CAPE YORK LAND COUNCIL ABORIGINAL CORPORATION

ICN 1163
ABN 22 965 382 705

32 Florence Street
PO Box 2496
CAIRNS QLD 4870
Phone (07) 4053 9222
Fax (07) 4051 0097

Your ref:
Our ref:

Contact: Marita Stinton
Email: mstinton@cycl.org.au

30 November 2010

The First Assistant Secretary
Social Inclusion Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Facsimile No. 02-6141 4928

And by email: native.title@ag.gov.au

Re: Discussion Paper – Leading Agreements: maximizing outcomes from native title benefits

We refer to the Commonwealth Discussion Paper dated July 2010. Cape York Land Council (CYLC) welcomes the opportunity to comment.

CYLC is the Native Title Representative Body for Cape York, pursuant to the *Native Title Act 1993* (Cth). CYLC has a proud history of representing Traditional Owners and native title holders in the region since 1990. The Aboriginal peoples of Cape York actively seek involvement in the management, sustainable development and use of their traditional lands. The Cape York communities possess a wealth of knowledge which stems from their stewardship of country and culture for many years. Represented by CYLC, they have a valuable contribution to make to the issues raised in the Discussion Paper.

In addition to the responses to specific questions below, CYLC supports the submissions made by the National Native Title Council (NNTC) and the Minerals Council of Australia in relation to these issues.

A. Governance Measures

Consultation Questions:-

(a) Are the governance features discussed above appropriate? Are there other measures that would be more appropriate? Why? Why not?

CYLC supports efforts to improve the governance of Indigenous organizations. However, it is our understanding that most Indigenous organizations incorporate under either the CATSI Act or the Corporations Act, and there are of course already transparency and other mechanisms in those Acts that encourage accountability to members. As noted in the Discussion Paper, there are also already programs offered by ORIC to help develop business skills and knowledge, and independent directors are now considered best practice by Australian Stock Exchange & big corporations.

We submit that one way to improve governance of Indigenous organizations set up as part of native title agreements would be to make substantive changes to the proof requirements under the Native Title Act. At present, the bulk of funding, resources, time and effort allocated to native title claim negotiations goes towards issues associated with proof of connection, so that there is often an inability to ensure that appropriate governance arrangements are put into place within available timeframes.

We do not believe that imposing further regulatory requirements on these organizations is likely to significantly improve governance. Rather, the focus needs to be on providing sufficient resources and support for the organizations to be established and to operate in accordance with existing rules and responsibilities, and to educate and train those involved to ensure that there is compliance with existing obligations. There are a number of Indigenous organizations in Cape York which have insufficient funding and resources to operate at even a very basic level. If office bearers don't have access to basic office resources or sufficient funding to hold meetings, then greater regulation will not assist.

A number of Cape York entities have been established for purposes associated with grants of land under the *Aboriginal Land Act 1991* (Qld) and CYLC has for some time been urging the Queensland Government to provide assistance to improve governance of those entities, including by clarifying the trust nature of the grant of land and the status of the land trust as opposed to its members. Better coordination between Commonwealth and State legislation and programs would be extremely beneficial, with many Cape York Indigenous groups spending time, money and resources trying to understand and rationalize inconsistent and sometimes competing requirements.

(b) *What are your views on the above mechanisms to enhance transparency and accountability of payments to native title beneficiaries? Are there any other mechanisms? What democratic controls are currently lacking in native title agreements?*

CYLC submits that there are already a range of mechanisms in existence in legislation and agreements which are intended to address issues of transparency and accountability. The greater concern is with the capacity of the organizations. It is difficult to mandate requirements that will be suitable for the range of entities that may be appropriate for any given set of circumstances. For example, there appears to be an assumption that a native title agreement will involve just one entity, when in reality there may be a number of organizations that need to be established with a range of different functions. As with other proposals contained in the Discussion Paper, there appears to be a focus on the end point of the native title negotiation process, rather than an attempt to identify issues and provide support and assistance at the outset (in

order to ensure that groups have the capacity to negotiate and achieve good agreements), throughout negotiations and into implementation.

We submit that improvements would be achieved in governance generally if there was greater coordination between the State and Commonwealth, and also industry, so that there is greater clarity of obligations and responsibilities for all concerned.

