDonald Lawyers, August 2007; Gunya Australia 2007, Indigenous Economic development Scheme, Discussion paper: http://www.gunya.com.au/acrobat/gunya_discussion_paper_august_07.pdf.

¹²⁵ Strelein, L. 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, p. 64.

¹²⁶ Strelein, L. 2008 *Taxation of Native Title Agreements*, *Native Title Research Monograph No. 1/2008* Native Title Research Unit, AIATSIS, Canberra, pp. 64-65.

¹²⁷ Nish, S, 2008 'Tax effective accumulation of intergenerational capital', presentation to the Indigenous Communities, Economic Development and Tax Policy Symposium, Melbourne February; Stewart, M 2008 'Tax Structures and Incentives for Commercial Activities' paper presented at the Indigenous Communities, Economic Development and Tax Policy Symposium, Melbourne February;

exempt Aboriginal Foundation with underlying business that are taxable corporate entities.¹²⁸

¹²⁸ Agius, P, 2008 'Aboriginal Business Enterprises a Model for Economic Development, presentation to the Indigenous Communities, Economic Development and Tax Policy Symposium, Melbourne February.

5. Potential use for template agreements and specified principles to guide the making and implementation of agreements

There needs to be further investigation into how template agreements and best practice principles should be determined and their subsequent use and advantages within the context of native title agreement making.

While there is an urgency to understand agreement benchmarks, templates and principles should not be inflexible or set low precedents that can potentially limit the social and economic opportunities that can be realised by Indigenous parties to native title agreements.¹²⁹ Whilst some NTRBs have developed templates for certain types of agreements, the main format of template agreements or protocols have been created by government or proponents with varying degrees of input from NTRBs or Indigenous parties.¹³⁰ In some cases Indigenous parties have been involved in the negotiation of these templates and protocols, but in order to ensure best practice from the perspective of Indigenous parties it will be crucial for more Indigenous-led initiatives in setting benchmarks.

There has been some work towards developing uniform standards for agreement although this has been limited to certain types of benefits and the jurisdiction in which the agreement is made. Two such examples include precedents created by the Victorian Department of Industry for mining agreements¹³¹ and the South Australian Native Title Resolution.¹³² The Natural Resources Advisory Council of New South Wales has also developed an Aboriginal Resource Agreements Kit, although this is not native title specific. There are also a range of templates available online on the National Native Title Tribunal website¹³³ and the Agreements Treaties and Negotiated Settlements (ATNS).

5.1 Model agreements

The NTRU has received requests from NTRBs to identify best practice clauses in agreements. In order to provide such information NTRBs need to share information about existing agreements and provide access to this information for review and analysis. Whilst mining companies often operate in several

¹²⁹ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹³⁰ See for example the Goldfields Heritage Protection Protocol <http://www.atns.net.au/agreement.asp?EntityID=1520> at 18/08/08.

¹³¹ See for example the pro forma agreements agreed to by the Victorian Minerals and Energy Council and Native Title Services Victoria <http://www.dpi.vic.gov.au/DPI/nrenmp.nsf/childdocs/-A48C1BB7CE3591DF4A256A8000169DF8-617E72CCD1C18D264A256A800016C10F?open> at 18/08/08.

¹³² There is extensive information available on the South Australian Naïve Title Resolution website: <http://www.iluasa.com/info/templates.asp> at 18/08/08. The Queensland Government has previously proposed a statewide exploration ILUA: Queensland Premier Media Statement, 1 October 2001, <http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=3129anddb=media>.

¹³³ The National Native Title Tribunal has some agreement templates available on its old website: <http://oldsite.nntt.gov.au/agreements/> at 18/08/08.

jurisdictions, NTRBs do not necessarily have ready access to information about agreements negotiated in other regions or states and territories. This makes agreement benchmarking difficult and means that scarce NTRB resources are consumed by ‘re-inventing the wheel’ with each new agreement negotiation, rather than building on a growing body of expertise and experience. AIATSIS workshops strive to develop best practice and together with the conference, share current models and practices.

