Law Council
OF AUSTRALIA

From the Office of the President

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Dear Sir/Madam,

LEADING PRACTICE AGREEMENTS

The Law Council is pleased to provide the following comments in response to some of the issues raised in the discussion paper on "Leading Practice Agreements – Maximising Outcomes from Native Title Benefits" (**the discussion paper**).

The Law Council of Australia is the peak body for the Australian legal profession, representing around 57,000 lawyers through the State and Territory Law Societies and Bar Associations and the Large Law Firm Group Ltd. The Law Council speaks for the profession on a range of issues, including matters affecting the legal rights of Indigenous Australians.

Sustainability

The characteristics of 'sustainability' are set out in the penultimate paragraph on page 4 of the discussion paper. It is indicated that "*sustainability means ensuring that the interests of all current and future native title holders are represented and protected in decision-making. It means ensuring native title holders understand agreements...*[and] *incorporating mechanisms to ensure benefits received are adequately preserved.*"

It is axiomatic that native title holders should understand agreements and be provided with sufficient information to make informed decisions. However, it is less clear what is meant by notions such as ensuring that benefits received are "adequately preserved" and ensuring that benefits are "deployed for the benefit of both current and future generations".

There is a question of principle about whether native title holders are to be left to make these decisions themselves (after having access to all appropriate advice) or whether it is intended that new requirements be introduced aimed at ensuring 'adequate' preservation / deployment for future generations.

The Law Council considers that the decision should be left to the native title holders, in the same way that the disposition of a corporation's income is left to the Board / shareholders to decide. A significant number of Indigenous groups around the country have built up substantial investment portfolios. Registered claimants and native title holders who are negotiating agreements should no doubt be advised how preservation of some of the benefits can be achieved and how this would advantage future generations.

However, it would be undesirable to impose any general requirement that native title holders preserve a certain proportion of their receipts for future generations. Any such requirement would be paternalistic and may unduly restrict the capacity of a native title group to invest in certain assets and may interfere with rights to self-determination.

If any such restriction were to be imposed, it certainly should not apply to all native title groups, many of which would be the best managers of their native title benefits. It is noted that there may be a case for imposing some restrictions on particular groups, where there is good evidence of a history of profligacy, waste etc in relation to previous receipts. However, this should be either voluntary or on the application of a traditional owner and member of the native title group in question.

In this context, Mansfield J's decision in *Brown v SA* [2010] FCA 875 is worthy of mention. In that case, a mining company purported to withhold its consent to a consent determination on the basis that it wished to include a 'sustainable benefits' clause in relation to the application of compensation payments by a prescribed body corporate. The claimants did not agree with this clause. Mansfield J held that the mining company was not entitled to withhold its consent (to the consent determination) on this basis.

The Law Council considers that there should be no reason why a mining company cannot seek to negotiate such a clause in agreements with registered claimants and native title holders. However, it is important that such clauses only be included with the agreement of the claimants / native title holders. The tax system *encourages* expenditure in particular ways, for example, by making gifts to charitable organisations tax deductible. However, there is no law requiring us to spend our money in that way and nor should there be for native title holders.

Governance measures

Under this section, there are two references to 'democratic controls'. It is true that the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) does provide that each corporation member has one vote at general meetings (s 201-115). The *Native Title Act 1993*, on the other hand, provides for two types of decision-making that govern the authorisation of claims and the authorisation of Indigenous Land Use Agreements (ILUAs):

(i) a process that, under traditional laws and customs, must be complied with; and

(ii) where there is no such process that must be complied with, a process that is adopted or agreed by the persons comprising the native title group (see s 251A & 251B).

The Law Council understands that some corporations incorporated under the CATSI Act have rules which preserve some traditional elements in decision-making, for example, by having an Elders Council which appoints the members of (or at least nominates the candidates for) the Board. It is considered that such arrangements ought to be preserved under any new governance arrangements.

Review of benefits packages

The discussion paper, on page 8, proposes a review of the sustainability of benefits packages, not their quantum. However, it is unclear against what criteria such a review would be conducted. The criteria need to be identified and subject to consultation.

The Law Council is also uncertain whether the Office of the Registrar of Indigenous Corporations has the capacity and expertise to perform such reviews in relation to native title benefits packages. It seems that a review of the 'sustainability' of the benefits package will depend on a broad range of considerations, requiring expertise in financial advice, native title law and practice, etc.

It is also noted that the reviewing body 'would not have a veto right over the commercial terms of the agreement'. However, it is unclear what would happen following the review. Would the native title holders merely be told about other options that they may not have considered, with the final decision being left to them?

On page 5 of the Discussion Paper, mention is made of:

> "...poor outcomes, such as benefits being dispersed in ways that achieve limited outcomes for native title holders, including funds being dissipated to expert advisers..."

Native title holders obviously need expert advice in order to negotiate satisfactory agreements. Expert assistance should be available to native title holders through the staff and consultants of Native Title Representative Bodies (NTRBs). Such persons naturally need to have appropriate expertise to give such assistance.

NTRBs are publicly funded and sufficient funds should be made available to them to fulfil this function. The concept that native title groups should be able to learn from the experience of others who have gone before them is entirely appropriate, provided that the confidentiality is respected. There are at least some existing mechanisms whereby this is sought to be achieved. For example, the Aurora Project recently conducted a 'master class' for experienced NTRB lawyers. The topic of one of the papers was 'Native title benefits, economic development and tax'. Other topics covered included 'Calculating royalties', 'The potential for exemption from local government rates' and 'Good or bad faith – negotiating non-native title issues in consent determinations'.

