Transparency in Resource Agreements with Indigenous People in Australia

Miranda Stewart, Maureen Tehan and Emille Boulot

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TRANSPARENCY IN RESOURCE AGREEMENTS WITH INDIGENOUS PEOPLE IN AUSTRALIA

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Abstract

This working paper examines transparency requirements in agreement making with Indigenous People. In particular, this working paper examines resource payments provided to Indigenous entities or individuals, under a variety of types of agreements made by Indigenous peoples with resource companies, and/or governments. In general, these resource payments are made as part of obtaining a social licence to carry out resource activity on Indigenous lands, and in a process of a resource company gaining approval for exploration or production licenses. Benefits made under agreements can include monetary and non-monetary benefits such as training, education and employment benefits.

Payments or other benefits are provided by resource companies to Indigenous peoples in relation to investment in oil, gas, mining exploration or production in Australia under various legal regimes and in a range of forms. We call the many diverse payments and benefits that may be provided to Indigenous people under these regimes resource payments for ease of reference in this working paper. Resource payments may be provided to Indigenous entities or individuals, under a variety of types of agreement made by Indigenous peoples with resource companies, and/or governments. In general, these resource payments are made as part of obtaining a social licence to carry out resource activity on Indigenous lands, and in a process of a resource company gaining approval for exploration or production licenses.

Overall, there are minimal or no public disclosure requirements for most types of resource payments, in law and practice in Australia. There is also, in general, no legislative prohibition of disclosure or public reporting of resource payments. Most resource payments are made under contractual agreements between resource companies and Indigenous communities. Subject to normal contractual rules, the parties (resource companies and Indigenous communities) could agree to disclose or report resource payments. However, most do not.

Australian law does require some reporting of the existence of agreements under which resource payments are made and the parties to those agreements, and also requires some reporting by Indigenous entities of sources of income including resource payments that they receive. There is a spectrum of legal requirements for public disclosure and transparency of resource payments made to Indigenous people by governments and resource companies. Consequently, in this working paper, we organise the different entities and agreements under which resource payments are made, along a spectrum of transparency from those agreements or entities with the greatest amount of publicly available information, to those agreements which are least transparent.

Part 1 of this working paper examines the level of transparency in resource payments. Part 2 examines the range of potential benefits that an Indigenous party to an agreement may receive, the potential value of such benefits and the regulatory requirements in relation to received agreement benefits. Part 3 summarises reporting requirements for entities that receive resource payments and part 4 summarises reporting requirements for agreements under which resource payments are made.
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<td>Aboriginals Benefit Account</td>
</tr>
<tr>
<td>ACNC</td>
<td>Australian Charities and Non-for-Profits Commission</td>
</tr>
<tr>
<td>AIATSIS</td>
<td>Australian Institute of Aboriginal and Torres Strait Islander Studies</td>
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<td>ALGA</td>
<td>Australian Local Government Association</td>
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<tr>
<td>ALRA</td>
<td><em>Aboriginal Land Rights (Northern Territory) Act 1976</em> (Cth)</td>
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<td>ASIC</td>
<td>Australian Securities and Investment Commission</td>
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<td>ATNS</td>
<td>Agreements, Treaties and Negotiated Settlements Project</td>
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<td>CATSI</td>
<td><em>Corporations (Aboriginal and Torres Strait Islander) Act 2006</em> (Cth)</td>
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<td>CGOI</td>
<td>Consolidated Gross Operating Income</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<td>DGR</td>
<td>Deductible gift recipient</td>
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<tr>
<td>FaHCSIA</td>
<td>The former Department of Families, Housing, Community Services and Indigenous Affairs, now the Department of Social Services</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICDC</td>
<td>Indigenous Community Development Corporation</td>
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<td>ILUA</td>
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<td>MWT</td>
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<td>NNTT</td>
<td>National Native Title Tribunal</td>
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<td>NTA</td>
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<td>ORIC</td>
<td>Office of the Registrar of Indigenous Corporations</td>
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<td>PBC</td>
<td>Prescribed Body Corporate</td>
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<td>TOSA</td>
<td><em>Traditional Owner Settlement Act 2010</em> (Vic)</td>
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<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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Introduction: Transparency in resource payments

Payments are made to indigenous peoples and communities under various arrangements which provide access to land for a company, identification and protection of indigenous cultural heritage, a social licence to operate for the company and/or fulfil legislative requirements.

The term transparency is very broad and may range from full public disclosure to minimal disclosure between parties to agreements. Therefore in this working paper, depending on context, we use the term transparency in a general way to cover the full spectrum of transparency ranging from public disclosure to transparency between parties and beneficiaries under agreements. In assessing the relevant level of transparency it is helpful to ask for whom the transparency is sought and for what purpose as requirements for transparency may depend on matters such as whether projects, agreements and benefits are large or small scale and any in built transparency measures between parties.

Overall, there is a lack of public disclosure regarding resource payments to Indigenous people in Australia. The law does not require reporting for most kinds of resource payments. In particular, there are limited reporting obligations for payments made under native title agreements, which are the most common form of resource agreement with Indigenous people. While this may mean there is a lack of public transparency, the lack of public disclosure does not necessarily mean a lack of transparency between parties to or beneficiaries of agreements.

The law also does not prohibit transparency of resource payments in most cases. Most resource payments to Indigenous people are made under contractual agreements. Consequently, the resource companies and Indigenous communities who are party to agreements under which resource payments are made could agree to make the contents, types of payments and amounts public. In general, they do not do so.

While overall there is low transparency in the sense of public disclosure, the law does require reporting of some basic information about agreements under which resource payments are made, and requires reporting by some kinds of entity that receive resource payments. There is a spectrum of transparency requirements from more to less transparent produced by the patchwork of legal regimes for resource agreements and Indigenous entities. Consequently, in this working paper, we organise the different entities and agreements under which resource payments are made, along a spectrum of transparency from those agreements or entities with the greatest amount of publicly available information, to those agreements which are least transparent. Part 3 and Appendix B summarises reporting requirements for entities that receive resource payments. Part 4 and Appendix C summarises reporting requirements for agreements under which resource payments are made. Appendix E provides some examples of agreements and the quantum of payments made pursuant to them.

One form of native title agreement, the Indigenous Land Use Agreement (ILUA), must be registered with the National Native Title Tribunal (NNTT) and so the existence of ILUAs is accessible from one central public repository. However, apart from their existence and information about the parties and territory covered, the terms of ILUAs and payments made under ILUAs do not have to be publicly reported.

Much less information is available about other types of native title agreement. Specifically, Future Act Agreements under the native title right to negotiate regime are the least transparent of the agreements examined. Only the number of Future Act Agreements published and nothing is known as to their content unless parties make information available via press release or other means.
Agreements under the *Traditional Owner Settlement Act 2010* (TOSA) in Victoria are publicly available and the process is therefore quite transparent.

Aboriginal land rights mining related payments under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) are next in levels of transparency. Payments are required to be reported by the land council which receives the payments, in general terms. The statutory royalty equivalents must be paid to *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI) corporations and are therefore subject to the oversight of the Registrar of Indigenous Corporations (see 3.1 below). While the full text of agreements is generally not available and the information is more difficult to locate, the *ALRA* provides a mandated procedure and protocols around negotiation and reporting on benefits received.

1.1 Low transparency?

The relatively low level of transparency of resource payments with Indigenous people is primarily the result of legal regimes not requiring public reporting of these payments.

However, given that there is not usually a prohibition on publicity, parties could report agreements and resource payments if they chose. The relatively low transparency of resource payments in Australia can be attributed to a variety of factors, including:

- Low legal requirement for disclosure
- The viewing by some or all of the parties to agreements as well as regulators, as private or commercial contracts similar to agreements with private land-holders, especially where the State is not a party;
- The availability of (and preference for) more informal, more flexible and less resource-intensive (and hence less burdensome in terms of disclosure) types of agreements over more formal, and marginally more transparent, alternatives such as ILUAs; and
- A widespread tendency by parties to agreements to regard the entirety of agreements as ‘confidential’.

1.2 Low levels of mandated disclosure

The legal regime for most kinds of resource payments to Indigenous peoples does not require or encourage publicity of resource payments.

In a discussion paper titled *Leading Practice Agreements*, the Commonwealth government has suggested that broadening the requirements for the amount of information that must be made available for public inspection following the registration of an ILUA could improve the transparency of such agreements (2010a: 12–13). However, this discussion paper also highlighted concerns that would accompany any attempt to enhance transparency by mandating greater disclosure in statutory rules.

For instance, prescribing a broader range of information to be disclosed could lead to a greater ‘focus on form rather than substance’ in agreement-making parties’ decisions about which information to release to the public (Commonwealth of Australia 2010a: 13). Furthermore, if these broader disclosure requirements were applied to ILUAs only, they could make parties even more reluctant to register their arrangements in this form, increasing the existing
preference for less time-consuming, more informal arrangements (Commonwealth of Australia 2010a).

The introduction of mandatory requirements for full or more comprehensive disclosure of all agreement terms could remove some of the key attractions that agreement-making holds for agreement participants. These attractions include the confidential, flexible nature of agreements, the fact that they represent a far less time-consuming alternative to formal processes such as the running of a litigated native title claim, or the obtaining of a future act determination by the NNTT and the relationship building inherent in the agreement making process. The nature of these attractions also shows that while the low threshold of disclosure prescribed by the NTA with respect to ILUAs and Future Act Agreements has a role to play in their low transparency levels, other less formal factors are more determinative in the culture of confidentiality that has come to permeate agreement-making with Indigenous people.

1.3 The private or commercial nature of agreements

Many parties involved in negotiations over land access for mining, often including both corporations and Indigenous land owners, consider that the legal relationship is a private contractual relationship that should not be subject to public regulation and scrutiny beyond the normal accountability requirements for various entities.

