Indigenous Communities, Economic Development and Tax Policy Symposium

By Toni Bauman, AIATSIS and Odette Mazel, Agreements, Treaties and Negotiated Settlements Project

Signalling a dynamic new approach to tackling the challenges to economic development for Indigenous communities, the Agreements, Treaties and Negotiated Settlements (ATNS) Project hosted the 'Indigenous Communities, Economic Development and Tax Policy Symposium' at the University of Melbourne on the 26 & 27 February 2008. The Symposium was prompted by a paper presented by Dr Lisa Strelein at the ATNS Symposium in Broome 2007. The Melbourne Symposium was designed to address the critical legal issues pertaining to governance and economic development that arise in the interface between Indigenous organisations and enterprises, governments and corporations. The focus of the Symposium was on the role of taxation, legislative frameworks and other economic arrangements, and how these models might develop to enhance socio-economic outcomes for Indigenous Australians.

The Symposium brought together a unique breadth of participants - experts from the private sector, government, academia and Aboriginal organisations and communities to capture the complexities of the issues and the challenges ahead. These challenges reflect the social reality which sees Indigenous peoples disadvantaged due to a lack of real engagement with the economic prosperity of the Australian economy, especially in areas associated with the mining boom. To address this issue, the deficits in current models for the management and distribution of benefits were identified throughout the Symposium, and alternative arrangements discussed and debated.

Sessions on the first day addressed macro issues associated with Indigenous economic development, Specifically, speakers addressed the impediments and challenges to Aboriginal economic development and identified potential legal structures, policies, and agreement implementation strategies that may enhance economic benefits. Presentations on the second day addressed specific tax regimes and models and options for Indigenous governance, employment and business opportunity.

Mr Galarrwuy Yunupingu AM began the conference, emphasising the need for sufficient infrastructure in Indigenous communities before economic development could become a reality. He spoke of the need to encourage economic development initiatives with the private enterprise, but not at the expense of Governments providing essential services. Neil Westbury spoke of existing institutional constraints and the government reforms that are necessary to ensure Indigenous participation in the economy, and Paul McCullough from the Department of Treasury explained Treasury's mission to improve the well-being of Australians through their Wellbeing Framework.

To contextualise these issues, Native Title Representative Bodies, traditional owners and those managing trust bodies for the benefit of Aboriginal communities provided first hand experience of the challenges facing communities in the Pilbara, Kimberley, South Australia and Western Cape York. Parry Agius from the Aboriginal Legal Rights Movement discussed the South Australian agreement making model, along with other presentations of successful ventures resulting from agreement outcomes, providing evidence of the possibility for great progress in this area. Sufficient funding for the implementation of agreements was deemed critical in ensuring benefits to community members in all cases.

The management and distribution of gas royalties and the accumulation of those funds in Natural Wealth Accounts in Timor Leste provided an important international comparison, as did the presentation on the renegotiation of the Ok Tedi mine agreement in Papua New Guinea, the latter highlighting the link between good process and sustainability of agreements, and the significance of an independent facilitative process.
Several papers addressed issues around appropriate corporate, trust and organisational design, drawing on notions of hybridity and the intercultural. Indigenous organisations and corporations such as Prescribed Bodies Corporate often have a multiplicity of functions and responsibilities and it is necessary that the governance structure of the entity is designed to match the diversity of these responsibilities and the groups it represents.

In an attempt to move forward and overcome shortfalls within the current tax system and legal environment, specifically with regard to the use of charitable trusts, and to address issues of capacity building, community development and Aboriginal economic development, the Minerals Council of Australia (MCA) presented the 'Aboriginal Community Development Corporation' (ACDC) model drawing on work by Adam Levin. Under this model, the ACDC would be established under the *Income Tax Assessment Act 1997* as a new category with tax exemption of deductible gift recipient status. Debate around this potential model highlighted the lack of appropriate 'corporate' forms to meet the functional needs of Indigenous communities, and provided a valuable starting point for the development of new or innovative governance structures.

Throughout the Symposium, the nature of the interaction between Indigenous Australians, corporations and the tax system was debated. Some argued that Indigenous Australians, like their US and Canadian counterparts, should be given sovereign immunity from tax in order to help overcome Indigenous disadvantage. Others perceived such a view as 'special treatment', which would work against the aim of building economically sound communities, whilst others took the view that special tax considerations were simply 'cost shifting' and that Indigenous people should be prepared to engage with risk and responsibility. These discussions made it plain that there exists a need to shift attitudes, thinking and language away from concepts of charity and welfare and towards concepts of national priority, incentivisation, partnership and engagement with the private sector.

To achieve these ends, agreement was reached to establish a working group with broad ranging representation to continue this work and further discuss issues raised throughout the Symposium. Presentation of these issues will be further facilitated through the annual Native Title Conference in June 2008 in Perth, and the Aboriginal Enterprises in Mining and Exploration Conference associated with the MCA conference to be held in Darwin in September.

