

Liscia & Tavelli Legal Consultants Pty Ltd

REVIEW OF
CONTRACTUAL
ARRANGEMENTS
BETWEEN
AUSTRALIAN
ABORIGINAL
ENTERPRISES AND
THE RESOURCE
INDUSTRY

Prepared for the Pilbara Aboriginal Contractors Association Inc.

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INTRODUCTION

PACA

In February 2009, as a response to the lack of opportunities for and representation of local Aboriginal contractors, the Pilbara Aboriginal Contractors Association Inc (**PACA**) was formed for the purpose of promoting, fostering and supporting Aboriginal business owners and aspiring Aboriginal entrepreneurs in the Pilbara region of Western Australia.

PACA as the peak body in the Pilbara region for Aboriginal businesses and contractors provides leadership for its members and acts as a liaison with the resource industry in the Pilbara and with government generally.

PACA subscribes to the view (held by many¹) that to create a sustainable future for all Aboriginal people, more is required than employment programmes. Aboriginal people cannot become truly independent and self sufficient in the modern world until they control their own destiny. One means of controlling their destiny is to gain economic independence; whether as small business owners and operators, or as larger enterprises competing with the “big boys” of mining.

To this end PACA, amongst its other activities, provides its members with advice and services relating to:

- Start up business planning;
- Workshops and training on all business related topics;
- Contract tendering; and
- Pre qualification for resource industry contracts.

PACA has as its formal objects, to represent Aboriginal people who:

- are either traditional owners or non traditional owners, and
- are members of PACA; and
- conduct business; and
- are based or operate in the Pilbara region of Western Australia.

PACA has defined “*Traditional owner(s)*” as the “*first Aboriginal inhabitants and their descendants, claiming rights to land in any part of the Pilbara*”.

¹ “Options for the Future of Indigenous Australians”, Australian 2020 Summit Final Report 2008, www.australia2020.gov.au; House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs “*Open for Business - Developing Indigenous enterprises in Australia*”, October 2008; Godden, Lee, Langton, Marcia, Mazel, Odette and Tehan, Maureen, ‘*Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability*’ (2008) Journal of Energy and Natural Resources Law, (2008) Vol 26 No 1

Definition of Aboriginal Business

PACA members spent considerable time on developing a culturally sensitive and suitable definition of what constitutes an Aboriginal business for insertion into its constitution.

It was finally decided that to be eligible for membership to PACA and to be recognised as an Aboriginal business, that business must have Aboriginal ownership equating to 25% or more and the business must be operative in the Pilbara region of WA.² In addition, the business must be committed to pursuing all avenues of employment and training opportunities for Traditional Owners of the Pilbara region of WA. BHP Billiton uses a similar definition.

Whilst others have suggested that Aboriginal ownership must be at least 51%³, PACA notes that in the world of commerce, ownership of as little as 5% of the issued shares in a company can secure a person a seat on the board of the company and that ownership of 20% of the issued shares of a public company can trigger the takeover provisions of the Corporations Act.

Brief overview of the Resource Industry & Aboriginal People in Western Australia

The aim of this paper is not to provide a history of the relationship between Aboriginal people and mining in Western Australia, and in particular the Pilbara region of Western Australia⁴.

Suffice to say that Aboriginal people have had involvement with the resource industry in the Pilbara since World War II and that most large scale mining operations commenced in the 1960's. It was not until the mid 1960's that mining legislation took any account of Aboriginal land and cultural issues, and not until the Mabo decision in 1992⁵, that Aboriginal people were able to claim any form of title to land.⁶

However, a few points need to be made to enable this paper to be understood and for its recommendations to have context. In summary, the following needs to be stated:

- Royalties in the sum of \$3,239,656,049 were paid to the State of Western Australia in the 2009 financial year⁷;

² PACA Constitution, clause 5(1)

³ House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs *“Open for Business - Developing Indigenous enterprises in Australia”*, October 2008

⁴ See summary in White, Simon, *‘Native Title and the promotion of new regional Aboriginal economic and employment development opportunities; the case of the Pilbara Region. A report to the National Native Title Tribunal’*, (February 2004).

⁵ Mabo & Ors v State of Queensland (1992) 66 ALJR 408

⁶ Godden, Lee, Langton, Marcia, Mazel, Odette and Tehan, Maureen, *‘Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability’* (2008) Journal of Energy and Natural Resources Law, (2008) Vol 26 No 1

⁷ Prospect, December 2009 to February 2010, WA Department of State Development

- Projects totalling some \$85 Billion have been committed to in Western Australia as at 2009, with most being in the Pilbara region⁸;
- Most of the earnings of the resource companies (approximately 80%) do not remain in Western Australia⁹
- Aboriginal business in the Pilbara accounts for approximately 0.6% of all local businesses¹⁰; and
- Aboriginal people still suffer from extreme disadvantage in areas of health, education, employment, housing and economic independence.¹¹

Despite the long lasting and highly profitable nature of the resource sector, Aboriginal people and in particular Aboriginal contractors have not reaped any of the benefits that one would have expected to flow to the local community, especially in more recent times when governments and business has accepted and adopted a corporate social responsibility, and not just an economic responsibility.

Current State of Aboriginal People

The deplorable state of Aboriginal people in Australia is one that is often referred to and which is the subject of many and varied policies and initiatives. Yet it is not until relatively recent that the non Aboriginal population has understood that none of the issues facing Aboriginal Australians can be solved without the involvement and leadership of Aboriginal people themselves.¹²

In 2009, the Commonwealth Government noted the following pertinent points in its report entitled “*Closing the Gap on Indigenous Disadvantage; the Challenge for Australia*” report.¹³

- Aboriginal people make up 2.5% of the Australian population;
- The Aboriginal population increased at a rate of 12.8% from 2001 to 2006, nearly double that of the non Aboriginal population for the same period;
- The median age for the Aboriginal population is 21 years, compared with 37 years for the non Aboriginal population;

⁸ Ibid

⁹ Andrich, Mark A, Oxburgh, E Ronald and Imberger, Jorg, “*Raiding Utility and Lowering Risk Through Adaptive Sustainability: Society and the Risk of Wealth Inequity in Western Australia*”, Centre for Water Research, UWA, 2008

¹⁰ www.business.gov.au, ABN search in Pilbara region

¹¹ “*Closing the Gap on Indigenous Disadvantage; the Challenge for Australia*”, Commonwealth of Australia, February 2009; Rudd, Kevin; Prime Minister Ministerial Statement, “*Closing the Gap*”, (11 February 2010), www.pm.gov.au

¹² Ibid, “Options for the Future of Indigenous Australians”, Australian 2020 Summit Final Report 2008, www.australia2020.gov.au

¹³ “*Closing the Gap on Indigenous Disadvantage; the Challenge for Australia*” Commonwealth of Australia, February 2009, see Rudd, Kevin; Prime Minister Ministerial Statement, “*Closing the Gap*”, (11 February 2010), www.pm.gov.au for more recent figures.

- 28% of the Aboriginal population is under the age of 15 years (compared to 19% of the non Aboriginal population);
- 25% of the Aboriginal population live in remote areas;
- Life expectancy for the Aboriginal population is 17 years lower than for non Aboriginal population, with Aboriginal males expecting to live until 59 years (77 for non Aboriginal males) and 65 years for Aboriginal females (compared with 82 for non Aboriginal females);
- 83% of Aboriginal deaths below the age of 5 years occur in the first year of life, with nearly half occurring in the first month;
- Educational achievement is lower for Aboriginal students than for non Aboriginal students, with those in remote areas doing extremely poorly;
- In 2007, 42.9% of Aboriginal 17 year olds completed secondary school compared with 65% of the non Aboriginal 17 year olds. These figures are not improving, with the gap widening; and
- As at 2006, 48% of the Aboriginal workforce aged population was in employment compared to 72% for the non Aboriginal workforce aged population.

