NSW GOVERNMENT | Premier & Cabinet

Ms Katherine Jones,
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Dear Ms Jones,

I enclose the NSW Department of Premier and Cabinet's submission in relation to the Commonwealth's Discussion Paper entitled *"Leading practice agreements: maximising outcomes from native title benefits"*.

The submission has been developed in consultation with other affected NSW government agencies.

The contact officer for any queries in relation to the paper is Ms Fiona Cameron, who may be reached on (02) 9228 3225.

Thank you for the opportunity to provide input into this important review.

Yours sincerely

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Submission to the Commonwealth Discussion Paper:

Leading practice agreements: maximising outcomes from native title benefits

November 2010

Introduction

The NSW Department of Premier and Cabinet welcomes the opportunity to provide input from a NSW perspective into the Commonwealth's consideration of ways to improve outcomes from benefits in native title agreements.

Although it is possible that there will be native title settlements in NSW with significant payments (for example, related to subdivisions of coastal residential land) most settlements in NSW will be on a small scale. This reflects the extent of extinguishment from long European occupation and the disruption of Aboriginal communities. Such native title rights as survive are likely to be of limited scope, isolated to particular parcels of land, and usually on land where there may only be limited surviving rights.

While it is understood that the Commonwealth is concerned about the way the benefits of agreements in relation to large mining projects are applied, solutions that may be appropriate for those large projects should not be imposed on the small agreements that are most likely to arise in NSW. Such a uniform approach would create a real risk of imposing unrealistic requirements on the human resources and financial capacity of native title bodies in NSW.

Comment on specific questions in the paper

A. GOVERNANCE MEASURES

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

Governance arrangements need to be appropriate to the activities of the body concerned. What may be appropriate to a body receiving a large income stream from a mine might not be appropriate to a body receiving only a single small settlement or occasional small payments. The existing costs of running a corporation already exceed the financial capacities of prescribed bodies corporate in most cases in NSW. Further costs should not be imposed on them unless either they clearly have the capacity to pay, or the Commonwealth accepts

the responsibility for providing the necessary support to enable them to meet their governance obligations.

For those bodies which do not have a revenue stream, additional and improved funding support from the Commonwealth targeted at supporting bodies to meet their governance functions would be a more appropriate measure. Current Commonwealth funding progams are only provided on an annual basis, with corporations having to apply for funding each year. This does not provide them with sufficient security of funding to maintain their governance processes nor to prepare long term strategic plans or business plans that would enable them to become more sustainable. Three year or four year funding programs would be more appropriate.

It would also be useful for native title parties if greater support could be provided by the Office of the Registrar of Indigenous Corporations (ORIC) .

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?

Measures to improve transparency and accountability are of benefit. However, the discussion paper does not give a clear indication of how this would be achieved.

All settlements in NSW have involved corporations established to represent the interests of the claimants. It would be preferable, therefore, not to duplicate accountability requirements that might already exist in complying with the legislation under which they are established.

It is also noted that any new requirement for independent directors to be appointed to the board of a native title body corporate would be beyond the financial capacity of most corporations, unless the independent directors were prepared to act *pro bono*, or the Commonwealth provided the necessary funding.

Additional and improved funding from the Commonwealth to support governance of corporations, would ensure that the directors of corporations could meet regularly, thus increasing accountability between directors, the Chair and Secretary of the corporation. It would also increase their ability to communicate with their members in a more systematic way, eg through meetings, but also correspondence, newsletters and annual reports. Without improved funding, Corporations may only meet once a year for their annual general meeting and have very limited processes for communication with their whole membership. This could lead to a lack of transparency and accountability.

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

The NSW experience is that awareness levels vary. Some beneficiaries are well informed but many have little knowledge. A core group of people involved in NSW negotiations may have good knowledge, while the remainder of the claim group has less knowledge and widely varying expectations of the outcomes of the agreements. This can lead to difficulties in implementation, when those expectations are not met, leading to tensions and dispute.