There may be genuine reasons why parties to agreements may wish to prevent the disclosure of certain types of information. Indigenous people, for example, may need to protect traditional or ‘intensely personal’ information, especially when it relates to their stories, their individual and communal rights, and their responsibilities and connections to country and to observe cultural sensitivities about who has access to culturally significant knowledge (Bauman and Kingham 2005: 22). They take the view that the arrangements are confidential and private to the relevant group as is the case with any other private landholder related agreements. Companies for example may consider the information commercially sensitive. Amounts paid under agreements or other benefits (such as the provision employment, training or infrastructure programs pursuant agreements) may contain commercial in confidence aspects and other provisions which should not be disclosed to their competitors. Compensation packages may be characterised as setting a benchmark against which other future act agreements might be negotiated. On the other hand, governments and some Indigenous communities may consider these relationships and therefore the payments made to have a public character and that the agreements and payments should be subject to public assessment in terms of fairness, quantum of payments including the creation of benchmarks and the use made of payments.1 The Law Council of Australia (2009:5) has suggested that this is information that might be most useful to native title parties engaged in subsequent negotiations. Some mining companies, in particular Rio Tinto, and some Indigenous organisations, in particular the Kimberley Land Council, have taken steps to make agreements public. However, these are the exception. There is a tension here between the private relationship of the parties and the attempts of governments to bring these payments into account when determining expenditure on indigenous communities (Langton and Mazel 2008; ATNS Submission to Native Title Working Group 2008).

1 Although it is important to note that the quantum of payments and the accountability and internal governance arrangements for Indigenous entities may engage different considerations.
1.4 The resource-intensive nature of formal agreement registration

The number of registered ILUAs since the passing of the NTA is far outweighed by the number of (less formal) Future Act Agreements, which are not subject to the same notice and registration requirements. Government and private parties wishing to obtain consent to future acts clearly prefer to do this without going through the process of registering an ILUA.

The making of a binding ILUA may be a lengthy and resource-intensive process, involving a number of steps such as negotiation, lodging, notification and finally formal registration. There are significant transaction costs associated with preparation for, negotiating and completing an agreement, especially when a large project is at stake (FaHCSIA 2009: 3). As noted in submissions to the Commonwealth of Australia’s discussion paper, Leading Practice Agreements, the notification periods for ILUAs may be excessively long (one month for body corporate ILUAs, and three months for area and alternative procedure ILUAs) (2010a: 12). There is also the risk of further delays as a result of what the discussion paper calls ‘vexatious or frivolous objections to ILUA registration’ (Commonwealth of Australia 2010a: 12).

On the other hand, some have suggested that the lack of transparency has contributed to the resource-intensive nature of the agreement-making process (FaHCSIA 2009: 9).

However, unless disclosure requirements are streamlined and made less burdensome and time-consuming for parties, such parties will always opt for the kinds of agreements that are accompanied by a low level of transparency — or will no longer see agreement-making as a less formal and costly alternative to the formal resolution of matters such as native title.

1.5 A tendency to treat the totality of an agreement as ‘confidential’

The scarcity of information available about the contents of agreements on native title may be attributable to ‘unnecessarily broad confidentiality provisions in agreements’ as suggested by the FaHCSIA Native Title Payments Working Group in its recommendations to the Commonwealth government’s discussion paper on Optimising Benefits from Native Title Agreements (FaHCSIA 2009: 2). This has been described by O’Faircheallaigh (2004: 6) as part of a culture of ‘excessive secrecy’ in agreement-making.

Broad confidentiality provisions in agreements stem from a preference among parties to regard a very broad range of agreement content as being confidential. They may also be the result of formal legal professional advice that adopts very broad confidentiality provisions as a matter of course or ‘boilerplate’ in agreements. In this state of affairs, potential benefits of greater disclosure such as the positive publicity that follows a strong policy of engagement with Indigenous communities by a resource company, are overshadowed by the perceived concerns associated with opening up ‘private’ arrangements to public scrutiny.

O’Faircheallaigh (2004: 2) suggests a fear of criticism of parties to agreements, including companies, governments and Indigenous groups, regarding the level and distribution of payments under agreements. The negotiation of agreements often requires Indigenous groups to make concessions about their native title rights and entitlements in exchange for certain benefits. Afterwards, they may not want the extent of concessions that they made to be known
to other groups, or to be characterised as having precedent value for subsequent negotiations with other groups (ALGA 2002: part 5.2). Companies may prefer that the amounts paid under the agreement or other benefits (such as the provision of employment, training or infrastructure programs) are not known to their competitors or characterised as setting a benchmark against which other native title agreements might be negotiated (Law Council of Australia 2009: 5).

This fear of criticism is compounded by the current process by which agreement outcomes are scrutinised, assessed and measured — a process that O’Faircheallaigh (2004: 3) describes as ‘inherently political’. However, as suggested in the FaHCSIA Native Title Working Group’s report (2009: 2), while there is a need for parties to be confident that ‘genuinely commercially or culturally sensitive information’ will be adequately protected it is likely that there is no need for confidentiality of the ‘totality’ of agreements.

### 1.6 Arguments made for increased transparency

The overall lack of public disclosure of resource payments to Indigenous peoples has been discussed in several government reviews of the agreement-making process. While it is widely accepted that agreements may generate significant benefits for Indigenous communities, there is also a consensus that we know little about the making, content and substantive outcomes of agreements for Indigenous communities (O’Faircheallaigh 2004: 1, 10; Langton and Mazel 2007: 24; Tehan 2003: 565; Bauman and Kingham 2005: 24). Various concerns have been expressed. These include that it is impossible at present to quantitatively and qualitatively assess their benefits and potential limitations and disadvantages for Indigenous people (Langton and Mazel 2007: 24, 40) or at least it is still too early to assess the long term sustainability of benefits to communities. For a range of views on agreement making see: Dodson 2006: 12-13; McCausland 2005; Howard-Wagner and Maguire 2010; O’Faircheallaigh 2004; Ritter 2009; Laurie 2007; NNTT 2007.

The main arguments for increased transparency are briefly discussed here.

1. **To provide models and templates for parties to future agreements.** There is a scarcity of ‘best practice’ models and templates for both large and small agreements including quantum of benefits. Greater transparency in agreement-making would benefit parties involved in negotiating new agreements by providing them with models or templates to follow (FaHCSIA 2009: 2). Parties involved in agreement-making incur unnecessarily high transaction costs due to the resource-intensive nature of drafting new agreements from scratch (Commonwealth of Australia 2008: 9). They also fail to take advantage of best practice principles that have already been established in previous agreements.

2. **To enable more comprehensive analysis of the outcomes of agreement-making for Indigenous people.** In particular, there are indications that the outcomes of many agreements especially Future Act Agreements are minimal, or inadequate (O’Faircheallaigh 2007; NNTT 2007: 27; Laurie 2007). The NNTT suggests in its publication Getting the Most out of the Future Act Process (2007: 28) that agreements are delivering benefits to Indigenous communities but also suggests that there are some valid concerns about whether or not agreement-making is actually delivering positive outcomes for all Indigenous communities.
3. *To address complexities in power imbalances* that might meet concerns that packages may not be appropriate for the scale of impact, exacerbated by the asymmetry of information and perceived or actual (in some instances) of power imbalances between companies and indigenous communities. This includes monitoring of activities of intermediaries or agents who may seek to negotiate on behalf of Indigenous communities.

4. *To address the frustration of governments* that may be aware of the full amount of monies flowing to specific indigenous communities or entities and their concern about contributions of those funds to critical infrastructure and service delivery and well as ensuring the proper treatment of such funds for taxation and income/welfare purposes.

5. *To enable analysis of the equity of agreement-making processes involving Indigenous people.* There is a need for adequate monitoring and evaluation to ensure, for example, that agreement negotiation and mediation processes demonstrate an adequate awareness of the cultural differences and discrepancies in terms of resources between Indigenous and non-Indigenous participants (Bauman and Kingham 2005: 17, 18, 24). There is also a need to ensure that the ‘right’ people are taking part in such processes on behalf of their communities, and that any mediation or negotiation of an agreement is aware and inclusive of those community members whose participation is vital to the success of any resulting agreement (Bauman and Kingham 2005: 17, 18).

6. *To increase accountability in the implementation of agreements* by requiring transparency and accountability for payments in the hands of the receiving entities.

A more fundamental reason given to open up much more of the agreements to public scrutiny is the general move towards a culture of transparency, accountability and corporate social responsibility in both governmental and industry contexts.
2. Types of resource payment

A range of types and values of resource payment is made to Indigenous peoples in Australia.

2.1 Legal framework for resource payments

Most resource payments are made under agreements with Indigenous people. The detailed reporting requirements for each type of resource agreement under which payments and benefits are provided under the native title, land rights and heritage legal frameworks is explained in Part 4. Different types of agreement include Indigenous Land Use Agreements (ILUAs), Future Act Agreements, usually referred to as Section 31 Agreements and ancillary agreements made in association with ILUAs or Section 31 Agreements, and other forms of agreement or determination under the native title regime; State native title settlement agreements such as those in Victoria and South Australia; agreements under land rights Acts; and heritage agreements.

There are three general situations where resource payments may be made (as suggested by Howard-Wagner and Maguire 2010: 74):

1. Resource payments made under agreements, where legislation requires an agreement before a resource project or certain acts can proceed. For example, the ALRA requires such agreements before mining projects can continue.

2. Resource payments made under agreement with Indigenous people even if this agreement is not required by law – that is, mining activity may proceed even if an agreement does not eventuate. For example, this may occur under the right to negotiate under the NTA.

