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Dear Attorney General

Re: Discussion Paper 'Leading practice agreements: maximising outcomes from native title benefits'.

I thank you for the opportunity to comment on the proposed actions to maximise outcomes from native title benefits.

Purpose of the Proposed Reforms

It is with concern I identify some of the measures within the Paper, along with other recent *Native Title Act Amendments* look to use the agree-making right of native title holders or interests to 'help close the gap between Indigenous and non-Indigenous Australians'. Whilst this is a desired outcome it seems the Commonwealth is looking to use rights and future benefits which are already in the hands of native title holders, to enable the social, economic and educational raising of the bar in Aboriginal communities.

I disagree with the proposition there is a veil of secrecy around agreement-making which disadvantages native title claimants, the bush telegraph is a powerful tool and 15 years of negotiations have improved stakeholders understandings. Whilst there may still be a clear need to share information as new interpretations of the *Native title Act* develop, the establishment of bench marks tied to leading practice would not have changed the outcome of the more controversial of recent cases.

I agree considering 'sustainability,' as defined within the paper adds value to an agreement however I am not certain the class of agreements concerned here deserve to be viewed in

connection to one principle whilst other contractual arrangements are not subject to the same scrutiny.

I applaud the Commonwealth's action in contemplating change to the *Native Title Act* to enable the literal reading of the *Act* to reflect its beneficial intention which *Puutu Kuntj Kurrama & Pinikurra People v FMG Pilbara Pty Ltd & Ors case (FMG v Cox)* has compromised.

Improving Governance and Native Title Agreements

The Paper proposes agreements are registered and 'assessed against leading practice principles'. Such principles will remain vulnerable to the control of political fashion and necessarily detract from the 'Right to Negotiate' which is all the more vulnerable given *FMG v Cox* decision.

I recognise the purpose of the support strategies in relation to sharing and promoting 'leading practice' seek to best empower parties to have and own success around their negotiating table. I express concern at the shift from what a good relationship looks like to what a good agreement looks like; the shift from a focus on 'good faith' to whether the agreement covers a benchmarked area.

I propose consultation with the proposed new body be optional and contact with said body stop the current clock on the 6 month negotiation period. The consequence of this proposal may be new body is less well placed to inform the Minister, however, better placed to support native title parties in their agreement- making whilst preserving the potency of their 'Right to Negotiate'.

Questions remain;

- Which 'some' agreements would undergo assessment? This seems like a statement which with unclear words ambiguously provides little security for anyone and I hope is not the first step towards creating an alternative scheme to 'good faith' which would entirely diminish the 'Right to Negotiate'.
- If an agreement reflects the 'leading practice principles' will there be any recourse to suggest the agreement has not come out of 'good faith negotiations'?
- Will a review of the 'form' in terms of sustainability detract from a review of the right to determine how a native title party's property is affected?

- Does this registration offend the *Racial Discrimination Act*?
- Another regulatory body? With respect, surely defining the scope of the judiciary and executive in connection with 'future acts' has a somewhat changeable history, would including another limb to the process complicate matters?
- If this body were 'private' and independent could conflict of interest be easily identified?

Leading Practice Agreements Toolkit

I acknowledge the absence within this Paper of some of the more tangible proposals in the 'Optimising Benefits from Native Title Agreements Discussion Paper' such as:

- a) Promoting good practice through the development of a template collaboratively designed by Minerals Council of Australia, Native Title Council of Australia and State and Commonwealth governments. The very real effect of developing these templates could have led to negotiation content being interrogated against what the 'template' identified as good practice. Such a template may have redefined 'good faith' and a fair deal and clearly infringes upon the 'Right to Negotiate' by restricting what is negotiated and yet broadening the function of these agreements to fill the gap of policy when the agreements were initially connected to notion of property rights.
- b) The legislative scheme proposed therein would, 'prescribe the minimum level of statutory benefits to be provided under Native Title', and provide 'off the shelf agreement templates.' It was proposed these agreements include 'optional and mandatory' clauses. The mandatory clauses clearly encroach upon a party's 'Right to Negotiate' and would necessarily be referred to in the tribunal's decisions.

The development of a 'leading practice toolkit' may better meet the outcomes proposed in the earlier paper of providing negotiating parties with a valuable resource without depriving parties of their 'Right to Negotiate'.

Streamline ILUA processes

By changing the registration of ILUAs would it be possible for the factors requiring registration to be negotiated, 'future acts' to commence and then the details to fall short of expectations of the parties?

Clarifying Good Faith Requirements

Perhaps it was the nature of appeal enabled by the *Native Title Act* which led to the *FMG v Cox* decision, however, as identified by the Commonwealth, the literal words of the *Act* contributed.

FMG v Cox has framed 'good faith' firmly in the space of the '6 month negotiation'. To best achieve genuine good faith negotiations time must run for the period it takes; to develop relationship and then participate with interest-based negotiation. Such negotiation requires clear conversations connected to parties' interests and then exploration of creative models to meet those interests.

Instead of 6 months, a more appropriate frame would be that as established within the *Aboriginal Land Rights Act* of the Northern Territory. It may be contended the original 6 month period of negotiations was envisaged in light of specific future act negotiations where as the current literal reading of the statute enables the 6 months to run for broader more comprehensive agreements. I recognise expanding the time frame carte blanche may encroach upon the current mining and industry rights and do not therefore suggest the measure.

In the alternative, to avoid the consequences of *FMG v Cox*, it may be appropriate to oblige parties during negotiations to make their intentions clear particularly in respect to a probable 'Future Act Determination Application.' Once a specific future act is identified in this way parties could be granted a 'reasonable time' to respond and come to arrangements themselves in light of said intention. These measures would mirror those within the *Fair Work Act* legislative regime.

This 'notice' plus 'reasonable time' strategy would not require parties to abandon broader agreements in favour of specific future act agreements unless a party is going to apply for a 'Future Act Determination'. Notice of priority aspects of a broad agreement should be given to native title parties to ensure they are well placed to use their 'Right to Negotiate' rather than be subject to an arbitrated agreement.

If the statutory requirement is connected to 'substantive agreement' then 'substantive' may need to be defined as a genuine discussion about the consequences of the future act and

the scope of the particular benefits which may match the consequences. Such discussions have a different nature to broader agreement negotiations.

Statutory clarification of 'good faith' would be helpful; an example of a more thorough description of good faith is found within the *Fair Work Australia Act*.

With Regards

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