Submission to Australian Government discussion papers:

Leading practice agreements: maximising outcomes from native title benefits; and

Native title, Indigenous development and tax Consultation Paper

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About ANTaR

ANTaR is the pre-eminent non-Indigenous national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander people. We do this primarily through lobbying, public campaigns and advocacy.

ANTaR's focus is on changing the attitudes and behaviours of non-Indigenous Australians so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society.

ANTaR seeks to persuade governments, through advocacy and lobbying, to show genuine leadership and build cross-party commitment to Indigenous policy.

ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Indigenous Australians as First Peoples.

ANTaR is a non-government, not-for-profit, community-based organisation.

ANTaR campaigns nationally on key issues such as Close The Gap, constitutional change, the Northern Territory Emergency Response, reducing Aboriginal incarceration, eliminating violence and abuse, racism and other significant Indigenous issues.

ANTaR has been working with Indigenous organisations and leaders on rights and reconciliation issues since 1997.

Introduction

ANTaR thanks the Departments of Families, Housing, Community Services and Indigenous Affairs, Attorney-General's and Treasury for the opportunity to respond the discussion papers *Leading practice agreements: maximising outcomes from native title benefits* and *Native Title, Indigenous Economic Development and Tax.*

We have taken the opportunity to respond to both of the discussion papers in this submission and thank the respective departments for granting this flexibility.

Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits

On 3 June, the Attorney-General and Minister Macklin announced a consultation process on a package of reforms 'to promote leading practice in the governance of native title payments and in agreement-making'. This discussion paper forms the Government's initial response to the Joint Working Group on Indigenous Land Settlements (JWILS) terms of reference and the report of the Native Title Payments Working Group. In releasing this paper for consultation, the Government has indicated that it is consulting with stakeholders directly involved in native title on a potential package of reforms 'to improve native-title agreement making'.

The Government has stated that native title agreement-making has an important role to play in helping to 'close the gap'. Native title negotiations can, the Government believes, provide opportunities for reconciliation and the forging of new relationships.

In this submission, ANTaR responds to options proposed in the Discussion Paper relating to governance, the new statutory function and the leading practice toolkit. We do not address the proposed reforms to the Future Acts and Indigenous Land Use Agreements (ILUA) processes.

Discussion Paper: Native Title, Indigenous Economic Development and Tax

The Government's economic development and tax discussion paper proposes a number of options to reform the tax system in order to 'support the resolution of [native title] claims and the management of benefits under native title agreements'.[1] The paper seeks to respond to concerns about the complex and uncertain tax implications of native title claims. The three reform options proposed are:

- An income tax exemption
- A new tax exempt vehicle; and
- A native title withholding tax.

The paper also discusses the use of deductible gift recipient categories to deliver benefits for communities, 'consistent with the Government's commitment to closing the gap on Indigenous disadvantage'.

[1] Native Title, Indigenous Economic Development and Tax, Consultation Paper, May 2010, Foreword by The Hon Nick Sherry at Page v.

ANTaR notes that both of the above Discussion Papers raise issues of great complexity and significance for native title holders. We therefore urge the Government to continue consultations on these issues to ensure that the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples is obtained before any changes are made, as required by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

ANTaR's approach to native title issues is informed by principles of self-determination, human rights and social justice. From this perspective, we argue that any reforms to native title must respect the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[2]

Summary of recommendations

ANTaR recommends that:

- **The Government continue consultations with affected Aboriginal and Torres Strait Islander peoples in order to obtain free, prior and informed consent before any changes to the native title agreement-making or tax systems are made.**
- **The Government <u>not</u> proceed with the creation of a new statutory function.**
- **The Government instead increase resources for capacity development for native title holders through funding to Prescribed Bodies Corporate and Native Title Representative Bodies.**
- **The Government explore ways to support Indigenous organisations and communities to implement agreements in consultation and negotiation with Indigenous stakeholders and communities.**
- **The Government support the implementation of Recommendation 4 of the Native Title Working Group, which states that:**

The Minerals Council of Australia, NNTC and the Australian and State and Territory Governments should produce guidance materials on negotiation, content and implementation of agreements. Specifically, the guidance should:

1) ***highlight leading practice approaches for all parties in the agreement making process;***
2) ***identify the characteristics of good agreements; and***
3) ***provide guidance on generic clauses that should be a feature of such agreements.***

- **The Government support existing independent research and knowledge management projects on native title agreements**
- **The Government proceed with the proposal to introduce income tax exemptions for all payments flowing from native title agreements;**
- **The Government proceed with the proposal to establish a new tax exempt 'Indigenous Community Fund' entity under legislation to receive payments flowing from native title agreements;**

[2] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009,* recommendation 2.1.

