National Native Title Tribunal

Submission on the Discussion Paper 'Leading practice agreements: maximising outcomes from native title benefits,' July 2010

30 November 2010

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Summary

The National Native Title Tribunal (the Tribunal) welcomes the opportunity to comment on 'Leading practice agreements: maximising outcomes from native title benefits' (the Discussion Paper).

The Tribunal understands that the Australian Government, in broad terms, wishes to achieve the following:

- to improve the outcomes for the parties, and in particular the current and future native title holders, from native title agreement-making processes;
- to improve the quality and availability of information about native title agreements; and
- to streamline the indigenous land use agreement (ILUA) registration process and facilitate the review and amendment of ILUAs.

The Australian Government seeks to do this in a number of ways by:

- improving the governance arrangements in place to manage benefits provided to native title holders under native title agreements;
- registering certain agreements and reviewing some of those agreements to determine if they meet 'leading practice standards';
- establishing a 'leading practice toolkit' to assist the parties make 'leading practice' native title agreements;
- clarifying the good faith requirements under the right to negotiate scheme of the *Native Title Act 1993* (Cwlth); and
- simplifying the ILUA registration process, reviewing what information is publically available on the Register of ILUAs and facilitating the registration of amended ILUAs.

In the Tribunal's view some aspects of the policy proposals in the Discussion Paper could usefully be clarified. In the absence of specific proposals for amendment of the Native Title Act, the Tribunal finds it difficult to respond fully to what is proposed.

Notwithstanding those reservations, the Tribunal responds, in summary, as follows:

- it supports, in principle, measures to ensure strong and appropriate governance arrangements for groups receiving native title payments but does express any view as to the specific options set out in the Discussion Paper.
- if the Australian Government is committed to establishing new registration and review functions for native title agreements the Tribunal recommends that, to avoid duplication, confusion, and fragmentation of the native title system, and to enable the functions to be managed in the most cost effective manner, the functions be conferred upon the Native Title Registrar.
- there are a number of technical issues which need to be clarified in relation to the registration and review functions. For example, what mechanism would be used to encourage lodgment of agreements, what agreements would be registered, which of those agreements would be reviewed, how would the leading practice standards be set, what would be the consequences of not meeting those standards, and to which party would those consequences apply?

- The Tribunal views the development of a broad-based leading practice agreements toolkit as a positive initiative, although its development raises a range of practical issues (indentified from experience of similar initiatives) as well as copyright and confidentiality issues if it is proposed to use registered agreements as the source of template agreements and clauses without the consent of the copyright owners and the parties respectively. Template agreements in particular are problematic for the reasons set out in the Tribunal's submission.
- The Tribunal does not support the proposed changes to the ILUA registration process. The proposed changes are unnecessary and may give rise to increased risks in relation to the protection of native title and involve conflicts of interests for NTRBs. In relation to registering amended ILUAs (new agreements), any scheme would have to carefully address the criteria to be met for registering such agreements.
- The Tribunal does not recommend that the 'negotiation in good faith' indicia be codified by embedding them in the Native Title Act. Rather, it considers that it would be helpful if the operation of s. 31(2) is clarified. There may also be merit in an amendment requiring the negotiation parties to address substantive issues in their negotiations. In particular, there may be merit in clarifying what is meant by negotiating 'with a view to obtaining' the native title parties' agreement.

The Tribunal would welcome the opportunity of providing responses to specific proposals for legislative amendment once the proposals have been further developed and refined.

Introductory comments on the Discussion Paper

The Discussion Paper is divided into sections and a number of questions are posed in each section. The Tribunal's submission responds to each section in turn and provides responses to the questions.

Unless the context indicates otherwise, all references to 'the Act' are references to the *Native Title Act 1993*.

The Discussion Paper makes the point that native title agreements should be sustainable, both in terms of workability and providing for native title holders into the future. For the purposes of this submission, the Tribunal uses the terms 'native title parties' (NTPs)[1] rather than 'native title holders. ..

The Tribunal agrees with the objective of sustainability of agreements. Agreements should be capable of appropriate implementation during their terms. They need to be structured in a way that properly provides for the 'what ifs' that may arise within that period.

It is not the sole role of agreements, however, to provide for native title holders into the future. As the Discussion Paper identifies, the governance structures that each NTP has in place to manage, invest or distribute the payments and other benefits which may flow from an agreement are perhaps even more significant. Expert advice is required to enable each NTP to make the best decisions in relation to such matters.