Communication about the outcomes of native title agreements could be improved. For example Native Title Representative Bodies or the National Native Title Tribunal could be funded by the Commonwealth to undertake more intensive communication with the whole claim group (not just the negotiators or the Directors of the PBC) about the outcomes at the following stages: prior to authorisation of the ILUA; after registration of the ILUA; and during implementation of the ILUA, with regular updates. This could include a formal communication strategy for the use of all the parties, plain English fact sheets, newsletters, meetings and a plain English implementation plan. All of these would need to be developed with the other parties to the agreement, to ensure consistency in key messages.

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

As noted above, awareness levels vary. Particular problems can also arise when the only people who do understand the way in which the proposed benefits are to be distributed also have the capacity to control decision making.

The comments about communication above apply also in relation this question.

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

The NSW experience is that there is probably already sufficient accountability *in theory*. What may be lacking, however, is the ability for people to hold directors to account in practice. The ORIC might be used to provide potential beneficiaries with assistance to obtain information they need if they cannot obtain it from directors.

In addition, accountability can be improved if corporations are provided with sufficient funding to support good governance, so that they can hold regular meetings of the directors, hold regular meetings with the members and have systematic communication processes, eg correspondence and newsletters. In NSW where most Corporations do not have a revenue or income stream, additional funding should be provided by the Commonwealth to meet baseline governance requirements. NSW considers that the Commonwealth Government funding programs could be improved to address this need. As previously mentioned, there is a need for multiple year, not single year, funding programs.

Link with tax proposals

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?**

Once more the crucial issue is the financial capacity of the body. It would not be helpful to give tax relief only on the condition that the body adopts governance measures that are beyond its financial capacity. A two tiered system might be more appropriate. All bodies whose assets/income are below a certain level could be tax free. Those above might be required to comply with certain governance measures. The tax free threshold should be set at a level that ensures that benefits are able to flow to beneficiaries, rather than be fully expended on meeting the PBC's governance expenses.

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

Assistance could be provided direct to groups, by way of training and access to professional assistance. Networks could be established so groups could share expenses. ORIC could take a more proactive and extensive role. For example, on registration of an ILUA, ORIC could contact the PBC to advise them of training programs.

The comments about funding already made elsewhere in this submission, in particular the need for the Commonwealth funding programs to be changed to multiple year funding, are also relevant here.

B1. REVIEW FUNCTION

Overview

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

Maximising of benefits is obviously something that should be considered by a group's own professional advisors. If this is not occurring, consideration should be given to why the advisors are failing in this task, or why the group has not been able to access quality advice.

It could be of general assistance, however, if the proposed new independent statutory body could provide information to the parties - particularly the native title claim group - rather than simply review sustainability of an already negotiated agreement. This might include providing lists of matters that might be considered, or precedents that have proved useful, which could be accessed before and during negotiations. This could include case studies or fact sheets.

It would also be more helpful to the sustainability of benefits if this kind of support could continue through the implementation stage of an agreement.

b) Are there alternatives to the function proposed?

As noted above, it might be of more assistance to provide lists of matters that might be considered, or precedents that have proved useful, which could be accessed before and during negotiations.

It might also be of assistance if the body were able to provide independent advice, particularly advice to native title claim groups, at the beginning of negotiations rather than a review at the end, and also to continue that role into the implementation stage. For example, there are a number of claim groups who rely on pro-bono legal advice during negotiations and then have no legal advice after negotiations have been completed. They may not have a prescribed body corporate if the agreement did not result in a consent determination and they may not receive any assistance from Native Title Representative Bodies as a result. These groups could benefit from additional support and advice from such an independent body.

It might be of assistance if the new body could support or facilitate native title claim groups and the other parties to meet with claim groups and others who have negotiated best practice or leading practice agreements.

It might be of assistance if:

- leading practice was included as a theme at the AIATSIS annual native title conferences; and
- this body presented at these conferences on leading practice trends and outcomes.

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

The proposal seems largely to involve the new body providing comment on aspects of an agreement only after it has been concluded.

The merits of such an approach are difficult to identify. It is assumed, for example, that there is no place for any statutory capacity for parties to "walk away" from the deal made after adverse comment from the body. It would also not be appropriate for a Commonwealth body to act as an arbiter of sustainability on negotiations that a State has concluded.

