A Brief Commentary in Response to the Australian Government Discussion Paper ‘Optimising Benefits from Native Title Agreements’ and the Report of the Native Title Payments Working Group

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Please find attached brief comments prepared by Ms Kirrily Jordan and myself in response to the Australian Government Discussion Paper 'Optimising Benefits from Native Title Agreements' and the report of the Native Title Payments Working Group.

By way of introduction I include my comments from both an historical perspective and from a social sciences perspective having researched such issues since the early 1980s (including chairing a review of the Aboriginals Benefit Trust Account now ABA in 1984 for the Commonwealth Minister for Aboriginal Affairs) and more recently as Chief Investigator on an ARC Linkage project with Rio Tinto and the Committee for the Economic Development of Australia (CEDA). The outcomes from the ARC project will be published during the first half of 2009. I was not invited to provide input to either the Working Group or drafting of the Discussion Paper so Ms Jordan and I provide some comment now, although our comments will be more general than your specific questions many of which I believe have been addressed in the past, in one way or another, in an existing and extensive literature.

Both the Working Group Report and the Discussion Paper seek to address a complex issue of public policy, namely how can benefit sharing agreements ensure a flow of benefits to both current and future generations of intended Indigenous beneficiaries. It should be noted that most of the recommendations of the Working Party are constructive (although recommendation 5 seems unrelated to the Working Group’s terms of reference). However, it is quite unclear how the recommendations of the Working Group correlate with a further set of issues that need to be addressed. In particular, the question of how benefit sharing agreements can ensure a flow of benefits to current and future generations of intended Indigenous beneficiaries cannot be constructively examined until a number of first order issues are discussed and resolved. Four concerns that are identified with both reports are:

1. The need to reflect on history and available evidence. While both reports ostensibly focus on native title agreement payments this exercise is a little ahistorical and does not undertake any comparative analysis of similar issues that have bedevilled agreement payments under land rights regimes for the past 30 years.

2. The need to address threshold issues that are obscured in both papers, including the distinction between traditional owners and communities; whether payments are compensatory or a form of mineral rent sharing; and whether payments are
public or private. These three critical questions have been surprisingly conflated in both reports.

3 The need to examine the proper role of multinational corporations (MNCs) and the state in deciding on the use of payments made to Aboriginal interests in commercial negotiations. The lack of attention to this issue suggests the need for a radical rethink of the issues being examined in the inquiry process.

4 The need to focus on existing examples of best practice where local empowerment and performance are linked.

Both reports in my view ignore these complex issues and available evidence so the key point under discussion is rendered somewhat technical (to paraphrase anthropologist James Ferguson) ignoring history, statutory precedents and some of the complex politico-economic structural reasons for Indigenous disadvantage like state neglect and highly variable engagement of mining companies with Indigenous populations of mine hinterlands.

We address these key concerns briefly in our submission and end with four brief recommendations. It is our overall view that a more comprehensive assessment of the issues being addressed is required.

I would be happy to provide further information if required.

Yours sincerely

[Signature]

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1. THE NEED TO REFLECT ON HISTORY AND AVAILABLE EVIDENCE.

1.1 In the quest for Indigenous improvement linked to mining, the focus on legal agreements has all too often rendered the inquiries technical. When this occurs, the complicated historical, social, cultural and political considerations that all influence improvement are rendered invisible. Historically, there have been highly variable relations between the mining industry and Indigenous communities, and state support for forced removal and enforced mining approval in the face of Indigenous opposition.

1.2 Because issues rendered contemporary and technical overlook history, any discussion of such issues needs to go back over 50 years to the genesis of Australian state proposals to earmark payments from mining for Aboriginal benefit in the Northern Territory (NT). In the NT a statutory regime has been established to address a number of issues raised in the Australian Government Discussion Paper. For example, there is legal provision for statutory payments—now termed mining royalty equivalents (although in many situations they are not full equivalents)—as well as negotiated payments; for statutory division of statutory payments according to a formula and full transparency on how these moneys are utilised; and the taxing of payments at source via the Mining Withholding Tax (MWT). Unfortunately, a somewhat fuzzy distinction between statutory and negotiated payments in the NT Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) remains and while the MWT should deem mining payments tax free, in reality many payments are double taxed. We note that the latter is not an issue that is taken up in your Inquiry.

1.3 It should be noted that there is substantial evidence not yet considered by the Working Group. While much of this research is already available, the results of a major research project ‘Indigenous Community Organisations and Miners: Partnering Sustainable Regional Development’ will become available later in 2009. The research, undertaken by staff at the Centre for Aboriginal Economic Policy Research at the Australian National University between 2002 and 2007, was funded by an Australian Research Council Linkage Grant and industry partners Rio Tinto and the Committee for Economic Development of Australia (CEDA). The major question that this research, undertaken at a three regional sites in Western Australia, the Northern Territory and Queensland, set out to address is whether major long life
extractive mines located on Aboriginal-owned land and near Aboriginal communities have the
capacity to fundamentally alter the marginal socio-economic status of Indigenous Australians
in a sustainable manner. Its findings will be particularly useful in examining the question of
whether benefit sharing agreements ensure a flow of benefits to both current and future
generations of intended Indigenous beneficiaries. Each of the eight chapters raise key issues,
such as the problems of cost-shifting, the tensions between traditional owners and the broader
Indigenous community, and the overbearing nature of the state and multinational corporations
MNCs in how benefit sharing agreements are made and how agreement payments are spent or
quarantined. While the monograph is not yet publicly available, it is surprising that evidence of
these problems has not also been identified by members of the Working Group.