- **The Government not proceed with the proposal to introduce a Native Title Withholding Tax;**
- **The Government proceed with the proposal to create a new DGR category for Indigenous organisations that carry out activities across multiple DGR categories.**

The UN Declaration on the Rights of Indigenous Peoples

The Australian Government indicated its support for the UN Declaration on the Rights of Indigenous Peoples on 3 April 2009.The Declaration is a comprehensive statement of Australia's existing human rights obligations to Indigenous Australians. Although it does not create new rights, it provides a comprehensive framework for action and a guide to the way Government should engage with Indigenous peoples.

Article 19 of the Declaration gives expression to the right to free, prior and informed consent which provides that:

> States shall **consult and cooperate** in good faith with the indigenous peoples concerned through their own **representative institutions** in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.

The right applies to measures which affect land and resources.

ANTaR endorses the Social Justice Commissioner's call for the principle of free, prior and informed consent to be reflected throughout the native title system, and the recommendation of the National Native Title Council that the principle should underpin the native title agreement-making process. The Social Justice Commissioner outlines guidelines for engagement and consultation processes to promote FPIC at the end of his 2009 report, to which we refer the Government.

ANTaR also highlights the right of Indigenous peoples to 'determine and develop priorities and strategies for exercising their right to development', contained in Article 23 of the Declaration.

ANTaR recommends that:

- **The Government continue consultations with affected Aboriginal and Torres Strait Islander peoples and in order to obtain free, prior and informed consent before any changes to the native title agreement-making or tax systems are made.**

The Native Title Payments Working Group report

The Native Title Payments Working Group report identified a range of issues that impede successful native title agreements, including the:

- Lack of existing good agreements to provide leading practice models;
- Lack of available data about the terms of agreements resulting in:
    - Agreements lacking transparency;

    - Unnecessary expenditure because all new agreements have to be drafted from scratch;
- Lack of capacity within the native title system to support traditional owners, particularly in the negotiation stage;
- Lack of capacity of Indigenous organisations and communities to implement agreements due to:
    - Insufficient attention being placed on implementation;
    - Inadequate human and financial resources available for monitoring and implementing agreements; and
    - Lack of financial literacy and understanding among PBC members around the role of trusts and the importance of corporate governance.
- Systemic lack of government investment in core citizenship entitlements and normal government services in mining areas. Benefits from agreements that could otherwise be applied to economic development are therefore often directed to the provision of public infrastructure and services (that should be the responsibility of governments).

ANTaR is concerned that the Government discussion papers fail to address many of the factors identified by the Working Group, and proposes a mechanism – a new statutory function - that was explicitly rejected by the Working Group. Indeed, prominent members of the Working Group have expressed concerns that the Government has ignored its recommendations (see, for example, public comments by Professor Marcia Langton).[3]

Although the Working Group highlighted the lack of data about agreements as an obstacle, ANTaR believes that this issue can be addressed in a range of ways which do not require bureaucratic review and regulation. For example, we highlight below the role of independent research projects in collecting and analysing information about agreements, as well as the possibility of parties voluntarily agreeing to share some information about agreements.

PART 1: Response to 'Leading practice agreements: maximising outcomes from native title benefits' discussion paper

Overview of proposed reforms

As noted above, the Government's stated objective is to 'improve' native title agreement-making, in particular, 'to maximize the benefits of native title agreements to communities and future generations'.

The discussion paper proposes a number of possible reforms, including:

- Governance reforms to entities receiving native title payments;
- Linking governance measures to tax treatment to create an incentive for compliance;
- Creating a new statutory function to 'review the sustainability of benefits packages, amongst other functions;
- Reviewing agreements against 'leading practice principles';
- Creating a 'leading practice agreements toolkit';

[3] World News Australia, 'Native Title Reform branded 'racist'', 10 June 2010, Online: http://www.sbs.com.au/news/article/1275632/Native-Title-reform-branded-%27racist%27-#, Accessed on 22 November 2010

- Reforming the Future Acts process to 'streamline and improve transparency'; and
- Increasing information on the Register of Indigenous Land Use Agreements.

