Lawyers | McCullough Robertson

Leading practice agreements - maximising outcomes of native title benefits

Submission by McCullough Robertson

Version: 1

Level 11 Central Plaza Two 66 Eagle Street Brisbane QLD 4000 | GPO Box 1855 Brisbane QLD 4001 Australia | **ABN** 42 721 345 951
Telephone 07 3233 8888 | **Fax** 07 3229 9949 | **Web** www.mccullough.com.au

Table of contents

Lawyers McCullough Robertson

Leading practice agreements – maximising outcomes of native title benefits

McCullough Robertson submission

This submission is in response to the Government's discussion paper 'Leading practice agreements: maximising outcomes from native title benefits' (**discussion paper**).

1 Our involvement

1.1 In preparing this submission McCullough Robertson draws on its experience:

(a) negotiating native title arrangements when acting for clients in the resources industry;

(b) advising on tax issues flowing from the negotiation of native title agreements; and

(c) providing legal and tax structuring and corporate governance advice to Indigenous organisations (nonprofits and native title groups).

2 A – Governance measures

Consultation question A(a), page 6

2.1 We agree that encouraging entities that receive native title payments to:

(a) incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) or the *Corporations Act 2001* (Cth) (**Corporations Act**); and

(b) appoint independent directors,

will assist to strengthen governance practices.

2.2 We do not agree that enhanced transparency or accountability to members of entities receiving native title payments is required. In our view, transparent reporting to members and accountability of board members can be facilitated through good governance practices and the controls and procedures available under the CATSI Act or the Corporations Act.

2.3 Consideration should be given to how participation by independent directors would be managed in a culturally appropriate manner. It is usual practice for the Board to drive the identification of independent directors having regard to the particular skills requirements of the organisation (for example, corporate governance or financial experience). Independent directors are, under Division 249 CATSI Act or Part 2D.3 Corporations Act, subject to members' powers of removal.

2.4 We have identified the following issues for consideration:

(a) whether an appropriately qualified advisory board would assist to enhance capacity and develop mechanisms to promote accountability and transparency, if entities are reluctant to provide for participation by independent directors;

(b) whether periodic review (i.e. every, say, two years) of the ongoing need for participation by non-native title holders, i.e. ORIC or a new regulator would be useful.

Consultation question A(b), page 6

2.5 We do not agree that enhanced transparency or accountability to members of entities receiving native title payments is required, provided appropriate legal structures are established. In our view, transparent reporting to members and accountability of board members can be facilitated through good governance practices and the controls and procedures available under the CATSI Act or the Corporations Act.

2.6 In our experience, legal structures established to receive native title payments often include a charitable trust to provide a further level of assurance to the community and stakeholders as to how benefits received are held, and income and property applied, for the purposes for which they are received, and how this may flow to the community.

2.7 In our view, it would assist to establish appropriate democratic controls in entities established to receive native title benefits by:

(a) ensuring membership structures, board appointment, reporting and matters reserved for member approval are considered and, if necessary, negotiated as part of the initial native title benefits package negotiations;

(b) facilitating education around good governance practices and corporate governance generally in native title negotiations and on commencement of operation of entities receiving native title benefits.

Consultation question A(c), (d), page 6

2.8 We expect these questions will require consultation with native title parties. However, we make the observation that, native title parties generally obtain legal advice from lawyers of their own choosing, paid for by proponents. In our experience, this legal advice is provided at both consultation and negotiation stages and the implementation stages. If they are not aware of the benefits to which they are entitled under agreements, our view is that their legal representatives have failed to advise them sufficiently. Whether all beneficiaries are aware of their entitlements is a more difficult question, as the group of beneficiaries may be very broad. Their knowledge of entitlements is dependent on the communication they receive from their representatives – generally the persons comprising the registered native title claimant (in the case of a registered claim).

Consultation question A(e), page 6

2.9 For the reasons stated above, we do not see a justification for requiring a higher level of accountability of a director of a company managing native title payments.