3. Resource payments where there is no legal requirement to negotiate, but the resource company chooses to negotiate with Indigenous people voluntarily; this occurs generally in situations where the resource company held interests in the land prior to the native title regime (O’Faircheallaigh and Corbett 2005: 634-635). The Argyle Diamond agreement is an example (ATNS, 2005). These are often called ‘as if’ agreements as they are made as if the parties are bound by the relevant legal framework.

Resource payments may be received by a range of different legal entities created for the benefit of Indigenous people. There are various transparency and reporting requirements for each type of legal entity. The entities are CATSI Corporations under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act), proprietary limited companies and companies limited by guarantee established under the Corporations Act 2001 (Cth), trusts including discretionary or fixed trusts and charitable trusts, specific trust arrangements including the Victorian Traditional Owners Trust established under the Traditional Owner Settlement Act 2010 (Vic) (TOSA), and the various statutory land rights entities established by the ALRA. There is also a recent proposal for a new legal status or entity, called an Indigenous Community Development Corporation (ICDC), however this has not yet been established.
2.3 Estimated value of resource payments

As there is no public reporting of resource payments to Indigenous people in Australia, there is no reliable independent estimate of the overall value of resource payments. The Minerals Council of Australia has provided an estimate of approximately $3 billion as the total value of native title and land rights payments made by the mining industry for the 2011-2012 financial year (Taxation of Native Title and Traditional Owner Benefits and Governance Working Group 2013: 13). This estimate encompasses cash payments, native title land access payments, royalty equivalents under the ALRA, Indigenous and non-Indigenous heritage management, payments made under other land rights regimes and payments made under impact/benefit agreements. Future act agreements (that is agreements driven by the future act process of the Native Title Act 1993 (Cth): see Part 4 below) provide the main source of native title income.

2.4 Types of resource payment

Resource companies may make a range of types of resource payment under the ALRA or NTA regimes including financial payments and non-monetary benefits. Agreements and payments made thereunder will vary markedly depending upon whether the payments are made in respect of exploration or mining as well as the scale of a project. The few publicly available agreements, and anecdotal evidence from both resource companies and Indigenous communities, indicates that a range of payments and benefits is common under native title agreements although quantum will vary. These different types of resource payment are illustrated in the Case Study example of a comprehensive agreement in Appendix A.

Monetary resource payments include:

- “lump sum”, once and for all payments, sometimes expressed to be for compensation or for access to or acquisition of an asset;
- Periodical payments, for example royalties or in the nature of royalties; linked to periodic use of an asset, such as a lease or licence payment, including ALRA royalties;
- Profit share payments, which may be made only when the specific project is profitable;
- Reimbursement of expenses associated with engaging in negotiation, concluding an agreement and operating an ongoing entity or management structure for receipt of funds;
- Lease or license payments;
- Investments in commercial businesses, low interest loans or equity contributions to Indigenous community organisations or businesses.

Non-monetary resource payments or benefits include:

- Real property such as freehold land or long term leases eg land owned by the resource company, or Crown land, or land purchased for the purpose;
- Equity, such as a shareholding, in a corporation;
- Funds to be expended for various social, employment or cultural benefits but remaining under control of the resource company (with obligations to disburse them for benefit of the Indigenous group);
- Employment targets and community development investment by the resource company;
- Education and training for members of the Indigenous community;
• Housing provision to members of the Indigenous community.

**Other types of support or benefit** include resource payments made to private individuals or related entities that are not representative of the traditional owner group as a whole, such as:

• Local business development and Indigenous contracting;
• Education and training including scholarships and bursaries;
• Payments for heritage services by individuals;
• Town maintenance and facilities;
• Accommodation and housing benefits;
• Health and wellbeing projects and initiatives;
• Recreation and culture projects and initiatives;
• Cooperative land management;
• Environmental and heritage initiatives and protocols.

Appendix A includes a Case Study that illustrates these payments made under a comprehensive agreement. Appendix E includes examples of agreements including quantum and types of payments.

### 2.5 Tax treatment of resource payments

Different types of resource payment have different tax treatment, but most are non-assessable on receipt by Indigenous groups or individuals. Resource payments may be reported to the Australian Taxation Office for tax purposes on entity or individual tax returns; however, these are confidential and not available to the public.

A Mining Withholding Tax (MWT) is imposed at a rate of 4.5 per cent on payments from mining companies to eligible distributing bodies for the benefit of Aboriginal people, under Division 11C of the *Income Tax Assessment Act 1936* and the *Income Tax (Mining Withholding Tax) Act 1979* (Cth). The MWT was established in 1979 and has operated primarily in the Northern Territory and in Queensland (for a detailed analysis see Martin 2010). It generally applies to resource payments under the *ALRA*. Where the MWT applies, then the payment to an Indigenous person or entity is treated as non-assessable for income tax (s 59-15 of *Income Tax Assessment Act 1997*).

New s 59-50 of the *Income Tax Assessment Act 1997* (Cth) has confirmed that most native title payments are non-assessable for income tax. Various Indigenous entities and individuals may be required to declare native title benefits in tax returns, generally to ensure that they attract the exemption which is intended to ‘clarify that amounts or benefits that may otherwise be assessable income for an Indigenous person or an Indigenous holding entity’ are treated as ‘non-assessable non-exempt’ income ‘if the amount or benefit is a native title benefit’.

Section 59-50(5) defines a ‘native title benefit’ as:

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2 Explanatory Memorandum to Tax Laws Amendment (2012 Measures No. 6) Bill 2012, [1.17].
‘An amount, or *non-cash benefit, that
(a) arises under:
(i) an agreement made under an Act of the Commonwealth, a State or a Territory, or under an instrument made under such an Act; or
(ii) an ancillary agreement to such an agreement;
to the extent that the amount or benefit relates to an act that would extinguish *native title or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title; or
(b) is compensation determined in accordance with Division 5 of Part 2 of the Native Title Act 1993.

The provision allows non-assessable native title benefits to be passed on to further eligible entities, or individuals, by the original recipient. Tracing of these payments will be required, and individuals must report (again confidentially) on tax returns.
3. Transparency and reporting requirements for entities

There is a range of entities that receive resource payments for the benefit of Indigenous people and these entities have a range of transparency and reporting obligations. To obtain a full picture of transparency and reporting obligations in relation to resource company payments to Indigenous people, it is necessary to identify the various entities that may receive such payments and their reporting obligations to various regulatory agencies. Some entities are required to publish detailed information about income, assets and agreements, while others must file minimal reports, if any. Entities may also enter into partnerships or joint ventures. Generally the reporting requirements will attach to the entities that are the partners or venturers. A summary of entity legal requirements is in Appendix B and the range of possible entities is illustrated in the case study in Appendix A.

The majority of income received by Indigenous groups and people, besides government grants, is related to land access or services. It is estimated that other categories of income comprise less than 10 per cent of the total income received by indigenous organisations (Taxation of Native Title and Traditional Owner Benefits and Governance Working Group 2013, 12).

Most Indigenous entities are required to file tax returns (unless they are charities that are tax exempt). Entities that receive native title payments may be required to declare these and set out the types of payment or benefit. This will generally be done in order to obtain tax exemption, for example for native title payments that are compensatory in nature, as explained in 2.5 above. In the normal course such tax filing will be confidential and may only be used by the Australian Tax Office in respect of its tax administration function.

3.1 CATSI Corporations

CATSI corporations are subject to stringent reporting obligations in respect of their management structure, income, expenses and activities. All information about each CATSI corporation and its annual reports are made public on the ORIC register.

Under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act) a CATSI corporation must report to the Registrar, the Office for Regulation of Indigenous Corporations (ORIC), each year about its finances and membership. It must include a report as to how well it has abided by the requirements of the CATSI Act and the corporation’s own rules (constitution) (CATSI Act s 327-1).

Small corporations with a consolidated gross operating income (CGOI) of less than $100 000 need to lodge a general report. Small/medium corporations with a CGOI of $100 000 or more and less than $5 million must lodge a general report and a financial or audit report. Large corporations and those in receipt of a CGOI of $5 million or more must lodge a general report, financial report, audit report and directors’ report. However, a CATSI corporation is not required to specify the source of income, or whether it has received resource payments.

3.2 Proprietary Limited company

A native title claim group may establish a proprietary company under the Corporations Act 2001 (Cth), which is taxable. That company may operate businesses or investment activities. It must report to the Australian Securities and Investment Commission (ASIC) as do other
companies and file a tax return. Unless it is a small proprietary company (as defined in s 45A(2) of the Corporations Act 2001 (Cth)) it must prepare a financial report (s 295), a directors report (s 298), have the financial report audited (ss 301, 307, 308), provide the reports to members (s 314) and lodge with ASIC (s 319). A small proprietary company does not need to prepare these reports unless directed to do so by ASIC or by at least 5 per cent of its members (s 292(2)). Companies are not required to specify the type or source of income in these reports.

3.3 Company limited by guarantee

It is common, especially for older indigenous organisations, that a company limited by guarantee is established. That company may operate businesses or investment activities. As for a proprietary limited company, a company limited by guarantee must report to ASIC and if in receipt of taxable income, it must file a tax return. Companies limited by guarantee are commonly used by organisations that seek and obtain charitable and deductible gift status for tax purposes.

Companies with an annual revenue less than $250,000 which do not have deductible gift recipient status are exempt from preparing a financial report under the Corporations Act 2001, unless exceptions apply. Companies with either annual revenue of less than $250,000 that are a deductible gift recipient, or have annual revenue of between $250,000 and $1 million, irrespective of whether the company is a deductible gift recipient, must prepare a reviewed financial report and a directors report (ss 292, 298, 300B). The financial report does not need to be audited unless the company is a Commonwealth company, or a subsidiary of a Commonwealth company or Commonwealth authority. Companies with annual revenue of $1 million or more, irrespective of whether they are a deductible gift recipient, must prepare and lodge an audited financial report ss 292, 301 and a directors report (ss 298, 300B) and must give reports to any member who elects to receive them (s316A). Companies are not required to specify the source of income in these reports.

