National Indigenous Australians Agency Post-Draft Submission to the Productivity Commission Draft Report on Resources Sector Regulation

July 2020

Executive Summary

The NIAA welcomes this study by the Productivity Commission into regulations affecting business investment in the resources sector in Australia. We acknowledge and appreciate the extended submission period due to the impact of COVID-19.

We welcome the focus on international leading practices and the opportunity this presents to learn from other jurisdictions in advancing Indigenous prosperity in Australia.

The rights and interests of Indigenous Australians are intrinsic to the regulatory framework governing resource operations and to the relationships with Indigenous communities where resource companies operate. In contemporary agreement making practice, the guiding principle underpinning these relationships is typically one of partnership. There are many examples in recent decades of successful agreements between resource companies, traditional owners and Indigenous communities that have delivered mutual benefits. These benefits include local employment and training for Indigenous Australians and the opportunity to save, build wealth and start businesses.

Economic development and jobs are a key element of the partnership with Indigenous Australians to 'close the gap' on Indigenous disadvantage. Land security and economic security are also fundamental to achieving outcomes under the Northern Australia Indigenous Development Accord, signed by the Prime Minister and jurisdictional leaders in December 2019. The Accord remains integral to the refresh of the Northern Australia White Paper. [1]

Agreement making gives Indigenous Australians a seat at the resource development table. But work remains to be done to increase the capacity of traditional owners and representative bodies to engage more effectively in the negotiation process and to take on the role of proponents and investors to make the most of economic development opportunities.

There also remains an opportunity for the resources sector to continue building its capacity to more effectively engage with traditional owners and to better understand the opportunities for agreement making afforded by the regulatory framework governing Indigenous rights and interests in land. This includes working in partnership to protect Indigenous cultural heritage and sacred sites.

Section 1 of this submission gives an overview of the current reform program for the *Native Title Act 1993* and provides information on issues raised in the draft report.

Section 2 references the current review of Part IV (Mining) of the *Aboriginal Land Rights (Northern Territory) Act 1976* and provides information on issues raised in the draft report.

Section 3 deals with Indigenous heritage protection matters and Section 4, the Australian Government's Indigenous procurement policy.

The Appendix addresses benefit sharing arrangements and issues associated with native title and building Indigenous land holders' opportunities to engage as proponents or participants in native title agreement making.

[1] https://www.niaa.gov.au/resource-centre/indigenous-affairs/northern-australia-indigenous-development-accord

1. Native Title Act 1993

Introduction

The Attorney-General and the Minister for Indigenous Australians have joint responsibility for the *Native Title Act 1993* (NTA). The Minister for Indigenous Australians is responsible for Native Title Representative Bodies and Service Providers and Prescribed Bodies Corporate (PBCs) under Part 11 and Division 6 and 7 of Part 2 of the NTA. The Attorney-General is responsible for the remaining parts. This includes the future acts regime and those sections dealing with agreement making, including so-called 'section 31' agreements (referred to below) which are common in the resources sector. The Ministers work closely together on matters of policy that affects those who hold or may have native title.

Native Title Legislative Amendment Bill 2019

The *Native Title Legislation Amendment Bill 2019* (the Bill) was introduced into the Australian Parliament on 17 October 2019. The Bill seeks to amend the NTA and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) to improve the native title system for all parties, including by:

- supporting the capacity of native title holders through greater flexibility around internal decision making;
- streamlining claims resolution and agreement-making processes;
- allowing historical extinguishment to be disregarded over areas of national, state or territory parks with the agreement of the parties;
- increasing the transparency and accountability of PBCs to native title holders (for example by removing the discretion of PBC directors to refuse membership and limiting the grounds for cancellation of membership by PBCs), and
- improving pathways for dispute resolution following a determination of native title (for example by providing a new ground for the appointment of a special administrator by the Registrar of Indigenous Corporations in circumstances where a PBC has seriously or repeatedly failed to comply with its native title obligations).

The Bill will also confirm the validity of agreements made under section 31 of the NTA in light of the Full Federal Court of Australia's decision in *McGlade*. Section 31 agreements are a particular kind of native title agreement which relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.

While the Government took decisive action to ensure the validity of Indigenous Land Use Agreements through the amendments in 2017, there is a significant risk that the issue raised by the *McGlade* decision similarly affects section 31 agreements.

The Bill is informed by feedback from stakeholders following public consultation on an options paper for native title reforms released in November 2017, with 52 submissions received and over 40 consultation meetings held across Australia. Exposure draft legislation released in October 2018 attracted 36 submissions.

An Expert Technical Advisory Group was also convened on four occasions to provide technical advice on the reforms. This group comprised representatives from the National Native Title Council, including National Native Title Representative Body (NTRB) representatives, the National Native Title Tribunal, States and Territories and industry.

The amendments aim to better support economic and investment opportunities for traditional owners by giving native title holders greater flexibility around their internal decision-making

processes, making improvements to the processes relating to native title claims resolution and agreement making, and better supporting the sustainable management of native title post determination.

Draft finding 5.3

The McGlade decision of the Federal Court in 2017 created concerns in the resources industry about the validity of native title agreements that had only been signed by the majority of the individual members of the applicant. Amendments proposed in the Native Title Legislation Amendment Bill 2019 (Cth) should address these concerns.

As noted above, the Bill will confirm the validity of agreements made under Part 2, Division 3, Subdivision P of the NTA (section 31 agreements) following the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10. While the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* confirmed the validity of area ILUAs affected by *McGlade*, there is a significant concern that section 31 agreements not signed by all members of the applicant (or registered native title claimant) may be similarly affected.