O’Faircheallaigh has conducted extensive research on criteria for assessing agreement provisions in relation to the core areas of agreement making discussed earlier.¹³⁴ He proposes a sliding scale approach that could be appropriate for the assessment of current agreements and the benchmarking of future agreements. O’Faircheallaigh argues that there is considerable variation in financial benefits contained in agreements concluded during any one time period. He identifies differences in legislative frameworks, company policies, individual and community capacity and the willingness of governments to contribute to financial packages as contributing to this.¹³⁵ Whilst noting trends towards more sophisticated and customised financial models within agreements, O’Faircheallaigh also observes that there does not appear to be a linear progression in agreement making. It is likely that one of the reasons for this is the absence of a strategic NTRB-wide approach to native title agreement-making.

A significant trend is that where one area of an agreement is strong and beneficial to Indigenous parties, other areas also tend to follow.¹³⁶ For example, an agreement with substantial financial payments is also likely to have extensive employment and education provisions to match. Those agreements with limited financial payments are more likely to have poorer education and employment outcomes. This reflects the fact that variations in outcomes are not reflective of deliberate trade off during the negotiation process.¹³⁷ This raises further questions highlighting the need for benchmarking and systematic study of current agreements in order to determine the extent of ‘benefits’ that can be derived from native title agreements.

5.2 Negotiation strategies and frameworks

It is well recognised that NTRBs have severe resourcing issues and often prioritise their work based on existing claims. There have been substantial calls

¹³⁴ O’Faircheallaigh C 2004 ‘Evaluating Agreements Between Indigenous People and Resource Developers’ in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton.

¹³⁵ O’Faircheallaigh, C. 2003 ‘Financial Models for Agreements between Indigenous Peoples and Mining Companies’ *Aboriginal Politics and Public Sector Management Research Paper No. 12*, Centre for Australian Public Sector Management, Griffith University, Queensland pp. 14-15.

¹³⁶ O’Faircheallaigh C 2004 ‘Evaluating Agreements Between Indigenous People and Resource Developers’ in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton.

¹³⁷ O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25, 2004, 1-12.

for negotiation training specific to the native title context.¹³⁸ In order to negotiate agreements proponents are often required to provide financial support for various elements process (see Section 2 and 3 above). An ideal agreement making model should not be reliant solely on the financial resources of the proponent. However within the current political and social context, many Indigenous parties would inevitably lack the resources and capacity to equally engage with proponents without assistance.¹³⁹ Further, limited budgets and high workloads of NTRBs in addition to tight project time frames means that many proponents would be willing to assist Indigenous parties reach agreements. This raises issues in terms of whether Indigenous parties are capable of coming to agreements on equal terms. Standards for financing negotiation processes need to be developed in order to ensure that Indigenous groups can maximise opportunities for agreement making without having to compromise their positions due to a lack of resourcing or capacity.

Indigenous representative bodies are also constrained by the procedural provisions surrounding some forms of agreements such as ILUAs and are forced to rush negotiations or risk legal penalties.¹⁴⁰ There is some evidence of agreements being concluded within a very short timeframe such as the Adelong gold mine ILUA negotiations with the Wiradjuri and Walgalu peoples which were concluded in three months.¹⁴¹ This contrasts severely with voluntary agreements negotiated by Rio Tinto.¹⁴²

5.3 Implementation of agreements

The effectiveness of the implementation phase of agreements will determine its success and whether or not the agreement is sustainable.¹⁴³ Appropriate processes and mechanisms for managing agreements require careful thinking.

There have been limited moves to streamline the implementation of agreements including resourcing and support. Measuring the implementation of agreements is more complex than understanding the terms of an agreement itself. There are a range of other factors that need to be considered including:

- human and organisational capacity of Indigenous groups and other parties they work with including NTRBs

¹³⁸ Bauman, T 2007 'You mob all agree? The chronic emergency of culturally competent engaged Indigenous problem solving' *Indigenous Law Bulletin* (6) 29 pp. 13-15.

¹³⁹ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2006 *Report on the operation of Native Title Representative Bodies*, Canberra http://www.aph.gov.au/SEnate/committee/ntlf_ctte/rep_bodies/report/index.htm at 18/08/08.

¹⁴⁰ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹⁴¹ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2006 *Report on the operation of Native Title Representative Bodies*, Canberra http://www.aph.gov.au/SEnate/committee/ntlf_ctte/rep_bodies/report/index.htm at 18/08/08, [4.47].

¹⁴² Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2006 *Report on the operation of Native Title Representative Bodies*, Canberra http://www.aph.gov.au/SEnate/committee/ntlf_ctte/rep_bodies/report/index.htm at 18/08/08, [4.48].

