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## THE TANAMI GOLD NL MINING

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### AGREEMENT WITH TJURABALAN:

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## AN EXAMPLE OF HOW A SMALL NATIVE TITLE GROUP INVESTS ITS MINING FUNDS

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by Fiona Martin

### INTRODUCTION

It is becoming clear from recent comments and research<sup>1</sup> that throughout Australia there are a number of relatively small groups of Indigenous Australians that hold native title and who also receive small, irregular or one-off mining payments. Even though these payments may be small it is still important for many of these groups to use them in a way that will maximise their benefit to themselves and their community. This article provides an example of such a situation and discusses the choices that have been made in choosing a legal and investment structure for the community to receive mining payments.

The subject of this article is a mining agreement<sup>2</sup> over native title land in the Kimberley Region of Western Australia. I have chosen to examine this agreement as the native title interest is one of the first determinations of native title on the Australian mainland<sup>3</sup> and it involves a single Prescribed Body Corporate ('PBC') under the *Native Title Act 1993* (Cth) ('NTA') representing a relatively small Native Title Group of around 90 members.<sup>4</sup>

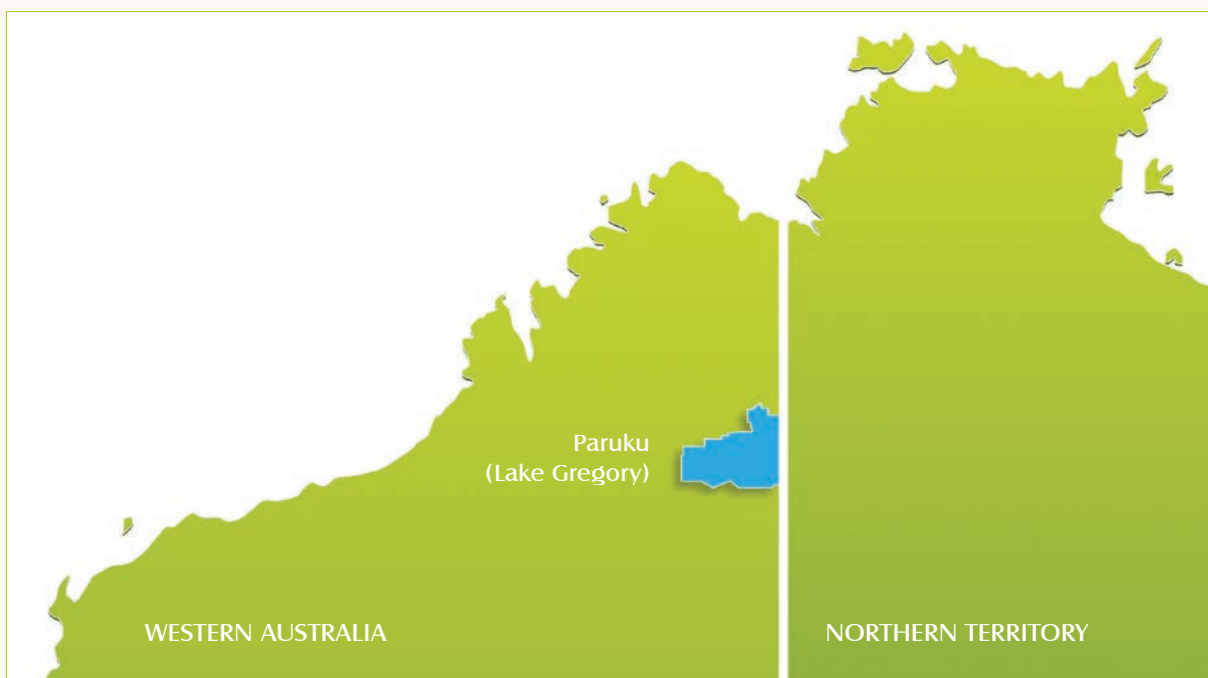
The determination is a consent determination granting exclusive possession over most of the claim area in favour of the Tjurabalan people. It is only the third consent determination in Western Australia<sup>5</sup> and was ratified by the Federal Court on 20 August 2001.<sup>6</sup>

### MAP OF DETERMINATION AREA<sup>7</sup>

The Determination Area is shown on the map below<sup>8</sup> and described as Paruku (Lake Gregory) near Halls Creek, Western Australia. It covers some 26,000 square kilometres of land and waters in the Tanami desert region.<sup>9</sup>

### DETAILS OF THE NATIVE TITLE DETERMINATION

The determination provides that the native title rights and interests held by the common law holders in relation to the determination area are the right to possess, occupy, use and enjoy the land and waters of the area to the exclusion of all others.<sup>10</sup> In other words they have exclusive possession which is similar to freehold, although, it is not identical. The rights under this determination specifically include:



