



27 January 2012

Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

To Whom It May Concern,

Re: Review of not-for-profit governance arrangements consultation

Thank you for the opportunity to contribute to the process of determining the core organisational governance principles applying to registered Not for Profit organisations.

The Minerals Council of Australia (MCA) notes the very tight timeframe allowed for the preparation of this submission over the Christmas New Year holiday season. Many of MCA's members and National Native Title Council counterparts are on holidays over this period making it difficult to conduct consultations that address the specific questions in the consultation paper.

MCA and the National Native Title Council have provided joint submissions on issues that pertain to the proposed Indigenous Community Development Corporation (ICDC). However given the consultation constraints it has not been possible to develop a joint submission in response to this review. Instead, MCA will summarise the relevant sections on governance in the following joint submissions prepared in consultation with the NNTC:

- Definition of Charity Review Consultation Paper, December 2011
- Native Title, Indigenous Economic Development and Tax Consultation Paper, December 2010

The earlier submissions have discussed both the structural, technical and governance constraints of the Charitable Act provisions in enabling appropriate management of land use agreement funds. This submission will focus on the constraints that enable good governance of the management of land use agreement funds, and will discuss the preferred governance arrangements under the proposed Indigenous Community Development Corporation.

Background to the MCA

The MCA is the peak national industry association representing exploration, mining and minerals processing companies in Australia. MCA members account for more than 85% of annual minerals production in Australia and a slightly higher proportion of mineral exports.

Members of the MCA recognise that Industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australian's rights in law, interests and special connections to land and waters. This point is made even more acute by the fact that more than 60% of minerals operations in Australia have neighbouring Indigenous communities.

The MCA's vision is a thriving minerals industry working in partnership with Indigenous communities for the present and future development of mineral resources and the establishment of vibrant, diversified and sustainable regional economies and Indigenous communities. Industry further recognises that the present and future operations of minerals companies are inextricably linked to building and enhancing our strong relationships with Indigenous communities, and to meeting the needs of this generation without compromising the ability of future generations to meet their own needs.

The industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests, and welcomes changes that improve the efficiency and operability of the Native Title system without diminishing the rights of Indigenous Australians.

Moving from a welfare to economic independence focus

The *Native Title Act* has provided a vision for Aboriginal people in shifting attitudes from welfare dependency to financial independence and the ability to make lifestyle choices. Within the native title system, opportunities for achieving economic improvement are mainly under the future acts process through negotiations with the extractive industry. This is allowing native title groups to gain some significant benefits and become more and more involved in the broader economy. Other opportunities within the broader private sector are also having an increasing and positive impact for Indigenous Australians, including where NTRBs/NTSPs are negotiating their own frameworks with organisations that include employment and economic benefits for native title groups and Indigenous communities.

Accordingly, we welcome the opportunity to explore with Government a range of policy and governance reforms to better position Indigenous Australians to capture the full extent of direct and indirect economic opportunities presented in those remote and regional communities where mining is a major economic catalyst.

The role of Agreements

A clear opportunity exists to leverage the increased economic activity associated with mineral wealth to enhance social and economic capacity whereby Indigenous people can become long term contributors to, and drivers of, regional and community development.

Specifically, the MCA and NNTC consider that provided that a broader framework of policies and social and physical infrastructure is in place to support Indigenous economic development, payments made under agreements negotiated with native title groups provide a platform for the long term investment of such monies. It is hoped that this will ensure sustainable, intergenerational benefits to Indigenous communities.

The long term social licence to operate interests of mining companies creates a driver for commercial negotiations to include details on governance arrangements for the management of, and criteria for the distribution of financial benefits. The objective here is to ensure that both the current and future generations of the native title groups share in the benefits of resource development.

Charitable Trusts

Currently, charitable trusts are commonly used for holding benefits from negotiated agreements to both maximise the value of the benefits and to avoid some of the difficult definitional issues in current taxation arrangements. However, charitable trusts and funds are not a neat fit, particularly for agreements centred on the statutory entitlements of native title holders.