In this report, the Commonwealth Government recognised that improving the long term economic participation and wealth creation by Aboriginal individuals and communities is one way to close the gap on Aboriginal disadvantage.

In his speech¹⁴ to the Australian Parliament on 11 February 2010 reporting on initiatives to close the gap on Aboriginal disadvantage, Prime Minister Rudd named as his 5th target the aim to halve the gap in employment outcomes between Aboriginals and other Australians within a decade.

He also announced the appointment of a Government Ambassador for Business Action, who has been given the mandate to encourage businesses across Australia to take part in initiatives aimed at closing the gap on indigenous disadvantage.

This target is welcomed by PACA, but again, the emphasis is on employment rather than creating business opportunities for Aboriginals. It must be stressed that in remote Aboriginal communities employment (as distinct from business) opportunities are few and often requires leaving one's community and living in regional centres, making fulfilling cultural obligations difficult. However, the creation of Aboriginal business ventures allows Aboriginals to create their own unique working environments, adaptable to their cultural and family responsibilities.

¹⁴ Rudd, Kevin; Prime Minister Ministerial Statement, "*Closing the Gap*", (11 February 2010), www.pm.gov.au

What is in it for the Australian Resource Industry?

As indicated in the Esteves report,¹⁵ sourcing from local operators leads to much more than business for local suppliers of goods or services; it leads to further economic activity in the community and attracts investment as suppliers engage other suppliers and employees spend in their local community.

As was noted by the House of Representatives in its report, “*Open for Business - Developing Indigenous Enterprises in Australia*”, the Commonwealth Government is looking at ways to close the gap between Aboriginal and non Aboriginal people. The Commonwealth Government sees building on the strengths and competitive advantage of Aboriginal businesses as an important element in closing the gap on Aboriginal disadvantage.

In the House of Representatives report¹⁶ it was noted that the resource sector, which at that time was experiencing labour and skill shortages, was subject to enormous costs associated with fly in fly out labour and the lack of better serviced communities near the mining developments; should, as a simple matter of commercial and social sense, look to Aboriginal businesses for answers.

In so far as the resource sector is concerned, by engaging with Aboriginal businesses, they too can play a positive part in closing the gap (also referred to in various papers as accepting their corporate social responsibility or meeting the triple bottom line) as well as securing a local and secure source of services and/or goods. This is certainly understood, even if not always acted upon by the resource sector¹⁷.

Pilbara Aboriginal businesses provide the only sensible long term solution to all of the above issues for generations to come. Aboriginal businesses are superior in their ability to train and retain Aboriginal employee’s and are committed by blood and culture to ensure there is a lasting social and economic legacy for their people. This has been recognised at the Australian 2020 Summit¹⁸ and by the Commonwealth Government¹⁹.

Time for Action

Aboriginal businesses and the entire community cannot afford to wait another 50 years to see any real and lasting change to the way in which the resource sector in particular, but not exclusively, deal with Aboriginal contractors.

¹⁵ Esteves, Ana Maria, Barclay, Mary Anne, Samson, Daniel and Brereton, David “*Local SME Participation in the Supply Chains of Australian Mining, Oil and Gas Companies - Interim Report on Phase 2: Issues and Emerging Good Practice*”. (December 2009).

¹⁶ House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs “*Open for Business - Developing Indigenous enterprises in Australia*”, Chapter 4, October 2008

¹⁷ Rio Tinto, ‘*Indigenous Policy and Programmes in Australia*’; Memorandum of Understanding on Indigenous Employment and Enterprise Development between The Australian Government and the Minerals Council of Australia;

¹⁸ “Options for the Future of Indigenous Australians”, Australian 2020 Summit Final Report 2008, www.australia2020.gov.au.

¹⁹ House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs “*Open for Business - Developing Indigenous enterprises in Australia*”, October 2008

The problems facing Aboriginal peoples is well documented²⁰ and not discussed at great length in this paper.

There is no reason why the resource companies operating in the Pilbara region cannot review their policies and practices and with the assistance of bodies like PACA, make significant changes to their policies and practices to ensure that Aboriginal contractors are given opportunities to tender for work. This has certainly been the case with BHP Billiton.

However, history teaches us that whilst logic may indicate that resource companies have much to gain by pro-actively engaging with Aboriginal contractors, this is not likely to happen and if it does, the time taken to do so will result in significant and long lasting disadvantage to many Aboriginal contractors, and thereby to the Aboriginal population as a whole.

For this reason, it is recommended that the State Government should, as part of its social and economic responsibilities to Aboriginal people, introduce legislation to require business entities to open up business opportunities to Aboriginal contractors.

PACA, with its broad range of skills and experiences offers the resource sector the opportunity of developing positive options to counter and deal with the current position. This partnership has proven fruitful in the case of BHP Billiton, which in consultation with PACA, has restructured its Aboriginal business unit and streamlined the tendering process to allow Aboriginal businesses a greater opportunity to tender for contract work. A similar approach could be developed with other resource companies to assist them in reviewing and more importantly restructuring their procurement practices to produce tangible results for the benefit not only of the Aboriginal community, but also for the resource companies, almost immediately.

Whilst recognising that there is nothing to prevent the Pilbara resource companies from responding to the issues facing Aboriginal contractors, if we are to learn from history, we will appreciate that change is rarely achieved when it is most needed.

Hence, the aim of this report is to review relevant literature and to identify whether there is a need and place for legislation to be introduced in Western Australia to deal with the obvious disadvantage against Aboriginal businesses rather than to wait the many years that it will take for change to occur – if in fact change does occur!

²⁰ See references in Annexure 1

THE CONTEXT - WHY DO WESTERN AUSTRALIAN ABORIGINAL BUSINESSES NEED ACTION?

Increasingly, PACA has noted that despite much talk about equality of opportunity for Aboriginal businesses, the rhetoric fails to meet reality.

In searching for answers, PACA has been astounded by the lack of hard data dealing with the interaction between Aboriginal businesses (as distinct from Aboriginal communities and Traditional Owners) and the resource sector. This view was also expressed at the Australian 2020 Summit²¹ and to the House of Representatives when it was investigating Aboriginal businesses.²²

Aboriginal Employment Rates

Data from the ABS 2006 Census²³ indicates that the Aboriginal population in the Pilbara region is approximately 7,100, compared to the total Pilbara population of 42,500 (excluding fly in/fly out or other workers who noted their address as being other than the Pilbara).

The Taylor Report²⁴ analysed the profile of the Pilbara region to identify the opportunity and constraints affecting the ability of Aboriginal people to participate in the labour market through mainstream employment or more traditional pursuits. This task was not easy as the relevant data, primarily census data, was incomplete for a variety of reasons explained in the report.

The Taylor Report notes that since the 1960's, the overall employment rate of Aboriginal people in Pilbara rose only slightly from 38% in 1971 to 42% in 2001. However much of this growth in Aboriginal employment was due to the Community Development Employment Programme (CDEP).²⁵ The authors note that in last 30 years Aboriginal workers have moved from reliance on private sector (pastoralists) to reliance on government in the form of CDEP and community service industry.²⁶

The conclusion of the Taylor Report was in essence that:

“The basic message conveyed is that little has been achieved over the past four decades in terms of enhancing Aboriginal socioeconomic status.”²⁷

²¹ “Options for the Future of Indigenous Australians”, Australian 2020 Summit Final Report 2008, www.australia2020.gov.au

²² House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs “Open for Business - Developing Indigenous enterprises in Australia”, October 2008

²³ Australian Bureau of Statistics, “Population and Distribution: Indigenous and Torres Strait Islander Australians”, 2006 (cat. 4705.0)

²⁴ J Taylor and B Scambary, ‘Indigenous people and the Pilbara mining boom – A baseline for regional participation’ Centre for Indigenous Economic Policy Research, Australian National University, Canberra (2005)

²⁵ Ibid @ page 27

²⁶ Ibid, @ page 28

²⁷ Ibid, @ page 145

Aboriginal Businesses & Their Effects

Recently studies have been commissioned researching the level of participation and the ability of local and Aboriginal businesses to become a part of and benefit from the resource sector in Australia, in particular Western Australia.²⁸ Esteves (et al) has noted that the corporate practices of the resource sector actually **prevent** local businesses, and in particular Aboriginal businesses from participating in upcoming projects. This is despite the fact that many resource companies recognise the benefit that their procurement policies can have on the local economy, both during the life of the project (which is often 20 to 40 years) and even after the closure of any mine or project.