The Symposium set the stage for increased discussion, research and development of alternate arrangements for enhancing economic benefits for Indigenous communities and their interactions with government and the private sector, and continues the ongoing work of the ATNS Project, which began in 2002. Funded by an Australia Research Council Linkage Grant, the Project involves a partnership between the University of Melbourne, the Native Title Research Unit at AIATSIS, the Department of Families, Housing, Community Services and Indigenous Affairs and Rio Tinto Pty Ltd. The Project more broadly, involves a comparative study of the implementation of agreements and treaties with Indigenous and local peoples across selected Australian and international case studies. It aims to investigate the specific factors that promote long-term sustainability of agreement outcomes and the capacity of agreements to endure over time and continue to meet the economic, environmental and social objectives and goals of the parties.

The workshop was supported by AIATSIS, BHP Billiton, Newmont Australia and Santos. For more information on the work of the Agreements, Treaties and Negotiated Settlements Project, please visit www.atns.net.au. The work of AIATSIS on Taxation, Trusts and the Distribution of Benefits can also be viewed online http://ntru.aiatsis.gov.au/major_projects/taxation_trusts.html.

The role of native title in reconciliation

Speech delivered by the Attorney General, the Hon Robert McClelland MP

Just under two weeks ago, in the Australian Parliament, our Prime Minister said 'sorry'. He said 'sorry' for the past mistreatment of Indigenous people – particularly the stolen generation. He apologised for the pain and suffering caused to them, and to their families – and the indignity and degradation inflicted on a proud people and a proud culture. However, he also talked of the importance of moving forwards together, of forging new relationships, new partnerships. I believe native title has a crucial role to play in forging this new relationship. Just as an apology recognises and acknowledges the past hurt caused by the removal of children, through native title we acknowledge Indigenous peoples ongoing relationship with the land. To bury native title in a unnecessary complexity is an affront to that heritage. In short, native title is but one way of recognising Indigenous peoples' connection to land.

Where indigenous people have lost their native title by removal or through the passage of time, we should be able to find a way to recognise their relationship with land. In summary, we need to move away from technical legal

arguments about the existence of native title.

In my short period as Attorney-General I have spent some time trying to get on top of native title. I have not yet succeeded. But I have discovered four things:

- native title is highly technical and complex;
- native title nonetheless has great potential – both symbolic and practical;
- we have a long way to go before we realise the full potential native title can bring.
- nonetheless, there are some excellent examples of how to achieve real outcomes.

The other thing to keep in mind is that native title is important but it is far from a complete answer to addressing the rights of all indigenous Australians. This recognised in the Preamble of the Act, which states in part; "It is also important to recognise that many Aboriginal people and Torres Strait Islanders, because they have been dispossessed of their traditional lands will be unable to assert native title rights and interests…." In that context it should not be overlooked, for instance, that members of the stolen generation – and their descendants have by third party intervention may have been deprived of their historical connection to their traditional land.

The Rudd Labor Government is also committed to a new partnership with the indigenous community and closing the gap between Indigenous and non- Indigenous Australians. It is committed to halving the gap in literacy, numeracy, housing, infant mortality and employment outcomes and opportunities between Indigenous and non-Indigenous Australians.

Native title can play a role in this new partnership. In short, native title is about more than just delivering symbolic recognition. It can and should have practical benefits as well. A native title system which delivers real outcomes in a timely and efficient way can provide Indigenous people with an important avenue of economic development. This is a key priority of the Rudd Labor Government. We have an obligation to past and future generations not to squander that opportunity.

Nearly 15 years ago the High Court found that Australia's common law could recognise Indigenous peoples ongoing connection to the land. It recognised what courts in other common law countries had recognised up to 100 years before– that Indigenous people had a form of land ownership prior to white settlement.

The Native Title Act that followed was a cautious step forward. The Act sought a way through the complexities and uncertainties of common law claims. It struck a fine balance between allowing for the recognition of native title and validating other forms of land tenure. The heart of the Act was the principle that the recognition of Indigenous peoples' ongoing connection with their land should be resolved by negotiation and mediation not litigation.

Regrettably that admirable intention of the Act has not been realised. Anecdotally, it seems all too often negotiations are characterised by the absence – rather than the presence – of "good faith". All participants from government down can do much better. Much better in resolving native title claims. Much better in creatively and innovatively using negotiations as a vehicle to achieve practical outcomes.

What caused this negative and often obstructive attitude to negotiation ? I think in some ways it was a reaction to the Mabo case itself. Some have painted the decision as the zenith of judicial activism. Both the meaning of the Mabo decision and the intent of the Native Title Act soon became casualties of a spiteful culture war. If the scaremongers were to be believed, backyards were at risk and an apartheid system was being created in the Australian outback. As a result, native title was seen as a zero sum game. It became strangled in litigation and arguments over technical provisions of a complex Act. An opportunity for reconciliation has all too often become an instrument of division.

But we must now have the opportunity to grasp the momentum created by the apology. It's time to develop new attitudes and new ways of thinking and doing things. In this 15th anniversary of the Mabo decision, there has never been a more pressing need for a new way of thinking in relation to native title. More to the point – there has been more opportunity to achieve outstanding outcomes.

But tinkering at the edges is not enough. Real progress will only come through a change of attitude on the part of all native title participants; whether it is the purists intoxicated by their expertise in an horrifically complicated system that – at times – they have aggravated. Whether it is governments that have obstructed the resolution of claims because of a belief that there are matters which can only be resolved by a court. Whether it be some claimant groups who unreasonably refused to accommodate legitimate claims by others. Whether it be some respondents who have all but persuaded themselves of fanciful arguments about potential prejudice.