Once an agreement is finalised, depending on what is involved it may well be appropriate for the registered claimants / native title holders to obtain further expert advice, for example in relation to the management of a capital sum. It is not explained how expert advisors are said to have dissipated funds. If this is a problem, it should be examined closely and addressed.

<u>Future acts reforms</u>

The discussion paper envisages changes to the ILUA registration process, including increasing the speed of registration and amount of information held on the ILUA register.

ILUAs can be used to address land use issues between native title holders or claimants and persons such as developers, pastoralists, miners and governments. They can be utilised to resolve an extant native title claim, or to resolve present or future issues where there is no extant native title claim. They can be made subject to the withdrawal of a native title claim over all or part of the area to which the agreement relates and can also provide for the surrender of native title. They can govern 'future acts' (certain acts that 'affect' native title).

The contents of ILUAs and the registration of ILUAs are subject to a raft of statutory provisions. The decision to register or not to register an ILUA is made by the Native Title

Registrar or his or her delegate. Part 8A of the Act requires that there be a Register of ILUAs. While the agreement is on the register, in addition to any other effect it may have, it has contractual effect and binds not only the parties to the agreement, but also all persons holding native title in the relevant area (s 24EA).

Certain basic details of registered ILUAs (e.g. the area involved, the parties, the duration of the agreement) must be included on the Register (s 199B). The Register is able to be inspected by members of the public (s 199D), save that the public right of inspection does not apply where the parties advise the Registrar that they do not wish some or all of the details to be available for inspection by the public (s 199E).

ILUAs are only one kind of agreement that might be made with native title claimants or persons who have been found to be native title holders (whether in a consent determination or after a trial). For example, the right to negotiate provisions of the *Native Title Act 1993* can result in agreements of the kind referred to in s 31(1)(b) of the Act and other forms of agreement can be made with governments about matters other than future acts.

It therefore appears clear that Indigenous bodies interested in striking 'state of the art' agreements with third parties would not gain much enlightenment from inspecting the Register of ILUAs.

To address this, the discussion paper proposes that more information about registered agreements be made available on the Register, for public inspection.

There is no evidence presented in the discussion paper that drafters of ILUAs and other agreements need such assistance. However, it is noted that the Native Title Payments Working Group Report[1] asserted that:

> "…while hundreds of agreements exist between traditional owners and industry, there are only around one dozen agreements that provide substantial benefits to Aboriginal people and Torres Strait Islanders and exhibit principles embodying best practice in agreement making. The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the *Native Title Act 1993* (NTA) is, in itself, deserving of inquiry."

The Law Council is unable to comment on the statement by the working group above, however it is considered that future drafters would be better assisted by having better resourced NTRBs and Prescribed Bodies Corporate (PBCs), the provision of negotiation training, etc. It is considered that there may already be substantial collaboration between NTRBs charged with duty of negotiating and drafting agreements. They are not in competition with one another and, the Law Council understands, generally have good relations. It is unlikely that mandating collaboration would improve that which is happening voluntarily and informally.

It is considered therefore that a stronger driver of the proposals set out in the discussion paper is more likely to be "accountability and transparency", which is referred to in the Native Title Payments Working Group report (page 2). It is accepted that there must be

[1] Available at http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.pdf/$file/Working+Group+report+-+final+version.pdf

accountability where public funds are involved. However, public funds are not involved in many of these agreements. 'Transparency' is a notion that is often mentioned in connection with the dealings of governments and government authorities or the conduct of corporations *vis a vis* their shareholders.

Public accountability and transparency are not notions that are generally sought to be applied to private citizens or groups. Private citizens are not generally accountable for the way in which they spend their money. Nor do commercial arrangements that we might choose to make generally attract public scrutiny.

Aboriginal and Torres Strait Islander bodies should clearly be accountable to their members in accordance with their rules. The conduct of those who govern such bodies should be transparent *vis a vis* their members. However, if there is thought to be a problem with respect to accountability of Indigenous entities, as opposed to non-Indigenous entities, this has not been explained in discussion paper or Working Group report.

If there is a concern that Aboriginal and Torres Strait Islander organisations lack accountability or the capacity to manage benefits received under ILUAs and other agreements, it should be openly acknowledged and information provided in support.

In summary, in relation to the future act proposals, the Law Council considers that:

1. There should be better resourcing of NTRBs and PBCs, so as to ensure a level playing field between parties to negotiations, including mining companies and State Governments;

2. Where public monies are paid under agreements, it is appropriate that there be requirements for accountability and transparency in how those monies are applied;

3. The Indigenous bodies to whom such payments are made should be accountable to their members in respect of monies that they might receive under such agreements;

4. Insufficient evidence has been presented to support making public what are, in essence, private agreements. To the extent that there is a need to assist future drafters of agreements, this can be achieved by better resourcing of NTRBs and PBCs and by encouraging greater collaboration between such organisations.

If there are any queries in relation to the matters raised in this submission, please contact Nick Parmeter on (02) 6246 3736 or nick.parmeter@lawcouncil.asn.au.

Yours sincerely,

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