These studies support what has been said by PACA since its formation and by many prior to the formation of PACA, namely that change is slow, and whilst there may be good intentions – those intentions are not being transformed into action, all to the cost of Aboriginal contractors and the wider Aboriginal community.²⁹

Data from the ABS 2006 Census also indicates that some 6,600 Aboriginal people indicated that they were self employed, representing 6% of Aboriginal people aged between 15 to 64 years. In comparison, 16% of the non Aboriginal population in the same age bracket indicated that they were self employed. Self employment rates for Aboriginal people in remote areas were 2%, with 6% in regional areas and 7% in major cities. The trend is the opposite for non Aboriginal people, with self employment rates being lower in major cities (15%) and higher in regional and remote areas (both 19%).

A not unsurprising statistic is that when compared with Aboriginal employees, 68% of self employed Aboriginal people were likely to own their own homes compared with 40% of employed Aboriginal people.

If we look specifically at the Pilbara area, statistics indicate that there are 6,788 registered Australian Business Numbers (ABN) in the Pilbara region as at August 2009³⁰, not taking into account businesses that operate in the Pilbara but have their registered address elsewhere. Of these, PACA estimates that some 40 ABN's (or 0.6%) are Aboriginal businesses, leaving 6,748 (or 99.4%) non Aboriginal businesses.

PACA figures indicate that 15 of its members employ 494 people, with 221 of these being Aboriginal and of these, some 125 are Pilbara Aboriginal people. These statistics demonstrate that Aboriginal contractors have Aboriginal employment rates of **45%**, well above the Aboriginal employment rates of the resource sector companies.

²⁸ Esteves, Ana Maria, Barclay, Mary Anne, Samson, Daniel and Brereton, David “*Local SME Participation in the Supply Chains of Australian Mining, Oil and Gas Companies - Interim Report on Phase 2: Issues and Emerging Good Practice*”. (December 2009).

²⁹ Andrich, Mark A, Oxburgh, E Ronald and Imberger, Jorg, “*Raiding Utility and Lowering Risk Through Adaptive Sustainability: Society and the Risk of Wealth Inequity in Western Australia*”, Centre for Water Research, UWA, 2008, @ page 12

³⁰ www.business.gov.au, search of ABN in Pilbara region

Most large resource companies are struggling to maintain employment figures in the region of 5%, with Argyle Diamonds, situated in the nearby Kimberley region and arguably the best performer, stating that it has increased its Aboriginal employment rate from 5% in 2000 to 25% as at 2008.³¹ In contrast, Rio Tinto's Iron Ore operations in the Pilbara had an Aboriginal employment rate of 8.15% as at 2008,³² a decrease from the 2007 figure of 10.2%.

In addition, most resource companies in the Pilbara are heavily reliant upon fly in/fly out workers³³, resulting in ever increasing costs due to the need to transport the workers (usually airfares), and the increasing costs of either building or renting accommodation for its workforce. There are also difficulties in retaining labour, with many choosing to return to their families in cities rather than endure the hardships that accompany working on a fly in fly out basis.

The most recent edition of "Prospect"³⁴ states that almost one quarter of Western Australia's revenue is provided by royalties paid by the resource sector. In the 2008/2009 year, royalties accounted for \$3,239,656,049 of the State's revenue, an increase of 41% from the royalty receipts for the 2007/2008 year. In addition the value of committed projects was approximately \$85 Billion, with projects worth an estimated \$52 Billion being under consideration. The great majority of these projects are located in the Pilbara region of Western Australia.

Given the size and economic and therefore social impact of the resource sector in the Pilbara, it is incredible that so few Aboriginal businesses are operative in the region.

Indications are that the lack of Aboriginal businesses is not because the Aboriginal population is not interested in business, but rather due to the fact that Aboriginal people have for decades been prevented from starting their own businesses and in more recent times, even when they have started their own business, the practices of larger resource companies actually discriminate against Aboriginal businesses.³⁵

PACA has further stories to support this contention, with its members able to recount recent experiences where the tendering processes result in Aboriginal businesses not being informed of tender opportunities, or where they are so informed, the very operation of the tender process ensure that Aboriginal businesses cannot qualify for tenders.

The investigations and reports that have been undertaken³⁶ clearly demonstrate that despite the fact that the resource sector has been active in Western Australia

³¹ Rio Tinto, *Sustainable Development Report Argyle Diamonds 2008 Delivering enduring benefits*

³² Rio Tinto, *Iron Ore group in Western Australia Sustainable Development Report 2008*

³³ Australian Bureau of Statistics, "Australian Social Trends, 2008", (cat. 4102.0)

³⁴ "Prospect", December 2009 to February 2010, WA Department of State Development.

³⁵ Esteves, Ana Maria, Barclay, Mary Anne, Samson, Daniel and Brereton, David "Local SME Participation in the Supply Chains of Australian Mining, Oil and Gas Companies - Interim Report on Phase 2: Issues and Emerging Good Practice". (December 2009)

³⁶ Godden, Lee, Langton, Marcia, Mazel, Odette and Tehan, Maureen, 'Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability' (2008) Journal of Energy and Natural Resources Law, (2008) Vol 26 No

for over 60 years, benefits to Aboriginal people have been minor. In fact benefits did not really start to flow until after the Mabo decision in 1992 and the effects of the common law and legislation dealing with the new place of Aboriginal people at the negotiation table brought about by the Mabo decision was felt, with real gains only beginning to flow since 2000. In other words, it was not until business was forced to consider the Aboriginal community that it actually did so in a positive manner.

In the case of Argyle Diamonds, it was not until 8 June 2005 (even though the mine was commissioned in 1985) that a comprehensive agreement was reached between the Aboriginal community and Argyle dealing with, amongst other things, opportunities for Aboriginal employment and business.

With the exception of BHP Billiton, the resource sector whilst claiming to be reviewing its policies and practices, has once again not engaged with the Aboriginal business community, with the distinct possibility (if past history is any guide) that once more, these so called “solutions” for Aboriginal business will be devised and delivered by non Aboriginal people who have no understanding of the issues, thereby limiting the effectiveness of any such “solution”.

A review of international experiences demonstrates that when obliged to provide business opportunities for Aboriginal contractors, companies such as Rio Tinto are able to do so, whilst maintaining a healthy profit for its shareholders.³⁷

It is obvious that to distil fact from fiction, an open and transparent review of all contracts let by the resource sector is required. This can be achieved without naming names, by the provision of statistical information identifying to whom contracts are awarded by reference to the region of Western Australia, State and country, and by a sub category noting if the contractors are Aboriginal and if so, to what region.

1; House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs “*Open for Business - Developing Indigenous enterprises in Australia*”, October 2008; Langton, Marcia, Mazel, Odette and Doohan, Kim, “*Indigenous participation in the Resource and Extraction Industries: learning from the Argyle Diamond Mine Agreements*”; Langton, Marcia, Wand, Paul and McLeish, Kevin. ‘*Rio Tinto Iron Ore Independent Inquiry into Indigenous Contracting Practices*’, (September 2008); “Options for the Future of Indigenous Australians”, Australian 2020 Summit Final Report 2008, www.australia2020.gov.au.