Also, unless there are ongoing, practical benefits to parties from the proposed registration and review process, there is no obvious justification in requiring them to pay a fee to the new body to register.

Provision of advice and assistance by the new body to the native title parties *before* a deal is concluded would appear to be of greater practical use than the review role described in the paper.

Functions

a) What are your views about these functions?

As discussed above, the involvement of the new body after an agreement is concluded may be too late to be of most value. It would be preferable if advice on best practice was provided earlier in the process.

It is also unclear who would benefit from the maintenance of a register, who would be permitted to access it and for what purpose?

There is obviously benefit in making the information on the register available for Commonwealth officers to undertake policy research. It should be a primary function of any new body to undertake research and communication on leading practice.

It would be of greater benefit, however, if the new body could draw on this research and make publicly available information on the outcomes and approaches of the registered agreements, provided this was agreed by the parties. This would not have to involve publication of the agreement itself. Summaries and fact sheets reflecting the findings should also be made available in plain English to claim groups.

Reporting on trends and issues would also be useful. This should be distributed and communicated more widely than a report to Parliament, as suggested in the discussion paper. For example, the new body could send the report to all relevant State Government native title agencies, as well as present on trends and issues at the AIATSIS annual native title conferences. Leading practice could be included as a theme at these conferences.

b) Are there other functions you would suggest?

As noted above, if the new body is to be established, earlier involvement than is currently proposed would be useful. Advice and assistance would be much more valuable provided before negotiations are concluded. It is unclear what assessment after the event would achieve for native title parties.

Establishing the body

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

It is too early to form a concluded view as the answer will depend on what functions are finally settled.

It would not appear to be appropriate for a private organisation to undertake the new role. Given the need for confidentiality and accountability, it would be preferable that a statutory body performed the new role.

Clearly, consideration will need to be given to whether there would be any conflicts of interest for an existing organisation. For example, whether or not ORIC has any conflict in relation to its regulatory role that would prevent it from expanding its functions.

Agreements subject to registration

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

If the focus is to be on agreements under which significant ongoing benefits are provided, there should probably be a threshold below which registration should not be required. For example, if the only benefit being provided is the transfer of a small block on which a family residence could be constructed, the type of analysis proposed in the discussion paper would serve no great purpose, and accordingly registration seems of no benefit to the native title parties.

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

As discussed above it is not clear that registration will be of any specific and immediate benefit to native title parties. Whether a registration requirement should be extended will depend on what it is hoped to be achieved, beyond informing policy-makers.

It may sometimes be difficult to identify all ancillary and related agreements. There would be value to native title parties, however, to know if development proponents are engaged in making "side" arrangements with parts, but not all, of the community.

Review against leading practice principles

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

- Clear responsibilities;
- Access to training and/or professional support, including legal, businesss, governance and administrative support;
- Clear communication and decision making processes, that minimise administration;
- Provision of jobs with associated training, including capacity building. This may include paid positions with the corporation to meet administrative requirements;
- Identification of possible income streams (difficult in most NSW agreements) and business opportunities;
- In appropriate cases, transfer of freehold land and payment of monetary compensation accompanied with training and investment advice; and

- For corporations that do not have a large revenue stream, funding for the corporations to meets their administrative requirements under the agreements (see comments above about improving Commonwealth funding programs).

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

It is not clear what sort of legislative provisions are proposed.

The proposed statutory body could be required, however, to regularly publish leading practice information. By their nature, leading practice examples should change over time and will need to be updated.

There is also a risk in legislating of limiting the imagination of negotiators in reaching settlements appropriate to specific circumstances.

The leading practice sustainability elements suggested in the paper may also only be suitable for large projects, and there may be advantages in legislative provisions for them. They are not, however, appropriate for small settlements, unless the Commonwealth is prepared to fund compliance.

If the subject of an agreement is non-exclusive rights in relation to land of small monetary value, for example, it would not be practical for a State to enter into any significant ongoing funding arrangement. In such cases, although it is a question of balance, it would be more appropriate for States to continue simply to acquire the land and pay one-off compensation.