Is there a case for reform?

In answering this question, we need to ask:

- Is there a problem?
- If yes, what is the cause, nature and scale of the problem? and
- Given the above, what is the most effective and appropriate response to the problem?

ANTaR is keen to ensure that native title holders are able to maximize the benefits of native title agreements and exercise their right to economically develop their land.

We share the Government's concern that native title agreements have largely failed to deliver substantial and long-term benefits to Aboriginal and Torres Strait Islander Australians.

We note, in this context, the broad definition of 'wealth' proposed by the Native Title Payments Working Group, 'encompassing positive health, educational, employment and economic development opportunities as well as social, cultural and spiritual well-being', and advocate a similarly broad definition of 'benefits'.[4]

However, while we are concerned about the failure of agreements to deliver substantial benefits, we believe that this is related less to the poor management and administration of native title payments than to the lack of a level playing field between native title parties.

We are also mindful that benefits from agreements which could otherwise be applied to economic development have instead been directed to meeting the infrastructure and service needs of disadvantaged communities, due to the 'systemic lack of government investment in core citizenship entitlements and normal government services in mining areas', a point made by the Native Title Working Group in its report, and cited above.[5]

In proposing these reforms, the Government states that it is motivated by a number of factors:

- The growing number, and increasing value, of native title agreements;
- The need for benefits arising from native title agreements to be deployed for future generations (and perception that this is not always currently the case);
- The 'pressing need' for improved transparency and to ensure leading practice agreements;
- Concerns expressed to Government by Indigenous groups and Industry about agreements and governance arrangements; and
- The need for review of agreements and data collection to inform evidence-based policy and guide future initiatives.

[4] Native Title Payments Working Group Report at 1.

[5] Ibid at 4.

However, although identifying these factors, the Government provides little or no evidence to demonstrate the existence or scale of the problem it identifies. In particular, no evidence is provided on trends in the number and value of native title agreements. Beyond anecdote, no evidence is provided as to the number and nature of complaints to the Minister about the agreement-making process. It is not clear to what extent Indigenous stakeholders generally perceive there to be a 'pressing need' for reform.

Affected and interested stakeholders therefore have the difficult task of seeking to engage with the Government's proposed reforms, without any sense of the existence, scale or nature of the problem to which the reforms are proposed as a response.

The Discussion Paper claims that native title agreements have been increasing in value and implies that substantial benefits flowing from agreements are not being used optimally or sustainably by communities. However, the available evidence suggests that few communities have received substantial benefits from native title agreements.

In his 2009 report, the Social Justice Commissioner notes that native title agreements have often failed to deliver on the promise of substantial benefits for Aboriginal and Torres Strait Islander communities.[6] The Native Title Payments Working Group report found that:

> *…while hundreds of agreements exist between traditional owners and industry, there are only around a dozen agreements that provide substantial benefits to Aboriginal people…The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the Native Title Act 1993 (NTA) is, in itself, deserving of an inquiry.*[7]

This finding is supported by research by Marcia Langton and Odette Mazel which shows that many Indigenous communities have experienced little or no improvement in their social and economic status, despite state and federal legislation relating to mining and Indigenous rights and corporate responsibility standards.[8] For this reason, Professor Langton has described the proposed statutory oversight function as a 'waste of time'.[9]

In his 2009 report, the Social Justice Commissioner suggested that the Government should focus on creating a level playing field between Indigenous parties, resource companies and governments to produce better outcomes for communities, including by strengthening the underlying procedural rights of negotiation.[10] As the Commissioner stated:

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[6] At 57.

[7] Native Title Payments Working Group (2008), 'Native Title Payments Working Group report', Australian Department of Families, Housing, Community Services and Indigenous Affairs, Canberra. Available at: http:/ /www.fahcsia.gov.au/indigenous/native_title_wg_report/Native_title_working_group_report.pdf

[8] M Langton and O Mazel, '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, p. 38, cited in the *2009 Native Title Report* at 57.

[9] World News Australia, 'Native Title Reform branded 'racist'', 10 June 2010, Online: http://www.sbs.com.au/news/article/1275632/Native-Title-reform-branded-%27racist%27-#, Accessed on 22 November 2010

[10] At 19.