3.4 Discretionary or fixed trusts

Many Indigenous organisations establish one or more trusts to hold assets or income for the benefit of the native title claim group or members of the organization. Some trusts may be used for investment or business purposes as is common in Australia more generally.

Resource payments may be made to a discretionary trust in favour of a traditional owner clan, identified by named elders. This is illustrated in the case study in Appendix A. The discretionary trustee pays out sums directly to individual clan members as determined by the clan. In a fixed trust, the interests of the beneficiaries are fixed in relation to the income or the capital of the trust.

Trustees are subject to reporting and regulation under State Trustee Acts. In some circumstances, trustees carrying on investment or business activity must report to ASIC. Trustees are also required to lodge tax returns for the trust. A trust may have a corporate trustee which, as a company, will be subject to regular ASIC reporting requirements. However, there is no general requirement in law for trustees to specify the source of income, such as resource payments that may be made to trusts or the distribution of those payments.
3.5 Incorporated associations

Some Indigenous organisations may be established as incorporated associations under State Associations legislation. Generally, these organisations are required to be not for profit and they are subject to State reporting requirements which are generally minimal (see for example Associations Incorporation Reform Act 2012 (Vic)). They may be registered as a charity. This legal entity form appears to be little used for receipt and management of resource payments by Indigenous groups.

3.6 Registration as a charity

A trust may be established for a charitable purpose (generally known as a charitable trust), and receive resource payments for Indigenous peoples. Other entities, such as a CATSI corporation or company limited by guarantee, may also be a charity at law.

For example a trust or company limited by guarantee may be established for the purpose of poverty relief and advancement of Indigenous people, which may comprise an Indigenous claim group and other Indigenous people who live in the community. A charitable trust may have a fund that provides education scholarships for members of the claim group and is utilised to receive payments. It may also invest resource payments for the life of the mine or other long period for future benefit of the group.

A charity, in whatever legal form, may choose to register with the Australian Charities and Not-for-profits Commission (ACNC). While voluntary, this registration is required if the charity is to be eligible for income tax exemption. Apart from this, a charitable trust is subject to any State based regulatory regime for Trustees while other entities that are charities are regulated under relevant entity regimes.

One of the main goals of ACNC registration is increased transparency. Charities are required to lodge annual tax returns and to lodge reports with the ACNC. As to the content of the reports to the ACNC, small charities need to submit an Annual Information Statement, which, from 1 January 2014, will include basic financial questions. Medium charities need to submit an Annual Information Statement and from 2014 must submit an Annual Information Statement and an annual financial report that is reviewed or audited. Large charities need to submit an Annual Information Statement and from 2014 must submit an Annual Information Statement and an annual financial report that is audited (ACNC Reporting). None of these require the charity to specify the source of income, such as resource payments.

To prevent duplication of regulation, the ACNC has entered into memoranda of understanding with various other government regulators. Currently, if a CATSI corporation is registered with the ACNC they do not need to send any reports to the ACNC. ORIC and the ACNC have signed a memorandum of understanding that confirms the ACNC will accept corporation reports lodged with the Registrar under the CATSI Act as meeting the ACNC’s requirements.

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3 The Abbott government proposes to abolish the ACNC however the Bill to remove the commission has been placed on hold. In the interim, all charities must report and information is on the ACNC Register.
A charitable trust may also have a corporate trustee, which will be subject to the relevant corporate reporting requirements.

### 3.7 Victorian Traditional Owners Trust

The Victorian Traditional Owners Trust manages lump sum funds resulting from native title settlements in Victoria, pursuant to agreements under TOSA (see Part 4.2.2 below). The Trust is registered as a charity and makes distributions to traditional owner groups for charitable purposes.

The Victorian Traditional Owners Trust and Trustee are audited by the Victorian Auditor-General's Office. The Trust produces public Annual Reports and Report Cards for each traditional owner group that has an account within that Trust (Victorian Traditional Owners Trust 2013).

At present, there is only one traditional owner group receiving payments under the Victorian Traditional owners Trust, the Gunai Kurnai (see 4.2.2 below); the Dja Dja Wurrung agreement has just been finalized and may lead to payments into the Trust in future.

### 3.8 Indigenous Community Development Corporation (ICDC).

A new ICDC entity or status was proposed by the Minerals Council of Australia and National Native Title Council as a not-for-profit, income tax exempt entity, with DGR status. The Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report to Government (2013) adopted the proposal and considered that an ICDC would be established by an Indigenous community with the purpose of promoting sustainable community and socio-economic development. The ICDC structure could be used to manage land related payments and other income. The purpose of the ICDC would be wider than a charity and would therefore allow for a range of economic development activities and distributions, including for private profit, beyond what a charitable body is currently permitted to do.

The Working Group has stated that the ICDC would need to have safeguards to ensure Indigenous community funds are not misused and proposed that there should be minimum governance standards for ICDC entities, which ensure that the fiduciary obligation of responsible persons of the ICDC and appropriate standards of accountability, financial management and investment planning are met and that this is able to be supervised by an ICDC regulator.

The ICDC governance standards would apply to all entities that seek registration for the status of an ICDC which could include entities listed above such as CATSI corporations, companies limited by guarantee or trusts. It is unclear as to whether the ICDC will lead to greater transparency in resource payments made to Indigenous people.
4. Transparency and reporting requirements for agreements

Most resource payments are made under agreements with Indigenous people in both government policy and commercial practice in Australia. Resource payments were first made under legal regimes and agreements pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (ALRA). While this regime is still operative, the native title system established under the *Native Title Act 1993 (Cth)* (NTA) has become the dominant arena for agreement making with indigenous people in the last two decades. All of these types of agreement may provide Indigenous people with financial and infrastructural investment benefits, business opportunities, employment and community development opportunities and decision-making responsibilities, especially concerning the management and protection of environmental and cultural heritage (Commonwealth of Australia 2008).

In particular, the NTA and amendments to it in 1998 providing for Indigenous Land Use Agreements (ILUAs) brought about a significant increase in negotiated native title agreements in respect of diverse locations, parties and subject matters (Langton and Mazel 2007; Tehan and Godden 2012; O’Faircheallaigh 2004). As identified by the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, land access agreements and payments to Indigenous groups are increasing due to factors including increases in the indigenous estate (land rights or native title); new resource development projects moving into production; and greater indigenous participation in the formal economy (2013: 11).

Apart from direct government service grants, land-related payments comprise most of the income received by Indigenous organisations and people (ibid: 12). In addition, there may be commercial contracts between Indigenous peoples and private parties including resource companies made outside the land settlement legal regimes, and there are various regional and community agreements with governments (Llewellyn and Tehan 2005; Langton and Palmer 2007: 22; Langton and Mazel 2007: 17-22). As indicated above, agreement content will vary according to whether it covers exploration or mining or both as well as the scale and duration of the activity. Many agreements also cover matters unrelated to extractive industries, for example, pastoral lease access or conservation management.

Sources of data on agreements

The main sources of data about agreements that are publicly available and referenced in this working paper are:

- National Native Title Tribunal (NNTT) register and annual reports of statistics ([www.nttt.gov.au](http://www.nttt.gov.au)).
- Agreements, Treaties and Negotiated Settlements (ATNS) database ([www.atns.net.au](http://www.atns.net.au)), established in 2002. This regularly updated database is a publicly accessible repository of published information on agreements with Indigenous people. The database links together published information on ILUAs (such as media releases or academic articles) and the NNTT Register extracts of such agreements. It summarises the ILUA extracts, links them to a map of the agreement area and to relevant resources such as parties and any secondary commentary and provides background information on native title and other issues in the

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4 Under ARC Linkage Projects generally known as *Agreements, Treaties and Negotiated Settlements Project*. 21
subject area. The database also includes publicly available information on non-ILUA agreements including Future Act Agreements and ALRA agreements.

- Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is a research institution that collects and collates information and research about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples. AIATSIS releases a monthly native title bulletin which includes information on native title agreement making.\(^5\)

In addition to the transparency requirements under the various legal regimes, parties to a resource agreement may voluntarily release further information on the agreement, however in general this does not occur. See Appendix C for more detailed information on agreements and transparency requirements.

### 4.1 Native Title Agreements

#### 4.1.1 Mabo (No 2) and the Native Title Act 1993

In 1992, indigenous rights in land based on pre-sovereignty law and custom were recognised at common law by the High Court in *Mabo (No 2)*. These rights were called ‘native title’. Following considerable national and parliamentary debate, the *NTA* was passed establishing a national scheme for the recognition and protection of native title (Tehan 2003).\(^6\) Since amendments establishing Indigenous Land Use Agreements (ILUAs) in 1998 (see part 4.1.3 for more information), there has been a proliferation of native title agreements between Indigenous people. Agreement making has become the preferred way of resolving most native title issues (Neate 2002; NNTT 2010).

Native title rights (as defined by the *NTA*) persist where they have not been abrogated by government actions, which have the legal effect of extinguishing native title. For an Indigenous group to claim a native title right, a continuing observance of a practice or tradition in relation to that right must be demonstrated (*Yorta Yorta* (2002) 214 CLR 422). Divisions 2, 2A and 2B of the *NTA* validate certain past and intermediate period acts by State and Federal governments in relation to native title and confirm extinguishment in certain circumstances. Division 3 deals with future acts and ILUAs, while Division 5 relates to the determination of compensation for acts that affect or have affected native title. An act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (*NTA* s 227).