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

Model terms could be very useful, provided they are truly a model and serve only as a resource that parties may consider in their circumstances, rather than terms parties were required to use. Several different model terms should be provided covering the same topics, so parties could select what suited them best.

Topics could include future act regimes, types of benefits offered, methods of provision of benefits, on-going consultation, exercise of native title rights, dealing with existing interests and third parties, and dispute resolution.

Assessment

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

Whether an agreement should be assessed for sustainability depends on the nature of the benefits being provided, rather than the activity of a development proponent. Key elements in deciding what to assess would be the quantum of the benefits being provided, the time

period over which they were to be provided, and the time frame in which it is expected that the beneficiaries would apply those benefits.

B2. LEADING PRACTICE AGREEMENTS TOOLKIT

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

From a State respondent perspective, the following resources/information appear to be presently difficult to obtain:

- the greatest difficulty is in relation to the internal arrangements of the claimant group, and having sufficient information to be satisfied that all relevant people are being included in the negotiations and the proposed benefits.
- Access to information on other agreements and best practice examples, given most agreements are confidential.
- Information on funding support for claimant groups.

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

The topics proposed in the paper seem appropriate. Particularly useful for claimants would be the identification of potential funding sources.

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

- All parties to negotiations.
- Native title groups considering making a claim.
- Developers considering acts on land with potential surviving native title.

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

It could begin by providing information and examples. Its contents should then be monitored to see how users are using the toolkit and for what purposes so that adjustments, if necessary, can be made.

C1. STREAMLINED ILUA PROCESSES

Reduction in ILUA registration period

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

In some circumstances a reduction in the notice period would be sensible. If well-publicised negotiations have been going on for some time, all relevant parties should be aware of them, and waiting an additional three months seems too long. It may be wise, however, to

have safeguards where negotiations are started and completed in a very short time-frame – a longer notice period might be appropriate in such circumstances.

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?

Given the obligations of the representative body in s.203BE(2), this should provide sufficient protection of parties if certification is provided, and a shorter notice period could be used.

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?

The current registration period is a delay in the final resolution of matters and the commencement of implementation of any agreement.

Increase information included on the Register of Indigenous Land Use Agreements

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

It would be useful to have a map in all cases, searchable on-line.

It would be useful to have a more detailed summary of the outcomes of the agreements, should the parties agree to this being included.

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?

Apart from the summary of outcomes, the type of matters that would be useful to parties are the same as could be provided in toolkits and model terms, and would be presented better through those mechanisms.

Streamlining 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?

The definition of minor amendment would need to be clear.

It should be made clear that matters such as change of addresses and contact details do not need to go through a full re-registration process. Minor amendments to procedures may also be appropriate – eg to change a notification period.

On the other hand, alterations to provisions such as land covered, people included and rights dealt with should be considered properly, even if they appear minor.

In between are areas such as mechanisms for how corporations are structured and how benefits are provided.

Whatever process is adopted should result in there being no doubt as to the current terms of the agreement, and that the agreement as amended has the benefit of s.24EA(1)(b).

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

If something is merely administrative, the delays can be frustrating. On the other hand, it is important that rights are not eroded by incremental – but apparently minor – amendments.

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

The amendment would be lodged with the NNTT which should satisfy itself that all parties affected by the amendment concur with it, and that it meets the criteria of what is defined to be a minor amendment.

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

Change of address, change of contact details, change of name of a corporate or official party.

Possibly change of procedures if the new procedure achieved the same result as the old one, and all parties previously involved in the procedure are either involved in the new one or clearly consent to being removed.

C2. CLARIFYING GOOD FAITH REQUIREMENTS

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

It would be useful to consider a provision that, following an application under s.35, the arbitral body can direct the parties to negotiate about a particular issue and report back within a specific time.

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 approach is made to the NNTT for a determination? Are there any problems with this approach?

No. It would defeat the mechanism for resolving a dead-lock.

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

No. If there are to be a series of acts of the same type over a time period, these should be able to be part of a single negotiation, if the parties want.