- The right to live on the area;
- The right to make decisions about the use and enjoyment of the area;
- The right to hunt and gather, and to take water and other traditionally accessed resources (including ochre) for the purpose of satisfying personal, domestic, social cultural, religious and communal needs;
- The right to control access to, and activities conducted by others on, the land and waters of the area;
- The right to maintain and protect sites which are of significance to the common law holders under their traditional laws and customs, and
- The right as against any other Indigenous group or individual to be acknowledged as the traditional Indigenous owners of the area.<sup>11</sup>

These native title rights and interests are exercisable in accordance with the traditional laws and customs of the common law holders.<sup>12</sup> The determination agreement also defines the Native Title Group as follows:

The common law holders known as the "Tjurabalan People" are those people who hold in common the body of traditional law and culture governing the Determination Area and who:

- are members of the Walmajarri, Jaru or Nyininy language groups; and
- have a common and inclusive cultural and geographic association with the Determination Area which includes: Gregory Salt Lake (Paruku) and Sturt Creek (Tjurabalan) and the adjacent portions of the Tanami Desert (Ngaluwan) and Gardiner Range (Lirrankarni).<sup>13</sup>

The Native Title Group is therefore comprised of three language groups who have a common cultural and geographic association with the native title land. It is also important to note that the native title interests include the right to ochre but not any other minerals or petroleum.<sup>14</sup> This is in accordance with the decision of *Western Australia v Ward*<sup>15</sup> and the way that state mining legislation and mineral royalty payments operate.

Subsequently, a PBC, the Tjurabalan Native Title Land Aboriginal Corporation ('Tjurabalan') was incorporated to hold the native title on trust in accordance with the NTA.<sup>16</sup> The PBC, Tjurabalan, is the trustee of the Tjurabalan Native Title Land Aboriginal Corporation Trust ('Tjurabalan Trust').<sup>17</sup> This Trust was established as a result of the PBC entering into a mining agreement and was endorsed by the Australian Taxation Office as a charity from 29 August 2005.<sup>18</sup> As a charity its income is therefore exempt from income tax.<sup>19</sup> Furthermore, in order to be a charity the Trust must have a charitable purpose.<sup>20</sup> In the case of the Tjurabalan Trust its primary purpose is to

promote the relief of poverty, sickness, helplessness and distress amongst the members of the corporation.<sup>21</sup> Relief of poverty is a charitable purpose.<sup>22</sup> Poverty in this context does not require destitution but means that the ultimate beneficiary of the charitable purpose must not be able to sustain a modest standard of living in Australia.<sup>23</sup>

#### TJURABALAN RESOURCE AGREEMENT WITH TANAMI GOLD NL

On 20 April 2005, Tjurabalan and Tanami Gold NL<sup>24</sup> ('Tanami Gold') signed a resource agreement to deliver specific financial and other benefits to the Tjurabalan Native Title Group.<sup>25</sup> This agreement (the 'Tjurabalan Agreement') covers mining and exploration in the 26,000 square kilometres of Tjurabalan lands covered by the native title determination.<sup>26</sup>

The Tjurabalan Agreement has enabled the development of the Coyote Gold Project by Tanami Gold at the Coyote mine.<sup>27</sup> Tanami Gold is also involved in exploration agreements with Indigenous Australians and the Central Land Council relating to land in the Northern Territory close to the Tjurabalan lands<sup>28</sup> and in March 2010 Tanami Gold acquired the Central Tanami Gold Project from Newmont Mining Corporation.<sup>29</sup>

The Tjurabalan Agreement sets out the basis on which the Tjurabalan will consent to Tanami Gold's mining activity on their country. The main points of the Agreement are:

- Native Title*: Tanami Gold acknowledges the Tjurabalan people as the native title holders for the area, and that the Agreement does not affect this title.
- Payments and Share Issues to Tjurabalan*: Most payments to Tjurabalan are tied to production levels. Set annual payments are to be made if production levels reach 50,000 ounces per annum. Additional set payments are to be made when production levels reach further benchmarks. Shares in the company will be issued to Tjurabalan in relation to production levels. Tjurabalan can request that these payments be made by Tanami Gold in equivalent value goods and services (e.g. grading roads, drilling bores, and so on).<sup>30</sup>

The first financial report for the Tjurabalan Trust was lodged with the Office of the Registrar of Indigenous Corporations ('ORIC') in 2009. The reports state that in 2008 the payment from the mining company to the Tjurabalan Trust was \$91,859, in 2009 \$194,856 and in 2010 it was \$224,699.<sup>31</sup> It appears that there were payments prior to 2008 which is evidenced by the statement in the 2009 financial report that there are accumulated funds brought forward of \$248,353.