The Discussion Paper raises a number of issues which do not appear to be addressed by the proposals contained within it. The Tribunal agrees with the point that the NTP should understand the agreements under which they are entitled to receive benefits. This is particularly so *before* they enter into an agreement. They should also be able to make 'informed decisions about how those benefits are deployed'. However, none of the proposals in the Discussion Paper, with respect, appear to directly address these points.

Every agreement is different, and generalised information on clauses and mechanisms, while helpful in some limited respects, does not take the place of expert up-front advice on draft agreements or ways and means of structuring governance and investment vehicles to sustain and maximise returns from native title payments (if any) and other benefits.

[1] The term 'native title parties' (NTPs) is intended to cover native title holders, claimants and persons who assert native title rights but have not lodged a claim. Not all claimants will obtain a determination that native title exists. Indeed it may be the case in some native title alternative settlements that claimants, by way of an ILUA, 'surrender' their disputed asserted rights and interests in exchange for a benefit package. The package may or may not involve continued 'future act' rights recognised under a state or territory scheme.

The Tribunal agrees that it is not currently the role of the Native Title Registrar to consider the contents of ILUAs in the registration process, other than determining whether:

- the application for registration of the ILUA is valid;
- the agreement actually is an ILUA (see *Fesl v Delegate of the Native Title Registrar* [2008] FCA 1469 at [84] to [91] (*Fesl*) and *QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019 (*QGC*); and
- the conditions for registration are met (see *Fesl*, *Kemp v Native Title Registrar* [2006] FCA 939 (*Kemp*) and *Murray v The Registrar of the National Native Title Tribunal* [2002] FCA 1598 (*Murray*)).

It is only in the case of alternative procedure agreements, where a valid objection has been lodged, that the Tribunal would consider whether it was fair and reasonable to register an agreement. In making that decision the Tribunal is obliged to have regard to:

(i) the content of the agreement;
(ii) the effect of the agreement on the native title rights and interests;
(iii) any benefits provided under the agreement to current native title holders (whether or not identified at the time the agreement is made) and their successors, and the way in which those benefits are to be distributed; and
(iv) any other relevant circumstance (s. 24DL(2)(c); and see ss. 24DJ and 24DL).

These issues can be quite complex. The Tribunal is required to hold an inquiry to determine such matters (s. 139 and following). No alternative procedure agreements have been lodged with the Native Title Registrar as at 26 November 2010.

The Tribunal accepts that native title agreements are not currently available for scrutiny. Indeed current provisions of the Act allow for the contents of agreements to be kept confidential (see s. 199E, for example). Further, it appears to be the view of many parties to future act agreements that it is not necessary to lodge the substantive agreement with the Tribunal to obtain the benefit of the relevant provisions of the Act (ss. 24EA, 24EB, 24EBA and 28). Ancillary agreements, not lodged with the Tribunal and not forming part of the relevant s. 31 agreement and in some cases the ILUA are used as a means of ensuring that these agreements remain confidential. Please refer to Tribunal comments on the review function proposal at B.1.(i) below

A significant number of comments have been made concerning the potential of native title agreements to facilitate Indigenous[2] economic development. There has not been, however, any real identification of which agreements are caught by the term 'native title agreements'. Agreements that may be made in the context of native title are very diverse and include the following:

[2] A distinction should be drawn between Indigenous communities and native title holding groups. Not all the persons within an Indigenous community hold native title. Rather those other persons may be historically affiliated with the area. Those persons will not necessarily have access to any of the benefits negotiated under a native title agreement. Indeed there may be serious conflict within communities between the native title holders and other Indigenous persons.

- registered/unregistered ILUAs;[3]
- section 31/41A agreements, whether or not they are lodged with the Tribunal;[4]
- agreements aimed at either preventing lodgment of an objection application or the withdrawal of such an application under the expedited procedure provisions of the Act;[5]
- possible compulsory acquisition and infrastructure facility agreements under s. 24MD(6A) and (6B);
- agreements for access etc. under various state legislation;[6]
- pastoral access agreements made pursuant to s. 44B(3);
- agreements negotiated in South Australia under the alternate s. 43 regime;
- agreements negotiated under specific legislation such as the Victorian Alternative Settlement Framework;
- agreements that may be made under s. 87 and s. 87A to resolve native title claims, including agreements about matters 'other than native title';
- other agreements that may be negotiated as part of a native title mediation process including pursuant to negotiations under s. 86F;
- traditional owner recognition and reconciliation agreements.