2. THE NEED TO ADDRESS THE DISTINCTION BETWEEN TRADITIONAL OWNERS AND COMMUNITIES;
WHETHER PAYMENTS ARE COMPENSATORY OR A FORM OF MINERAL RENT SHARING; AND WHETHER
PAYMENTS ARE PUBLIC OR PRIVATE.

2.1 The relationship between traditional owners (broadly defined) whose land is physically (and
spiritually) impacted by mining and Indigenous communities socially affected by mining
needs careful consideration. This issue has been complicated by historic inconsistency in the
application of moneys from benefit sharing agreements especially in the NT, but also elsewhere,
which allows considerable discretion in interpretation.

2.2 The long-standing lack of clarity about the nature of benefit sharing agreement payments
needs some clarification. Are these payments intended as compensation or a share of mineral
rent or a combination of both, and if the last, in what proportions? Moreover, if these payments
are compensatory shouldn’t they be used by traditional owners as compensation in any manner
they see fit, a little like compensation for surface disturbance? If, alternatively, they are a share
of mineral rent, shouldn’t equality of treatment also mean that traditional owners should be at
liberty to use these payments as they see fit like other Australians?

2.3 The associated long standing lack of clarity about whether such payments are public (and hence
there is a legitimate state interest in how they are expended) or private (and hence there is no
legitimate state or mining sector interest in how they are expended) needs attention. In general
it seems to us that while there may be a case that some payments under the NT land rights
regime may be public, this is generally not the case in agreements under the Native Title Act
regime unless state parties are also signatories and providers of financial benefits. If payments
are compensatory and private then a comparable interest test suggests that Indigenous land
owners should be treated no differently from non-Indigenous land owners.

3. THE NEED TO EXAMINE THE PROPER ROLE OF MULTINATIONAL CORPORATIONS AND THE STATE
IN DECIDING ON THE USE OF PAYMENTS MADE TO ABORIGINAL INTERESTS IN COMMERCIAL
NEGOTIATIONS.

3.1 The lack of attention to this issue suggests the need for a radical rethink of the issues being
examined in the inquiry process. The key question here is one of power. Who should have decision
making powers over the use of payments from benefit sharing agreements? In particular, what
role should multinational corporations and the Australian state play in deciding how benefit
sharing payments should be expended? Arguably, both are in potential conflict of interest and
face moral hazard. MNCs are likely to want to see benefit sharing payments invested in raising
local capacities so that direct compensation costs can be offset by the availability of cost-
effective Indigenous labour. And the state is likely to want benefit sharing agreement payments
to be committed to cover the cost of provision of state-like services as a form of cost shifting from the public to private sector. There is, arguably, a state interest in the use of mining royalty equivalents because by historical accident and bureaucratic intent these equivalents are paid from consolidated revenue and so are public moneys in the NT. In addition, given the growing interdependence of the state and the mining sector—the former increasingly dependent on the mining sector for revenue, the latter needing licence to operate from the state—to what extent does the state operate as a neutral arbiter in its dealings with Indigenous people?

3.2 There is evidence that in recent years the state has exercised excessive influence on how agreement moneys are utilised, recalling that the original statutory intent was for: a proportion to be paid to Aboriginal land councils as a source of income independent of normal budgetary processes and associated state dominance; a portion to be applied to or for the benefit of traditional owners and residents of areas affected by mining; and the balance to be paid to Aboriginal people in the NT on the advice of an all Aboriginal Advisory Committee that has frequently been by-passed. The excessive influence of the state in determining how these moneys are utilised is very evident in the much publicised case of the previous minister directing Aboriginal Benefit Account (ABA) funds to the Dreaming Festival in what was his electorate outside the NT and, more recently, by Minister Brough and now Minister Macklin earmarking ABA funds to pay traditional owners of townships for long-term leasing of their lands (Bathurst Island and Groote Eylandt) and for the operations of the Office of the Director of Township Leasing under s19A of ALRA. In general, in recent years, the ABA Advisory Committee has been increasingly marginalised from effective decision-making. It is salutary reading to consider the progressive agenda for the ABA envisioned and agreed in its only comprehensive and independent review some twenty five years ago compared to today.