(c) *Are beneficiaries of native title agreements generally aware of the financial and non-financial benefits they are entitled to?*

CYLC submits that the awareness of beneficiaries of native title agreements will vary from individual to individual. Some members of a group may have a very good understanding of the benefits contained in an agreement, while others (due to age, health, education, culture, interest, etc) may not. Better resourcing of Indigenous organizations would assist to enable office holders to provide information to beneficiaries and members. Greater regulation will not assist groups who are already struggling to meet basic requirements.

(d) *Are native title group members aware of how benefits distribution structures in their agreements work?*

As for the previous question, CYLC submits that there will be a significant variation between members of groups in terms of awareness of how agreements are intended to work. Again, better resourcing and support for Indigenous organizations might assist.

(e) *In your experience, is there a need for greater accountability of directors of entities that receive native title payments?*

CYLC submits that there are already sufficient provisions in place under legislation and most agreements to ensure accountability if directors have sufficient support to meet those obligations.

Second set of questions for Part A

(a) *Do you think any new tax treatment should be conditional on adopting the governance measures and leading practice principles discussed above? Why? Why not?*

No. CYLC supports an approach of encouragement and incentives for the adoption of best practice arrangements. We doubt that a "one size fits all" approach will work in practice and there needs to be flexibility for groups to adopt arrangements that best suit their circumstances. It is our understanding that the various reviews and reports that have been carried out in the lead up to this Discussion Paper have all opposed proposals to mandate further requirements.

(b) *Are there other mechanisms to incentivize native title groups to adopt the measures and principles discussed above?*

As noted above, CYLC seeks greater focus on improving the capacity of groups from the outset of negotiations, simplifying native title claim processes and greater assistance with implementation of agreements.

B. Improving Governance and Native Title Agreements

B.1 Review function

B.1.(i) Overview - Consultation questions:

(a) Do you agree that there is a need to support parties to native title agreements to maximize the positive financial and non-financial benefits from native title agreements? What do you see as the main advantages and disadvantages?

CYLC encourages efforts to support parties to native title agreements to maximize benefits from native title agreements. However, CYLC strongly opposes the proposal to create a "new statutory review function". We are not aware of any data that supports the assertion that opportunities to create wealth are being lost or mismanaged. We believe that the proposal may be linked to a public perception that significant sums of money attached to native title agreements are being squandered in some way. It may be that some native title agreements negotiated in the early days of operation of the Native Title failed to appropriately provide for use of monies received. However, it is our firm view that:-

- The Discussion Paper proposal for a review body means that the primary focus is on management of any monies that may flow under native title agreements. The reality is that there are many more native title agreements that contain little or no financial benefits. The review body would seem to be of little assistance in those circumstances;
- There seems to be an assumption that native title groups are in a strong negotiating position when in reality they are usually very much at the mercy of the other parties to the negotiations in terms of what agreements contain;
- Many native title groups are at a disadvantage from the outset of negotiations, both in terms of their capacity to participate in negotiations and in terms of the extraordinary range of demands and pressures brought to bear on those closely involved in the process. Rather than establishing a review process, which would operate at the end of negotiations, the focus must be on ensuring that all parties are negotiating in good faith with a full range of possible benefits identified and on the negotiating table from the outset;
- Despite best endeavours when agreements are being negotiated, it is often difficult to assess the effectiveness of agreements at the time of execution, with issues only arising during implementation;
- Native title agreements may well contain appropriate design and structure in relation to financial and other benefits, but potential benefits fail to be realized because of the lack of ongoing support and resourcing into the implementation phase;
- Beneficial or best practice provisions may not be included in agreements, not through ignorance or greed, but because of a lack of viable alternatives – for example, many dispute resolution clauses included in native title agreements are not likely to work well in practice, but there is no point including a comprehensive, culturally appropriate process if there is no funding or resources available for the process to be followed; and native title groups are often forced to agree to processes which contain quite short, culturally inappropriate timeframes by the demands of other parties;
- We are concerned that the addition of yet another stage to the native title process will simply add to the cost and time involved, and make a difficult process even

more complex. If there is no veto right proposed, no power to look at quantum, and the agreements will remain confidential, we do not see how any real gains will be achieved. If the review identified in a particular circumstance that leading practice principles have not been included, there is no clear process for what happens from that point. It would be extremely difficult for NTRBs to adequately budget in advance for some further negotiation process. Development and promotion of leading practice in agreement making would be much more effective and timely if the focus is on the negotiations from the very beginning, and continues throughout the negotiation process;

- A review process won't assist where a native title group is dysfunctional because they are unlikely to get to agreement stage. Again, resources added to the front end of the process would be more beneficial;
- Information from individual NTRBs could be sought by the Commonwealth which would demonstrate the sorts of design elements and structures regularly being incorporated into agreements to ensure maximum potential benefits to existing and future native title group members.