The *NTA* recognises a right to compensation in relation to acts affecting native title and introduces mechanisms for determining compensation. This is achieved through a variety of specific provisions and the operation of the *NTA* as a whole. While the concept of compensation is central to the *NTA*, to date there have been no successful litigated (as opposed to consent) compensation claims. As at 30 June 2012, there were only 8 compensation claims in the National Native Title Tribunal (NNTT) compared to 441 native title claims (NNTT 2012: Table 2, 35).

Compensation may be provided where there has been validation of an existing mining right where the title is not extinguished (ie, the non-extinguishment principle applies). In this situation, native title rights are not extinguished but cannot be exercised for the duration of the

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\(^6\) For the definition of native title see s223 of the *NTA*.
grant (NTA s 238). Principles regarding the payment of just terms compensation are contained in ss 51, 51A and 53 of the NTA. Section 22L of the NTA also provides for compensation to native title holders as a result of validation of transfers under the Aboriginal Land Rights Act 1983 (NSW). Mining is also treated under separate provisions in Part 2 Division 3 of the NTA.

4.1.2 Key elements of the native title regime

The two most prominent types of native title agreement today are ILUAs and Future Act Agreements, (in relation to extractive industries usually referred to as Section 31 Agreements), both of which are made under the future acts regime in Division 3 of the NTA.

**Future acts** include the grant of exploration and mining tenements and the future act regime authorises many other activities post the commencement of the NTA on 1 January 1994. Some future acts that come within a limited range of categories set out in the NTA are automatically characterised as ‘valid’, and can therefore be carried out in accordance with certain procedures that require but are not limited to the payment of compensation to the relevant native title holders (Part 2, Division 3, Subdivisions F–N NTA). Such procedures include notification or consultation obligations and compensation where native title is affected and include many non-extractive industry related agreements, but do not include a right to negotiate. However, they may result in agreements (including ILUAs) involving payments to native title holders. There are special provisions relating to opal mining that similarly do not attract the right to negotiate (NTA s26C). In respect of these types of mining, there is no legal requirement for any government or NNTT involvement and therefore no requirement for public reporting or scrutiny of agreements.

Future acts are activities and developments that have the capacity to extinguish native title rights and interests, or that are wholly or partly inconsistent with the continued existence, enjoyment or exercise of those rights and interests (defined in s 227 and s 233 of the NTA). Section 24AA(2) of the NTA provides that a future act is valid if covered by the provisions of the NTA, while s 24AA(3) provides that a future act is valid if dealt with by a registered ILUA.

**The right to negotiate** is the central feature of the future act provisions of NTA in relation to mining exploration or production. The right to negotiate arises when a State or Territory Minister intends to make a grant of a mining right (this may be for exploration or mining) in respect of land for which there is an existing native title determination or a registered native title claim (NTA s 26 and s 29). Where the Minister issues a notice under s 29, a process is triggered under which the parties have 6 months to negotiate in relation to the proposed grant. Negotiation must be in good faith and may cover a range of issues including the quantum of payments, which may be related to the value of the resource (NTA s 31).

At the expiration of the 6 month period, if no agreement has been reached or the parties have not agreed to extend the time for negotiations, either party may ask to have the matter arbitrated by the NNNTT (NTA s 35(1)(a)). The NNNTT may determine that the act be done, that the act be done on certain conditions or that the act not be done (NTA s38). The NNNTT cannot have regard to the value of the resource in setting conditions or compensation (NTA s 39) and this can influence negotiations (O’Faircheallaigh 2007). In almost all arbitrations, the NNNTT has found for the mining grantee party in that the act has been permitted (Corbett and O’Faircheallaigh 2006 suggest that forced arbitration has benefited mining companies; c.f. Sumner & Wright

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7 Or after 1 July 1993 if the act constitutes an amendment or repeal of a legislative act under s 233 (1)(a)(i) of the Native Title Act. The complex definition of ‘future acts’ in the NTA means that some grants made post 1 January 1994 are not ‘future acts’.
2009). It is not uncommon for the parties to disregard the strict time limits and take some time to negotiate an agreement. However it is these provisions that provide the legal backdrop for negotiations that may either result in an ILUA, a Future Act Agreement or an arbitrated outcome. Payments may flow from each of these arrangements.

4.1.3 Indigenous Land Use Agreements (ILUAs)

ILUAs are voluntary agreements made under Division 3, Subdivisions B, C and D (ss 24BA, 24CA and 24DA) of the NTA between the claimants or holders of native title with respect to a particular area of land and waters, and others who either have or seek to gain an interest in that area. At 20 December 2013 there were 846 registered ILUAs.

An ILUA can cover any subject matter. Agreements in relation to exploration and mining including permissions and payments, as noted above, may also be made as ILUAs. An ILUA may be signed prior to a formal determination of native title by the Federal Court of Australia, or after native title has been determined. Often they are used to determine the way in which the parties’ native title rights and interests, public laws and private rights will be managed at ground level (ALGA 2002: para 2.1). ILUAs remain binding on the parties even if native title is not ultimately made out. ILUAs now cover more than 18 percent of Australia’s land mass and a substantial area of sea (below the high water mark); there are ILUAs in all states, but with a significant majority in Queensland (NNTT 2012, 37). See Appendix D for the NNTT map which indicates the extent of ILUA coverage.

The NTA provides for three types of ILUA:

- ILUAs made with bodies corporate – ‘body corporate agreements’ (NTA Part 2 Division 3 Subdivision B) of which there are 185 registered as at 20 January 2014;
- ILUAs made in relation to an area where there is not a body corporate – ‘area agreements’ (NTA Part 2 Division 3 Subdivision C) of which there are 670 registered as at 20 January 2014; and
- ILUAs made under ‘alternative procedures’ (NTA Part 2 Division 3 Subdivision D).

These subdivisions provide for the technicalities relating to parties, content, objections and registration of each type of agreement and provide lists of requirements for an agreement to satisfy the definition of an ILUA.

Disclosure and registration

The making of a valid ILUA involves a certain mandatory threshold of disclosure. An ILUA will only bind the parties when it is registered with the Registrar of the NNTT (NNTT 2008: 5). Once registered the ILUA operates as a contract between the parties but normal contract principles are varied in that the ILUA binds native title successors in title (NTA s24EA).

When the Registrar receives an application for the registration of an ILUA, he or she is required under ss24BH, 24CH or 24DI (depending on the type of ILUA) to issue a public notice containing basic information about the agreement. Following registration, an extract of the

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8 ILUAs may cover activities unrelated to mining and therefore the total numbers represented here do not all relate to resource activities or payments.
9 Some registered ILUAs have expired and been removed from the register.
ILUA is made available to the public on the NNTT Register. This extract must contain the following information (NTA s 199B(1)):

- a description of the area covered by the ILUA;
- the name and contact address of each party to the ILUA; and
- the period during which the agreement will operate (if specified in the agreement).

The registered extract must also contain any of the following statements (which are mentioned in 24EB(1) or 24EBA(1) or (4)) if they are specified in the agreement:

- that the parties consent to the doing of the particular class or classes of future acts, with or without conditions; or
- that the right to negotiate does not apply to these particular acts; or
- that the native title rights and interests of the parties have been surrendered; or
- that the parties have agreed to change the effects of an intermediate period act on native title (in the case of body corporate or area agreements); or
- that the parties agree to the validation of a future act (other than an intermediate period act) that has already been performed invalidly; or
- that the non-extinguishment principle applies.

Although it registers ILUAs, the NNTT has no role in overseeing the content of ILUAs, for example in respect of whether it is a fair agreement, achieves industry benchmarks or contains particular types of payments or benefits. The registration regime is only concerned with ensuring that the ILUA meets the procedural requirements under the NTA. There is no on-going monitoring of the implementation of the agreement including whether and to whom payments are made or benefits provided.

**Transparency requirements**

Aside from the fairly limited level of disclosure mandated by s 199B(1), the publicly available extract of an ILUA is limited to information that the Registrar considers appropriate. The parties are not required by the NTA to disclose any additional details of their agreement (ss 199B, 199E). The release of information about the content of ILUAs is a matter for the parties to the ILUA. Publicly available information on most ILUAs is limited to the agreement extracts published on the Register, and these do not include the compulsory clauses mandated by s 199B(1).

Overwhelmingly, parties keep the content of ILUAs confidential. Out of a total of 846 ILUAs registered with the NNTT by 20 January 2014, there appear to be fewer than ten which have full-text copies of the agreement available to the public.\(^\text{11}\) Any additional information is usually supplementary to the compulsory clauses which set out, for example, the exact kinds of future acts that may be performed or the kinds of native title rights that are retained by the parties. For example, additional information may note an Indigenous group’s surrender of native title rights

\(^{11}\) The authors have located the following full text agreements: Bundjalung of Byron Bay (Arakwal) Indigenous Land Use Agreement; the Argyle Diamond Mine Participation Agreement; the Eastern Kuku Yalanji, the State of Queensland and Douglas Shire Council Indigenous Land Use Agreement; the Yandruwandha/ Yawarrawarrrka Petroleum Conjunctive Indigenous Land Use Agreement; the Murchison Radio-Astronomy Observatory Agreement; the Small Scale Regional Mining Indigenous Land Use Agreement; the Yawuru Prescribed Body Corporate Indigenous Land Use Agreement; and the Yawuru Area Agreement Indigenous Land Use Agreement. See the ATNS database for copies of the agreements [www.atns.net.au](http://www.atns.net.au).
or its consent to future acts, but almost never provides details in relation to the payments, community development programs and other benefits made by the private party or government.

It is difficult to identify any trends with respect to the relative transparency of various types of ILUAs. It is possible to conclude, however, that Body Corporate Agreements and Area Agreements concerning access to land covered by pastoral leases are the least transparent of all such agreements. The NNTT Register extracts of all of these agreements contain virtually no information at all, apart from the most basic agreement details such as the names of the parties, the date of registration, the type of ILUA and the location.