Confirming the validity of these agreements will provide certainty to traditional owners around benefits they have negotiated and agreed with other parties under section 31 agreements (and which can, for example, include compensation in return for the grant of mining or exploration tenements over native title land). Stakeholder operating in the native title system generally support the validation of section 31 agreements.

Draft Finding 5.4

The level of compensation paid for resources developments on native title land has typically been a matter for proponents and native title groups. However, the Timber Creek decision of the High Court in 2019 went to the value of native title rights and interests and could affect agreement-making with native title groups. Any uncertainty will likely be resolved as access negotiations occur over time.

The NTA provides native title holders with an entitlement to compensation for any loss, diminution, impairment or other effect of certain acts on their native title rights and interests. On 13 March 2019, the High Court delivered its judgment in the matter of Northern *Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 (Timber Creek). Timber Creek is the first judicial determination of the principles governing the entitlement to compensation on just terms for the extinguishment or impairment of native title under the NTA.

The High Court awarded the Ngaliwurru and Nungali native title holders compensation totalling $2.53 million, made up of:

- $320,250 for economic loss;
- $910,100 for interest on the economic loss; and
- $1.3 million for what the High Court termed ‘cultural loss’.

In clarifying how compensation can be valued, the High Court’s judgment in *Timber Creek* represents a significant milestone for native title. The *Timber Creek* decision will provide guidance to native title holders and proponents assisting them with agreement negotiations. However, further jurisprudence may be needed to clarify outstanding issues such as how to quantify compensation for acts that temporarily impair (rather than permanently extinguish) native title, such as the grant of mining tenements.

Draft Finding 10.1

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.

Native title rights and interests are substantive legal rights. These rights and interests are held and/or managed by the PBC post-native title determination on behalf of native title holders. Registered native title claimants have procedural rights pre as well as post determination.

It is important to note that native title monies that are held by native title claimants and holders (and their corporations) are private in nature. Like other groups or corporations they are entitled to protect their legal interests and leverage the benefits from these interests. They are not required to share the benefits of these rights with other parties.

For resource companies, Indigenous stakeholders for negotiations may be those with legal interests under the NTA or other land act (i.e. *Aboriginal Land Rights (Northern Territory) Act 1976* or other state or territory land rights regime) or those with community interests arising from living near or within the region of a resource operation.

Draft finding 10.1 contrasts 'voluntary activities' between Indigenous stakeholders and resource companies against activities arising in law and asserts that voluntary activities can benefit a greater number of Indigenous peoples. However, voluntary arrangements cannot displace the private legal interest held by the native title party under the NTA, or other statutory land rights holders.

In addition to dealing fairly with the native title interests, resource companies are also free to strike beneficial arrangements with a wider community of stakeholders, and some seek such arrangements as part of their 'social license' to operate.

Draft Finding 10.3

The capacity of Prescribed Bodies Corporate to engage meaningfully with resources companies is critical to Aboriginal and Torres Strait Islander people being able to give their free, prior and informed consent to resources development on their traditional lands, and to negotiating effective agreements. However, many Prescribed Bodies Corporate lack this capacity.

Draft Finding 10.3 refers to the capacity of PBCs to engage meaningfully with resources companies, making informed decisions in relation to resources development and negotiating effective agreements. PBCs (or registered native title body corporate under the NTA) are the corporate entity which represents the native title holders. This role is an important one for the community and for land management generally. Unlike other corporations, PBCs have obligations to common law holders under the NTA, who may or may not be members of the corporation

The NTA contains a number of procedural safeguards and rights to ensure native title claimants and holders are notified and consulted about acts on or decisions within their claim or determination. The primary source of these processes is the 'future acts' regime under Part 2, Division 3 of the NTA, which sets out requirements which must be met before development and other activities on native title land can be validly done. Further, PBCs are required consult and to act on the consent of the native title holding group when making decisions relating to native title.

To assist with fair and equitable access to the native title system, the Australian Government funds a network of 15 Native Title Representative Bodies/Service Providers (NTRB/SPs) across Australia to assist traditional owners by performing functions in the NTA for their benefit. These functions include but are not limited to assisting traditional owners with claims and agreement making,

certifying that claim applications and certain agreements are properly made and notifying traditional owners of acts potentially impacting on their native title. In 2019-20 14 NTRBs/SPs received a total of $94.66 million operational funding to perform their functions under the NTA. Funding is provided under Program 1.1 Jobs, Land and Economy of the Indigenous Advancement Strategy (the Torres Strait Regional Authority funds its native title activities out of its general appropriation). PBCs with low capacity generally depend on their NTRB/SP for support. Please see response to Information Request 10.1 for further information on Commonwealth funded PBC Capacity Building projects.

Information Request 10.1

The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular:

- *Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native title agreement-making process, or where it has reduced reliance on government funding?*
- *Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?*

NIAA provides funding for NTRB/SPs to perform statutory functions set out in Part 11 of the NTA Funding is provided under Program 1.1 Jobs, Land and Economy of the Indigenous Advancement Strategy. Part of this funding is allocated to PBC Basic Support, which assists PBCs to meet their corporate requirements. This funding is provided through the relevant NTRB/SP. In 2019-20 $9.80 million was provided to support 121 PBCs.