2.10 In our view, consideration needs to be given to how capacity can be improved amongst directors of company's managing native title payments. Establishment of appropriate education and training programs, including particularly governance and financial reporting, will assist to develop the requisite capacity.

Consultation question A(a), page 7

2.11 In our view, it is not necessary to impose particular governance requirements on entities receiving native title benefits to obtain particular tax treatment beyond the requirements imposed on other types of income tax exempt entities.

2.12 To the extent appropriate, we expect that:

(a) self assessment and audit obligations will be imposed by the ATO in connection with the operation of a category of tax exempt fund (similar to the requirements of any organisation with concessional tax endorsement);

(b) the fund (or the trustee of the fund, as appropriate) will be required to adopt governance arrangements suitable to the exemption available, including, where appropriate, participation by:

(i) the public, demonstrated by participation by a majority of individuals unrelated in a business or personal capacity; and

(ii) responsible persons, as determined in Tax Ruling TR 95/27.

2.13 From a compliance perspective, it may be appropriate to establish a process that enables exemption to be clawed back, i.e. subsequent liability to assessment. A key concern with any category of tax exempt fund to be established is the practical administration and, particularly, determining whether a payment has been applied for allowable purposes. In our view, detailed consideration of purposes for which exempt funds may be applied will be important.

2.14 Consideration of how restrictions around the availability of exemption may be managed requires consultation with native title groups.

Consultation question A(b), page 7

2.15 In our view, it is not necessary to provide incentives to compliance or create a higher level of regulation.

2.16 In our view:

(a) negotiation and discussion of membership structures, board appointment, reporting and matters reserved for member approval should be an aspect of the native title benefits package negotiations; and

(b) improved corporate governance and financial reporting education will improve the corporate governance practices of entities receiving native title benefits.

3 B – Improving governance and native title agreements

Consultation questions B.1.(i)

3.1 We agree that there is a need to support parties to maximise the positive financial and non-financial benefits from native title agreements. The advantage is increased wealth and opportunity in Indigenous communities in the long term. We can see no disadvantages. We do not, however, support the proposed method of achieving this through an oversight function by a statutory body.

3.2 There are alternatives to the function proposed. In our experience in advising both proponents and native title parties, the major impediment to sustainable agreements is not goodwill on the part of either party. On the contrary, many of the proponents we represent wish to negotiate agreements which offer sustainable benefits to native title parties as part of the company's corporate social responsibility policy. Similarly, native title parties wish to benefit their communities for the long term, but their good intentions are often fraught by divisions within the

native title group itself, which means that the benefits from agreements are not fully enjoyed, if they are enjoyed at all.

3.3 We see the most pressing need is for:

(a) access to 'best practice' precedents for inclusion in agreements; and

(b) access to experienced consultants who can assist parties to develop benefits packages, develop capacity and to assist in implementation.

3.4 In our view, it is preferable to assist parties at the outset, before agreements are finalised, rather than reviewing agreements at a later stage for 'compliance'. This is not only more efficient, but is respectful of the parties' negotiation.

3.5 Our suggested alternative is that the National Native Title Tribunal (**NNTT**) expand its educative and consultative function to develop 'best practice' precedents and to provide access to consultants.

Consultation question B.1.(ii)

3.6 As stated above, we do not support the proposal for a body (whether existing or new) to receive and review native title agreements, or assess them against leading practice principles, unless this is a process which is voluntary and is undertaken prior to the finalisation of an agreement.

3.7 Similarly, we do not support reporting to Ministers where parties are 'not prepared to adopt leading practice principles', except as a general report on trends. Unless certain clauses are mandated by legislation, we see no reason why Ministers should receive reports on private commercial negotiations between parties to an agreement.

3.8 The functions of advising and assisting parties, research and communication and reporting on trends to Parliament, could be of assistance.

Consultation question B.1.(iii)

3.9 We consider that the limited functions we support (i.e. educative and consultative functions, rather than review of agreements) could be performed by expanding the duties of the NNTT, rather than using resources to create another body.