The list is not exhaustive and the various agreements may or may not provide direct financial or other benefits to the NTP. Most work area clearance agreements, for example, only involve the payment of daily rates and expenses to a number of members of the native title group to participate in work area clearance activities on the specific tenement area.

The Tribunal notes that the Discussion Paper states that only future act agreements would be subject to registration. Section 31 agreements and ILUAs are noted as the primary agreements of interest. As was noted above, there may be a large number of 'future act agreements' related to heritage clearance work which are not s. 31 agreements. Further, as previously noted, most if not all s. 31 agreements in Western Australia do *not* reveal details the deal struck between the grantee party and the NTP. Such information is contained in the ancillary agreements. These latter agreements do not form part of, and their terms are not incorporated into, the s. 31 agreements.

Although the Discussion Paper refers to supporting 'parties' to native title agreements, the focus is on supporting the NTP. It should be noted that some non-native title parties are small

[3] An ILUA may be a 'bare bones' agreement with a separate substantive agreement not being lodged for registration. The ILUA may not even refer to the existence of the other agreement. This may be used by parties as a mechanism to keep their agreement about commercial and some other matters strictly confidential while obtaining the benefit of ILUA registration under the Act.

[4] For example, in Western Australia there have been 1,484 s. 31 agreements lodged with the Tribunal between 15 December 1995 and 2 November 2010, noting however, that these s. 31 agreements are not the substantive agreements between the NTP and the Grantee Party in relation to the future act but rather are simple tripartite deeds in which the NTP consents to the doing of the future act as required by s. 31.

[5] Most of these agreements relate to work area clearance processes for the relevant area. Refer, for example, to the standard heritage agreements that have been used in Western Australia.

[6] For example, low impact future acts such as the grant of some exploration licences with a condition that requires the tenement holder to negotiate an access agreement with the native title holders/claimants before the explorer can access the land, and some geothermal licences.

companies or individuals with little in the way of resources to support the provision of significant benefits to the native title groups. Many projects are actually or potentially small scale or of limited profitability. This raises difficult policy issues in establishing 'standards' for agreements. 'Standard agreements' may create expectations in relation to the benefits that may be obtained by under native title agreements which cannot be met in practice in relation to many negotiations. Additional obligations placed upon the negotiation parties might result in longer negotiations with associated transaction costs, and possibly fewer agreements. In relation to 'right to negotiate' matters,[7] the Tribunal might have to make more arbitral decisions as more negotiation parties cannot reach agreement.

Further, the 'sustainability of benefit packages' may be relevant to some agreements but not all agreements. Some agreements, as the Discussion Paper recognises, involve 'one off' payments. In such cases it is not necessarily what the agreement provides in relation to the payment that is relevant but rather what the recipients do with that money. That leads into issues relating to the distribution of benefits, control of assets and governance structures. In other cases the benefit package may include regular payments, employment and other opportunities.

A. Governance Measures:

The Tribunal supports in principle measures to ensure strong and appropriate governance arrangements for bodies receiving native title payments. However, the Tribunal does not express any view as to the specific options set out in the Discussion Paper and is not in a position to answer the consultation questions on pages 6 and 7.

It is noted, however, that in any discussion of governance structures, consideration may need to be given to the following points:

- not all members of the NTP are necessarily members of the relevant Indigenous corporation;
- it may be the case that not all recipients of benefits which may be paid under specific agreements are members of the Indigenous corporation;
- it is not clear who would pay for the appointment of independent directors. The costs may be particularly high if the role involves attendance at meetings in remote areas;
- should the 'first' miner to negotiate an agreement with a particular NTP bear the brunt of establishment and administrative costs of supporting an Indigenous corporation when subsequent miners do not;
- there may be a higher Indigenous corporation failure rate8 if the only reason for their incorporation is the receipt of a better tax treatment in relation to native title payments.

B. Improving Governance and Native Title Agreements

Introduction

[7] For 'right to negotiate' matters see Part 2, Division 3, Subdivision P of the Act.

[8] Refer to 'Analysing Key Characteristics of Indigenous Corporate Failure Research Report', Office of the Registrar of Indigenous Corporations, March 2010.

Part B of the Discussion Paper relates to proposed new registration and review functions in relation to native title agreements.

It appears that the proposed registration function would involve registering only a subset of all future act agreements. Of those registered agreements only a selection would be reviewed.