More information is available on agreements relating to matters such as the joint management of national parks, possibly because these are agreements with governments rather than third parties. However, this information tends to be found in news articles and media releases published by government and corporate agreement parties, rather than within the NNTT Register extracts of the agreements themselves. While the global quantum of payments and benefits may be published in media releases, detail is rarely available. For the full text of an example ILUA, refer to the Argyle Diamond Mine Participation Agreement – ILUA on the ATNS database (atns.net.au). Appendix E also contains a summary of the benefits received under the Argyle Agreement.

4.1.4 Section 31 Future Act Agreements

Apart from ILUAs, negotiation under the ‘right to negotiate’ provisions can have a number of possible outcomes, including the making of a Future Act Agreement under s 31(1)(b). Future Act Agreements are far greater in number than ILUAs. Between 1 January 1994 and 30 June 2007, 1,442 Future Act Agreements were lodged with the NNTT as required under the NTA. Between 2008 and 2010 there were more than 9000 future act applications, many in Western Australia and Queensland (NNTT 2011b). Most applications are withdrawn, presumably being resolved by private agreement (but not resulting in an ILUA), although it is difficult to track these outcomes. The NNTT keeps a record of the number of Future Act Agreements but does not publish the figures on any central register, although they are mentioned among other statistics in the Tribunal’s annual reports.

As explained in 4.1.2, a Future Act Agreement deals with any act that affects native title in the future including exploration and development of minerals, petroleum and gas (but excluding some specific matters relating to renewals etc). The main purpose of a Future Act Agreement is to negotiate the manner in which an act will be undertaken and to provide payments and benefits for future impairment of title, even though the agreement itself may not extinguish or suspend title (NTA s 33). A Section 31 Agreement in relation to exploration or mining may take the form of a tripartite agreement between the native title holders or claim group, State or Commonwealth government and resource company or a bilateral agreement between the native title holders or claim group and resource company. The Section 31 Agreement confirms that the grant of a mining tenement can proceed (NTA ss 28 and 29). The Section 31 Agreement will usually be accompanied by further ancillary agreements (see part 4.1.5) detailing compensation payments, heritage protection and other benefits to be obtained by the native title parties (NNTT 2008: 5). The agreements can cover projects ranging from large resource extraction projects

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12 A negotiation might also ultimately result in an ILUA.
13 Section 31 agreements are often called ancillary agreements. This can create confusion as there are also ancilliary agreements to ILUAs as well as Section 31 agreements themselves. This is explained further at 4.1.3 below.
with a life of 50 years or more to small short agreements covering part or all of an exploration program. The payments and benefits will vary accordingly.

The mandatory threshold of disclosure for Section 31 Agreements is very low. Unlike ILUAs, Future Act Agreements are not subject to any formal public notification or registration process whether legislative or administrative (confirmed in NNTT 2008: 8). The parties need only provide the NNTT with a copy of the agreement, and also advise the relevant minister of its making (NTA ss 28(1)(f) and 41A(1); NNTT 2008: 5). Due to confidentiality concerns, Section 31 Agreements provided to the NNTT rarely contain details about payments or other benefits that have been promised to Indigenous groups (NNTT 2006). Information is limited in general to basic facts such as the names of the parties and the date of the agreement. Even these minimal details are not available for public inspection (NNTT 2005: 26; NNTT 2008: 8). They may only be disclosed by the NNTT if the parties give their consent, or if an interested person seeks to obtain access to them through the Freedom of Information process (NNTT 2005: 26).

Because of these minimal disclosure requirements, there is no comprehensive public source providing information on Section 31 Agreements or Future Act Agreements generally.\(^{14}\) The ATNS database includes links to a small minority of agreements reached under the ‘right to negotiate’\(^ {15} \).

It has been recommended by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (2013:17-18) that a process for the registration of s 31 native title Future Act Agreements be developed and that the federal government undertake the regulation of private agents (persons or firms other than NTRBs and Native Title Service Providers) involved in negotiating Section 31 Agreements in order to protect indigenous community benefits and prevent the exploitation of the process and payments.

4.1.5 ILUA and Section 31 Ancillary agreements

Ancillary agreements are a key feature of the agreement-making landscape. They are made in addition to formal ILUAs and Section 31 Agreements, especially for larger projects (and payments). They generally contain more information and key provisions than those contained in formal native title agreements. The parties to an ILUA or Section 31 Agreement have no obligation to lodge any ancillary agreements made by them with the NNTT. In this situation, most such agreements are confidential, including provisions that may be agreed between the parties for dispute resolution mechanisms, liaison committees, payments and benefits (NNTT 2008: 5). The case study in Appendix A provides an illustration.

Even where the NNTT has access to the information, ancillary agreements are never published by the NNTT in deference to the parties’ wish for confidentiality. In any case, ancillary agreements are almost never provided to the NNTT in their full form. See the Case Study in

\(^{14}\) There are a few exceptions. For example, the Burrup and Maitland Industrial Estates Agreement (2003), signed by the West Australian government and three Indigenous groups, is unusually transparent for a Future Act Agreement, as it has a full-text copy available on the West Australian government’s native title website. The Browse LNG Precinct Agreements (2011) signed by the West Australian government, the Goolarabooloo Jabirr Jabirr peoples and Woodside Energy Ltd was also made public in its entirety on the West Australian government’s Department of State Development website. There are also other future act agreements that are not available in their entirety, but that nonetheless well-publicised, with much of their content available online in summary form. One example of these is the Gulf Communities Agreement (1997), which was signed by MMG Century, the Queensland government and four native title groups: the Waanyi, Minginda, Gkuthaarn and Kukatj.

\(^{15}\) The ATNS database contains information on 54 future act agreements including information on 16 template agreements.
Appendix A for an example of the material in ancillary agreements.

4.1.6 Expedited Procedure

A Future act in relation to explorations may be validated in the absence of negotiation with the native title holders or claim groups, if the relevant government asserts in a notice under s 29 of the NTA that the act is one to which the ‘expedited procedure’ in s 32 applies (i.e. exploration that is unlikely to involve disturbance or interference with sites or community NTA s237). Unless an objection to the expedited procedure is then lodged under s 32, the act can be done without further reference to the NTA. The majority of s 29 notices asserting the expedited procedure do not attract objections. However compliance with heritage legislation is still required and this may produce an agreement under which payments are made (see 4.4 below).

If an agreement is subsequently reached on such an act, there is no legal obligation for the parties to provide the agreement to the NNTT at all (in complete or extracted form), to publish it anywhere else or even to reveal whether the expedited procedure was actually used in the process of making the agreement.

4.1.7 Future Act Consent Determinations

The ‘right to negotiate’ process may also give rise to two other outcomes besides a Future Act Agreement. These two outcomes both afford a more influential role to the NNTT.

First, if the parties agree on the terms of a s 31(1)(b) Future Act Agreement, but cannot finalise it for some logistical reason, they may apply to the NNTT for a ‘consent determination’ that gives effect to their joint wishes (NNTT 2007: 22).

Second, if the parties to a future act negotiation do not succeed in reaching agreement at all, one or both parties may make an application to the NNTT (as the Arbitral body) for a future act determination that establishes whether or not the proposed act may go ahead and if so on what conditions (NTA s 35). Most such applications are resolved in a future act determination by consent.

In contrast to ILUAs and Section 31 Agreements, the full text of consent determinations must be published on the NNTT website. Consequently, there is a fuller record of agreements subject to consent determinations than there is of Future Act Agreements concluded without a determination. However, even agreements subject to consent determinations only have a minimal published content that is normally limited to recognising the existence of native title rights. It is usually the case that a more detailed record of the benefits, outcomes and management processes agreed is in an ancillary agreement between the parties. The ancillary agreement may sometimes be provided in extracted form to the NNTT for the purpose of making the determination.

4.1.8 Compensation Claim Consent Determinations

Compensation Claim Consent Determinations are applications made under NTA for compensation from government for validation and extinguishment. Specific provisions such as sections 17 and 19 and 22D and 22G of the NTA provide that for ‘past acts’ and ‘intermediate

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16 As an example, between 1 January 1994 and 30 June 2007, 32,249 s 29 notices (80.5%) asserted the application of the expedited procedure (NNTT 2007: 11). However, 63 per cent of those notices did not attract any objection application (NNTT 2007: 11).
period acts’ of extinguishment, the Commonwealth (or State as applicable) will be liable for compensation.

The Federal Court recently handed down the first award of compensation for the extinguishment of native title rights and interests under these provisions of the NTA (De Rose v State of South Australia [2013] FCA 988). The De Rose Hill Compensation Claim Group (the Nguraritja people) filed a compensation claim against the State of South Australia, under sections 50(2) and 61 of the NTA. The applicants and the South Australian government reached a compensation agreement, and the court made an order under s87 of the NTA (allowing the court to make a consent determination on compensation under an agreement of the parties) regarding compensation payable. However, the amount of compensation under the agreement and the method of calculation remained confidential and were not provided to the judge. Justice Mansfield accepted this confidentiality as, he stated, he did not wish to influence, or prejudice, other judges who may be required to make native title compensation decisions in future. Justice Mansfield was nevertheless satisfied that it was appropriate to make an order under s87 of the NTA, which requires consideration of a number of factors including whether the decision ought to be made.

4.2 State government settlements

Two State governments, South Australia and Victoria, have instituted State based settlement processes to resolve native title disputes and to provide for compensation. Some agreements have been made under these State settlement processes and it is expected that there will be more such agreements in future.