(b) Are there alternatives to the function proposed?

CYLC submits that possible alternatives to the function proposed are:-

- To obtain data about the sorts of agreements that are being negotiated, and the design and structures contained in them, and to disseminate information about leading practice principles to native title groups involved in negotiations, at an early stage. There is an informal network of information sharing amongst NTRBs, but a more formal arrangement to ensure that native title groups are aware of and understand leading practice principles would assist;
- To amend the Native Title Act to simplify the processes involved, including by reversing the onus of proof, so that resources can be more appropriately directed to negotiating sustainable benefit packages and management structures. At present, our experience is that the native title claim process is about the State putting the native title claimants to very high levels of proof of their connection to the area since the time of sovereignty, and negotiating about what other parties to the claim want in order to give their consent to a native title determination;
- To amend the Native Title Act by extending the right to negotiate period – 6 months is insufficient for most native title groups to be able to adequately negotiate;
- To amend the Native Title Act by making it easier for native title agreements to be amended, in appropriate circumstances (see additional comments on this issue later in these submissions);
- To improve the tax system to provide clarity and increase financial resources for native title groups (noting that CYLC supports the first two proposals in the Commonwealth's tax discussion paper, although does not support a native title withholding tax).

(c) Do you agree that these characteristics and roles are appropriate? Are there other principles you would suggest to guide the development of Government policy in this area?

No. See comments above that we submit should guide the development of Government policy in this area.

B.1.(ii) Functions - Consultation questions:

(a) What are your views about these functions?

CYLC supports efforts to assist parties in implementing leading practice, and to improve the development and promotion of leading practice in agreement-making, but does not see any need for a "review" body.

An existing organization such as the National Native Title Tribunal could be tasked with many of the functions proposed, if consideration was given to better use of data extracted from native title agreements lodged with the NNTT for registration. We do not agree that there is a need for either a "review" function in terms of assessing completed agreements or the establishment of a new body. By encouraging parties to consider removing confidentiality provisions from native title agreements (perhaps apart from monetary figures or other commercial-in-confidence information), it would be much easier to ensure the development and promotion of leading practice principles and to enable reporting to Parliament and Ministers.

(b) Are there other functions you would suggest?

CYLC does not agree that there is a need for a new body and thus we do not suggest "other functions" in the context of such a body. However, we strongly support the implementation within the native title system of a number of principles contained in a paper entitled "Development and Indigenous Land: A Human Rights Approach – Digest" [2003] AUIndigLawRpr 11; (2003) 8(1) Australian Indigenous Law Reporter 79, including recognition, respect, prior informed consent and economic development and benefits, as key elements of negotiation processes.

B.1.(iii) Establishing the body - consultation questions:

(a) Would this function be more effective in an existing body or a new body?

CYLC does not support the establishment of a new body, for the reasons set out above. For some of the functions proposed, we suggest that the NNTT could provide assistance.

B.1.(iv) Agreements subject to registration - Consultation questions:

(a) Do you have any comments on the proposed scope of agreements requiring registration?

CYLC submits that even if the registration process was limited to "future act" agreements related to development activity that affects native title, there would still be considerable time, cost and resource implications for native title groups and NTRBs. The subject matter of such agreements may still fall within a very broad range of activity, subject matter and benefits involved. Efforts would be better placed to building the capacity of Indigenous people to negotiate good agreements.

(b) Should it extend to settlement agreements, and/or trust deeds and other benefits management mechanisms?

CYLC does not support the registration/review proposal.

B.1.(v) Review against leading practice principles - Consultation questions:

(a) In your experience, what are the elements of agreements that promote sustainable benefits?