3.3 The aim of the Working Group expressly refers to wealth creation in the broadest sense, including ‘positive health, educational, employment and economic development opportunities as well as social, cultural and spiritual wellbeing.’ But nowhere is there a reflection on what this means. There is a growing literature on Indigenous perspectives on wellbeing and a great risk that mainstream notions of economic development may actually undermine the social, cultural and spiritual wellbeing of some Indigenous peoples and communities. Both discussion documents overlook this crucial point. For example, while the report of the Working Group notes that not all Indigenous people aspire to work in the mining industry, the Discussion Paper (p.13) refers to a State and Territory Government commitment to a ‘target of work-ready Indigenous people who can be employed in mining and associated industries.’ It is unclear how this target would be determined, or if it is indeed what Indigenous people would want. The lack of recognition of diverse Indigenous interests and aspirations in the discussion documents underlines concerns about the role of the state in directing the use of payments to specific purposes. At the heart of this concern is a debate between a perspective that emphasises a policy goal of addressing socioeconomic inequality via engagements between Indigenous Australians and miners (mediated by the state) and a perspective that sees inherent value in a livelihood approach in which Indigenous cultural values and aspirations play an ongoing role.

3.4 While the Working Group does draw its membership from a diversity of interest groups including Indigenous land councils, native title representative bodies, community organisations, the mining, legal and academic sectors, it is unclear who is representing traditional owner views (or the views of others in remote communities that may be affected by mining agreements) on the use to which benefit sharing agreement payments should be applied? While public submissions are invited and information sessions are scheduled for several cities, the limited
terms of reference and the inbuilt assumptions about appropriate economic development suggest that broader Indigenous perspectives on development will be overlooked.

3.5 As an aside, we have noticed that some of the language or ideas contained in the Working Group Report have been changed and/or omitted in the Discussion Paper. For example, in their list of characteristics of good agreements the Working Group noted that agreements should be culturally appropriate (without saying what this means). The Discussion Paper has omitted this point. Where the Working Group refers to government investment in Indigenous training for mining jobs, the Discussion Paper refers to a ‘target’ of work-ready Indigenous people. The Working Group (p.14) notes the ‘need to take into account the communal decision-making processes and the rights and interests of the traditional owners,’ but this is overlooked in the Discussion Paper. As is evident in our focus on local perspectives, empowerment and aspirations, we concur with these points in the Working Group Report.

4. THE NEED TO FOCUS ON EXISTING EXAMPLES OF BEST PRACTICE WHERE LOCAL EMPOWERMENT AND PERFORMANCE ARE LINKED.

4.1 While the Working Group notes that details of many benefit sharing agreements are not made public, there are numerous existing and accessible examples of best practice in benefit sharing agreements. For example, Aboriginal landowners and the members of the Central Land Council (CLC) have initiated an innovative program to apply their own royalty and rent money to community development projects. Tired of waiting for services to be delivered to their communities and outstations, Aboriginal people in some areas in Central Australia are starting to pay for them with their own money. In a limited number of cases Aboriginal rent and royalties have been used to successfully leverage complementary government funding or support for community projects. The Warlpiri Education and Training Trust (WETT) is a positive example in which royalties from Newmont’s gold mining operations in the Tanami region (around $1.2 million annually for the life of the mine) is used to improve education and training outcomes for Warlpiri people in Yuendumu, Lajamanu, Willowra and Nyirripi. The WETT program, administered by the CLC, supports: culturally appropriate education for Warlpiri children; education, training, mentoring and professional development of Warlpiri adults, including educational professionals; relevant research and development; and a forum for the discussion of curriculum and syllabus development. Importantly, WETT supplements, rather than replaces, education and training services that are the responsibility of governments.

4.2 Another successful example is the Ngurratjuta/Pmara Ntjarra Aboriginal Corporation (NAC), a Northern Territory royalty association. The NAC is one of the oldest royalty associations operating in the NT, having been incorporated in 1985 under the then Commonwealth Aboriginal Councils and Associations Act 1976. In its critical position as broker and negotiator between two economic systems of production and distribution, the NAC has become a multi-dimensional financial organisation, delivering a wide range of social, economic, cultural and political services. Its activities have gradually expanded to include not only royalty trust account management and acting as a ‘clearing house’ (disbursing a proportion of ‘areas affected moneys’ and negotiated payments) but also: the development and management of an investment portfolio made up of a diverse set of assets; tourism project support services; the establishment and operation of an accounting service (Ngurratjuta Accounting Service); and the establishment and operation of an outstation resource agency.
Both reports are a poor basis for policy making as they provide very partial perspectives on complex statutory and moral issues and legal ambiguities within existing laws. There is a need to:

1. Address underlying tensions first. These can be understood in part as a tension between dominant western and subordinate Indigenous social norms. Indigenous land owners are treated inconsistently and differently from non-Indigenous land owners. Key terms are conflated in an unproductive manner.

2. Shift the approach of the inquiry from public policy for disempowerment, with an overemphasis on the direction of funds to specific purposes, to empowerment and enabling Indigenous responsibility.

3. Create and empower local Indigenous organisations and institutions so that they can manage discretionary dollars in accord with local values, social norms and local views of what is appropriate and productive.

4. Ensure that there is a high degree of consistency between the commentary and recommendations made in the Working Group Report and the Australian Government Discussion Paper. We have noted some inconsistencies as exemplars.