> "Communities know their own priorities. Once they have more power, they will be in a better position to pursue the outcomes they want to see achieved."[11]

This view is reflected in research conducted by Jon Altman and Kirrily Jordon which highlights the need to create and empower local Indigenous organisations so they can manage benefits 'in accord with local values, social norms and local views of what is appropriate and productive'.[12]

In this context, it is important to acknowledge that not all communities have the potential for resource or infrastructure development and the royalties that such development can deliver. Communities also have very different development priorities, resources, social and environmental contexts and aspirations.

ANTaR is concerned that a number of the measures proposed would involve extensive Government interference and oversight of the decisions of native title holders. While Governments do play a role in markets in prohibiting unscrupulous behaviour, as the Discussion Paper notes, they generally do not prevent legal entities from voluntarily entering into lawful agreement as is proposed in relation to native title holders.

ANTaR accepts the importance of native title holders understanding the contents of agreements and processes. We also want to ensure that the native title agreement-making process is designed to support Indigenous parties to negotiate fair and equitable agreements, which have real benefits for communities and future generations. However, we believe that a key impediment to better outcomes for communities is the lack of a level negotiating playing field, which would not be addressed by the proposed reforms.

In our recent Election Priorities Statement, ANTaR made a number of recommendations for reform of the native title system, including recommendations to support native title holders to negotiate better agreements, including:

- Providing additional resources to Native Title Representative Bodies to ensure they are adequately resourced to represent Indigenous peoples in native title negotiations;
- Providing additional resources to Prescribed Bodies Corporate to ensure that they are able to fulfill their responsibilities to manage their lands;
- Working with Aboriginal and Torres Strait Islander peoples to develop a social justice package which complements the native title system.

'Governance measures'

The Government is considering a range of governance measures that would affect entities that receive native title payments, such as:

- Incorporation;
- Independent directors;

[11] At 19.

[12] Altman, J. and Jordan, K. (2010), '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', CAEPR *Topical Issue* No. 03, Centre for Aboriginal Economic Policy Research, p. 3.

- 'enhanced democratic controls', such as by enhancing accountability and transparency for beneficiaries.

The Government is also exploring ways to encourage adoption of 'leading practice principles', including by mandating compliance or making compliance a condition of receiving any favourable tax treatment.

Good governance is a critical precondition for communities to be able to determine their strategic goals and priorities and make decisions. Governance is fundamentally concerned with issues of control, capacity and power. In this way, there are clear links to the right to self-determination, free, prior and informed consent and the UNDRIP.

Accepting that good governance is essential for community development, it is essential to then establish what policy settings are needed to support Indigenous governance. To this end, we refer the Government to the recommendations of the Reconciliation Australia/ ANU *Indigenous Community Governance Project – Year Two Research Findings,* in particular, Recommendation 6.6.1, which states:

> *There is an urgent need for a nationally coordinated approach to the provision of governance capacity development and training that is targeted, high quality and place-based. Governance capacity development is needed for leaders, managers and staff of organisations and community groups. Given the pivotal role of governance for Indigenous social, economic and cultural outcomes on the ground, serious consideration should be given to the early establishment of an Australian Indigenous Governance Institute to:*
> *• foster, encourage, communicate and disseminate best practice in Indigenous governance and design*
> *• encourage, facilitate and, where practicable, collaborate with relevant bodies at the national, state, territory and local levels to develop practical, culturally-informed educational and training materials, tools and resources to support the delivery of governance and organizational development at the local level*
> *• facilitate and implement the development of 'train the governance trainer' and mentoring courses, particularly targeted at developing a sustainable pool of Indigenous people with the requisite professional skills, and*
> *• commission and undertake applied research to support those functions.*
> *The Institute should be funded on a joint basis by the Australian, state and territory governments, and also be able to seek support from the philanthropic and private sectors.*[13]

'Improving Governance and Native Title Agreements'

Proposed new statutory function

The Government is considering the creation of a new 'statutory function', independent of Government, with powers to:

- review and assess native title agreements;
- advise parties on implementing 'leading practice principles';
- research and communicate on leading practice;

[13] Working Paper 36, Centre for Aboriginal Economic Policy Research, 2007 at xvi.

- report on trends and issues;
- advise Ministers where parties are not prepared to adopt leading practice principles; and
- possibly assess access to tax benefits.