³⁷ Rio Tinto, *Sustainable Development Report Argyle Diamonds 2008 Delivering enduring benefits*; Rio Tinto, “*The Argyle Participation Agreement – Breaking New Ground*”, Argyle Diamonds; Canadian Sub-committee of the Intergovernmental Working Group on the Mineral Industry “*Report on Native Participation in Mining: Phase II - It Can Be Done*”, November 1991; West, Dr Martin “*Local Content Requirements in the Oil and Gas Industries in Selected Countries - Final Report*”, Department of Industry and Resources March 2008.

AUSTRALIAN EXPERIENCES

State Agreements

One of the methods adopted by the Western Australian State Government in relation to major resource projects is to enter into agreements with proponents of such projects, which agreements are ratified by legislation (State Agreements). Currently there are 72 State Agreement Acts.³⁸

State Agreements specify the rights, obligations, terms and conditions for development of the project and establish a framework for ongoing relations and cooperation between the State and the project proponent. In particular, State Agreements expressly provide that they override any legislation that is in conflict with a State Agreement.

State Agreements provide the State with an opportunity to ensure that major resource projects ensure the delivery of tangible benefits to the Aboriginal community.

Surprisingly, given the available data and the history of the resource industry in the Pilbara region, recent State Agreements do not contain specific provisions dealing with Aboriginal labour or contractors. Instead recent Acts and State Agreements speak of the use of labour, professional services, materials, etc from Western Australia and Australia in preference to overseas sources, where such is reasonable and economically practicable³⁹.

Whilst the right of business to conduct its affairs as it sees fit is recognised, equally, the resource sector understands and accepts that it has a social responsibility to the community (both local and on a larger scale) in which it operates⁴⁰.

A recent addition to the usual wording of State Agreements is the requirement for the proponent to provide the State with a “community development plan” or “community and social benefits plan”.⁴¹ The proponent is required to prepare a plan with proposed strategies to achieve the community and social benefits, submit the plan to the Minister for approval, implement the plan and report to the Minister on the implementation of the plan.

However, there are no definitions, targets or KPI’s to identify what the community benefits are, nor what is to occur if the proponent fails to provide those benefits.

³⁸ Annexure 2 – List of State Agreement Act.

³⁹ Barrow Island Act 2003 - Gorgon Gas Processing and Infrastructure Project Agreement (9 September 2003), clause 15; Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002, Iron Ore Processing (Mineralogy Pty Ltd) Agreement, clauses 5A, 6(2), 6(6), 12; Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006, Iron Ore (FMG Chichester Pty Ltd) Agreement, clauses 7, 8 & 19.

⁴⁰ Gorgon Gas Processing and Infrastructure Project Agreement, Recitals C and D of Agreement; Iron Ore Processing (Mineralogy Pty Ltd) Agreement, clause 5A

⁴¹ Iron Ore Processing (Mineralogy Pty Ltd) Agreement, clause 5A; Iron Ore (FMG Chichester Pty Ltd) Agreement, clause 7.

To this extent, the clauses are nothing more than statements of intention, which recent studies have shown do not translate into action.⁴²

As will be discussed below, the State has an obligation and should require more from those who seek approval for major projects which will have a significant impact upon this State and its people, then mere statements of intention, which are not enforced or perhaps capable of enforcement.

State Government – Buy Local Policy

The State Government's *Buy Local Policy* (as amended in 2009)⁴³ is the State Government's initiative aimed at recognising and building stronger communities. It is aimed at requiring government agencies to source goods and services locally in line with specific tender requirements, namely:

- requiring "local content" to be have a minimum 20% weighting in the selection criteria for all tenders valued at \$750,000 or above;
- a target of 80% of government goods and services to be sourced locally;
- ensuring buying practices, procedures and specifications do not disadvantage local businesses;
- ensure that in relation to quotations valued at \$50,000 or less in a region other than Perth, local businesses within the area are invited to bid;
- provide early notice on future tenders valued at \$50,000 or above to local businesses;
- encourage bids from and give priority to tenderers who are Aboriginal (solely or in partnership) or who have in place or are prepared to consider employment strategies and programmes for Aboriginal people;
- to provide preferences in certain circumstances to West Australian, Australian and new Zealand businesses by applying an impost on tenders that include imported goods or services and by applying a reduction to tenderers that include regional content or are regional themselves.

However, as a consequence of signing the Australia – New Zealand Government Procurement Agreement, the Australia – United States Free Trade Agreement and the Australia – Chile Free Trade Agreement, any business that based in New Zealand, United States or Chile, in effect, qualifies as a local business! To this extent, the effectiveness of the Buy Local Policy is questionable.

In any event, the wording of the policy is loose, and as experience has shown, the structure of the tender itself can hinder Aboriginal involvement (especially if a track record is required). Further, despite comments to the contrary, anyone who has

⁴² Marcia Langton, Paul Wand, Kevin McLeish, 'Rio Tinto Iron Ore Independent Inquiry into Indigenous Contracting Practices', (September 2008)

⁴³ Government of Western Australia, '*Buy Local Policy*' (July 2002), and 2009 addendum

experience in the tender process is aware that in the end the evaluation of a bid can be subjective.

Big Business – The Pilbara Region & the Rio Tinto Example

The concept of a resource company (or any other company) being socially accountable for its activities and indeed having responsibilities and obligations to the community is often referred to as the “**social licence to operate**”.

For many years, Rio Tinto has understood that its activities as a resource company operating in the Pilbara (and other areas) has, not only economic and environmental, but also social and cultural impact for the region and indeed the nation.⁴⁴ Mr Lenegan stated that one way in which the resource sector can contribute to a sustainable economy, including leaving a legacy when the resource sector is no longer the prime industry in the region, is to assist in the creation of Aboriginal economic independence by facilitating Aboriginal economic enterprises.

In 2008, Rio Tinto Iron Ore commissioned a report to review its procurement practices in relation to Aboriginal businesses in the Pilbara region. A modified version of this report (Wand Report) has been made public.⁴⁵

The Wand Report noted the following important facts:

- As an organisation, Rio Tinto has publicly expressed an intent to engage with Aboriginal contractors; and
- That intent is **not** being translated into action due to a number of factors identified in the report.

Importantly, recommendations were made to address the deficiencies identified in the Wand report. Of particular relevance to this paper are the recommendations that Rio Tinto:

- Issue a clear leadership statement and develop suitable policies and guidelines to implement that leadership statement;
- Establish a standing committee of MD’s and Aboriginal leaders to deal with issues relating to the engagement of Aboriginal contractors;
- Establish KPI’s and targets for the engagement of Aboriginal contractors;
- Implement the KPI’s and targets in major contracts; and
- Report outcomes so that all can monitor the progress of the implementation of the KPI’s and targets.

Rio Tinto’s “Sustainable Development Report 2008 – Iron Ore Group in Western Australia” reinforces the “social licence to operate” concept mentioned above. A

⁴⁴ “Resourcing an Innovative Industry” – Minerals Week 2005, “The Minerals Sector & Indigenous Relations”, an address by Charlie Lenegan, Managing Director of Rio Tinto Australia

⁴⁵ Langton, Marcia, Wand, Paul and McLeish, Kevin. ‘Rio Tinto Iron Ore Independent Inquiry into Indigenous Contracting Practices’, (September 2008)

perusal of the 2008 report shows that Rio Tinto currently views Aboriginal employment and agreements with communities as forming the foundations for Aboriginal economic independence.

In this respect Rio Tinto is not alone – most effort is spent in Aboriginal employment matters and agreements with Aboriginal communities, rather than Aboriginal contractors.

In August 2009,⁴⁶ Rio Tinto confirmed to PACA that it was in the process of reviewing the Wand Report and its recommendations and of making changes to its policies and practices. Whilst Rio Tinto is applauded for its efforts in recognising the deficiencies in its policies and practices, the response was far from comforting.

