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Australian Institute of Aboriginal
and Torres Strait Islander Studies

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Native Title Research Unit

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Worldwide knowledge and understanding of Australian Indigenous cultures, past and present

Committee Secretary
House of Representatives Standing Committee on
Aboriginal and Torres Strait Islander Affairs
PO Box 6021
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CANBERRA ACT 2600

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Re: Inquiry into developing Indigenous enterprises

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has a strong research focus on Indigenous economic development within the native title context. The work of the Native Title Research Unit (NTRU) located within AIATSIS is focused on the recognition and protection of the native title rights of Aboriginal and Torres Strait Islander peoples. The NTRU research program, supported by the Department of Families, Housing, Community Services and Indigenous Affairs, particularly through the work of the Unit manager Dr Lisa Strelein has involved research into the corporate design of Indigenous bodies, agreement making over native title lands, and the taxation of native title outcomes. Dr Strelein is also a partner in the Agreements, Treaties and Negotiated Settlements (ATNS) project, which is an Australian Research Council funded project, led by Professor Marcia Langton with colleagues from the University of Melbourne, which examines the scope and outcomes of agreement making with Indigenous peoples.

1. Whether current government, industry and community programs offering specific enterprise support programs and services to Indigenous enterprises are effective, particularly in building sustainable relationships with the broader business sector

The recognition of native title has been a strong influence on the increased engagement of Indigenous peoples in the Australian economy and in the development of new enterprises. The *Native Title Act 1993* (Cth) (NTA) provides a framework for negotiation of agreements with government and industry who seek access to land where native title has been recognised or is subject to a native title claim. There are currently 338 Indigenous Land Use Agreements in place. Some of these agreements involve the establishment of Indigenous businesses; others secure financial and other benefits that will be distributed or invested and require the establishment of a corporation or body to administer the benefits.

AIATSIS has taken the lead in providing resources and support to native title holding groups and their corporations. Prescribed Bodies Corporate (PBCs) are established to hold and manage native title and any benefits flowing from agreements. AIATSIS has been working with native title holding groups to establish and realise their aspirations. Discussions with

PBCs have revealed that enterprise development, economic development and improving the economic wellbeing of individuals within the groups are key aspirations for native title holders. However, the capacity of PBCs and native title groups to access programs and resources to identify and support business enterprise is lacking.¹

AIATSIS has developed resources specifically for native title groups to identify government programs and resources. These 'toolkits' are designed to reduce the 'search costs' involved in sourcing government programs.² This is imperative for organisations that have little or no core funding. However, there remains a significant barrier for native title holders in project design, submission writing and acquittal. In addition, more could be done at a more foundational level to assist Indigenous groups to identify economic potential and business/enterprise opportunities in their region, particularly where there are not established markets to enter or learn from.

AIATSIS is currently undertaking research partnerships with a number of PBCs to identify better planning and implementation to assist PBCs to realise their aspirations, supported by the Minerals Council of Australia. There is a need for better business planning models, from identification of business opportunities, to corporate design and business planning and development, that are tailored to the native title context – both for the 'business' of running a PBC and for the development of enterprises utilising native title lands or benefits from native title agreements.

The changing nature of the range of advice and support required by native title groups is being recognised by Native Title Representative Bodies and Native Title Service Delivery Agencies (NTRB/NTSDAs). As part of AIATSIS projects, NTRB/NTSDAs have participated in workshops to examine current practice, build skills and develop best practice models in structuring agreements and corporate design. AIATSIS also coordinates advice from a pro bono panel of tax law experts for NTRB/NTSDAs and their clients.

The importance of native title to fostering Indigenous economic development is recognised by key government agencies and programs, such as Indigenous Business Australia, Department of Education Employment and Workplace Relations, Office of the Registrar of Indigenous Corporations and state based agencies, who are strong supporters of the AIATSIS annual Native Title Conference as sponsors, speakers and workshop hosts. The conference now has strong economic and business streams.

The ATNS project, with the support of industry partners, Rio Tinto Ltd and the Department of Families, Housing, Community Services and Indigenous Affairs, has also held two key

¹ See Bauman, T and Tran, T. 2007. *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes, Canberra 11-13 April 2007*, Native Title Research Unit, AIATSIS. Canberra and Strelein, L and Tran, T. 2007. *Native Title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment*, Native Title Research Report 2/2007 PBC Workshop Report, Native Title Research Unit, AIATSIS, Canberra. This is also reflected in the FaHCSIA *Guidelines for Support of Prescribed Bodies Corporate* which has a preference for funding to be administered through Native Title Representative Bodies and Service Providers rather than directly funding PBCs.