Consultation question B.1.(iv)

3.10 We do not support the requirement to register agreements. However, for completeness, we make some additional comments about the Government's proposal.

3.11 In Queensland, native title agreements generally fall into two categories:

(a) ILUAs; and

(b) Section 31 deeds (between the State, the native title party and the proponent) and ancillary agreements (which include the commercial terms agreed between the native title party and the proponent, in consideration for the consent given in the section 31 deed).

3.12 We also have the experience of drafting ancillary agreements to ILUAs, at the request of certain native title parties who do not wish to include commercial terms in an ILUA, which must be registered with the NNTT. This demonstrates the sensitivity of some native title parties to confidentiality, even where they are aware that the NNTT does not scrutinise commercial terms.

We expect that this suspicion would be heightened where the Government was explicitly scrutinising commercial terms.

3.13 It is clear that ILUAs are within the scope of the Government's proposal. Section 31 deeds, however, do not contain any of the commercial terms regarding financial or non-financial benefits which would be the subject of the Government's review. As such, there appears no reason why the Government would review these. Ancillary agreements would be of interest to the Government, however, these are generally confidential documents between the proponent and the native title party which have never been open to scrutiny by a third party. In our experience, native title parties and proponents are equally protective of confidentiality and neither would wish to provide these documents to a government agency.

3.14 Trust deeds and other documents for the management of benefits may also be of interest to the Government, however, we suspect that native title parties would be even less willing to provide these to Government, as they are considered the private business of a native title group. Proponents may not have access to these documents for the same reason. There is, however, a need for native title parties to have access to quality legal and strategic advice in relation to trusts and other structures. In our experience, this is sometimes provided by proponents in an effort to ensure that native title parties are properly advised. However, proponents may not have the financial means to provide this service, and in some cases, the provision of advice by a consultant engaged by the proponent is seen as biased. For this reason, advice provided by consultants engaged by the NNTT or another body would be beneficial.

Consultation question B.1.(v)(a)

3.15 We consider that resources companies must be encouraged to offer a range of benefits, but that the determination of which specific benefits comprise a compensation package should remain with the native title party, having regard to such factors as the size of the project, the needs of the community and the preference of each native title party for particular benefits.

3.16 By providing a range of options including provisions relating to compensation, employment, Indigenous business development, training, education and investment, each package can be personalised and chosen by each native title party to ensure it is the most beneficial and promotes sustainable benefits.

3.17 In our view, individual elements of benefits packages should not be considered in isolation. Employment benefits may have limited impact unless there are appropriate training provisions and, separately, implementation and audit regimes. For example, training strategies could then be developed so that Indigenous businesses could be established that are responsible for the training of members of the community to be employed as mining contractors. This would have two benefits: the education of local community members to be employed as trainers and employment of members as contractors to the mine. Strategies such as this would provide opportunities for local Indigenous members to not only gain current employment but be provided with skills necessary for future employment and promote sustainable development within each community.

Consultation question B.1(v)(b)

3.18 We would not support the incorporation of 'leading practices' into legislation. By definition, 'leading practice' is a reflection of the best practices as developed by parties from time to time to suit their circumstances. It is likely to change over time and continually improve. Once it is mandated by Government, such practices cease to be 'leading' and become 'standard'. We prefer the approach of allowing parties to continue to innovate and develop better agreements.

3.19 Incorporating leading practice in a regulatory framework may encourage resources companies to simply negotiate about the matters prescribed by regulation. This may ultimately impede innovative approaches to future agreements.

3.20 Each agreement should be considered on an individual basis and a prescribed template of minimum standards may not offer sufficient flexibility.

Consultation question B.1(v)(c)

3.21 We are supportive of a set of 'model' terms, if such terms were included in a set of precedents, available to negotiating parties, rather than mandated or subject to review by the Government.