4.2.1 South Australian Settlement processes

The South Australian Settlement Framework (see ATNS 2003 for more information) is not an alternative to the NTA, but rather focuses on two alternative paths to litigation under the NTA for resolving native title disputes –ILUAs and consent determinations (ATNS 2011c). The process for registration of ILUAs with the NNTT, (discussed at 4.1.3 above) applies to any ILUAs made under the South Australian Settlement Framework

The South Australian Native Title Resolution process operates in parallel to the ILUA process, bringing together the Congress of Native Title Management Committees, the South Australian Native Title Services, the SA Farmers Federation, the SA Chambers of Mines and Energy, Wildcat Fisheries SA, the Local Government Association and the South Australian Government. The Resolution process can result in a Federal Court determination, a consent determination, or an agreement not to pursue. Compensation is determined either under a consent determination or an ILUA. The South Australian Resolution process does not specify particular heads of compensation.

Participants in the South Australian negotiation process have developed five template ILUAs that relate to the following areas (ATNS 2003):

17Determinations have been made to provide for procedures under Land Acquisition Act 1969 (SA), Mining Act 1971 (SA) and the Opal Mining Act 1995 (SA).
• Fishing and aquaculture;
• Local government;
• Minerals exploration;
• Outback areas; and
• Pastoral.

These templates are available on the ATNS database. The minerals exploration ILUA template enables a mineral exploration company who holds an exploration tenement to sign up to the ILUA by completing and signing an acceptance document in the form attached to the registered framework ILUA. The company thereby enters into an agreement with the State, the native title claim group and the native title claim group’s PBC on terms called the “exploration contract conditions”. This contract is called an “accepted exploration contract”.

The following types of mining tenements are authorised under the minerals exploration template ILUA:

(a) tenements chosen by the explorer in the acceptance document;
(b) any additional tenements notified by the explorer to the native title claim group during the term of the accepted exploration contract;
(c) renewals, regrants and extensions of those exploration tenements; and
(d) grants (and renewals, regrants and extensions) of exploration tenements of a different type within the area covered by the chosen or notified tenements (such as mineral claims, retention leases authorised for exploration only and miscellaneous purpose licences required for exploration).

As at 1 December 2013 four mining exploration ILUAs were in place for the Adnyamathanha Traditional Lands Association (Aboriginal Corporation) RNTBC, Gawler Ranges Native Title Group, Ularaka Arabunna Association Incorporated and Antakirinja Land Management Aboriginal Corporation.\(^8\)

As at November 2012, Petroleum ILUAs in South Australia are in place for Yandruwandha/Yawarrawarrika Native Title Claim Group and the Wangkangurru/Yarluyandi Native Title Claim Group. The ILUA does not authorise mining (Parry et al 2005).

4.2.2 Victorian Settlement Process

Agreement-making in Victoria may occur under the Victorian Native Title Settlement Framework, as established by the Traditional Owner Settlement Act 2010 (Vic) (TOSA), or arising out of applications for determinations of native title in the Federal Court. Both of these pathways are open to applicants and failure in one avenue does not necessitate failure in the other. For example, the Yorta Yorta people came to an arrangement under the Settlement Framework with the Victoria Government (prior to the Act passing), despite failing in their appeal to the High Court (Members of the Yorta Yorta Aboriginal Community v Victoria (2002)\

The Victorian Settlement Framework seeks to pre-empt or render unnecessary Federal Court determinations on native title, minimizing costs and recognizing a wider range of traditional owner groups in Victoria. The Framework provides a mechanism for the government and private parties to conduct direct negotiations with traditional owner groups (Department of Justice 2013). Agreements under the Settlement Framework are called ‘non native title agreements’. They generally include a declaration that the group will cease native title applications in relation to the agreed land and promises not to commence any such action in the future. The State and the traditional owner group negotiate a settlement package that may include an alternative future act procedure under which payments might eventually be negotiated.

The Settlement Framework provides for substantive recognition of land title, payments and benefits of various kinds, and also contains measures for recognition and strengthening of culture. The overarching ‘Recognition and Settlement Agreement’ is designed to be equivalent to a native title settlement under the NTA. It may include four types of sub-agreement:

**Land Agreements** – including the grant of freehold over unreserved public land, with or without conditions; the grant of ‘aboriginal title’.

**Land Use Activity Agreements** - deal with the procedural rights of traditional owner groups in relation to certain activities on Crown land such as mining, leases, controlled burning and revegetation (TOSA s28). These agreements are intended to replace the future act regime set out in the NTA in coordinating native title claim groups, Crown use and third-party use, in four simplified categories: routine, advisory, negotiation or agreement activities. Under TOSA s 30 the relevant Minister, on behalf of the State, may enter into an agreement with a traditional owner group entity for the whole or any part of the land that is the subject of the recognition and settlement agreement as to the carrying out of land use activities on or in relation to that land. Section 31 of TOSA sets out the procedural requirements for a valid Land Use Activity Agreement and s75 of TOSA requires that all information on the Land Use Activity Register is publicly available. For a template example of a Land Use Activity Agreement refer to Appendix G.

**Funding Agreements** - designed to provide a suitable funding base for traditional owner groups to perform their functions and meet their responsibilities under the Recognition and Settlement Agreement and may provide for money to be paid to the Victorian Traditional Owners Trust or to an Aboriginal Corporation (TOSA s78; see, eg, Dja Dja Wurrung Clans Aboriginal Corporation and State of Victoria 2013: 9).

**Natural Resource Agreements** - designed to recognise the rights of traditional owner groups to manage their non-commercial use of natural resources on lands and waters and may authorise participation rights for commercial use or activities for traditional purposes, such as hunting, camping, the harvesting of certain plants and the taking of fresh produce or water.

The ‘claims resolution’ aspect of the Settlement Framework accounts for the majority of

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19 The Barmah National Park was created in April 2010 pursuant to the Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009 (Vic) and is jointly managed by the Yorta Yorta people and the State of Victoria. Under s 25 of the Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009 (Vic), the Government is empowered to enter into agreements with Traditional Owner Land Management Boards. The establishment of Traditional Owner Land Management Boards is governed by the Traditional Owner Settlement Act 2010 (Vic).
compensation. Other rights such as participation in use of natural resources could provide more valuable benefits in the long run and may have a profound effect on economic development for the traditional owner group.

The Land Use Activity Regime provides procedures for future acts such as mining and large-impact land-use, providing for community benefits in that case. The ‘benefits’ will be targeted to assist economic, social and cultural development goals. TOSA s 67 specifically requires that a register of Land Use Activity Agreements is established and maintained. The register must include details as to the area of land to which the agreement applies, the date of initial registration, a copy of the agreement as at the initial registration, the date of registration of any variation of the agreement and a copy of any registered variation (TOSA s 74). Section 75 of TOSA requires that all information in the land use activity agreements register is publicly available.

**Settlement fund management**

The independent Victorian Traditional Owners Trust manages the lump-sum funds from native title settlements in Victoria, pursuant to Agreements under TOSA. More detail about the Trust is in 3.7 above.

**Dja Dja Wurrung Settlement**

The Recognition and Settlement Agreement between the Victorian Government and the Dja Dja Wurrung traditional owner groups, is available online and includes the full text of the agreement. In addition to this agreement there is a Land Use Activity Agreement and an ILUA. Under the settlement the ILUA satisfies the future act provisions of the NTA by establishing an alternative future act regime under the Land Use Activity Agreement. It provides for the withdrawal of some native title determination applications and undertakes not to make future applications (Testro 2013). Dja Dja Wurrung funds will be managed by the Victorian Traditional Owners Trust (see 3.7 above).

### 4.3 Aboriginal Land Rights (NT) Act (ALRA) payments

The Australian Indigenous land rights movement began to achieve recognition in the 1970s. Indigenous people also began to extract an economic benefit from agreements with mining companies (Altman 1983; 1995). Agreements such as the Groote Eylandt (Manganese) agreement, the Gove (Bauxite) agreement and the 1975 Memorandum of Understanding for the Ranger Project negotiated royalties for indigenous people. These agreements did little to protect Indigenous peoples’ interests (Howard-Wagner and Maguire 2010) although their structure remains influential in contemporary agreements (Tehan and Godden 2012).

Although there had been since the 19th century a system of Aboriginal reserves (Altman 1983), the ALRA was the first significant recognition of Indigenous land rights in Australia and for the first time, gave Indigenous people a real opportunity to engage with and extract a benefit from

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mining companies over mining on their traditional lands and with government over leasing back aboriginal land (Howard-Wagner 2010).

In contrast to native title rights and interests recognized under the *NTA*, the *ALRA* created an inalienable freehold title, held communally, over former reserves and mission land in the Northern Territory and allowed for claims over un-alienated crown land by those Aboriginal peoples and communities who could prove traditional ownership as defined in the Statute. It also created a scheme for decision-making by traditional owners about developments on their land including a *veto power* over mineral resource development (*ALRA* ss 40, 41). Traditional owners have the legal right to refuse mining on their land. Mining on Aboriginal land in the Northern Territory accounts for more than 80 per cent of the value of minerals extracted in the Northern Territory and approximately 30 per cent of Aboriginal land is currently under exploration or negotiation for exploration (Northern Land Council). A large proportion of the mining exploration land comes under the *ALRA*.

Part IV of the *ALRA* sets out the procedure for resource companies to engage with the Traditional Owners. Exploration and Mining Agreements are made between the relevant Aboriginal Land Council such as the Northern Land Council [www.nlcl.org.au] or Central Land Council [www.clc.org.au] and the exploration license applicant or prospective miners (*ALRA* ss40 and 46). These agreements require prior consultation with the traditional owners and contain the terms and conditions to which the grant of a license or a mining interest will be subject.

Payments made under the *ALRA* are much more regulated than native title payments. All payments received from mining companies and from governments for leasing purposes must be paid out to a corporation for the benefit of the traditional Aboriginal owners of the land generally within 6 months (*ALRA* s35). The corporation must be incorporated under the *CATSI Act*. The reporting obligations of CATSI corporations receiving payments under the *ALRA* are set out in 3.1 above.