² There are national and state toolkits published:

http://ntru.aiatsis.gov.au/major_projects/psc_ntbc.html#nationaltoolkit. There are also profiles of each PBC:
http://ntru.aiatsis.gov.au/major_projects/psc_profiles.html.

symposia to examine Indigenous engagement in the economy. The first, 'Mining, Petroleum, Oil and Gas Symposium: Indigenous participation in the resource and extraction industries' was held in Broome in July 2007. The symposium brought together industry, government, researchers and Indigenous organisations to examine in detail the problematic situation that sees Indigenous people left behind during the current resources boom. Successful models, such as Ngarda civil and mining or Gelganyum Trust, were compared with structural impediments that frustrate the emergence of more examples across the country.

Despite a growing government expectation of native title agreements to deliver social and economic change, there is not a corresponding level of support or funding for agreement making processes and the continued implementation and monitoring of agreements. Indigenous groups and their representative bodies have consistently called for more resources to assist groups to resolve disputes, develop strong decision-making structures, including policies for the management of funds, and to ensure their capacity to negotiate fair and sustainable agreements and to then administer agreements and take advantage of the opportunities they provide.³

2. Identifying areas of Indigenous commercial advantage and strength

The recognition of native title, especially in areas where there is potential for mineral exploration and extraction, tourism and land management partnerships, has created opportunities of Indigenous enterprise, particularly through agreements with other users of native title lands. Despite these opportunities for Indigenous people to engage with industry and more recently the government, the common law and legislative framework have constrained native title as an economically valuable right. There are limited rights to resources and very few overt references to economic rights.⁴ Moreover, the prioritising of non-Indigenous interests, diminishing the rights of native title holders in negotiating third party access to their land and the insistence on the 'fragility' of native title undermine the economic value of native title and the economic power of native title groups. This is at odds with the general view that native title holders can capitalise on their native title rights and interests as a part of the broader resources 'boom'.

Secure and certain property rights are essential to economic development. The strength of the property right is more important than its communal or individual ownership. Urgent consideration should be given to reforms to the native title system that guarantee economic power and agency for native title holders. At the same time, there should be recognition of the complex and onerous process requirements of proof that have limited the recognition of native title, thus slowing the progress of claims and requiring alternative processes to recognise the interests of Indigenous peoples in their traditional lands.⁵

³ HREOC has conducted a survey on traditional owner's understanding of land agreements which indicated that they cannot confidently participate in negotiations; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission.

⁴ See Strelein L, 2008 *Taxation of Native Title*, Research Monograph 1/2008. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

⁵ Farrel, R, Catlin and Bauman, T, 2007, *Getting Outcomes Sooner: Report on a native title connection workshop Barossa Valley, July 2007*, National Native Title Tribunal and Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007.

3. Feasibility of adapting the US minority business/development council model to the Australian context

The ATNS project, and specifically the work of Professor Miranda Stewart, is currently investigating the feasibility of an investment tax credit scheme in Australia.⁶ Preliminary work has been carried out on the applicability of a tax incentive model in the Northern Territory⁷ and there is some merit in a scheme attracting capital investment into Indigenous regions or businesses and more generally in remote areas.

The US model of the New Markets Tax Credit (NMTC) provides investors with a tax credit for making equity investments into a Community Development Entity (CDE), which is then used to make investments into eligible low income communities. The CDE then sells its investment into 'tax credits' in the scheme to the market who receive a tax credit spread. In exchange for its ability to profit from the tax credit, the CDE is required to reinvest the money into business activities or ventures according to specific regulations. The scheme is designed to increase the capital available for minority or poor communities by encouraging investment funds or banks to sell their investments in the tax credits to other investors. The scheme does not fund a particular business like current schemes operated by organisations such as Indigenous Business Australia (IBA).

The processes and implementation of such a scheme need to be approached with caution. The NMTC does not require that the businesses be owned by the communities, only that the businesses are located in those regions. In the US, there is evidence that the scheme has been used to subsidise the development of Wal-Marts in poor rural communities leading to low quality retail outlets and low quality employment opportunities. Despite significant accountability requirements the CDE still raises the question of whether there is genuine decision-making and involvement by the local community. Further, the long term success of such a scheme would require an analogous investment in capacity building in order to ensure genuine community involvement. Regulation of the scheme also needs to be carefully considered to ensure that benefits reach the intended communities rather than being locked in financial markets with limited outcomes. More importantly, the NMTC should not abrogate the responsibility of governments to provide infrastructure and to invest in Indigenous communities where the private sector is unwilling to do so. In raising the lowest common denominator, the NMTC will not necessarily lead to the requisite education and health outcomes that are also essential for development.