Again, whatever changes Rio Tinto is investigating (and hopefully implementing) appear to be progressing without any input from those who will be affected by the policies and procedures, running the risk – again - that any changes that are introduced will not be culturally appropriate, will not take into account Aboriginal Knowledge⁴⁷ and will not deal with the disadvantage that unfortunately exists. As was noted in the Wand report (and as has been noted by others⁴⁸) there must be real consultation and communication with the Aboriginal business community for any change to be effective.

The approach being adopted by Rio Tinto has caused PACA concern and does not create an atmosphere of confidence that Rio Tinto will be able to achieve its publicly stated objectives in a reasonable time frame, if at all.

As said by Mr Lenegan⁴⁹ change must be in **partnership** with Aboriginal people. Whilst the first step is internal change, that internal change must be guided and responsive to the Aboriginal needs. Here, PACA is a very obvious voice to listen to.

Big Business – BHP Billiton Example

Recently, BHP Billiton has actively engaged with PACA with the aim of identifying future tender opportunities for Aboriginal businesses.

BHP Billiton had undertaken this task with input from PACA and has put in place a new method for dealing with Aboriginal contracting. Specifically, BHP Billiton has:

- Aligned the management of Aboriginal affairs across its entire operations;

⁴⁶ Letter from Rio Tinto to PACA

⁴⁷ Aboriginal Knowledge is a reference to knowledge that is held and obtained by Aboriginal people in a cultural manner, but is not limited to cultural knowledge.

⁴⁸ Esteves, Ana Maria, Barclay, Mary Anne, Samson, Daniel and Brereton, David “*Local SME Participation in the Supply Chains of Australian Mining, Oil and Gas Companies - Interim Report on Phase 2: Issues and Emerging Good Practice*”. (December 2009).

⁴⁹ Godden, Lee, Langton, Marcia, Mazel, Odette and Tehan, Maureen, ‘*Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability*’ (2008) *Journal of Energy and Natural Resources Law*, (2008) Vol 26 No 1

- Created a cross functional Aboriginal contracting team that comprises the various internal departments dealing with tenders, in effect providing a one stop shop for Aboriginal contractors;
- This team is accountable to deliver BHP Billiton's Aboriginal contracting strategy;
- The creation of an Aboriginal contractor pre qualification questionnaire, which is a complete and single process to allow Aboriginal contractors the ability to gain access to tenders;
- A sourcing plan is being devised to identify opportunities and to provide a method by which Aboriginal contractors can obtain information about the nature and timing of future tenders so Aboriginal contractors can seek to qualify for the same or to enter into business relationships with third parties to do so.

Importantly, BHP Billiton has opened the doors to effective communication with Aboriginal contractors, mainly through the actions of PACA, and by that means, has been able to identify shortcomings in its processes and taken steps to remove the same.

As a result of these initial changes, BHP Billiton has announced that 9 Aboriginal contractors have successfully pre qualified with BHP Billiton, with another 5 are in the process of doing so.

The BHP Billiton example is seen by PACA as being a major development in changing attitudes and practices in the Pilbara in the way resource companies deal with Aboriginal contractors. It is also an example of what can be done when the will to confront an issue exists.

Big Business – The Kimberley Region & the Argyle Example

A look at Argyle's history shows that exploration began in 1972, with the main diamond pipe (AK1) being discovered in 1979. In 1983 the joint venturers decided to establish a diamond mine, with construction beginning in 1984 and the mine being commissioned in 1985.⁵⁰

The history of Argyle's interaction with the Aboriginal community in the Kimberly region has had a chequered history. Certainly relations were strained during the 1980's and 1990's. It was not until the early 2000's that a dramatic change of attitude by Argyle brought with it true consultation and reconciliation with the local Aboriginal communities. This led to, amongst other things, the Argyle Participation Agreement, which was entered into by Argyle and the Traditional Owners in 2005.

As a consequence of entering into the Argyle Participation Agreement, Argyle has worked towards increasing the economic participation of the local Aboriginal population.

⁵⁰ See http://www.argylediamonds.com.au/argyle_history.html

The following appears on Argyle's web site:

"As well as increasing the representation of indigenous people in its workforce, Argyle is helping indigenous people establish their own businesses that can exist independently of the mine. The role of business development facilitator was established under the Argyle Participation Agreement to assist in the development of Traditional Owner businesses, and to ensure that these businesses are able to compete for site-based contracts. Further to this, Argyle has developed an 'inside-out' approach to business development and contracting within its site operations, helping indigenous staff to develop commercial opportunities from existing roles (for example, assisting grader operators to become earthmoving contractors and waste management staff to set up waste management businesses). This approach allows local indigenous people with good skills and a passion to establish a private business to develop business skills over a reasonable period of time, maximising their chances for successful transition into a viable business."⁵¹

This is certainly welcomed by all Aboriginal contractors.

In particular, in return for the Traditional Owner's consent to the present and future mining operations, Argyle has undertaken to,⁵² amongst other things:

- Provide preferential training and employment for Traditional Owners and ensure that of its workforce, 80% is local and of the local workforce, 50% is Aboriginal;
- Provide business development support and preferential contracting with Traditional Owners. In particular where business tenders are roughly equal, Argyle will prefer bids from Traditional Owners.

Two examples of the engagement of Aboriginal contractors have been provided in Rio Tinto's "Sustainable Development Report Argyle Diamonds 2008". This is welcomed and provides evidence of what is possible.

⁵¹ See http://www.argylediamonds.com.au/indigenous_partnerships.html

⁵² See "The Argyle Participation Agreement – Breaking New Ground", publication by Argyle Diamonds

INTERNATIONAL EXPERIENCES

Canada⁵³

The Federal Canadian government has jurisdiction over the indigenous inhabitants of Canada (like Australia) while the provinces and territories have jurisdiction over natural resources (like Australia and its States).

The major difference is that the indigenous people of Canada have entered into numerous treaties with the Canadian governments, which treaties impact upon the rights of the indigenous peoples of Canada. The closest analogy to the Australian context are Native Title determinations or land use agreements.

The Canadian government deals with its indigenous people by a variety of means. Of principal interest is the use of socio economic agreements (SEA), which are entered into by governments, indigenous peoples and mining companies.⁵⁴

The aim of SEA is to ensure that proposed mineral projects provide maximum benefits to the local population.

The reasons that a company enters into a SEA vary. Some do so on a strictly voluntary basis (i.e. because the company is convinced that this is the best policy), whereas others enter into an agreement because it is a government requirement.⁵⁵

Often, the requirement to enter into a SEA arises as a condition of obtaining approval for a mining project, so to that extent it is not a truly voluntary process.

Importantly the SEA provides targets and an obligation on the mining company to report on the implementation of commercial agreements with local businesses, with the aim of such reports forming the basis for future business support programmes and services.

The SEA is couched in language which provides the company with more than adequate control and protection of its business interests. The SEA uses language to the effect that the company will establish as an objective that it will apply every reasonable effort consistent with the targets in the agreement to purchase goods and services from local businesses, to the extent that such purchases do not materially add to the cost of the project or compromise the quality or timing of the project.

South Africa⁵⁶

The government of South Africa has adopted a much more aggressive position in order to encourage the development of indigenous businesses. South Africa is faced with a situation that distinguishes it from many other countries, namely its

⁵³ See Annexure 3 for more detail

⁵⁴ See Annexure 2

⁵⁵ Report on Native Participation in Mining: Phase II - It Can Be Done, prepared by the Canadian Sub-committee of the Intergovernmental Working Group on the Mineral Industry, November 1991

⁵⁶ See Annexure 3 for more detail.

indigenous population forms the majority, with its non indigenous population being the minority of the population.