The Government has emphasised the role of the review function in supporting native title parties. The Discussion Paper canvasses a range of possible entities which could carry out the proposed new statutory function, including the Office of the Registrar of Indigenous Corporations (ORIC), a new independent body or private firms. The paper suggests that only future act agreements would be required to be registered with the new body, on the basis that these agreements have the most potential to benefit native title groups.

Agreements would be reviewed by the body to identify:

> …the capacity of the agreements to contribute to the intergenerational, social and economic development of native title holders and claimants, including whether the agreements incorporate leading practice.

The discussion paper identifies a number of possible leading practice elements against which agreements would be assessed and notes that a registration fee may be charged.

The new body would review all registered agreements and identify select agreements for assessment. No guidelines are proposed in the discussion paper by which a decision to assess could be made. It is therefore unclear what factors would be likely to trigger an assessment.

Importantly, the new body would not have a veto power over agreements.

The Government does not specify what it envisions by the term 'social and economic development' in this case. Altman and Jordan, in their response to the Discussion Paper, note that attempts to address socioeconomic inequality through engagements between Indigenous people and mining or other corporations may actually undermine the social, cultural and spiritual wellbeing of some Indigenous peoples and communities.[14] This raises the importance of native title holders being able to self-determine their development priorities and aspirations.

ANTaR's position on the proposed statutory function

As indicated above, ANTaR is not convinced of the need for increased bureaucratic regulation and oversight of native title agreements. Our priority is to ensure that native title holders are supported to self-determine their priorities and the way that any benefits flowing from native title agreements are managed. The Government's focus should be on building capacity and strengthening governance rather than increasing regulation.

[14] Altman, J. and Jordan, K. (2010), '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', *CAEPR Topical Issue* No. 03, Centre for Aboriginal Economic Policy Research, p. 3.

For this reason, we support the National Native Title Council's (NNTC) statement in its submission to the Attorney-General in 2008:

> *it is imperative that native title holders' right to take responsibility for themselves and to make decisions that affect their own lives be enhanced and maintained.*[15]

We also echo the concerns expressed in the media by a number of Indigenous leaders and native title experts, including Warren Mundine and Professor Marcia Langton:

> "I do have serious concerns about another layer of bureaucracy, another layer of expenditure which is going into bureaucracy that should be going to Indigenous people. And I do have concerns in governments micromanaging Indigenous people,"[16]
>
> Warren Mundine, Chief Executive of Native Title Services Corporation

The Native Title Payments Working Group report explicitly stated that it 'was inappropriate to mandate legislatively how benefits under agreements should be provided and applied'. The Working Group also raised legal and equity concerns about such an approach on the basis that Indigenous people would be singled out for increased regulation which does not apply to non-Indigenous people. It also raised concerns that little would be learned about best practice agreement-making by simply imposing legislative requirements on native title parties.[17] In this context, the Government's proposed leading practice toolkit would be a more effective and useful approach.

ANTaR is concerned that the proposed review and assessment powers of the new statutory function will impinge on the ability of native title holders to make their own decisions on the content of agreements and the way that any benefits are used. We are also concerned about the potential external imposition of development principles that may be foreign to communities and inconsistent with the aspirations of local communities. In this regard, the lack of recognition of the diversity of Indigenous interests and aspirations in the Government's discussion paper raises concerns about the state playing such a dominant role in determining what constitutes 'leading practice' for native title parties.

In his 2009 report, the Social Justice Commissioner made a number of recommendations regarding native title agreements, including proposals to increase access to agreements and promote best practice or model agreements.

Recommendations 3.20, 3.21 and 3.22 all relate to the agreement making process:

> **3.20:** That the Australian Government:

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[15] National Native Title Council (2008), *NNTC policy position on native title: submission to the Attorney-General*, 11 July, p.3.

[16] World News Australia, 'Native Title Reform branded 'racist'', 10 June 2010, Online: http://www.sbs.com.au/news/article/1275632/Native-Title-reform-branded-%27racist%27-#

[17] Native Title Payments Working Group (2008), 'Native Title Payments Working Group report', Australian Department of Families, Housing, Community Services and Indigenous Affairs, Canberra. Available at: http:/ /www.fahcsia.gov.au/indigenous/native_title_wg_report/ Native_title_working_group_report.pdf

- Consider options for increasing access to agreements (while respecting confidentiality, privacy obligations and the commercial in confidence content of agreements)
- Support further research into 'best practice' or 'model' agreements
- Support further research into best practice negotiating processes.