¹⁴³ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

- political support
- economic conditions (which may affect the quality of payments received) and
- policy and legislative frameworks.¹⁴⁴

While some agreements have resulted in substantial benefits to Indigenous parties, concluding an agreement does not necessarily mean that benefits and outcomes are ensured. Attention needs to be given to the implementation of agreements which can determine the success or shortfall of the agreement reached.¹⁴⁵ Research on the implementation of agreements has shown that the allocation of human and financial resources is critical to the success of agreements.¹⁴⁶ This is particularly important given the education and capacity of some Indigenous parties to agreements or their representatives. However, very few mining agreements allocate resources to implementation, placing the final burden on the Indigenous parties to agreements to manage it.

There is an unrealistic assumption that reaching a satisfactory agreement necessarily means that the Indigenous party concerned will have the requisite capacity to become an expert in trusts or develop the necessary skills instantly to be responsible company directors. A 2003 study showed that less than 2 per cent of the total of agreements allocated resources to the task of implementation.¹⁴⁷ In some instances there may be no implementation or monitoring whatsoever. There are also limited provisions for sanction or a failure to honour specific provisions.¹⁴⁸ Implementation failures are revealed by the fact that in many instances Indigenous parties fail to take up community development possibilities provided under agreements.¹⁴⁹

The implementation of agreements is also inextricably related to how the agreement was made in the first instance. For example, poorly designed or articulated community governance structures can impact on the negotiation, making and subsequently implementation of agreements. Such preliminary

¹⁴⁴ O’Faircheallaigh C 2004 ‘Evaluating Agreements Between Indigenous People and Resource Developers’ in Langton, Tehan, Palmer, Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton. See also O’Faircheallaigh C 2002 ‘Implementation: The Forgotten Dimension of Agreement-making in Australia and Canada’ *Indigenous Law Bulletin*, vol 5(20), pp14-17 and O’Faircheallaigh C 2003b *Implementing Agreements between Indigenous Peoples and Resource Developers in Australia and Canada* (Research Paper No 13, School of Politics and Public Policy, Griffith University, Qld, 2003; Guest, K, Strelein L and Bauman T, (working draft) *Comprehensive and Large Scale Agreements Workshop Report*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

¹⁴⁵ Langton, M and Mazel, O, ‘Poverty in the Midst of Plenty: Aboriginal People, the ‘Resource Curse’ and Australia’s Mining Boom’ (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹⁴⁶ O’Faircheallaigh, C, 2002, *A new Approach to Policy Evaluation: Mining and Indigenous People*, Ashgate Press Aldershot, England.; Langton, M and Mazel, O, ‘Poverty in the Midst of Plenty: Aboriginal People, the ‘Resource Curse’ and Australia’s Mining Boom’ (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹⁴⁷ This was the figure as at 2003: O’Faircheallaigh C 2004 ‘Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples’, *Land, Rights, Laws: Issues of Native Title*, Vol 2, No 25, 2004, 1-12.

¹⁴⁸ See for example ‘Aborigines to SUE Miners’ *Sunday Times* (Perth) 28 April 20002.

¹⁴⁹ ACIL Consulting and Indigenous Support Services 2001, *Agreements between Mining Companies and Indigenous Communities*, http://www.aciltasman.com.au/images/pdf/ISSReport_Indigenous_agreements.pdf.

factors need to be considered at the early stages of agreement making in order to avoid ongoing issues in the implementation phase.¹⁵⁰ This is particularly important given the communal nature of native title and the binding nature of some agreements on successive generations.¹⁵¹

There may also be additional elements to agreements requiring broader government support and financing. For example the major proportion of agreements related to mining occur over isolated Indigenous communities. This requires a further state or federal commitment to infrastructure in order to advance an agreement.¹⁵² The MOU between the federal government and the Minerals Council of Australia is one such example (see also section 2 above).