Following the end of apartheid, the new South African government faced the issue of redressing years of power imbalance and prejudice against its indigenous population. As a government, it did not have the luxury to allow businesses and business practices to come to terms with the changes – it had to act and act quickly. The government of South Africa acted by introducing legislation requiring non indigenous businesses and contracts to have substantial local control and content.⁵⁷

Whilst providing an interesting example, the South African model is unlikely to be politically or socially palatable in Western Australia.⁵⁸ Further, given the fact that the indigenous population of Western Australia accounts for approximately 3.8% of the West Australian population,⁵⁹ the South African model is not likely to be effective.

Other Countries

Further examples of how other countries have dealt with increasing indigenous business participation in the resource sector are contained in Dr West's paper⁶⁰ and in the papers contained in the special edition of the 2008 Journal of Energy and Natural Resources Law dealing with the resource sector and indigenous people.⁶¹

⁵⁷ Mineral and Petroleum Resources Development Act 28 of 2002, Broad-based Black Economic Empowerment Act

⁵⁸ See footnote 1 for further examples of how countries have sought to deal with local content for resource projects.

⁵⁹ Australian Bureau of Statistics, Population and distribution: Indigenous and Torres Strait Islander Australians, 2006 (cat. 4705.0)

⁶⁰ West, Dr Martin "Local Content Requirements in the Oil and Gas Industries in Selected Countries - Final Report", Department of Industry and Resources March 2008

⁶¹ Godden, Lee, Langton, Marcia, Mazel, Odette and Tehan, Maureen, 'Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability' (2008) Journal of Energy and Natural Resources Law, (2008) Vol 26 No 1

PACA – A SOLUTION?

PACA, as the peak body representing Aboriginal contractors in the Pilbara region is expertly placed to liaise with and provide assistance to the resource sector.

PACA has offered the major resource companies its services as a point of contact with Aboriginal contractors, as well as being a distribution point for information and resources from the miners to Aboriginal contractors to assist them in meeting tender and contract requirements.

To date, apart from BHP Billiton, none of the major resource companies have, despite their public statements, formally accepted PACA's offer to act as the contact point with Aboriginal contractors. This is sad and supports the anecdotal evidence that the mining companies' rhetoric is purely that, and that the publicly stated intentions to assist Aboriginal contractors are not genuine.

The members of PACA have found that they are subject to multiple forms of discrimination.

Firstly, they are seen as Aboriginal businesses and therefore are assumed to lack the capacity, skills and expertise to competitively tender and carry out contracts for the resource sector. Anecdotal evidence is rife with Aboriginal contractors being offered the "lunch run" contracts.

Secondly, as most PACA members are not community based traditional owner (TO) entities (although many are Traditional Owners), they are seen as somehow being "less Aboriginal" than TO entities and hence are ignored when it comes to resource companies complying with their Aboriginal enterprise commitments.

It is noted that the resource sector is busy negotiating with TO entities and claim groups, because without sound and meaningful agreements with the TO entities and claim groups, their ability to continue to operate may be jeopardised.

That said, resource companies have not investigated how investing in local Aboriginal contractors will have long term benefits not only for the contractors involved – who more often than not are TO, but for those Aboriginal persons who seek and obtain employment with the Aboriginal contractor, who is better placed to provide mentoring, support and positive role models.

It seems that Aboriginal contractors cannot win – either they are too black or not black enough!

As has been noted,⁶² such discrimination can only be tackled by the elimination of the discrepancy between the publicly stated policies of the resource companies and their practices. This in turn requires leadership and real support not only from senior management, but from middle management, who often design the policies and processes and make the decisions as to which contracts are awarded to whom.

⁶² See references at footnote No 1

POSSIBLE LEGISLATIVE RESPONSES

Affirmative Action Legalisation

As noted above, change that is not imposed by the State but is self imposed suffers from the obvious flaw that it is dependent on the individual as to whether or not change is effected, the timing for that change and the nature of the change effected.

Whilst there are resource companies operating in the Pilbara that are active in introducing changes to improving the status and position of Aboriginal businesses, it cannot be said that this is the accepted position by all resource entities operating in the Pilbara. The majority state publicly that they are “considering” or “reviewing” their policies and practices, but are doing so without any form of formal or structured input from those who are most affected by their policies and practices, the Aboriginal business community. Hence, as history has demonstrated, it is obvious that without this vital input, any changes that are effected will be slow and ineffectual.

Hence the introduction of affirmative action legislation is preferred from the perspective that it is pro active rather than reactive solution, and would be the simplest to introduce as it is not a new concept. It is based on changing attitudes rather than punishing those who fail to comply.

Affirmative action legislation aims to achieve change, usually in one of two ways:

- by enabling persons to seek redress for discrimination; or
- by preventing the occurrence of discrimination by setting standards for how various environments/relationships should function.⁶³

Affirmative action is about ensuring equality of opportunity. There can only be equality of opportunity if individuals and businesses are assessed on their merits and system discrimination is removed.

The *Equal Opportunity for Women in the Workplace Act 1999 (Cth)* came into effect on 1 January 2000, renaming and updating the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986*.

The Act requires:

- Private sector companies;
- Not-for-profit/Community organisations;
- Non-government schools;
- Unions;

⁶³ Valerie Braithwaite, ‘The Australian Government’s Affirmative Action Legislation: Achieving Social Change Through Human Resource Management’, Law & Policy Volume 15 No 4 (October 1993)

- Group training companies; and
- Higher education institutions;

with 100 or more people to establish a workplace program to remove the barriers to women entering and advancing in their organisation.

However, statistics available as at 2008 indicate that despite the existence of the Act, little has changed for women. The EOWA 2008 Australian Census of Women in Leadership (released in October 2008) reveals that the number of women on boards and in executive management positions has declined since 2006, and in some cases reverted to pre 2004 levels, with Australia now trailing behind the USA, UK, South Africa and New Zealand. Conducted by Macquarie University, the EOWA Census shows the number of women executive managers in the ASX200 has declined to 10.7% from 12% in 2006 and 11.4% in 2004. The number of companies with no women executive managers has risen sharply to 45.5% from 39.5% in 2006.

So has the Act made any real changes to the position of women? It has certainly identified an issue, but it has not been able to make any real inroads into changing cultures and work place patterns.

Real changes have occurred where women have been the masters of their own destiny. Women corporate leaders are, in the majority, business owners who understand the issues facing women and have a real economic interest in making the necessary changes to traditional methods of working, including structural changes to the way businesses are set up and operated.

Hence if legislation similar to the Act is to be considered, it must be strengthened to include, at the very least a method for Aboriginal businesses to actively participate in the:

- identification of processes that hinder the development and participation of Aboriginal businesses;
- setting of targets; and
- setting of key performance indicators;

that are applicable to all businesses covered by any proposed legislation.

The Australian business community is familiar with affirmative action by virtue of the operation of the Equal Opportunity for Women in the Workplace Act 1999 (Cth). Hence to a large extent, businesses already have systems in place to comply with affirmative action legislation. The cost of introducing similar legislation for Aboriginal businesses would therefore not be significant, especially when it is remembered that most multi-national companies operating in the Pilbara are required to meet targets and KPI in their operations in other countries.⁶⁴

⁶⁴ See Annexure 3; West, Dr Martin “*Local Content Requirements in the Oil and Gas Industries in Selected Countries - Final Report*”, Department of Industry and Resources March 2008, Godden,

Such legislation should require the creation of a governing committee consisting of representatives from Aboriginal business owners, industry and government. This committee should be entrusted with the task of identifying opportunities for Aboriginal businesses, assisting industry by the provision of expertise and advice on how to change its policies and practices immediately, providing an interface with emerging Aboriginal businesses and ensuring that there was public reporting on outcomes.