Funding NTRB/SPs for agreement making gives traditional owners access to professional specialist representation at no cost. Without that assistance they would be unrepresented, and thus generally disadvantaged in relation to better resourced proponents, or they would need to access private services at market rates. While the content of agreements are not public, we would expect that where they involved a substantial income stream there would be reduced reliance on government funding as capability and self-reliance increased. NTRB/SPs are best placed to provide examples to the Commission of such outcomes from agreement-making.

It is important to note when engaging in agreement-making with native title holders for large-scale commercial ventures like resource enterprises, the proponent often agrees to contribute to negotiating costs, including meeting expenses and professional advice. The capacity for PBCs to engage in agreement-making is supported by this fee-for-service process and the support of the NTRB/SP.

PBC Capacity Building funding is a further stream of funding available from NIAA under the Indigenous Advancement Strategy to support projects to build the capacity of PBCs. The funding aims to assist PBCs to generate economic benefits through the effective and sustainable management of their land, including by engaging with potential investors and proponents. The PBC Capacity Building program which emerged from the Developing Northern Australia White Paper process commenced in 2015-16. Funding is ongoing, with approximately $6.5 million a year allocated for PBC Capacity Building projects. As at 30 June 2020, since commencement of the program, PBC Capacity Building funding has provided $26.60 million in funding approvals to 6659 capacity building projects across Australia.

Under this stream, funding can be provided directly to PBCs. It can also be provided to organisations offering services to PBCs. For example, NIAA has granted funding to the National Native Title Council to run PBC Regional Forums, as well as developing and delivering a training curriculum to PBCs.

These projects are directed towards building the capacity of PBCs and strengthening their regional networks to improve collaboration between PBCs.

A comprehensive evaluation of the PBC Capacity Building funding is currently being commissioned by NIAA to be conducted across 2020-2021.

Draft Finding 10.4

Proposed amendments to the Native Title Act 1993 (Cth) (NTA) will allow applicants to enter into future act agreements as a majority by default. This could increase the risk of a majority of the applicant entering into a future act agreement that is not consistent with the wishes of the claim group. However, other proposed amendments to the NTA protect claim groups against this risk. They include allowing claim groups to impose limits on the authority of applicants, and clarifying that applicants owe fiduciary duties towards the claim group.

The effect of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* allowed the applicant to act by majority when entering into one kind of native title agreement, being 'area Indigenous Land Use Agreements'. The new amendments extend this majority rule to all circumstances in which the applicant is exercising a power or performing a function under the NTA, unless the claim group imposes a condition requiring otherwise. For example, the default majority rule can be displaced by conditions placed on the authority of the applicant, for example that the applicant must act unanimously.

The Federal Court's 2017 decision in *Gebadi v Woosup* held there is a fiduciary relationship between the applicant and the claim group. The decision also set out the duties owed by the applicant to the group, including that the applicant must act in the best interests of the group. The Bill will insert a new provision into the NTA to confirm that any obligation of the applicant under the Act does not affect, relieve or detract from the operation of any other duty that the applicant has at common law or in equity to persons in the claim group.

These changes are intended to support claim groups to establish more effective governance arrangements prior to a determination of native title, with a view to assisting the transition to corporate structure (through PBCs) as required following a determination.

Information Request 10.3

What are some potential reasons to allow native title funds to be removed from charitable trusts?

What are some mechanisms through which funds may be removed from charitable trusts, and what might the tax implications be? How would these proposals affect non Indigenous charitable trusts?

NIAA is not best placed to provide advice on the tax or other implications of the removal of funds from charitable trusts. We recommend the Commission seek views about the tax or other implications of the removal of funds from charitable trusts from states and territories, the Australian Charities and Not-for-profits Commission, the Department of Treasury and the Australian Tax Office.

Information Request 10.4

The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?

Native title funds are private monies that arise from private, commercial settlements. These monies belong to the native title holders who decide how they will be applied. A PBC or trust may hold monies on trust and directors have fiduciary duties to native title holders in this regard. Fit for purpose benefit management structures are important to assist native title holders to meet their aspirations. These aspirations may vary from group to group. Native title holders may choose to spend their private monies for a public benefit. Native title holders develop a range of benefit management and trust structures depending on the amount of funds received (or expected) and their aspirations.

NIAA is currently considering how best to support the development of 'fit for purpose' benefit management structures for native title groups as part of the review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). This paper is expected to be publicly available for consultation purposes. An important aspect of this is ensuring transparent and accountable governance and financial decision-making and reporting by PBCs and their related entities.

The NTA interacts with the CATSI Act with regard to PBCs, as PBCs must be registered under the CATSI Act Regulatory coverage for corporate governance falls to the Office of the Registrar of Indigenous Corporations (ORIC), however there is no regulator for native title functions and native title holders must seek relief through the Federal court. Regulatory oversight of the PBC functions will be canvassed in the discussion paper.

NIAA recommends the Commission consider research that has identified the design considerations that will support fit for purpose benefit management structures (see "Co-designing Benefits Management Structures" by Ian Murray, Joe Fardin, and James O'Hara (2019), Centre for Mining, Energy and Natural resources Law, University of Western Australia).

2. ***Aboriginal Land Rights (Northern Territory) Act 1976***

Introduction

The Minister for Indigenous Australians has portfolio responsibility for the *Aboriginal Land Rights (Northern Territory) Act 1976* (Land Rights Act) including in relation to Part IV, which provides an administrative regime for exploration and mining on Aboriginal land in the Northern Territory (NT). Aboriginal land held under the Land Rights Act accounts for approximately 50% of land in the NT. The Draft Report notes the historic significance of the Land Rights Act, acknowledging the "greater control over land" it gives to traditional owners in comparison with the *Native Title Act 1993*[2]. It is NIAA's position that any findings or recommendations resulting from this study that go to legislative amendment should be consistent with the beneficial purpose of the Land Rights Act.