The US model requires further review. The NMTC has been in place for nearly eight years and it remains difficult to measure whether the NMTC is improving economic development or living standards. There needs to be further research into the rules, conditions, success and adaptability of the scheme before a similar model is adopted in Australia. A number of important conceptual issues, such as the definition of an 'eligible community' and restrictions

⁶ Stewart, M, 2008 (draft), *Tax Structures and Incentives for Commercial Activities*, Paper presented to the ATNS Symposium, February 2008 Indigenous Communities, Economic and Tax Policy, Melbourne, 2008.

⁷ The Northern Territory Government has commissioned a draft discussion paper on potential tax credits for investment in Indigenous communities and businesses. The draft paper and position of the Northern Territory Government has not been released.

on the types of businesses that are acceptable, will also need to be resolved in order to ensure the workability of such a model within an Indigenous specific context.

4. Whether incentives should be provided to encourage successful businesses to sub-contract, do business with or mentor new Indigenous enterprises

In Australia, the question of tax based development models arises on three levels: tax and welfare for individuals in Indigenous communities; legal entities for Indigenous business activity and appropriate corporate structures for Indigenous economic development; and tax incentives to encourage investment and increase access to capital.

Dr Strelein's paper on taxation and trusts at the Broome symposium hosted by the ATNS project prompted the ATNS project to convene a working group of researchers, industry and Indigenous organisations to meet regularly to consider tax reform options.⁸ In particular, the group investigated a new tax vehicle, developed by the Minerals Council of Australia, that could fulfil the aspirations of native title holders and Indigenous communities for the management of benefits emerging from agreements. The Aboriginal Community Development Corporation model is focused on providing tax exempt and DGR status and long term accumulation for funds directed toward community development.

Dr Strelein's recent publication, *Taxation of Native Title* (enclosed), provides a comprehensive review of the agreement making context and provides comprehensive analysis of complex issues in relation to the taxation of native title payments, and makes recommendations for the taxation of native title. This review includes consideration of the interaction of taxation of trusts and benefits from native title agreements and social security payments, including the *Social Security Means Test Treatment of Private Trusts – Excluded Trusts Declaration 2005*

In February 2008 the ATNS Symposium, 'Indigenous Communities, Economic Development and Tax Policy' held in Melbourne again brought together experts from the private sector, government, academia and Aboriginal organisations and was designed to address the complex role of taxation, legislative frameworks and other economic arrangements, and how these models might develop to enhance socio-economic outcomes for Indigenous peoples. The forum considered additional models put forward by Gunya Australia and Arnold Bloch Liebler for capital investment models. One significant difference in the approach we have taken in our modelling and these latter proposals, is whether tax incentives are provided to Indigenous businesses or to (primarily non-Indigenous) investors or whether a combination of strategies is preferable to achieve the optimum results. It is imperative that any incentive scheme, or combination of strategies be targeted toward giving Indigenous communities greater flexibility to meet their diverse needs and aspirations with limited economic capital, without creating perverse incentives.

We have seen how the tax benefits of charitable trusts have influenced behaviour in the native title sector, and how better information is leading to more diverse approaches to

⁸ Strelein, L 2007, 'Maximising the benefits', presentation to the Mining, Petroleum & Gas Symposium: Indigenous involvement in resources and extraction industries, Broome, Western Australia, 9 July.

investment. Better utilisation of existing models and greater access to high quality advice should also be part of any consideration of incentive schemes.

The design and function of Indigenous corporate entities is still the subject of investigation as a part of the NTRU's current research into tax, trusts and the distribution of benefits and corporate design. A number of native title groups have established additional entities, apart from their PBC, to manage native title funds or conduct enterprises. Industry partners have often insisted on the creation of trusts, usually specific to their agreement, which has resulted in some cases in a plethora of funds, trusts and entities to be managed by the native title group.

AIATSIS Native Title Research Unit and the ATNS project plan to conduct further research on the particular tax problems that have emerged from our inquiry thus far, including: (1) the appropriate tax treatment of agreements and the income streams and assets generated from them; (2) taxation of legal models and entity forms that are used for implementation of agreements and investment and commercial activity by communities; and (3) the perceived need for economic incentives, in particular tax incentives, to encourage Indigenous capability development, entrepreneurialism and engagement in the market and to increase investment into Indigenous communities and businesses.

We thank you for the opportunity to provide input to this inquiry. If you would like further information on this submission, please contact Dr Lisa Strelein, AIATSIS Director of Research, on 6

Yours sincerely,

Professor Michael Dodson
Chairperson

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