5.4 Governance and capacity building

Governance is also a key implementation issue. Agreements involve complex arrangements between parties, which are driven by legal considerations that exclude intercultural and governance issues.¹⁵³ Agreement structures typically reflect key issues identified in negotiations that are reflected in the final outcomes of agreements including rights and interests, cultural heritage and environmental management, financial benefits, employment and training and business development. As a consequence of these aspirations, governance structures can:

- become in capable of responding to changing circumstances;
- be resource intensive; and
- place strain on Indigenous peoples, communities and their organisations.¹⁵⁴

Langton and Mazel note that Indigenous groups who are cohesive with recognised structures have the greatest capacity to engage in negotiations and maintain sustainable outcomes.¹⁵⁵ The resourcing of Indigenous representative bodies and capacity building is essential to their ability to effectively conduct and manage negotiations¹⁵⁶

Inadequate resourcing inevitably makes the agreement prone to failure, placing all parties to the agreement at major risk. The distribution of financial benefits is

¹⁵⁰ See for example Bauman T 2006 [Final Report of the Indigenous Facilitation and Mediation Project July 2003/04 – June 2006: research findings, recommendations and implementation](#). Indigenous Facilitation and Mediation Project. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

¹⁵¹ ILUAs operate as as a legal contract binding all native title parties to the terms of the agreement - including those who may not have been identified at the time the agreement was made.

¹⁵² Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹⁵³ Martin, DF, 2008, 'Governance Challenges in Agreement Implementation' paper presented to the *Indigenous Communities, economic Development and Tax Policy* Symposium, Melbourne, 26-27 February.

¹⁵⁴ Martin, DF, 2008, 'Governance Challenges in Agreement Implementation' paper presented to the *Indigenous Communities, economic Development and Tax Policy* Symposium, Melbourne, 26-27 February.

¹⁵⁵ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹⁵⁶ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, 2006 *Report on the operation of Native Title Representative Bodies*, Canberra http://www.aph.gov.au/SEnate/committee/ntlf_ctte/rep_bodies/report/index.htm at 18/08/08.

a crucial factor and the capacity of agreement governance bodies to manage conflicts over the distribution of benefits can affect the long term viability of an agreement. Developing the capacity of key organisations such as PBCs to manage these conflicts is crucial to the implementation of agreements. Any standardised approach to agreement making needs to mandate the allocation of resources to ensure that there are effective governance structures in place to manage the outcomes and benefits flowing from native title agreements.¹⁵⁷

For example, the Yawoorrong Miriuwung Gajerrong Corporation representing the Miriuwung Gajerrong people has faced significant issues in terms of finding sufficient operational and human resources to capitalise on the outcomes of their agreement despite receiving substantial financial benefits¹⁵⁸ as well as funding for the MG Corporation and 10 years to implement the agreement. There are a number of issues affecting sustainable implementation:

- sufficient operational and human resources to make it happen
- the substantial land benefit is now uncertain and the time implications for achieving economic development
- communication and ongoing support from the Government; and
- the complexity of the agreement and its administration structures.

Ideally, there should be resources dedicated to a coordinator or coordinating party and the review of native title agreements.¹⁵⁹ An agreements protocol would go a long way to facilitate this. The members of the coordinating committee should ideally include the proponent, Indigenous groups, government and other signatories to the agreement. It may be feasible to finance a coordinating officer or outsourced contractor servicing particular regions. Ideally the implementation officer or coordinator should:

- be involved at the beginning of the negotiation process to ensure that they are aware of the intricacies of the agreement and the internal dynamics between parties
- establish a relationship at an early stage of the negotiations
- be well versed in native title, trusts, equity, contract and corporations law
- understand cross cultural issues and be willing to undertake training from the Indigenous group(s) involved in the agreement
- be a member of the coordinating committee.¹⁶⁰

Consideration of a protocols focused on a holistic alternative approach would mean that agreements are valued not only for their monetary worth but also the effective and appropriate processes that support good outcomes.

¹⁵⁷ Langton, M and Mazel, O, 'Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom' (2008) 26 (1) *Journal of Energy and Natural Resources Law* 31.

¹⁵⁸ The agreement provides for funding over 10 years for investment; the transfer of 5 per cent of the total farm area for Miriuwung Gajerrong economic development; land transferred for community living areas; land transferred for conservation parks and joint management ; 5 per cent from the sale of residential land and funds for the Ord Enhancement Scheme.

¹⁵⁹ O'Fairchealigh, C, 2003 *Implementation of Mining Agreements in Australia and Canada*, Aboriginal Politics and Public management research Paper No 13, Griffith University, Brisbane.