These issues are not new and methods to implement new policies and procedures are not difficult – if the will (or requirement) is present. As the will has not been demonstrated across the board, PACA seek the imposition of legislation to create the requirement.

The Aboriginal community and especially the Aboriginal business community cannot wait any longer whilst business opportunities are lost, with the consequences that will flow from such – the continuation of Aboriginal disadvantage.

Amendments to State Agreements

When negotiating State Agreements, the process should take into account the point of view of Aboriginal businesses. Often Traditional Owners as a group do not have the necessary business experience or acumen to know what is possible from a commercial perspective or the means of achieving objectives, and therefore what type of clauses should be included in such agreements.

A business advisory committee, including Aboriginal business leaders, should be established to provide advice to the State Government on aspects of State Agreements, and in particular to endorse or reject any proposals relating to local business outcomes put forward by the resource companies.

Amendments to the Mining Act

Another option, although limited in its scope, would be to insert conditions on the grant of all mining tenements requiring mining tenement holders to meet minimum Aboriginal contract provisions.

These conditions could be modelled on the targets and KPI's contained in agreements reached between Argyle and the Kimberly Aboriginal community and the SEA land use agreements operative in Canada.⁶⁵

Amendments to Government Purchasing Policy

The Buy Local Policy requires further consideration and amendment to ensure that whilst compliance with the Australia – New Zealand Government Procurement Agreement, the Australia – United States Free Trade Agreement and the Australia

Lee, Langton, Marcia, Mazel, Odette and Tehan, Maureen, *'Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability'* (2008) *Journal of Energy and Natural Resources Law*, (2008) Vol 26 No 1.

⁶⁵ Rio Tinto, *"The Argyle Participation Agreement – Breaking New Ground"*, Argyle Diamonds; Canadian Sub-committee of the Intergovernmental Working Group on the Mineral Industry *"Report on Native Participation in Mining: Phase II - It Can Be Done"*, November 1991

– Chile Free Trade Agreement are complied with (in the sense that the local content preference, the imported content impost and the regional price preference are not applied), all contractors should be required to meet environmental and social performance indicators, which are aimed at providing a tangible return to the local community.

One means by which businesses could meet such performance indicators could be to increase the ability of local Aboriginal businesses to participate in government contracts as sub contractors.

ESSENTIAL ELEMENTS OF ANY SOLUTION

Whatever the form of the “*initiative*” that is devised, whether the introduction of legislation, amendments to State Agreements, etc, the following issues must be dealt with if the “*initiative*” is to have any positive effect, not only in the short term, but more importantly in the long term.

Which Businesses Will Be Effected

For any initiative to be effective it must be binding upon all businesses that operate in the Pilbara region. In much the same way that the development of East Perth was effected by the creation of an entity and legislation that applied solely to the East Perth area, as a minimum, Pilbara businesses that employ more than 100 employees should be bound by the initiative.

In addition, all state government agencies operating in the Pilbara region should also be bound by the initiative.

Minimum Standards

The initiative should set minimum standards that are to be met by Pilbara businesses in their dealings with Aboriginal contractors. These standards are on the understanding that the Aboriginal contractors must have the skills and expertise to perform the contract. As a minimum, the standards would include:

- In association with PACA, the identification of Aboriginal businesses, their capabilities and capacity to perform to the Pilbara businesses requirements (Qualifying Indigenous Contractors);
- In association with PACA, the identification of contracts or parts thereof that would be suitable for Aboriginal contractors;
- Setting targets for participation by Aboriginal contractors by reference to the number and size of contracts let or to be let by Pilbara businesses;
- provision for the preferential treatment of Qualifying Indigenous Contractors by the resource sector;
- optimising the participation of Aboriginal business in all phases of resource projects;
- provide for the standards to be monitored to record the participation of Aboriginal business in the resource sector;
- providing for the publication of compliance with the standards;

Consequences for non compliance

Whatever initiative is adopted, there must be provision to deal with the consequences for those who, without a reasonable excuse, fail to comply. Examples of possible consequences to the non complying party are:

- compensation for the Qualifying Indigenous Contractors who were prejudiced by the non compliance;
- being obliged to provide funds for training and capacity building for Aboriginal people wishing to start a business venture;
- being obliged to set aside future contracts for Qualifying Indigenous Contractors;
- in extreme cases, loss of mineral tenements and/or fines and penalties can be considered.

THE CHALLENGE

This paper has identified the issues and put forward some possible solutions. Its most important message is that time cannot be wasted. Economic opportunities are not ever lasting. Whilst Western Australia and the Pilbara in particular, have enjoyed unprecedented economic success for many years, the foundation for that success, being the exploitation of non renewal resources, cannot last forever. However, the Aboriginal community will be present long after the resource companies have left. The challenge is to leave the Aboriginal community in a better not worse position.

If Aboriginal businesses were able to get a fair share of resource contracts in the Pilbara pie over the next 5, 10, and 20 years, all indications are that the social and economic fabric of every Pilbara Aboriginal person and community would alter for the better.

All that the Aboriginal people ask for is social and economic **inclusion** – not exclusion.

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Government Agreements Act 1979

Alumina

Alumina Refinery Agreement Act 1961

Alumina Refinery (Mitchell Plateau) Agreement Act 1971

Alumina Refinery (Pinjarra) Agreement Act 1969

Alumina Refinery (Wagerup) Agreement and Acts Amendment Act 1978

Alumina Refinery (Worsley) Agreement Act 1973

Charcoal Iron and Steel

Wundowie Charcoal Iron Industry Sale Agreement Act 1974

Coal

Collie Coal (Griffin) Agreement Act 1979

Collie Coal (Western Collieries) Agreement Act 1979

Copper

Western Mining Corporation Limited (Throssell Range) Agreement Act 1985

Diamonds

Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981

Energy

Goldfields Gas Pipeline Agreement Act 1994

Pilbara Energy Project Agreement Act 1994

Ord River Hydro Energy Project Agreement Act 1994

Forest Products

Albany Hardwood Plantation Agreement Act 1993

Bunbury Treefarm Project Agreement Act 1995

Collie Hardwood Plantation Agreement Act 1995

Dardanup Pine Log Sawmill Agreement Act 1992

Paper Mill Agreement Act 1960

Wood Processing (WESFI) Agreement Act 2000

Wood Processing (Wesbeam) Agreement Act 2002

Gas

North West Gas Development (Woodside) Agreement Act 1979

Barrow Island Act 2003 (which incorporates the Gorgon Gas Processing and Infrastructure Project Agreement)

Gold

Tailings Treatment (Kalgoorlie) Agreement Act 1988

Iron Ore and Steel

BHP Billiton (Termination of Agreements) Agreement Act 2006

Iron Ore (Channar Joint Venture) Agreement Act 1987
Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006
Iron Ore (Goldsworthy-Nimngarra) Agreement Act 1972
Iron Ore (Hamersley Range) Agreement Act 1963
Iron Ore (Hamersley Range) Agreement Act Amendment Act 1968
Iron Ore (Hope Downs) Agreement Act 1992
Iron Ore (McCamey's Monster) Agreement Authorization Act 1972
Iron Ore (Marillana Creek) Agreement Act 1991
Iron Ore (Mount Bruce) Agreement Act 1972
Iron Ore (Mount Goldsworthy) Agreement Act 1964
Iron Ore (Mount Newman) Agreement Act 1964
Iron Ore (Murchison) Agreement Authorization Act 1973
Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972
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Iron Ore (Yandicoogina) Agreement Act 1996
Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002

Mineral Sands

Mineral Sands (Eneabba) Agreement Act 1975
Mineral Sands (Cooljarloo) Mining and Processing Agreement Act 1988
Mineral Sands (Beenup) Agreement Act 1995