The Land Rights Act has been subject to numerous reviews and amendments to date, often underpinned by similar objectives to those of the current study[3]. Most recently, the Aboriginal Land Commissioner, the Hon John Mansfield, conducted an independent review of Part IV[4] addressing *inter alia* the extent to which legislative amendments made in 2006 promoted economic development, the extent to which the operation of Part IV may restrict competition, and the

[2] Productivity Commission (2020) Draft Report – Resource Sector Regulation

[3] Mansfield (2013) *Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976*, Reeves J 1998, *Report on the Aboriginal Land Rights (Northern Territory) Act 1976,* House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATISA) 1999, Manning 1999, Toohey 1983, *Seven Years On*.

[4] Mansfield (2013) Report on Review into Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976

potential for further amendments to Part IV that would contribute to more efficient administration and improved outcomes in respect of mining and exploration.

The 2013 Part IV Report made 22 recommendations which, following initial consideration by a stakeholder Working Group in 2017, are now the focus of a revitalised Working Group[5] with a view to possible legislative amendment in the current term of government. Industry groups will be consulted as part of this process. The Part IV Report significantly informs NIAA's view on the Productivity Commission's Draft Report.

NIAA notes the commitment of the Minister not to amend the Land Rights Act without the support of the four NT land councils.

Information Request 5.1

The Commission is seeking further information on whether reforms to the following elements of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) would help to enable resources sector investment while still achieving the aims of the Act:

- *conduct of resources companies and traditional owners during negotiations (including the way that moratorium rights are exercised)*

The Draft Report suggests amending the Land Rights Act to require negotiations between resource companies and traditional owners to be carried out in good faith with potential to seek a court determination if they are not. The submission of the NT Chamber of Commerce, on which this proposal is apparently based, does not present any examples or evidence that such negotiations are not generally conducted in good faith. Mansfield's Part IV Report addressed this matter directly at paragraphs [363]-[365] and does not recommend the inclusion of such an obligation in Part IV[6]. A detailed analysis of wider issues relating to Part IV consultations and negotiations is also presented in the Part IV Report[7]. The Working Group is currently considering the relevant recommendations. Further, NIAA notes that ss 42(7) and 42(11) of the Land Rights Act already provide for an arbitrator or Mining Commissioner under certain circumstances, and on terms that maintain an appropriate balance of stakeholder interests.

The Draft Report highlights comments of the NT Chamber of Commerce that it costs up to $40,000 per meeting to negotiate access to Land Rights Act land, and that resources under the Land Rights Act should be treated the same as other resources, that is, "managed by the government for the benefit for all Australians"[8]. The NIAA does not agree that these comments constitute evidence that negotiations are not being conducted in good faith. Again we emphasise the intended beneficial purposes of the Land Rights Act for Aboriginal people in the NT. The ALRA provides traditional owners with the right of veto over exploration and mining on their land. The NIAA rejects any suggestion that this power be removed or altered.

The high costs of negotiating with traditional owners in remote areas is unsurprising and reflected in like negotiations conducted under the *Native Title Act 1993*[9]. Section 33A of the Land Rights Act provides for land councils to charge a fee for services prescribed by the regulations that it provides in performing any of its functions or exercising any of its powers under the Land Rights Act. In the absence of any regulations, land councils routinely charge for their services, guided by the principles

[5] The Part IV Working Group is comprised of representatives of the four NT land councils, NT Government, the Commonwealth Department of Industry Science Environment and Resources and NIAA.
[6] Mansfield (2013) *Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976*, 77-78 [363-365].
[7] Refer in particular to the Report's discussion at 2.2.4 Land Council consultation and negotiation, 69-79.
[8] Productivity Commission (2020) Draft Report – Resource Sector Regulation, 144
[9] AMEC (2020) Submission to the Resource Sector Regulation study (Submission No. 31) 19

of the Australian Government Charging Framework as they relate to Commonwealth statutory entities.

NIAA is currently consulting with land councils and the NT Government regarding the drafting of relevant regulations under s 33A. The Part IV Report also recommended that for clarity, s 42(4) be amended to require the applicant to pay all costs reasonably incurred for all meetings convened under that section. NIAA notes ALCOA's submission which argues that adequate resourcing and capacity of regulators such as the Northern Land Council is more fundamental to business investment in the NT than any changes to the Land Rights Act to streamline and clarify existing processes. NIAA firmly supports the financial contribution of the resource industry to enable such negotiations which would otherwise come at the cost of land councils and ultimately, the additional cost to the public purse.

The Draft Report requests information on the conduct of resource companies and traditional owners in respect of the way moratorium rights under s 42(8) of the Land Rights Act are exercised. The Part IV Report notes that past reviews of the Land Rights Act have addressed the practice of 'land banking' or 'warehousing' by resource companies, where a veto and five-year moratorium are deliberately invoked to prevent other companies from applying for an exploration licence over the same land. The Report found that while the moratorium may still be used to this effect, it is neither widespread nor a major concern[10]. The Report posits that the practice may have lessened as a result of the 2006 amendments to the Land Rights Act. NIAA does not consider this a significant matter of concern.