3.22 Elements which could be covered by model terms include:

(a) communication protocols between proponents and native title parties, such as agreement implementation committees;

(b) protocols for access to land by native title parties for traditional purposes;

(c) payment of benefits into particular structures, such as charitable trusts;

(d) employment and training programs for native title parties; and

(e) favourable consideration of tenders for businesses operated by native title parties.

Consultation question B.1(vi)

3.23 We do not support the assessment of any agreements for sustainability. However, in the event that the Government adopts this approach, we cannot see any reason why a certain class of agreement should be excluded.

Consultation question B.2

3.24 We support the development of a toolkit to assist proponents and native title parties to develop leading agreements, however, we believe that such a toolkit will be of limited use if it is only available online or in hard copy format.

3.25 In our experience, native title parties benefit from advice specific to their needs and circumstances. Native title parties and proponents are advised by legal representatives with expertise in native title law, but legal and other professionals with expertise in governance and tax structures are not as often involved in native title negotiations. We have been involved in negotiations where the proponent has engaged an accountant with expertise in establishing and maintaining charitable trusts and other structures has worked with native title parties to assist them in establishing an appropriate structure. If the NNTT or another agency were able to develop the toolkit and then provide consultants to assist parties in implementing the suggestions in the toolkit, this would be very useful.

4 C – Future act reforms

Consultation questions C.1 (i)

4.1 We support the proposal to reduce the notification period for ILUAs. In our experience, both native title parties and proponents can be frustrated by the amount of time required to achieve ILUA registration. The proponents are frustrated because it is a further delay to their project and

native title parties can be frustrated because the majority of benefits under an ILUA often flow only upon registration.

4.2 In the case of body corporate ILUAs, we agree that the one month notification period could be reduced. Once the NNTT is satisfied that all applicable body corporates are party to the ILUA and the other requirements of the *Native Title Act 1993* (Cth) (**NTA**) have been met, the ILUA should proceed to registration.

4.3 In the case of area ILUAs, we similarly agree that the three month notification period could be reduced. We consider that one month should be sufficient to allow parties to either object under section 24CI NTA or lodge a native title determination application in response to the notice specified in section 24CH(2)(d)(ii) NTA.

4.4 We would support giving the NNTT the discretion to reject vexatious or frivolous objections to ILUA registration. The discussion on objections must be divided into two parts – firstly, genuine objections to ILUAs certified by Native Title Representative Bodies (**NTRB**) (**certified ILUAs**) under section 24CI NTA, and information provided by persons regarding ILUAs not certified under section 24CL(4)(b) NTA, which is frequently used as a default 'objection' provision.

4.5 In our experience, objections to certified ILUAs are sometimes made on grounds other than those specified in section 24CI NTA, and in such cases, the NNTT tends to provide the objection to the parties to the ILUA for response, despite the objection not having been properly made. We suggest that section 24CI NTA be amended to state that the NNTT must reject any objections made on grounds other than those specified in section 24CI NTA.

4.6 We wish to draw the Government's attention to the need to tighten the wording in section 24CL(4) NTA, which currently states that, when considering whether the requirements of section 24CG(3)(b) NTA have been met for non-certified ILUAs, the Register must take into account *'any information the Registrar is given on the matter...by any other body or person...'*. In our experience, this section is being used as a default 'objection' provision, where persons are objecting to the registration of an ILUA on a range of grounds, not all of which relate to the requirements of section 24CG(3)(b) NTA. This is despite there being no ability for a person to object to the registration of an ILUA which has not been certified. This section should be amended to clarify that the only information which will be considered by the Registrar is information which relates specifically to the requirements specified in section 24CG(3)(b) NTA.

4.7 We have concerns in altering the registration process for a non-certified ILUA. These concerns centre around our experience in obtaining certification of ILUAs with a NTRB. During 2010, we submitted a number of ILUAs to the NNTT for registration on behalf of proponents. Our experience in seeking (and ultimately obtaining) certification of the first of those ILUAs by the relevant NTRB led to our decision to submit the remaining seven ILUAs directly to the NNTT under section 24CG(3)(a) NTA rather than obtaining certification.