These payments are relatively small compared to those made in respect of areas such as Cape York and the Pilbara<sup>32</sup> although such small amounts are considered common under many native title agreements.<sup>33</sup> It also appears that the agreement has resulted in the funding of a corporate officer position within Tjurabalan, although it is not clear whether this is in addition to the payments detailed above.<sup>34</sup> The reports also indicate that after payment of the Trust's expenses for such things as audit fees and legal fees some funds have been distributed to beneficiaries and the balance then invested into managed funds. For the financial year ended 30 June 2011 and all subsequent years the payments are being made to the Kimberley Sustainable Development Charitable Trust<sup>35</sup> which is discussed below. The payments, trust expenses, distributions and accumulated funds are summarised in the table below. This information is based on the details in the Tjurabalan Trust financial reports lodged with ORIC:<sup>36</sup>

According to the Tjurabalan *General Report* for 2010 there were 91 members of the Native Title Group.<sup>37</sup> If hypothetically each beneficiary received an equal share of the 2008 \$110,017 distribution then they would each receive \$1,208.98. After this relatively large distribution to beneficiaries in 2008 the payments in 2009 and 2010 are small and if, again hypothetically, were paid across all 91 members would result in payments of approximately \$277 and \$61 each for the 2009 and 2010 years.

#### THE TJURABALAN CHARITABLE TRUST

The Rule Book of Tjurabalan states that its main objectives are to relieve the poverty of the members of the corporation, perform the functions of a PBC under the NTA and preserve, maintain and enhance the traditional economic, cultural and social way of life of the Tjurabalan people and hold and manage the traditional land and waters on their behalf.<sup>38</sup> In 2006, Donovan Jenkins, a Tjurabalan member and PBC representative,<sup>39</sup> advised the media that at that stage community resources arising

under the Tjurabalan Agreement were being used to pay for funerals and his peoples' medical expenses.<sup>40</sup> He stated that the intention was that the mining money would go towards a dialysis machine, for education and to bring families together.<sup>41</sup> It was reported in the same interview that payments under the mining agreement could only be spent on projects that would benefit the whole community.<sup>42</sup> Tanami Gold's *Annual Report* for 2008 states that central to the Agreement is the commitment to employment, training and business development.<sup>43</sup> Tanami Gold's Report also states that the money from the Tjurabalan Agreement will be used to fund community benefits and investments.<sup>44</sup> Similar statements are made in its 2009 and 2010 *Annual Reports*.<sup>45</sup>

#### THE KIMBERLEY SUSTAINABLE DEVELOPMENT CHARITABLE TRUST

A change in strategy by Tjurabalan occurred in 2011. From 1 July 2011 all payments from the Tjurabalan Agreement were made to the Kimberley Sustainable Development Charitable Trust (the 'KSCD Trust'). This charitable trust is a subsidiary of the Kimberley Land Council.<sup>46</sup> Representatives of the Kimberley Land Council advise that there are several reasons why Tjurabalan and other PBCs have decided to pay their mining payments to the KSCD Trust.

First, with relatively small amounts of annual payments it is considered more effective to pool these amounts and then invest them as a larger sum of money, thus potentially increasing investment income.

Second, there are legal limitations to establishing charities that are for the benefit of family groups which could prevent a smaller charity whose members are defined through family connections from operating.<sup>47</sup>

Third, commercial trustee companies' fees are very high. This is demonstrated in Table 1 below where in 2008

TABLE 1: THE TJURABALAN TRUST

Year	2008	2009	2010
Mining payment	\$91,859	\$194,956	\$224,699
Audit fees	\$3,700	\$3,850	\$3,850
Other expenses including trustee administration fees and travel	\$61,592	\$9,303	\$9,132
Distribution paid to beneficiaries	\$110,017	\$25,231	\$5,607
Accumulated trust funds bought forward	\$248,353	\$151,821	\$301,874

trustee fees and travel expenses totalled over \$61,000. Representatives from the Kimberley Land Council have advised that pooling payments from a number of agreements into one central regional trust with only one professional trustee has resulted in lower overall fees in respect of each PBC's contributions than were previously being paid. This result is supported by Table 1 to an extent, which demonstrates that where the mining payments increased by \$30,000 between 2009 and 2010 the fees of approximately \$9000 stayed the same.