- *the conjunctive link between exploration and extraction approvals*

There is a long history of deliberation of the relative merits of conjunctive and disjunctive consent and agreement making under the Land Rights Act. Prior to 1987, the Land Rights Act provided for default disjunctive consent and agreement processes, with an optional conjunctive process. Following the recommendations in Toohey's 1983 Report, the Land Rights Act was amended to mandate a conjunctive consent process, with a single veto (but separate agreements) covering the exploration and mining stages. Mansfield's Part IV Report found that although the conjunctive agreement process is onerous, it strikes the right balance in protecting traditional owner interests and providing greater certainty to applicants. The Part IV Report further notes that in the absence of a single consent for both stages, applicants may be discouraged from exploration on Aboriginal land. This possibility renders questionable the Australian Conservation Foundation's (ACF) suggestion that a disjunctive process would benefit industry if traditional owners were less likely to oppose exploration applications[11].

The Draft Report inaccurately infers that the conjunctive agreement process has resulted in there being few if any mining projects that have been successfully approved by land councils[12]. This view has little substance given that traditional owners have consented to numerous exploration licence applications and mining proposals by way of the conjunctive process since 1987. 'Certainty' in respect of traditional owner consent to both exploration and mining is no guarantee that mining will proceed: there are clearly (multiple) other factors at play.

Relevantly, the Part IV Report made some recommendations to clarify the conjunctive consent and agreement process[13]. Recommendation 11 may address, in part, the concern expressed by the ACF that the process should facilitate and reflect full and informed consent.

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[10] Mansfield (2013) *Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976,* 101.

[11] Productivity Commission (2020) Draft Report – Resource Sector Regulation, 144

[12] Ibid.

[13] In particular Recommendation 13: That ss 44A(1) to the extent that it prohibits its terms and conditions which provide for compensation for the value of minerals removed or proposed to be taken from the land be

- *the potential costs and benefits of allowing other resources companies to apply to develop land rights land that is subject to a moratorium for another resources company.*

The NIAA holds the view that there would be few, if any, benefits to allowing other resource companies to apply to explore on Land Rights Act land that is subject to an existing moratorium following refusal of consent by traditional owners. As mentioned above, the issue of 'warehousing' land subject to an existing exploration licence was not raised as a key concern in submissions to the Part IV Report and is therefore not a compelling reason to effectively enable concurrent applications.

Logically, any new application would need to be significantly different to that which is under moratorium to warrant consideration by traditional owners. Provision for different types of titles over the same land already exists. NIAA notes that the 2006 Land Rights Act amendments introduced separate moratorium periods for petroleum and mineral exploration licence applications so that if a petroleum exploration permit application is rejected, a mineral exploration licence application can still be made in respect of the same land.

Where refusal of consent is premised on cultural or ecological concerns, traditional owners are highly unlikely to consent to any development proposal regardless of the anticipated target minerals or exploration / extraction methodology. NIAA is aware of anecdotal evidence from land councils that traditional owners are unlikely to consent to exploration over an area previously refused consent and subject to a moratorium. Rather than support interrupted moratorium periods, land councils may be more likely to advocate to extend the current five-year moratorium period to give respite to landowners from pressure applied by resource companies[14]. Allowing other companies to apply to develop land during the moratorium period would increase the administrative burden for the NT Government and land councils and risk meeting fatigue and the likelihood of rejection by traditional owners, resulting in little apparent benefit to any stakeholders.

It is noted that current provisions of the Land Rights Act enable the existing applicant to reapply following the expiry or lifting of the moratorium period, ahead of any other applicants. Throughout the Land Rights Act there is a clear intention to provide some level of certainty for applicants to support their investment in developing on Aboriginal land. In this respect, NIAA notes the Central Land Council's comment in the Part IV Report, that some restrictions on competition are "essential to the achievement of the purpose of [Part IV][15]. Allowing companies to apply to develop land while another application is under moratorium would come at a cost to the legislation's attempt to provide certainty for resource companies.

Draft finding 5.6

Very few projects are going ahead on land protected by the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.

repealed and Recommendation 11: That s 46(1)(a)(viii) be amended so that the quantity of environmental information in relation to a proposed mining works that needs to be included in a s 46 mining proposal be the same as that environmental information that is required to be provided under NT environmental legislation.

[14] Mansfield (2013) *Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976,* 44 [176].

[15] Mansfield (2013) *Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976,* 101

The current Draft Finding does not recognise the complex and distinct arrangements for exploration and mining on Aboriginal land in the NT. Nor does it adequately capture the wide range of issues previously identified by key stakeholders in respect of possible improvements to current processes for mining and exploration on Aboriginal land, including recommendations for legislative amendment. The apparent link between there being few mining projects on Aboriginal land in the NT with two aspects of the Land Rights Act is simplistic.

Draft Finding 10.1

Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.

There are existing provisions under the Land Rights Act for traditional owners to engage in benefit sharing agreements and develop resource projects. Following the provision of relevant consents, deeds or agreements between the land council, Aboriginal Land Trust and applicant include terms and conditions requiring the applicant to make payments to traditional owners in relation to exploration activities, mining and other land use activities.

A broad range of benefit sharing provisions are also typically negotiated as part of the above agreements including sacred site clearance services, support for Aboriginal training, employment, business and enterprise development, capital and infrastructure development and community development projects. These provisions are often designed to benefit both traditional owners and Aboriginal people and communities[16].

Although not common, NIAA is aware of examples where traditional owners have been the proponent or a joint venture party of a mining operation, and a recent example of an Exploration Deed that has provided for traditional owners to become a joint venture party if a Mineral Lease is to be sought or granted. NIAA currently takes the view that legislative amendment to support traditional owners to develop resource projects is not necessary and may be uncompetitive. NIAA supports Aboriginal landowners to leverage their land assets to generate wealth through various programs and policies.