CYLC agrees that agreements should cater as far as possible for intergenerational, social and economic development of native title holders and claimants. We also agree that sustainability elements include things such as regular reviews of the operation of agreements, mechanisms in agreements to respond to review findings, financial provision for administration of agreements, appropriate mechanisms for implementation amongst the native title group, dispute resolution provisions, and appropriate management structures. These are all aspects which CYLC endeavours to incorporate into native title agreements. However, it may be that some of those elements are dealt with outside the native title agreement itself, which raises issues about how agreements that would fall within any proposed review process definition would be identified.

Further, our experience is that a group's ability to include many of those elements is largely determined by the primary subject matter of the particular negotiation (for example, it has proved extremely difficult to include financial administration provision for agreements that are not driven by mining activity) and the attitudes of the other parties to the negotiation. Again, adoption of appropriate principles by the parties involved in a negotiation from the outset, as proposed by the HREOC paper referred to above, would be preferable.

(b) What do you see as the advantages and disadvantages of incorporating leading practice in legislation?

CYLC believes that most native title claim groups are already well aware of the elements that should ideally be incorporated into native title agreements. However, as noted above, they are often at the mercy of other parties, particularly State Governments and future act proponents, in terms of what is included in any final agreement. Unless there are consequences for the other parties involved in native title negotiations for failure to meet leading practice principles (as opposed to the native title claim group), then it is difficult to see how many of these aspects can be improved.

(c) How useful are model terms? What elements could be covered by model terms?

CYLC supports the dissemination of information about leading practice principles. Model terms might assist in that regard, if used by way of encouraging parties during negotiations to consider their incorporation, rather than penalizing native title groups if they are unable to include them because of an inability to obtain the agreement of other parties.

B.1.(vi) Assessment - Consultation questions:

(a) Should all agreements be eligible to be assessed for sustainability, or should some clauses of agreements be omitted, for example exploration-related agreements?

CYLC does not agree that any agreements should be "assessed", in the way proposed. For all of the reasons outlined above, efforts should be directed towards education, assistance and incentives, rather than creating another layer of bureaucracy. Further, we submit that:-

- the proposed distinction between "assessment" of only some agreements, with "review" of all native title agreements is unclear;
- there would be uncertainty about what resources of NTRBs might be required for the proposed process, if the review body has discretion to determine which agreements are to be assessed;
- we query the value of a process which provides recommendations about where leading practice has not been met, at the end of a long and complex negotiation – if there is no veto over the agreement, it may well be impossible to "unpick" those elements of the agreement which are identified, without the whole agreement falling over;
- any assistance to native title parties must be at the front end of the process, instead of pushing for amendments to a completed agreement.

B.2 Leading practice agreements toolkit

Questions:

(a) In your experience, what information resources are difficult to obtain when planning, negotiating and implementing native title agreements?

CYLC has experienced many significant difficulties in the process of native title agreement making in obtaining information resources - without dwelling on the reasons for these difficulties, they include:-

- attracting and retaining experienced legal, anthropological and other staff;
- difficulties in accessing professional advice and input, including financial and accounting advice;
- insufficient time, money and resources to build the capacity of members of the group who are directly involved in the negotiation process; and
- struggling to stretch scarce resources to ensure that the content and ramifications of agreements are appropriately explained to members of native title groups.

(b) What types of content/guidance should the toolkit cover?

CYLC welcomes the proposal for development of a toolkit, which could provide content and guidance for all stages of native title negotiations – including how to build the capacity of group members.

(c) What sorts of individuals or groups would access the toolkit?

CYLC submits that the toolkit should be available to and accessible by all those involved in native title negotiations. Consideration would need to be given to ways in which the toolkit can be best utilized by Indigenous parties.

(d) How could the toolkit address some of the difficulties associated with negotiating and implementing native title agreements?

CYLC submits that the toolkit could assist with dissemination of information about leading practice principles and examples, so that individual NTRBs and native title groups are not constantly "reinventing the wheel". It would also presumably provide up-to-date information about available resources.

C. Future Acts Reforms

C.1 Streamlined ILUA processes

(i) Reduction of ILUA registration period

(a) What measures do you think could be implemented to reduce ILUA registration timeframes?

CYLC supports the consideration of ways in which timeframes can be shortened and processes can be simplified. However, we understand that the NNTT has expressed a view that it would be difficult to reduce the 1 month Body Corporate ILUA notification period. We support the proposal for a reduction in the 3 month notification period for area and alternative procedure ILUAs.