3.21: That, where appropriate and traditional owners agree, the Australian Government promote a regional approach to agreement-making.

3.22: That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.

Given the lack of data on native title agreements, ANTaR recommends increased funding for independent research projects to collect more data on the nature, scope and value of agreements. This information will also be essential to the development of a best practice toolkit.

The Government proposal focuses on regulating and reviewing the outcomes of an agreement-making process, rather than supporting parties to the process from the outset to facilitate better outcomes. This is despite the fact that the Native Title Working Group argued that:

'The foundational principle in any significant future act negotiation should be that the traditional owners should have available to them advice and representation of a similar quality as the mining company or other proponent. In other words there should be a level playing field.'[18]

In response to this issue, the Working Group recommended better resourcing of NTRBs and PBCs to assist traditional owners, particularly at the negotiation stage. ANTaR supports this recommendation, as noted above.[19]

The proposal to create a new statutory function also fails to support the implementation and monitoring of agreements by the native title holders. The Native Title Working Group identified the 'lack of capacity of Indigenous organisations and communities to implement agreements once made' as an obstacle in the way of successful agreements.[20] Resources directed to this stage of the process would help to ensure that communities were better able to leverage and maximize the outcomes from agreements.

ANTaR recommends that:

- **The Government <u>not</u> proceed with the creation of a new statutory function;**
- **The Government instead increase resources for capacity development for native title holders through funding to Prescribed Bodies Corporate and Native Title Representative Bodies.**
- **The Government explore ways to support Indigenous organisations and communities to implement agreements in consultation and negotiation with Indigenous stakeholders and communities.**

Leading practice agreements toolkit

18 At page 3.

19 Recommendation 3 at page 15.

20 At page 4.

The Government is considering developing a leading practice toolkit. This is intended to assist parties in designing and implementing native title agreements that adhere to the leading practice principles against which they would be reviewed or assessed by the new review function.

The toolkit would provide detailed information on how these principles could be implemented, as well as guidance on agreement planning, negotiation, drafting and implementation. It is also suggested that the toolkit could provide a consolidated list of links to existing government programs and resources that could provide support, advice, training, capacity development and business development opportunities.

The discussion paper acknowledges that the content of the tool-kit would need to be regularly updated, and that there are inherent difficulties in trying to create a standardised toolkit that applies across different jurisdictions, regions and kinds of agreements.

ANTaR generally supports the development of leading practice principles and materials in some form, and believes this has the potential to be useful for native title parties and contribute to broader community development initiatives. Despite this, we are concerned to ensure that the principles do not merely reflect a lowest common denominator position, or impose overly prescriptive and inflexible requirements on native title parties.

We note the best-practice principles identified by the Working Group in its report, including:

- Aboriginal control of funds;
- Strong governance arrangements with multiple safety nets;
- Significant emphasis on training and capacity building of Aboriginal managers of funds.

We recommend that key stakeholders are involved in the development of the relevant principles.

ANTaR recommends that:

- **The Government support the implementation of Recommendation 4 of the Native Title Working Group, which states that:**

The Minerals Council of Australia, NNTC and the Australian and State and Territory Governments should produce guidance materials on negotiation, content and implementation of agreements. Specifically, the guidance should:

a) highlight leading practice approaches for all parties in the agreement making process;
b) identify the characteristics of good agreements; and
c) provide guidance on generic clauses that should be a feature of such agreements.

- **The Government support existing independent research and knowledge management projects on native title agreements.**

Part 2: Response to 'Native Title, Indigenous Economic Development and Tax' discussion paper

In May 2010, the Commonwealth Government released a discussion paper entitled *Native Title, Indigenous Economic Development and Tax*.

The paper canvasses a variety of tax reforms that could potentially improve economic outcomes for Indigenous people. The Government proposes three distinct approaches:

1. Income tax exemptions for payments made under native title agreements, and for specific entities created under legislation to hold monies arising from native title agreements.

2. The establishment of an 'Indigenous Community Fund' as a new tax exempt entity to 'deal with the taxation of benefits when they are used for a range of purposes'[21].

3. The establishment of a Native Title Withholding Tax (NTWT), modeled on the Mining Withholding Tax (MWT). Parties who make native title payments would be required to withhold a specified amount of tax and pass it on to the ATO. The remainder of the payment would be tax exempt if on-distributed to the native title holders or their representative body.