## CONCLUSION

Although it is early days and there is no publicly available data on how successfully the KSCD Trust is in investing funds contributed to it, this discussion demonstrates that even Native Title Groups with small memberships use charitable structures. Two major advantages to the Group of this legal structure are certainty in respect of the application of income tax law and the income tax exemption. Certainty is important for both the Native Title Group and the mining company that makes the payment.

From the mining company's perspective it requires certainty so that it knows that the gross payment is the amount that the Native Title Group can use to benefit their community. From the Native Title Group perspective, as this Group is small and does not have access to large amounts of income it is not necessarily in a position to obtain complex professional tax advice. The mining company may not wish to go to this expense either but may be concerned that any potential income tax liability should be factored into the amount of the payment. The use of a charity means that this advice is not required.

The charitable structure also means that both the mining payments to the charity and any income that is generated by its investment are exempt from income tax. The income tax exemption therefore means that the Group can maximise the use of the funds and any further income these funds generate. Although the Australian Government has introduced into Parliament legislative changes so that certain native title benefits are exempt from income tax this does not extend to the income generated by the investment of these payments.<sup>48</sup> Furthermore, although the legislation has been passed by the House of Representatives it has not been passed by the Senate and it may not be passed before the Federal election which is timetabled for 14 September 2013.

The other important advantage of a charitable structure is that through the use of a charity the limited amount

of funds can be invested and ultimately focussed on community purposes such as the suggested payment of funeral expenses and the establishment of dialysis equipment. A charity is not generally able to distribute amounts to individuals. It can distribute some small cash payments to individuals where its charitable purpose is the relief of poverty, however this is limited.<sup>49</sup> If a for-profit corporation was used to invest the mining payments not only would it be subject to income tax on the income generated by the money that it invests but it would also be required to distribute dividends to its shareholders.

A further advantage from a Native Title perspective of establishing a charity is that this trust does not have to have a specified vesting date. It can therefore be used to provide long term benefits to the Indigenous community. By establishing an entity that is not-for-profit and which has objectives that are to benefit a community rather than individuals the Native Title Group are agreeing that the monies from mining should be used communally. This approach flows from the communal ownership of the native title interests.

The major advantage of the move to a larger regional trust is that the Tjurabalan have decided to pool their resources with other groups so that joint funds can be invested with maximum return and trust and administration fees can be apportioned across several sub funds thereby reducing the costs to each group. This decision demonstrates that even small Native Title Groups can use their limited resources effectively and maximise their investment at the same time as they reduce their overhead costs.

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- 1 Marcia Langton, 'The Impact on Australian Governments and Mining Payments' (Paper presented at the Native Title: A Vehicle for Change and Empowerment Conference, Indigenous Law Centre, UNSW, 5-6 April 2013).
- 2 Although Lisa Strelein states that it is an ILUA in 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1, AIATSIS, 2008) 19, there is no record of this with the Native Title Tribunal or the ATNS Project website. Tanami describes it as the Tjurabalan Native Title Coyote Project Agreement in Tanami Gold NL, *Annual Report* (2011) 60.
- 3 See Wayne Bergmann, Kimberley Land Council, 'Native Title in the Kimberley' (Paper presented at AIATSIS National Native Title Conference, Darwin, 24-25 May 2006).
- 4 The Tjurabalan General Report states there are 91 members; see ORIC, Tjurabalan, *General Report* (2010) 10-14.
- 5 National Native Title Tribunal ('NNTT'), 'Tjurabalan Achieve