It may be difficult to prevent vexatious or frivolous objections in a practical sense, although the process for dealing with objections could be improved. We suggest that efforts might be better targeted at properly resourcing the negotiation process, so that there is better information flow and thus an opportunity for NTRBs or others to work with individuals who might otherwise seek to object to registration.

Of the proposals already suggested:

(b) What do you see as the advantages or disadvantages in altering the registration process when an ILUA has been certified by a NTRB?

CYLC supports the reduction of timeframes involved in registration processes when an ILUA has been certified by an NTRB.

(c) Do you think a reduction in the notification period will contribute to an improvement in the efficiency of the registration process? Are there other stages in the registration process that could be targeted instead?

CYLC submits that the timeframes involved in notification periods are fairly insignificant in the context of the length of time that native title agreements take to negotiate. A more appropriate focus would be on ways in which the native title negotiation process itself can be made more efficient.

(ii) increase information included on the Register of Indigenous Land Use Agreements

(a) Would there be benefit in broadening the information included on the Register?

Yes. CYLC supports efforts for greater transparency in relation to native title agreements, and better dissemination of information about the content of agreements. However, CYLC is aware that some parties may be reluctant to have more information on the Register and caution may be required to ensure that benefits which might otherwise have been provided in an agreement are not lost because of a parties reluctance to make information publicly available.

(b) Keeping in mind the need for culturally sensitive and commercial information to be kept in confidence, what additional information would be useful for parties negotiating ILUAs?

CYLC submits that parties should be encouraged to carefully consider whether confidentiality of the ILUA is required. It may be that in many instances, confidentiality is not necessary, or can be limited to a few specific clauses or provisions. This would enable greater transparency in terms of what native title agreements routinely provide, and assist with knowledge of and access to current native title practice.

(iii) streamline the registration process for minor ILUA amendments

(a) Should the Act be amended to permit minor amendments to registered ILUAs without the requirement to go through the registration process again?

CYLC supports a streamlined registration process for minor ILUA amendments (noting that it is already possible to build amendment mechanisms into ILUAs but the issue of registration of amendments remains a difficulty).

(b) What are the advantages or disadvantages in establishing an alternative streamlined procedure to allow minor amendments to a registered ILUA?

There is at present no process to enable minor amendments to be made to ILUAs, short of re-registering the entire amended ILUA. CYLC encourages native title groups to incorporate provisions in ILUAs that will enable amendments to those agreements in appropriate circumstances in the future, but our experience is that it can be difficult to adequately draft such provisions when the Act does not envisage such amendments being made short of a full consultation process with the native title group.

CYLC submits that the Act should be amended to enable amendments to be provided for in ILUAs that either does not require a further registration procedure, or that streamlines any such process.

(c) What should such a procedure look like, and what at a minimum should it include?

CYLC has not had an opportunity to give detailed consideration to the nature of such a procedure.

(d) What do you consider to be a minor amendment?

CYLC submits that consideration should be given to whether any "streamlined" procedure should be limited to minor amendments (however defined), or whether it is appropriate for more significant amendments to be included, in circumstances where consent to amendment is "covered off" in the authorization of the ILUA.

C.2 Clarifying good faith requirements

C.2 Clarifying good faith requirements

Questions:-

(a) How should the Act be amended to ahieve the Government's objective to clarify what negotiation in good faith entails? Can you identify any advantages or disadvantages to particular approaches?

CYLC supports the proposal to provide greater clarity about what negotiation in good faith entails, and to encourage more meaningful and transparent negotiations between parties. We suggest consideration be given to the recent case law which provides some guidance in relation to "good faith" requirements.

(b) In good faith negotiations, do you consider there would be a benefit achieved by a statutory requirement for parties to reach substantive agreement before an application is made to the NNTT for a determination? Are there any problems with this approach?

CYLC submits that there would be difficulties with such an approach, as parties can't be forced to agree. However, we encourage consideration of ways in which the negotiation process can be made more meaningful.

(c) Should the amendments clarify that good faith negotiations required parties to negotiate about each particular act, as opposed to more general negotiations about a range of acts?

CYLC supports this proposal.

We look forward to ongoing consultation in relation to these significant issues, and to working with the Commonwealth Government to achieve reform in this area.
Please do not hesitate to contact us if you require any further information.

Yours sincerely
CAPE YORK LAND COUNCIL

PETER CALLAGHAN
CHIEF EXECUTIVE OFFICER