It is not clear what mechanism is proposed to compel parties to lodge copies of their agreements with the relevant body. Nor is it clear what the ramifications would be if the parties to an agreement failed to lodge a copy of the agreement with that body (whether or not it also required 'review'). For example, under the Act at present there is a requirement for a copy of a s. 31 agreement to be given to the arbitral body (s. 41A). There is, however, no apparent penalty for failing to do so. The future act(s) covered by the agreement would still be valid (s. 28(1)(f)). The Tribunal has no way of knowing whether copies of all s. 31 agreements have been provided to the Tribunal.

The Discussion Paper poses a number of questions in relation to these new registration and review functions which will be addressed in the order they appear in the Discussion Paper. The Tribunal's response to the questions is generally given in the context of the relatively small number of agreements which involve the provision of significant benefits to NTPs.

B.1.(i) Consultation questions—review function*:*

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?

The Tribunal supports the intent of the review function. The 'quality' of native title agreements is highly variable and parties to native title agreements, particularly Indigenous parties, are often ill-equipped to negotiate complex agreements and/or to implement agreements in the post-negotiation environment. It is accepted that any mechanism which supports parties to maximise positive financial and non-financial benefits from native title agreements is a positive step that would assist the Government in meeting its 'closing the gap' objectives.

However, it is not clear that the review function as contemplated will assist parties to maximise benefits; rather, it appears to be tailored towards penalising[9] parties attempting to make agreements that do not meet a particular, and as yet undefined, set of benchmarks. It is acknowledged that this approach may, over time, encourage parties to adopt the Government's desired approach in agreement-making; but it is also suggested that there may be other unintended and less desirable consequences.

[9] Although it is not yet clear what is proposed to be the consequences of a failure of a 'future act' agreement to be lodged for registered or for failing to meet leading practice standards upon review. It could relate to access to tax benefits, 'naming and shaming', or validity of the agreement. If it is proposed to be the latter then further consultation is strongly recommended as it could cause significant difficulties in relation to certainty of agreement-making.

For example, and as noted above, parties may well opt to pursue 'registration' of an agreement to deal with future acts, while negotiating ancillary agreements to deal with some or all of the compensatory elements in relation to the doing of the future act. Additionally, it is likely that the review function will be characterised as a paternalistic and even punitive approach to dealing with a problem which is, in the Tribunal's view, largely created by a lack of capacity in the negotiation process.

b) Are there alternatives to the function proposed?

The Tribunal submits that a clear alternative to the proposed review function is to apply effort at the 'front-end' of the agreement-making process, rather than (as is contemplated in the Discussion Paper) after the agreement has been made.

This could involve the Australian Government establishing a program of support for the agreement-making process for agreements above a prescribed financial quantum (e.g. $500k/annum).

The program could provide assistance in negotiating the agreement, establishing governance structures and broader business/enterprise planning and/or developing the capacity of boards of management. It could do so, for example, by:

- establishing a panel of suitably qualified/experienced native title negotiators (akin to the Federal Court's panel of mediators);
- subsidising native title parties' access to the professional services of members of the panel.

The program could be administered by a body with appropriate skills and experience sets (e.g. Indigenous Business Australia). The costs of administering the program could be offset, for example, by mandating that the program provider is a beneficial party to the agreement for a prescribed period or until the costs of the assistance are recouped.

If adopted, consideration could also be given to legislating that the program provider has a mandatory seat on the governing board or other structure charged with administering the agreement for a prescribed period or until the costs of the assistance are recouped[10].

In the Tribunal's submission this approach could address some of the fundamental underlying causes of the mischief that the Government is attempting to remedy.

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?

Please refer to the responses above. As it is not clear what the ramifications of the review function might be, it is also not clear why the review function would be subject to strict time lines. How would the registration and review functions sit with current ILUA registration processes?

[10] The costs of that assistance would have to be carefully managed and review of those costs could be undertaken by a similar mechanism to that provided for in s. 60AC.

For example, would the review function be performed before or after the registration of an ILUA? If it were to occur before registration, there would need to be coordination between the Register (or her delegate) and the person conducting the review (if that person was not the Registrar). If an agreement was registered as an ILUA, but parties wished to renegotiate and vary the agreement in light of the review decision, would the amended agreement be subject to all the procedural steps that apply to an ILUA before the amended agreement could be registered?

Further consideration needs to be given by Government to clarify the outcomes it seeks to achieve.