- Native Title Recognition-The 3<sup>rd</sup> Consent Determination in WA' (Media Release, 20 August 2001).
- 6 *Ngalpil v State of Western Australia* [2001] FCA 1140.
  - 7 Agreements, Treaties and Negotiated Settlements Project, *Ngalpil v State of Western Australia*.
  - 8 Ibid.
  - 9 NNTT, above n 5.
  - 10 *Ngalpil v State of Western Australia* [2001] FCA 1140, 3.
  - 11 Ibid.
  - 12 Ibid; AIATSIS, Registered Native Title Bodies Corporate Profiles <<http://www.aiatsis.gov.au/ntru/docs/rntbc/profiles/Tjurabalan.pdf>>.
  - 13 *Ngalpil v State of Western Australia* [2001] FCA 1140, Third Schedule.
  - 14 Ibid 4.
  - 15 *Western Australia v Ward* (2002) 213 CLR 1. These minerals are defined in the *Mining Act 1904* (WA); *Mining Act 1978* (WA); the *Petroleum Act 1936* (WA); and the *Petroleum Act 1967* (WA).
  - 16 *Ngalpil v Western Australia* [2003] FCA 1098.
  - 17 Australian Government, Office of the Registrar of Indigenous Corporations, Search of the Public Register of Indigenous Corporations <<http://www.oric.gov.au/PrintCorporationSearch.aspx?corporationName=Tjurabalan&icn=>>>.
  - 18 Australian Government, ABN lookup <<http://abr.business.gov.au/>>.
  - 19 *Income Tax Assessment Act 1997* (Cth) Div 50.
  - 20 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531; Australian Taxation Office, Income Tax and Fringe Benefits Tax: Charities, TR 2011/4, 12 October 2011.
  - 21 Australian Government, above n 17, Tjurabalan Rule Book, 3.
  - 22 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531; Australian Taxation Office, Income Tax and Fringe Benefits Tax: Charities, TR 2011/4, 12 October 2011.
  - 23 *Ballarat Trustees Executors and Agency Co v Federal Commissioner of Taxation* (1950) 80 CLR 350, 385 (Kitto J).
  - 24 Tanami Gold NL is a public company. NL in its name means that as well as being a public company it is limited under the Corporations Act to mining activities only.
  - 25 Tanami Gold NL, *Annual Report* (2011) 60.
  - 26 Kimberley Land Council ('KLC'), Agreements, Tjurabalan <<http://www.bme.klc.org.au/agreements/tjurabalan/>>.
  - 27 Tanami Gold NL, *Annual Report* (2008) 51.
  - 28 Ibid.
  - 29 Tanami Gold NL, *Annual Report* (2010) 29. Aspects of the mining agreements with the Central Land Council on behalf of the Warlpiri and Newmont Mining were discussed in Chapter 3.
  - 30 KLC, above n 26; Wayne Bergmann, Kimberley Land Council, 'Successful Negotiation: A Kimberley Story' (Paper presented at the AIATSIS National Native Title Conference, Perth, 4-5 June 2008) <<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2008/ntc08papers/BergmannW.pdf>>.
  - 31 ORIC, Tjurabalan Native Title Land Aboriginal Corporation, *Financial Report* (2009) and (2010).
  - 32 For Cape York see National Native Title Tribunal, Registered ILUA Summary, Comalco ILUA <[http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Comalco\\_ILUA\\_QIA2001002.aspx](http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Comalco_ILUA_QIA2001002.aspx)>; for details on the Pilbara see Rio Tinto Sustainable Development 2011, Social, *Communities* <<http://www.riotinto.com/sustainabledevelopment2011/social/communities.html>>.
  - 33 See Marcus Holmes, 'Native Title Agreement Making' (Paper presented at the Native Title Forum, Brisbane, 29 August 2011).
  - 34 Lisa Strelein, 'Taxation of Native Title Agreements' (Native Title Research Monograph No 1, AIATSIS, 2008) 19.
  - 35 As advised by the Kimberley Land Council; see ORIC, Tjurabalan, *General Report* (2011) 14, which states that the income for this financial year is nil; see also ORIC, Kimberley Land Council Aboriginal Corporation, *General Report* (2012), which lists the Kimberley Sustainable Development Charitable Trust Pty Ltd as a subsidiary that is a trustee.
  - 36 ORIC, Tjurabalan, *Financial Report* (2009) 1, and (2010) 1.
  - 37 ORIC, Tjurabalan, *General Report* (2010) 10-14.
  - 38 Australian Government, ORIC, Search of the Public Register of Indigenous Corporations, Tjurabalan Native Title Land Aboriginal Corporation, Rule Book, 3, 16.
  - 39 ORIC, Tjurabalan, *General Report* (2010) 10.
  - 40 ABC, 'Tanami Gold Seals Deal with Kimberley's Tjurabalan People', *Stateline Western Australia*, 26 May 2006 (Donovan Jenkins).
  - 41 Ibid.
  - 42 Ibid.
  - 43 Tanami Gold NL, *Annual Report* (2008) 51.
  - 44 Ibid 7.
  - 45 Tanami Gold NL, *Annual Report* (2009) 15 and 54, and (2010) 24, 76.
  - 46 ORIC, Kimberley Land Council, *General Report* (2011) 47.
  - 47 See Fiona Martin, 'Prescribed Bodies Corporate under the Native Title Act 1993 (Cth): Can they be Exempt from Income Tax as Charitable Trusts?' (2007) 30(3) *University of New South Wales Law Journal* 713.
  - 48 Tax Laws Amendment (2012 Measures No. 6) Bill 2012.
  - 49 Australian Taxation Office, Income Tax and Fringe Benefits Tax: Charities, TR 2011/4, 12 October 2011 [316].

**Nan (Olive Jackson)**  
Jandamarra Cadd

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