3. Indigenous Heritage Protection

Information Request 6.1

The topic of Indigenous heritage has not been raised by many participants to this study and it is not clear which jurisdictions, if any, could be described as leading practice. Could interactions between Indigenous heritage and the resources sector be improved? Which jurisdictions manage these interactions well already? How do they do it?

The NIAA suggests that Indigenous heritage be more clearly defined in the report, including particular reference to the tangible and intangible aspects of Indigenous heritage. The report could

[16] See in particular the Central Land Council's Community Development Program https://www.clc.org.au/articles/cat/community-development/

usefully extend the reference to include 'Indigenous heritage and culture' to reflect the intrinsic connection between culture and heritage.

The responsibility for the protection of Indigenous heritage rests mainly with the states and territories and local governments. By comparison, the Commonwealth's role is limited. Within the Commonwealth, the responsibility for administering the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* sits with the Minister for the Environment. The NIAA provides policy advice to the Minister for Indigenous Australians.

The level of legislative protection afforded Indigenous heritage varies across jurisdictions. There is no nationally consistent approach. As pointed out in the draft report, a number of jurisdictions are currently in the process of reviewing or amending their heritage legislation. These reviews would provide an opportunity to look at the efficiency of the interaction between heritage regimes with relevant regulations governing resource development, and the broad range of costs and benefits of heritage protection and development, noting the difficulty of putting a monetary value on cultural heritage. Noting the draft report's mention of stakeholder concerns in relation to consultation with stakeholders and compliance monitoring, the NIAA would support a recommendation on the strengthening of consultation with stakeholders and compliance monitoring approaches in heritage legislation.

Failure to strike the right balance between the benefits of resource development and the costs associated with loss of cultural heritage can have disastrous consequences for all parties. The incident in May 2020 involving Rio Tinto and the destruction of caves at Juukan Gorge, a site of cultural significance for the Puutu Kunti Kurrama and Pinikura people, demonstrates the importance of a partnership approach in agreement making practice. In this case an agreement had been struck under the relevant Western Australian heritage legislation years prior to the actual incident. The failure to engage effectively with the traditional owners over subsequent years and the lack of opportunity for traditional owners to re-consider the consequences of the planned demolition appear to have been significant factors in the fallout that occurred after the demolition.

The level of interaction and coordination among the strategic planning, resource development, land policy and heritage protection arms of government at the state/territory level varies considerably across jurisdictions. We note that any work on the interaction between different statutes to address the costs to resource development proponents should not be to the detriment of cultural heritage protection, and that any efficiencies identified through such work may also assist Indigenous proponents of commercial activities.

The draft report notes that the Productivity Commission's 2013 recommendations on Indigenous heritage in the context of mineral and energy resources have not been fully implemented. Given this and the lack of a nationally consistent approach to heritage protection, the Commission could consider restating this recommendation in the new report.

The narrative on benefit sharing in the draft report is focussed on the economic perspective. The sharing of economic benefits accruing from resource development projects is important and does result in substantial social benefits for Indigenous communities. It is also important that the draft report considers the substantial longer-term impacts of protecting Indigenous heritage.

Protection of Indigenous heritage not only generates longer-term cultural and social benefits for Indigenous communities, but is also imperative for the intergenerational transfer of Indigenous knowledge and the safeguarding of Aboriginal and Torres Strait Islander cultures into the future.

Land is integral to Aboriginal and Torres Strait Islander peoples' cultures, spirituality and identities. The heritage values that exist on Country are a part of Indigenous cultures and identity. The draft report should recognise that Indigenous heritage values are extant not only on land owned or managed by Indigenous communities, but also on land under other types of tenure. It is on the latter

types of land that the risk of damage and destruction of Indigenous heritage values is higher due to either a lack of awareness and/or lower regulatory safeguards.

The draft report discusses the existence of free, prior and informed consent as part of the engagement with Aboriginal and Torres Strait Islander stakeholders in relation to resource development projects. However, it does not provide an indication of how widely this is practised by project proponents. The right to free, prior and informed consent is dependent on the good will of the project proponent (noting the draft report mentioning that this is not a right of veto). Indigenous stakeholders do not have any mechanism available to exercise this right where negotiations are not conducted in good faith. A recommendation on a nationally consistent approach to good faith engagement and consultation with Indigenous stakeholders would be a good starting point.

The requirement for proper engagement with Indigenous stakeholders also brings up the question of the need for cultural awareness training for proponents to enable these interactions to be culturally appropriate and productive. The draft report could explore the extent of cultural awareness capability and any approaches being undertaken to build up this in the sector.

4. The Australian Government's Indigenous Procurement Policy

Draft Leading Practice 9.2

Local procurement requirements can be a relatively high cost way of meeting development objectives. In contrast, resources companies and governments providing businesses in local communities with the support needed to engage with resources companies, such as BHP's Local Buying Program, is likely to create more enduring benefits for communities.