It is a requirement that all money paid to Land Councils arising from mining agreements or other land uses, shall be paid to the traditional owners within six months of receiving the money in accordance with the agreement or to any Aboriginal and Torres Strait Islander corporation affected by the agreement (*ALRA* s35). If the Land Council fails to do so it must provide a written report to the Minister within one month (*ALRA* s35(5)). The Land Councils must report on any money received under mining agreements and the Aboriginal and Torres Strait Islander corporations which receive the money must report the names of people receiving payments, and the dates, amounts and purposes of payments to the Land Council (*ALRA* s35C). If a royalty association does not report to the Land Council, Land Council may suspend further payments to that royalty association (*ALRA* s35(6A)). The activities and operations of the Aboriginal and Torres Strait Islander corporations receiving certain payments under determinations may be audited by the Australian Government Office of Evaluation and Audit (Indigenous Programs).

Subsequent to the *ALRA*, various State and Territory land rights laws were passed. South Australia, for example, passed the *Pitjantjatjara Land Rights Act 1981* and the *Maralinga Tjarutja Act 1984*. Victoria passed the *Aboriginal Lands Act 1970*, which granted freehold title to people of Lake Tyers Aboriginal reserve and the Farlingham reserve. New South Wales passed the *Aboriginal Land Rights Act 1983* (NSW) which transferred some former reserves to

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22 Established by section 193W of the *Aboriginal and Torres Strait Islander Act 2005*.
Aboriginal peoples and established a claims procedure over a small area of ‘claimable crown land, as well as creating a land fund. Each has varying provisions for consultation and compensation in relation to extractive industry activity.

4.3.1 Entity reporting under the ALRA regime

Specific rules apply to entities reporting under the ALRA regime. A CATSI corporation in the Northern Territory that receives payments under the ALRA must provide the relevant Land Council with a copy of its financial statements each reporting year under s 35C of the ALRA and a written report setting out the purpose for which that amount was spent (including details of any relevant project) and each recipient of that amount and the amount paid. This information must also be provided to the traditional owners.

Northern Territory Land Councils are required to publish and submit to the Minister an annual report (section 9 of the Commonwealth Authorities and Companies Act 1997). The Land Council must report information received from CATSI corporations as to mining payments in its annual report (ALRA s 37). The Land Council must also include information as to any amounts held in trust, when it was paid and the mining operations concerned. The Annual Report will also include information as to consultancy fees and other money received by the Land Council. Under s 48D of the ALRA, mining agreements may also make provision for the distribution of any money paid to the Land Council under the agreement to or for the benefit of such groups of Aboriginals as are specified in the agreement.

4.3.2 Aboriginal Benefits Account

The ALRA also establishes the Aboriginals Benefit Account (ABA) where payments are made to the ABA by the Commonwealth or Northern Territory government (“royalty equivalent payments”) based upon how much mining has been done on Aboriginal land. The ABA must receive and distribute monies generated from mining on Aboriginal land in the Northern Territory and use that money for the benefit of Aboriginal people living in the Northern Territory. A proportion of the ABA money funds operation of the Land Councils, 30 per cent goes to areas affected by mining and the balance is used for the benefit of all Aboriginal people living in the Northern Territory. The ABA advisory committee advises the Minister responsible regarding use of the balance (ALRA s64(4)).

The ALRA sets out the accounting and annual reporting of the ABA (Part VI, in particular s 64B of ALRA). The ABA directs funds to:

- initiatives of benefit to Aboriginal people living in the Northern Territory (beneficial payments) (ALRA s 64(4))
- distribution to traditional land owners (Royalty Associations) who are affected by mining operations on their land (ALRA s 64(3))
- support for the administration of the Northern Territory Land Councils (ALRA s 64(1) in accordance with s 34 (1))
- support for the acquisition and administration of land leases through the Office of Township Leasing (ALRA s 64(4A))
- support for the administration of the ABA (ALRA s 64(6))
The Annual Report of the ABA prepared by the department that administers the ABA must include the financial statements required by section 49 of the Financial Management and Accountability Act 1997 (Cth) and an audit report on those statements under section 57 of the Financial Management and Accountability Act 1997 (Cth). A copy of the report to the Minister must be tabled in each House of the Parliament as soon as practicable. The financial reports of the land councils include information on ABA appropriations.

4.4 Heritage agreements

Each State and Territory has a legislative regime that protects Aboriginal heritage as defined in the various statutes.23 There is last resort Federal legislation if the State and Territory schemes fail to protect heritage.24 Regardless of land status on which extractive industry projects occur, compliance with heritage legislation is required. These statutes create offences for various acts of interference with or destruction of heritage however defined. It is now commonplace for companies and Aboriginal land holders or custodians to enter into agreements for appropriate heritage protection processes. Under these agreements Aboriginal consultants will be paid for their time and expertise in clearing areas for work – either by identifying sites to be avoided or by clearing work areas in which the relevant exploration (or sometimes mining activity) may occur.

Agreements and methods will vary but templates of heritage agreements are provided by most governments or industry bodies. Western Australian examples are available at Land, Approvals and Native Title Unit, Government of Western Australia. Schedule 6 of the Proponent Standard Heritage Agreement indicates a daily rate of remuneration of $500 maximum (indexed to CPI) plus a Regional Allowance in accordance with Public Service rates and food and accommodation allowance at cost.25 These are direct payments for services provided and are not separately reported (see Appendix E for a summary of the template and Appendix F for the full text of the template).

4.5 Other agreements with Industry: ‘as if’ agreements

Companies and indigenous communities and groups will often enter into agreements under which payments will be made even though these agreements are not required by any legislation. These agreements will often be similar to those entered into under the various legal frameworks. There are many reasons for this practice including companies desire for a social licence to operate their activities. It is impossible to assess the number and scale of these agreements as they are not recorded publicly, although the Minerals Council of Australia assessment of the

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23 For example: Aboriginal Heritage Act 1988 (SA); Aboriginal Heritage Act 2006 (Vic); Aboriginal Cultural Heritage Act 2003 (Qld); Torres Strait Islander Heritage Protection Act 2003 (Qld); Aboriginal Heritage Act 1972 (WA); National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996 (NSW); Northern Territory Aboriginal Sacred Sites Act (NT).

24 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).

total payments made to indigenous communities would include some of these payments (see 2.3 above).

4.6 Other agreements with governments

There is a range of other kinds of agreements made by governments with traditional owners. These agreements are instructive as they may include models for governance and receipt and distribution of payments and benefits. These include, for example, joint management agreements with respect to national parks; quasi-commercial arrangements involving Indigenous Business Australia, the Indigenous Land Corporation and industry representative bodies; health service or health framework agreements involving the Commonwealth and state governments; and commercial contracts involving Indigenous parties (Langton and Mazel 2007: 22).

In some cases, State governments may be parties to ILUAs or other agreements under which they assume obligations to make certain payments for services. A State government or the Commonwealth government may also take on obligations for both payments and institutional arrangements. The Browse agreements are an example of this, agreed with the Western Australian government (see http://www.dsd.wa.gov.au/8617.aspx).

The COAG National Framework of Principles for Delivering Services to Indigenous Australians provided for the mainstreaming of service delivery to Aboriginal and Torres Strait Islander people (Langton and Mazel 2007: 21). Two specific types of agreements were established: Regional Partnership Agreements (RPAs) and Shared Responsibility Agreements (SRAs). The general approach was continued under the Rudd/Gillard Labor governments but it is not clear to what extent these agreement models will be utilized under the Abbott government. By 2013, there were 18 RPAs and 284 SRAs on the ATNS database. However, while yet to be officially confirmed, it appears that SRAs may no longer be used in Commonwealth government agreement making with indigenous people.

A further example of agreements with government is the 99 year township leases entered into with Aboriginal communities under the ALRA. Trust land is leased to a government entity, which makes lease payments to the relevant land trust. These leases are agreements under which payments are made by governments to an Indigenous land holder (Office of Township Leasing 2013).

4.7 Relevant international law principles

There are overarching international law principles that may have varying (and contested) relevance and application in Australia. The four most relevant international instruments are Indigenous and Tribal Peoples Convention, 1989 (ILO 169),26 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)27 and the International Covenant On Civil And

Political Rights (ICCPR). Each of these instruments contains varying provisions concerning recognition of indigenous rights to land, to control resources, to be involved in decision-making about resources (commonly referred to as the requirement for free, prior and informed consent, although it is unclear whether actual consent is required) and to enjoy the benefits from resources on their land. Australia has not ratified ILO169. The UNDRIP was retrospectively endorsed in 2009 and is an aspirational document as ‘it is non-binding and does not affect existing Australian law’.

Although not binding on Australia it is often argued that some elements of each instrument may constitute customary international law and therefore may have some impact on the manner in which Australia conducts itself in relation to indigenous land and resource owners and extractive industries. The International Convention on the Elimination of All Forms of Racial Discrimination protects individuals from discrimination on the basis of race and has been ratified by Australia and introduced into Australian law through the Racial Discrimination Act 1975 (Cth). The complaints procedure of this Convention has engaged the Australian government on occasions in relation to the operation of the Native Title Act 1993 (Cth) (for example: Committee on the Elimination of Racial Discrimination 2010; Triggs 1999).

The former Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, has reported specifically on Australia (Anaya 2010) and more generally on Extractive Industries and Indigenous peoples (Anaya 2013). He has expressed concern that Indigenous rights might be ‘inadvertently undermined because the terms of such agreements are kept secret’ (Anaya 2010; para 27). His general report does not raise this issue (Anaya 2013) but rather focuses on the need for fully informed consent through appropriately resourced negotiations, opportunities for indigenous involvement in development of resources and an approach based on ‘full respect, impact mitigation, equitable distribution of benefits ... within a framework of partnership’ (Anaya 2013 20-21).

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