B.1.(ii) Consultation questions—functions:

a) What are your views about these functions?

Although the Discussion Paper states that the suggested functions would not duplicate those of any existing body, the Tribunal's considers that there will be some duplication between the functions proposed for the review body, and functions already performed by the Native Title Registrar and other bodies. For example, the Discussion Paper refers to receiving and reviewing native title agreements and maintaining a confidential register of those agreements. In summary, the current situation is as follows:

- Section 199A of the Act requires the Native Title Registrar (the Registrar) to establish and maintain the Register of Indigenous Land Use Agreements (the Register).
    - In order for an agreement to be considered for entry onto the Register (among other things), parties are required to submit to the NNTT an application for registration of an ILUA and include material prescribed by the Native Title (Indigenous Land Use Agreements) Regulations 1999. The Registrar must then review the application and if appropriate give notice of the agreement, determine whether the agreement is an ILUA and whether the conditions for registration have been met (see ss. 24BA to 24DL of the Act and the QGC judgment).
    - Section 199E of the Act provides that details of agreements on the Register (other than those details specified in s. 199B(1)) must be kept confidential by the Registrar if the parties to the agreement advise the Registrar in writing that they do not wish some or all of the details of the agreement to be made available to the public.

The Tribunal's submits that:

- if the Australian Government is committed to establishing an agreement review function, then
- given that the Registrar is already statutorily bound to receive and review applications for registration against prescribed criteria, assess them for registration, and maintain a register of agreements

it may be more efficient and appropriate to enshrine the 'best practice guidelines' within the Regulations, and require the Tribunal to review compliance with best practice as part of the existing 'testing' process.11

It is accepted that under current law the Tribunal has no role in reviewing, registering or taking other administrative action in relation to native title agreements other than ILUAs. Setting aside, for the present moment, the difficulties in defining what other types of agreements can be defined as native title agreements, the Tribunal submits that statutory amendment could require the Native Title Registrar to register and/or review other specified types of agreements as well as ILUAs.

Finally, the Tribunal notes that the review function as contemplated would add further complexity to the negotiation of agreements, and it is highly likely that this would in turn extend the duration of time required for negotiation of agreements, and in all probability (and regardless of which body undertakes the review) extend the time required for compliance checking and registration of agreements, and hence the transaction costs of negotiating and registering an agreement.

The Discussion Paper suggests that the review functions could include:

- advising and assisting parties to implement leading practice in native title agreements

The Tribunal supports appropriate initiatives that will support the implementation of leading practice in native title agreement-making. However, in the context of discussion of the review function, it is not clear from Discussion Paper or from the consultation process what form the advice or assistance would take.

The Tribunal notes that the management and implementation of agreements may also require the giving of advice and assistance to the parties.[12]

The Discussion Paper suggests that the review functions could include:

- research and communication to develop and promote leading practice in agreement-making

These services are already provided by the IBA Community Toolkit, AIATSIS, through the ATNS (http://www.atns.net.au/) and, on a limited discretionary basis, by the Tribunal (please refer to the Tribunal's response at B.2, below).

b) Are there other functions you would suggest?

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[11] The consequences of failing to meet best practice guidelines would still have to be clarified. It is likely that many low value mining agreements would not meet the 'leading practice guidelines'. It may be that some of the elements of 'leading practice' may not be relevant to, or feasible in, these lower value agreements.

[12] Programs such as the ones run by the Office of the Registrar of Indigenous Corporations (which provides some limited assistance to PBCs in improving governance and management of PBCs) help in this regard.

It is not clear whether the thousands of future act agreements that already exist would be reviewed as well. In other words, would there be a requirement to lodge existing, currently in force agreements with the review body?[13]

B.1.(iii) Consultation questions:

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

As the Native Title Registrar already conducts a review of some native title agreements, it would appear to be more effective and efficient for the Registrar to also review the agreements in the manner contemplated (please refer to the Tribunal's response on B.1(ii)(a) above).

B.1. (iv) Consultation questions:

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

In the Tribunal's view, it is highly unlikely that the proposed approach will 'capture' all of the agreements intended to be captured by the review process. This is because, in Western Australia for example, s. 31B agreements reached with the State are given effect by way of a 'simple' State Deed. As discussed in the Introduction above, the Deed does not include the substantive/commercial terms of the agreement, nor in many instances does the Deed make any reference to any ancillary agreements. While the Tribunal is aware that comprehensive ancillary agreements 'often underpin' the Deed, in the Tribunal's view it is likely that there would be significant resistance to external scrutiny of these agreements.