¹⁶⁰ Indigenous Support Services Acil Consulting 2001 Agreements between Mining Companies and Indigenous Communities. A Report to the Australian Minerals and Energy Environment Foundation, Acil Consulting and ISS.

5.5 Scope and use of protocols

There are several documents outlining protocols for negotiations.¹⁶¹ However there is limited consideration of the quality and effectiveness of these protocols, some of which range from one page documents operating as a broad statement of principles while others include extensive information on the Indigenous group, standards for agreements and model clauses. Other protocols highlight the responsibilities of both parties with provisions for the composition and functions of a steering committee, the notification processes, conduct of heritage surveys, dispute resolution measures, reconciliation statement, and prescribed fees. There is also no consistency between jurisdictions and types of protocols that currently exist. Table 5 below outlines the potential advantages and disadvantages of using agreement templates.

Table 5: Advantages and disadvantages of agreement templates¹⁶²

POTENTIAL ADVANTAGES	POTENTIAL DISADVANTAGES
Providing a timely and cost effective way of assisting parties to negotiate	A lack of flexibility and creativity
Requiring fewer resources for each agreement	Narrowing legal issues to only those that have been contained in the template agreement
Providing flexibility	Restricting negotiations Experienced parties capitalising on poorly designed templates resulting in a 'poor deal' for native title parties

However template agreements have been used extensively in some areas including South Australia where the State Government has encouraged the use of ILUA templates to facilitate negotiations, Queensland where private legal firms have developed templates for local government and public utilities and Victoria where templates have been used in mining and exploration.¹⁶³ This does not necessarily mean that they offer the greatest possible benefits to Indigenous parties, nor does it indicate that the templates were developed in consultation – this contrast can be seen in the Queensland and South Australian examples cited above.

¹⁶¹ See for example, NSW Aboriginal Land Council and NSW Minerals Council, 2001 *Protocol for the Negotiation of Agreements for Exploration and Mining for New South Wales* http://www.nswmin.com.au/data/assets/pdf_file/0014/2516/alc-protocol.pdf at 18/08/08; Aboriginal Legal Rights Movement, Local Government Association and State Government, *Agreeing on Native Title - Indigenous Land Use Agreements - A Local Government Template*, http://www.lga.sa.gov.au/webdata/resources/files/ILUA_Local_Government_Template_and_Explanatory_Documentation.pdf at 18/08/08; National Native Title Tribunal *Claims Negotiating Framework*, <<http://www.atns.net.au/agreement.asp?EntityID=3421>> at 18/08/08.

¹⁶² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission <http://www.hreoc.gov.au/social_justice/nt_report/ntreport07/chapter11.html> at 18/08/08.

¹⁶³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission <http://www.hreoc.gov.au/social_justice/nt_report/ntreport07/chapter11.html> at 18/08/08.

More importantly, while it is ideal to have some understanding of agreement standards, this cannot be expressed in absolute terms nor can it be removed from the specific cultural, economic or social context of the Indigenous parties involved. The effectiveness of a universal template model will need to be able to establish an ideal standard of outcomes while remaining flexible and adaptable to the needs of a particular Indigenous group.

Appendix 1: ILUA Summary

Please go to http://ntru.aiatsis.gov.au/research/ilua_summary.pdf for the most recent summary.

Appendix 2: Financial Models for Agreements between Indigenous Peoples and Mining Companies

FINANCIAL MODEL	BENEFITS TO INDIGENOUS PARTIES	DISADVANTAGES/ CHALLENGES FOR INDIGENOUS PARTIES	EXAMPLE
Single Up-Front Payment	<p>Certainty of benefit from project (not reliant on success of project)</p> <p>Simple to administer payment</p> <p>Receipt of immediate benefit.</p> <p>Use of up-front payment to resource potential opportunities created by project.</p> <p>Investment of payment may provide long term benefits.</p>	<p>Administrative capacity required for investment and management of payment to ensure ongoing benefits</p> <p>May result in trade off between certainty of benefit and size of payment</p> <p>Loss of money through investment errors or small returns on investment.</p> <p>No further opportunities to obtain financial benefits from project.</p> <p>Significant time lag between payment and effect of impacts from project may cause resentment particularly if no financial gain.</p> <p>If the nature, size or profitability of the project changes over time the payment can not be changed to reflect this.</p> <p>Relies on capacity to judge an appropriate payment amount prior to the commencement of a project. Probability that scale of payments may appear inappropriate over life of project.</p>	Eastern Gas Pipeline Agreement
Fixed annual payments	<p>Annual payment amounts may vary.</p> <p>Certainty of receipt of annual payments.</p> <p>Simple to administer</p> <p>Not reliant on company profits or mineral prices.</p> <p>Not an all or nothing scenario (as in above)</p> <p>Opportunity to learn from experience (bad investment decisions)</p> <p>Benefits begin to accrue at in the early stages of a project</p>	<p>Annual payment amounts may vary.</p> <p>If the nature, size or profitability of the project changes over time the payment can not be changed to reflect this.</p> <p>Not as beneficial as other models if agreement relates to an existing project.</p> <p>Probability that scale of payments may appear inappropriate over life of project.</p> <p>Royalty amount needs to be fixed to CPI or the real value falls over time.</p>	Century Mine