4.8 In our experience, obtaining certification from the relevant NTRB was time consuming and frustrating, because:

(a) the NTRB had not been involved in the negotiation of the ILUA, and its evidentiary requirements on the identification of native title parties, the consultation process and authorisation process were more onerous than on previous occasions, and in a number of cases, more onerous than the NNTT's indication of its requirements; and

(b) despite having consulted with the NTRB prior to undertaking advertisement, consultation and authorisation of the ILUA, the NTRB advised us after authorisation that it:

(i) required certain information which neither party had retained; and

(ii) that certain processes should have been followed which were neither required under the NTA, required by the NNTT, nor required by the NTRB at the outset (for example, the NTRB requested to see that letters to members of the native title claim group had been sent, whereas the NNTT had advised that public advertisement in newspapers would be sufficient).

4.9 Although this may suggest that this particular NTRB's certification process, being so comprehensive, should mean fast-tracking a certified ILUA to registration, we believe that it exposes deficiencies in this particular NTRB's understanding of the NTA. It also demonstrates that the NTRB and the NNTT are not adopting a consistent approach to the requirements of the NTA.

4.10 For this reason, while we are reluctant to see ILUAs scrutinised twice by the NTRB and then the NNTT, we would not wish to see the NNTT's role in reviewing a certified ILUA reduced. If this means the timeframe cannot be reduced, we believe this is still preferable. Due to our own experience, we will likely continue to submit ILUAs directly to the NNTT rather than endure this particular NTRB's onerous certification process.

Consultation questions C.1 (ii)

4.11 Other than providing access to model clauses on governance and (de-identified) benefits as discussed above, we do not see any benefit in widening the information available on the Register of ILUAs.

Consultation questions C.1(iii)

4.12 We support the proposal to allow minor amendments to registered ILUAs without the requirement to go through the registration process again.

4.13 We would consider that any amendments to the following matters would need to be excluded from the definition of 'minor amendments':

(a) the consent provided to future acts by the native title party;

(b) the financial and non-financial benefits provided by the proponent; and

(c) the area covered by the ILUA (other than to reduce its size).

4.14 We suggest that the definition of 'minor amendments' could form part of the parties' agreement on the initial ILUA. For example, if a certain clause was of particular importance, the parties could agree that it may not be amended without reversion to the full authorisation and registration process.

4.15 However, we can identify some difficulties with how evidence of agreement to any minor amendments would be provided. Given the recent decision of *QGC v Bygrave (No 2)* [2010] FCA 1019, in which Justice Reeves indicated that it is authorisation of an ILUA which is paramount, rather than execution by certain persons, it is hard to see how an ILUA may be altered without reversion to that group which authorised it.

5 Clarifying good faith requirements

5.1 There is established case law on the meaning of 'good faith', which in many respects is informed by the relevant circumstances of the particular negotiations which are contemplated. We consider that that the adoption of a prescriptive regime of what is and what is not good faith, while attractive in concept because it suggests a greater level of certainty, would result in

'negotiation by numbers' rather than the parties reflecting upon their individual circumstances. Accordingly, we consider that the existing regime should continue.

5.2 We cannot see the logic in limiting the ability to apply for determination to circumstances where the parties have reached substantive agreement. If the parties have reached substantive agreement, there would only be a need to apply for a determination in very limited circumstances, e.g. where a member of the registered native title claimant has refused to execute an agreement. If this limitation is imposed, the parties would have no recourse if negotiations have stalled. The ability to apply for a determination must be retained in all circumstances.

Please contact Heather Watson or Dominic McGann to discuss any of the issues outlined in our submission.

Contact details

Partner:	Heather Watson/Dominic McGann
Phone:	07 3233 8820/07 3233 8838
Email:	hwatson@mccullough.com.au dmcgann@mccullough.com.au
Our reference:	HRW:106047-01728

Dated: 30 November 2010