- The Indigenous Procurement Policy (IPP) provides an example of mandating procurement requirements – note however the IPP does not mandate local procurement. The purpose of the IPP is to leverage the Commonwealth's annual multi-billion procurement spend to drive demand for Indigenous goods and services, stimulate Indigenous economic development and grow the Indigenous business sector through direct contracts and indirectly through major suppliers via subcontracts and employment opportunities.
- The rationale of the IPP is that by increasing Indigenous involvement in the economy, a tangible mechanism for improving a number of 'quality of life' outcomes such as health status, work life balance, social engagement, education and skills for the wider Aboriginal and Torres Strait Islander community will be generated. Seeking to increase economic activity with the Indigenous community will not only broaden Australian society benefit from increased goods and services but there will likely also be a corresponding reduction in government outlays.
    - In the third year evaluation of the IPP (published in August 2019), Deloitte outlined that the IPP is achieving social benefits through a business as usual activity that has no cost to the taxpayer. The view being that the IPP utilised money that would otherwise have been spent by the Commonwealth to secure those goods and services. Noting this, Deloitte has also considered that the IPP has much wider social impacts and believes that benefits would more than outweigh any costs associated with accelerating the outcomes available under the IPP. Consideration should be given to the wider social impact of the IPP and its ability to directly impact employment, social inclusion and wellbeing of Indigenous peoples.

    - That said, there is a view that consideration of the social impact of Indigenous businesses on the wider economy should be investigated to understand the true overall social cost-benefit of the IPP.

- Further information on the IPP is available here: https://www.niaa.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp

Business Council of Australia and Supply Nation partner together to deliver Raising the Bar:

- An example of private sector-driven mandating procurement is provided by Raising the Bar initiative. The Business Council of Australia (BCA) has collaborated with Indigenous supplier organisation Supply Nation to create the initiative. Raising the Bar was launched in August 2019 and will grow the Indigenous procurement capability and impact of Business Council member companies.
- Over five years, committed members will collectively spend more than $3 billion to boost Indigenous businesses, create new opportunities and deliver greater economic participation.
- The Raising the Bar framework has four key components:
    - an Indigenous procurement target of 3 per cent of annual influenceable spend with Indigenous businesses over a five-year period
    - the supporting systems and processes to achieve the target
    - reporting and monitoring of spend against the target, and
    - activities to develop Indigenous suppliers.
- The Business Council members that have signed up to Raising the Bar, include: Australian Unity, BAE Systems, BHP, BP Australia, Commonwealth Bank of Australia, EY, Fortescue Metals Group, KPMG, Lendlease, McKinsey & Company, Microsoft, Programmed, Qantas, Rio Tinto, Westpac and WSP.

Further information on the Raising the Bar initiative is available here: https://www.bca.com.au/indigenous_engagement

Appendix

Native Title Agreements and Benefit Sharing

Proposed activities or developments that affect native title (whether or not determined) are classified as **'future acts'**. For a future act to proceed, the NTA sets out requirements which must be met before development and other activities on native title land can be validly done. Depending on the kind of activity being proposed, this can include a requirement to notify, consult or negotiate with native title claimants and holders. In most instances, the activities will trigger notification rights, but more substantive procedural rights are available in some cases such as mining and exploration, tenure upgrades and compulsory acquisition.

For example, exploration or mining activity invokes the 'right to negotiate' which provides an opportunity for native title parties to negotiate agreements with proponents (known as s. 31 agreements). These agreements detail the conditions for undertaking the particular future act, including in some cases provision for employment and training, environmental or cultural heritage protection or compensation and payments.

Alternatively, the NTA allows native title groups and other interested parties to enter an **Indigenous Land Use Agreement (ILUA)**. These are voluntary agreements between a native title group and others about the use of land and waters. ILUAs deal with a wide range of native title matters such as the consent to future acts (development), compensation, protection of significant sites and culture, how native title rights and interests can be exercised alongside other interests. A feature of ILUAs (contrary from an ordinary contract) is that whilst registered they bind all persons holding native title even those who are not parties to the agreement.

Native title agreements offer a mechanism for indigenous communities to address disadvantage by providing sustainable and intergenerational benefits.

Monetary benefits can include single up-front payments, fixed annual payments, and equity participation. Equity participation enables Indigenous groups to have a direct say in projects and receive a portion of the profits[17]. This increases incentives for the community to maximise benefits and generates own-source revenues that increase self-reliance.

Benefit-sharing is crucial to mobilise economic development opportunities. With the right governance arrangements and tools, land can be a powerful lever for local Indigenous economic development[18].

Trust and investment vehicles

The challenge is raising sufficient capital to participate as an equity partner. Regardless of the model, financial capital and royalty payments are usually placed in a trust, which is considered a good practice because it generates autonomous financial resources to support sustainable regional economic development for the future, beyond the duration of the project[19].

It is important that the trusts be structured in a way that enables both wealth creation and charitable activities. This can be achieved by allocating a proportion of financial capital and royalty payments to a discretionary trust (which enables flexibility), and another to a charitable trust (less

[17] National Aboriginal Economic Development Board of Canada (2012) Increasing Aboriginal Participation in Major Resource Projects

[18] OECD (2019) Linking Indigenous Communities with Regional Development

[19] Loutit, J. Madelbaum, J. and Szoke-Burke (2016) *Community development agreements between natural resource firms and stakeholders - brief on good practices*

flexibility but with tax advantages). This arrangement enables the disbursement of income for a range of activities such as investing in local businesses, running community programs, and provide payments to community members.