The single purpose requirement of charities requires the establishment of a number of trusts to manage the range of diverse range of outcomes desired by Indigenous groups from their land use agreement negotiations (eg health, education etc). This requirement places a huge burden and responsibility on the limited number of Indigenous people with the capacity and desire to participate on management boards which many believe is not sustainable in the short and longer term.

The MCA and the NNTC believe that structural changes to the Charities Act are required in order to provide a more sustainable management option for land use agreement funds which will enable governance arrangements to operate more realistically and effectively within the current context.

The Indigenous Community Development Corporation (ICDC) Model

The proposal for an Indigenous Community Development Corporation (ICDC) model aims to create a new category of entity for tax purposes as an alternative entity for use when considering appropriate structures for the management of payments and benefits negotiated by Indigenous communities and groups, whether these benefits come from the public or private sector including, *but not limited to*, agreements centred on the statutory entitlements of native title groups.

The MCA and NNTC consider that the development of an alternative category of entity for tax purposes would substantially enhance the effectiveness and efficiency of the existing system, including:

- shifting the language away from concepts of charity to concepts of community and economic development;
- creating greater flexibility within the taxation system for community specific approaches to managing funds for socio-economic development;

- providing a structure that encourages intergenerational and sustainable benefits through the establishment of an accumulation fund;
- creating capacity to maximise the delivery of economic and social dividends with minimal administrative burden; and
- recognising the unique multifaceted challenge of Indigenous disadvantage.

Governance Requirements

It is the view of the MCA (as well as the NNTC as documented in previous submissions) that it is essential that necessary governance arrangements should be in place to facilitate best practice in ensuring effective management of funds generated by land use agreements. This can be achieved through:

- Appointment of a board of directors or company members who have the competencies as currently required by the Corporations Act & CATSI;
- Compliance with either the Corporations Act & CATSI;
- Encouraging the appointment of independent experienced directors (it is difficult to make this a requirement as there may not be an adequate supply of people available to undertake this role);
- Audits and review processes to be undertaken by an independent entity;
- Public disclosure mechanisms;
- Requiring an approved customised Accumulation (investment and distribution) Plan;
- Requiring an appropriately qualified professional be appointed to manage the accumulation fund;
- Capacity building on issues such as governance responsibilities (conflict resolution, conflict of interest etc), financial management; enterprise facilitation; community development etc to enable board members to successfully undertake their responsibilities. The capacity building should incorporate an intergenerational focus to ensure the next generation is ready to undertake these responsibilities in the short to medium term future.

Conclusion

The funding provided through mining agreements has the potential to be very significant. It is important that an appropriate administrative mechanism be established to ensure that the funds are managed and regulated effectively and in accordance with the needs and aspirations of native title groups. Therefore the opportunity to explore with Government a range of policy and governance reforms to better position Indigenous Australians to capture the full extent of direct and indirect economic opportunities presented in those remote and regional communities where mining is a major economic catalyst is welcomed.

The MCA and the NNTC have developed the ICDC model as a vehicle to manage native title agreement funding. Should the Government be in a position to expand charities to meet the aspects outlined above, the MCA and the NNTC would welcome the opportunity to engage with Government on the opportunity to progress the ICDC as an alternative tax structure. The ICDC would be an overarching entity which is the holder of two tax entities, namely a charitable trust (the Indigenous Community Fund) and a discretionary trust which would focus on individual payments and other economic development initiatives outside of charitable purposes.

Additionally it is essential that the necessary governance arrangements should be in place to facilitate best practice in ensuring effective management of funds generated by land use agreements. The MCA is disappointed about the consultation period provided to consider the range of issues canvassed in the consultation paper as it was unable to engage with its stakeholders to provide a comprehensive response. Instead, the MCA summarised governance sections of joint MCA and NNTC submissions already provided to other consultations processes as outlined above.

The MCA and NNTC had planned to discuss many of the governance issues raised in this consultation paper at a workshop on 10th February, 2012. We would be very happy to provide the outcomes of this workshop to this enquiry.

Thank you for providing the opportunity for MCA to contribute to the Review of Not - For - Profit Governance Arrangements Consultation Paper, (December 2011). Should you wish to discuss the matters raised in this letter, please do not hesitate to contact myself on 02 6233 0631.