The Consultation Paper notes that native title is a unique legal right. The interaction of native title payments with the taxation system is new and lacks legal precedence.

The Paper also invites comment on the potential use of the tax system to promote Indigenous economic development. In doing so, it notes that 'direct spending programs are ordinarily better suited' to supporting this priority.[22] Options to support economic development in this paper are limited to the possibility of creating a new general deductible gift recipient (DGR) category, which would include Indigenous organisations that carry out activities across multiple DGR categories.

ANTaR welcomes Government moves to address existing uncertainty about the interaction between native title and the income tax system.

ANTaR is not in a position to offer detailed analysis of each of the proposed options. However, we make some general points below about each from a perspective informed by the right to development and community development principles. As a starting principle, we note the distinctive compensatory nature of native title payments and argue that minimal or no tax should be imposed on these payments.

Approach 1: Income Tax Exemptions

The first approach proposed in the paper is income tax exemptions for payments made under native title agreements, and for specific entities created under legislation to hold monies arising from native title agreements.

[21] Tax Consultation Paper, p. 8
[22] Consultation Paper, p 1.

Options to ensure appropriate governance of such entities include: incorporation under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; legislation prescribing the features of the governance arrangements; and a requirement that the entity operate as a discretionary or non-discretionary trust.[23]

There is a strong case for native title payments to be granted an income tax exemption, with an exemption likely to assist in efforts to improve social and economic outcomes.

Approach 2: Indigenous Community Fund

ANTaR is broadly supportive of 'Option 3.2 – Indigenous community fund'.

Under this model, a new kind of entity, an Indigenous community fund, would be established under legislation and payments received into the fund would remain tax exempt when they are used for certain purposes. Broadly speaking, the specific purpose of such a fund would be to 'be used for the benefit of a particular native title group, a number of such groups and/or Indigenous Australians more generally'.[24]

The fund could receive payments made under native title agreements and payments associated with the fund's overarching purpose, with investment earnings assessable except if used for certain purposes. Payments to individuals from the fund would only be tax exempt to the extent that they support the fund's purpose.

The discussion paper raises a number of possible governance requirements for community funds – canvassing possibilities of mandatory incorporation, a requirement to operate as a discretionary or non-discretionary trust or to merely prescribe in legislation key governance features which are required, without prescribing a governance form. ANTaR believes that the last option would offer greatest flexibility for Indigenous communities and is best adapted to respond to the diversity of native title holder groups and aspirations.

Approach 3: Native Title Withholding Tax (NTWT)

The third approach involves the establishment of a Native Title Withholding Tax (NTWT), modeled on the Mining Withholding Tax (MWT). The MWT is currently levied on 'mining payments' made to Aboriginal people and/or a distributing body (like a land council) in relation to the use of Aboriginal land for mining and exploration.

Parties who make native title payments would be required to withhold a specified amount of tax (4% under the MWT) and pass it on to the ATO. The remainder of the payment would be tax exempt if on-distributed to the native title holders or their representative body.[25]

Such a regime was announced by the Howard Government in 1998 but was never enacted.

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[23] Office of Native Title, WA, Newsletter, June 2010, Online: *www.ont.dotag.wa.gov.au/_files/Newsletter_June2010.pdf*

[24] Discussion paper at 11.

[25] Office of Native Title, WA, Newsletter, June 2010, Online: *www.ont.dotag.wa.gov.au/_files/Newsletter_June2010.pdf*

ANTaR believes that, as a compensation payment, payments made under native title agreements should generally not be taxed. We therefore support tax exemption models and oppose the proposed Native Title Withholding Tax. More specifically, we have concerns about the flat tax model, which will operate inequitably. In doing so, we note the criticisms of the MWT as being both inequitable and inefficient.

New Deductible Gift Recipient category

ANTaR is broadly supportive of a new DGR general category for Indigenous organisations that carry out activities across multiple DGR categories.

ANTaR recommends that:

- **The Government proceed with the proposal to introduce income tax exemptions for all payments flowing from native title agreements;**
- **The Government proceed with the proposal to establish a new tax exempt 'Indigenous Community Fund' entity under legislation to receive payments flowing from native title agreements;**
- **The Government not proceed with the proposal to introduce a Native Title Withholding Tax;**
- **The Government proceed with the proposal to create a new DGR category for Indigenous organisations that carry out activities across multiple DGR categories.**