<p>Royalties based on output (Unit royalties)</p>	<p>Payments increase as the volume of minerals produced increases.</p> <p>Income generated generally stable in the short term (large changes to output don't occur quickly, assuming amount payable per tonne remains stable).</p> <p>Simple to administer (requires clause in agreement for Indigenous parties to access weight certificates for minerals shipped from the mine).</p> <p>Delay of 2-4 years before receipt of payment from new projects.</p>	<p>Payments decrease as the volume of minerals produced decreases.</p> <p>Increased volume of mineral production generally equates with increased impacts on environment, cultural heritage etc.</p> <p>Income received does not rise if commodity price rises.</p> <p>Royalty rate set at beginning of project when information about project profitability is limited/uncertain.</p> <p>Probability that scale of payments may appear inappropriate over life of project.</p> <p>Delay of payments in early stages of project may mean no resources to fund participation in other potential opportunities of project.</p>	
<p>Royalties based on value of mineral output (<i>ad valorem</i> royalty)</p>	<p>An increase in royalty rate, the volume of production or unit price will result in higher payments.</p> <p>Provides opportunity to share in the benefits of increasing mineral production and commodity prices.</p> <p>Delay of 2-4 years before receipt of payment from new projects.</p> <p>Royalty rate less likely to appear inappropriate over life of project as the level of payment adjusts to scale of project and value of commodity.</p>	<p>A decrease in royalty rate, the volume of production or unit price will result in lower payments.</p> <p><i>Ad valorem</i> royalty payments tend to vary more sharply than unit royalties, increasing uncertainty.</p> <p>Royalty rate set at beginning of project when information about project profitability is limited/uncertain.</p>	<p>Ranger uranium mine</p>
<p>Profit based royalties</p>	<p>Payment increases as company profits increase (can benefit from company's efficiency in cutting costs of production).</p> <p>Companies may agree to a higher royalty rate as they know they only have to pay if they make a profit.</p> <p>Complex to administer, require monitoring.</p> <p>Little benefit during early stages of project may be 5-10 years before project is profitable.</p>	<p>The ways in which companies may define profits may be open to different interpretations.</p> <p>If the project is not profitable, no payments will be received.</p> <p>Company profit levels tend to fluctuate, and thus so do royalty payments.</p> <p>Carry higher risk than other royalty models.</p>	<p>Cape Flattery Mine</p>

<p>Equity participation or shareholding</p>	<p>Equity provided free of charge or on a concessional basis.</p> <p>Opportunity to share in dividends paid by the company.</p> <p>Potential capital gain if shares can be sold for a higher value than they were acquired.</p> <p>Opportunity for greater partnership with company, participate more directly in decision-making.</p> <p>Opportunity to develop knowledge and experience for other joint ventures or commercial enterprises.</p> <p>If able to sell part of equity during early stage of project, may deliver benefits more quickly than profit royalty model.</p>	<p>Once shares sold, no further dividends or financial benefits can be derived from the project.</p> <p>If the project fails or share prices do not rise then little or no financial benefit will be received.</p> <p>May not be possible to get a shareholding in a particular project , shareholding may relate to several projects.</p> <p>High risk, as it may never yield dividend income.</p> <p>Reliance on commercial success of project could create conflicts of interest (eg heritage protection issues).</p>	<p>Adelong (NSW)</p> <p>Skardon River (Cape York, QLD)</p>
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