Nickel

Nickel (Agnew) Agreement Act 1974
Poseidon Nickel Agreement Act 1971

Oil

Oil Refinery (Kwinana) Agreement Act 1952

Railways and Port

Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004

Salt

Dampier Solar Salt Industry Agreement Act 1967
Evaporites (Lake MacLeod) Agreement Act 1967
Leslie Solar Salt Industry Agreement Act 1966
Onslow Solar Salt Agreement Act 1992
Shark Bay Solar Salt Industry Agreement Act 1983

Uranium

Uranium (Yeelirrie) Agreement Act 1978

Miscellaneous

Cement Works (Cockburn Cement Limited) Agreement Act 1971
Industrial Lands (CSBP & Farmers Limited) Agreement Act 1976
Industrial Lands (Kwinana) Agreement Act 1964

Pigment Factory (Australind) Agreement Act 1986
Silicon (Kemerton) Agreement Act 1987
Commonwealth Oil Refineries Limited (Private) Act 1940
Texas Company (Australasia) Limited (Private) Act 1928

ANNEXURE 3 - INTERNATIONAL EXPERIENCES

Canada

Canada, like Australia, is a federation, comprising of 10 provinces and 3 territories. A summary of the structure and operation of Canada's government is contained in the publication, '*How Canadians Govern Themselves*'⁶⁶

The Federal Canadian Parliament has power "to make laws for the peace, order and good government of Canada," except for "subjects assigned exclusively to the legislatures of the provinces."

The provincial legislatures have power over, amongst other matters, natural resources. The Federal government has power over Indians and Indian lands (which the courts have interpreted to cover Inuit as well).⁶⁷

The *Canadian Charter of Rights and Freedoms* guarantees that certain rights and freedoms "shall not be construed so as to abrogate or derogate from any indigenous, treaty or other rights or freedoms that pertain to the indigenous peoples of Canada", including rights or freedoms recognized by the Royal Proclamation of 1763, and any rights or freedoms acquired by way of land claims settlement.

The Charter states that "The existing indigenous and treaty rights of the indigenous peoples of Canada are hereby recognized and affirmed," and that the indigenous peoples are defined as including the Indian, Inuit and Métis peoples.

In 1983, the amending formula in the Constitution was used for the first time to add to the indigenous and treaty rights of Canada's native peoples, rights or freedoms that already existed by way of land claims agreements or that might be so acquired, and to guarantee all the rights equally to men and women. The amendment also provided that there would be no amendments to the constitutional provisions relating to Indians and Indian reserves, or the indigenous rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, without discussions at a conference of First Ministers with representatives of the native peoples. The amendment came into force on June 21, 1984.

Before Confederation, the Dominion of Canada signed treaties with First Nations. Since Confederation, the Government of Canada continues to negotiate modern treaties.

The Indian and Northern Affairs Canada (INAC) is the federal department responsible for negotiating and implementing treaties (including comprehensive and specific land claims).

⁶⁶ The Honourable Eugene A. Forsey, '*How Canadians Govern Themselves*',(1980)

⁶⁷ Ibid

As can be seen, the Federal Canadian government has jurisdiction over the indigenous inhabitants of Canada (like Australia) while the provinces and territories have jurisdiction over natural resources (like Australia and its states).

The major difference is that the indigenous people of Canada have entered into numerous treaties with the Canadian governments, which treaties impact upon the rights of the indigenous peoples of Canada. In the closest analogy to the Australian context are Native Title determinations or land use agreements.

The Canadian government deals with its indigenous people by a variety of means. Of principal interest is the use of socio economic agreements (SEA), which are entered into by governments, indigenous peoples and mining companies⁶⁸.

The aim of SEA is to ensure that proposed mineral projects provide maximum benefits to the local population.

The reasons that a company enters into a SEA vary. Some do so on a strictly voluntary basis (i.e. because the company is convinced that this is the best policy), whereas others enter into an agreement because it is a government requirement.⁶⁹

Often, the requirement to enter into a SEA arises as a condition of obtaining approval for a mining project, so to that extent it is not a truly voluntary process.

Most SEA's contain provisions to protect the rights and future of the indigenous peoples on whose land the mining activity is proposed. For example, in each SEA entered into by the Government of the Northwest Territories⁷⁰, there is provision for the mining company to purchase goods and services from local businesses, which is defined to include the indigenous people as well as other local inhabitants, as well as providing support for local businesses.

Importantly the SEA provides targets and an obligation on the mining company to report on the implementation of commercial agreements with local businesses, with the aim of such reports forming the basis for future business support programmes and services.

The SEA is couched in language which provides the company with more than adequate control and protection of its business interests. The SEA uses language to the effect that the company will establish as an objective that it will apply every reasonable effort consistent with the targets in the agreement to purchase goods and services from local businesses, to the extent that such purchases do not materially add to the cost of the project or compromise the quality or timing of the project.

⁶⁸ See Annexure 2

⁶⁹ Report on Native Participation in Mining: Phase II - It Can Be Done, prepared by the Canadian Sub-committee of the Intergovernmental Working Group on the Mineral Industry, November 1991

⁷⁰ BHP Diamonds Project, Diavik Diamonds Project, DeBeers Snap Lake Project; and Mackenzie Gas Project.

For example, in the BHP Diamonds Project it is a condition of the SEA that the company will procure the following goods and services from local businesses:

- 28% of the total value of goods and services purchased during the construction phase; and
- 70% of the total value of goods and services purchased during the operation phase.

The Canadian experience has shown that the best way to bring about real change within a realistic time frame is to ensure, by legislation (in the sense that entering into a SEA is a prerequisite to gaining a mining title), that the resource sector honour their moral and social obligations to the community and in particular the indigenous community, in a public and accountable fashion.

Further, identifying and stating targets has not hindered mining projects and in fact, has better placed the companies to deliver tangible benefits to the indigenous community, which includes indigenous businesses.

South Africa

The government of South Africa has adopted a much more aggressive position in order to encourage the development of indigenous businesses. South Africa is faced with a situation that distinguishes it from many other countries, namely its indigenous population is the majority, with its non indigenous population being the minority.

Following the end of apartheid, the new South African government faced the issue of redressing years of power imbalance and prejudice against its indigenous population. As a government, it did not have the luxury to allow businesses and business practices to come to terms with the changes – it had to act and act quickly. The government of South Africa acted by introducing legislation requiring non indigenous businesses and contracts to have substantial local control and content.⁷¹

Desme Human has postured⁷² that the affirmative action and black economic empowerment (BEE) legislation is only implemented by non indigenous companies for political reasons and therefore, to be truly successful, it must be reconsidered. As has been said, “*South Africa needs more entrepreneurs not a replacement of white entrepreneurs with black ones.*”⁷³

Whilst South Africa has by its legislation introduced compulsory “corporate social responsibility” (CSR), there are traces of CSR obligations in the legislation. Such legislation is not without its shortcomings. For example, one of the major problems is a skills shortage, thereby making it difficult for companies to meet their BEE targets. Another problem is that of “fronting” – that is the practice of

⁷¹ Mineral and Petroleum Resources Development Act 28 of 2002, Broad-based Black Economic Empowerment Act

⁷² Implementation of Affirmative Action and Black Economic Empowerment (BEE) in the Construction Industry: Desme Human (2006)

⁷³ Ibid at page 9.

indigenous people appearing to have a leading role with a company, but in fact they have no real economic control over the company. They are merely “window dressing” to enable the company to meet its BEE targets.

Whilst providing an interesting example, the South African model is unlikely to be politically or socially palatable in Western Australia.⁷⁴ Further, given the fact that the Aboriginal population of Western Australia accounts for approximately 3.8% of the West Australian population⁷⁵, the South African model is not likely to be effective.

⁷⁴ See footnote 1 for further examples of how countries have sought to deal with local content for resource projects.

⁷⁵ Australian Bureau of Statistics, Population and distribution: Indigenous and Torres Strait Islander Australians, 2006 (cat. 4705.0)