Based on the review of the relevant literature there are a number of elements that are needed to link benefit-sharing mechanisms to a strategy that supports community and economic development, and self-determination. This includes:

- Local strategy for development based on investing in community assets (financial, social, cultural, and physical capital) with agreed outcomes, measures of progress, and mechanisms to evaluate and report back to the community.
- Creating a framework for monetary benefits that increases incentives for commercial partnerships and own-source revenues (equity participation, employment, procurement).
- Establishing a trust structure (discretionary and charitable) that enables the allocation of income based on a local strategy and supports a mix of Indigenous-owned businesses and social enterprises, and social and cultural activities.
- Companies putting specific mechanisms in place to increase demand (preferential procurement and employment) and building supply-side capacity (e.g. business mentoring and employment and training).
- Government focusing on addressing local and regional supply-side factors (regulatory bottlenecks, skills, infrastructure), linking to wider regional development efforts, and building resilience for transition to cope with market changes and resource depletion.

Bargaining power and PBC capacity

The negotiation and implementation process is critical to realising the benefits of ILUAs for both Indigenous native title holders/land owners (including as proponents) and investors.

The main challenges relate to the significant power asymmetries between local Indigenous institutions and multi-national corporations[20].

Lack of capacity and fragmented relationships within communities have been identified as challenges by industry in terms of striking effective and timely agreements.

The primary role of PBCs is to hold and represent native title rights and interests, not to negotiate commercial agreements and promote local economic development.

Some support is provided by Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) including agreement making. However, complexities and risks can emerge, as PBCs are required to adhere to different regulatory requirements, oversee trust funds, and identify and fund projects.

Investments in leadership and governance training, business and commercial skills, and the opportunity to buy-in technical expertise for local Indigenous institutions, access to local data and analytical capabilities, skilled facilitators to help broker agreements, and cultural sensitivity training would all assist PBCs, NTRB/SPs and proponents to work better together in agreement making.

Some of this additional support is provided by Government but a significant factor in effectiveness is the efforts of the project proponent. A list of leading practices on agreement making for companies is identified below.

[20] Crooke, Harvey and Langton (2006) "Implementing and Monitoring Indigenous Land Use Agreements in the Minerals Industry: the Western Cape Communities Co-Existence Agreement", in *Settling with indigenous people: modern treaty and agreement-making*

- Conduct extensive research and consult widely to identify all communities, and the individuals who will represent them, in the negotiation process.
- Develop a pre-negotiation agreement, such as a memorandum of understanding, that establishes among other things the negotiation framework and funding for each stage. Commence culturally sensitive orientation programs and/or negotiations training to ensure meaningful negotiations and approval of the final agreement.
- Ensure community participation in the agreement-making process, including informed decision-making during negotiations and involvement in completing impact assessments.
- Benefit sharing means more than financial compensation for use of the land or displacement; it includes non-monetary benefits, such as heritage and sacred site protection, employment opportunities, training of locals, business development support, infrastructure and provision of services.
- There must be strong, accountable governance arrangements in the agreement to facilitate effective implementation. A system of ongoing monitoring and review mechanisms would allow for adjustment of the terms of the agreement when necessary.
- The agreement must plan for project closure and legacy issues. Agreements should include action plans for dealing with expected and unexpected closure at the outset and create a closure taskforce at the time of execution of the agreement.
- As far as possible, agreements should not be confidential, consistent with the objectives of transparency, accountability and good governance. Confidentiality provisions can weaken the capacity and power of local communities by prohibiting them from communicating with the media and other stakeholders for advice, support and information[21].

A seat at the table – building capacity for economic development

While benefit sharing through agreements such as ILUAs provide economic development and other opportunities for Indigenous people, resource development proponents are themselves rarely Indigenous, or Indigenous owned.

Traditional owners are predominantly passive recipients of development because they generally do not have the information base, capabilities or resources to proactively shape development outcomes. Consequently, traditional owners may be required to make a decision in the absence of an informed understanding of the value of their land interests, or the opportunity cost associated with accepting the proposal. This potentially reduces the scope of economic development opportunities for traditional owners and increases transaction costs and uncertainties for proponents.

The Northern Australia Indigenous Reference Group[22] (formed to advise the Northern Australia Ministerial Forum) has identified that these issues could be addressed by increasing incentives and support for:

- Development of blueprints or commercial prospectuses - providing geospatial information for the specific Indigenous estate, identifying its boundaries, other tenure interests, culturally sensitive areas, areas of social value, topographic features and natural resources such as water, soil types, local climatic conditions and geological features. This would need

[21] Loutit, J. Madelbaum, J. and Szoke-Burke (2016) *Community development agreements between natural resource firms and stakeholders - brief on good practices*

[22] https://www.industry.gov.au/about-us/our-structure/office-of-northern-australia/northern-australia-advisory-groups#:~:text=The%20group%20comprises%20senior%20Indigenous,represent%20specific%20organisations%20or%20communities.

to be supported by better access to data, support for land surveying, and investing in the capability of PBCs.

- Negotiation support - strengthening the capability of traditional owners to engage in commercial negotiations, sharing information and knowledge about good practices in community and economic development, and providing better guidance and information to inform commercial negotiations.

Prescribed Bodies Corporate (PBCs) have the potential to act as vehicles for the broader aspirations of native title holders. PBCs often seek to undertake activities relating to land use, management and development, cultural heritage, civil rights advocacy, economic enterprise and service delivery. The number of PBCs is growing as more native title claims are resolved. As at 35 May 2020, there were 218 PBCs in Australia.[23]

As we move to a post-determination environment, addressing how to leverage the Indigenous estate for commercial benefit will need greater focus. Recognising the opportunities offered by stronger PBCs the Australian Government established a capacity building funding stream in 2015. Funding is available to build capacity and provide funding directly to PBCs to capitalise on opportunities to use their native title rights and interests to pursue economic development.

[23] Office of the Registrar of Indigenous Corporations, Public Register, at www.oric.gov.au