Similarly, the Tribunal anticipates that, in many instances, if ILUAs are to be subject to review then it is highly likely that the substantive commercial terms will be encapsulated in non-reviewable ancillary agreements.

While the Discussion Paper clearly states that '[i]f ancillary agreements form part of the agreement, these would require registration', it is not difficult to envisage legal drafting strategies that would sever the 'ancillary' agreements from the s. 31 agreement and/or ILUA.

In any case it is not clear why agreements are to be 'registered' if they are not being reviewed. Nor is it clear what the consequences will be if an agreement is not lodged for registration. Thus, it is difficult to comment on whether other agreements should also be registered. Further, it is not clear what criteria would be used to determine which registered agreements should be reviewed.

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

The purpose of the registration function is not clear. On the assumption that not all of the registered agreements are to be reviewed, it would appear that the purpose of registration is to

[13] Many of the issues which now arise in relation to existing payments made under native title agreements will not be addressed by this review function. They chiefly relate to governance and other issues not dealt with in the agreement.

enable the Government to collect basic agreement information.[14] If that is the case *and the proposal is to be implemented*, the Tribunal's view is that it should be applied as widely as practicable. The challenge for government will be frame legislation in a manner that identifies the nexus between native title and the agreement/structure. It is not clear how this could occur in any practical sense. For example, the Tribunal is aware of agreements that include clauses stipulating that the agreement survives regardless of whether the (current) native title party is found not to be a native title holder at some later stage. Would these agreements be classified as a native title agreement under the proposed legislation? Would such an agreement continue to be classified as a native title agreement in the event that the claimants were found not to hold native title? If so, on what basis?

B.1.(v) Consultation questions:

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

There seems to some confusion in the Discussion Paper between sustainable *agreements* and sustainable *benefits*. Some of the examples in this part of the Discussion Paper appear to relate to the former.

Sustainable *agreements* need to address the 'what ifs' that might arise during the implementation of the agreement. Refer, for example, to the article of Allbrook and Jebb (2004) in the list of resources at Attachment A. Agreements only need to be sustainable during the period within which they operate. Some agreements simply provide for a one-off payment in exchange for the giving of consent to the doing of the act. Depending upon the nature of the future act involved, that type of arrangement may be appropriate. For example, where an agreement involves the surrender of native title over an area of land or waters to be used for a marina development, there is generally no on-going relationship between the parties.

Experience to date (and projections of where native title might be held to exist) suggests that only a small percentage of native title agreements are likely to involve big mining developments. A range of possible benefits packages might provide on-going income to NTPs. These include regular payments based on the parameters listed in s. 33(1) of the Act. They could also include milestone payments and the issue of share options etc. In some cases they may involve the use of joint venture vehicles. Whether such matters are covered in an agreement depends upon the nature of the resource, the size of the mining company and the bargaining positions of the parties. These are not necessarily matters which can be mandated to be in all mining agreements.

Despite the fact that substantial payments may be made under an agreement, in the Tribunal's view, it is generally not the role of the miner (or the agreement) to ensure that the benefits provided to the NTP under the agreement are well managed and available for future generations. That is a matter for the NTP.

[14] It may be that Government also proposes to use the registered agreements and clauses in its tool kit. As discussed in section B.2, use of such materials in that way is not straightforward as confidentiality and copyright issues arise. Copyright in the individual clauses of the agreement may vest in different people.

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

Paradigms on what constitutes leading practice fluctuate according to the subject of each agreement, market conditions, and the best available research at a given point in time. To provide flexibility to adjust the standards or criteria against which agreements are to be assessed, it is suggested that *if* leading practice 'identifiers' are to be incorporated into legislation they should be placed in regulations (rather than in the Act).

However, it is not clear what applying a 'leading practice' ruler to agreements will actually achieve. In the Tribunal's view it would preferable to encourage parties to incorporate leading practice (as appropriate to the relevant agreement) in the agreement *before* it is executed.

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

Model terms are of limited utility. The 'boiler-plate' clauses of agreements are generally uncontroversial and reasonably widely available; and, clauses generating the greatest controversy are generally idiosyncratic to a particular agreement (or possibly a class of agreements), and therefore not amenable to model clauses.

B.1.(vi) Consultation questions:

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

In the Tribunal's view, parties to native title agreements must have a clear understanding of the framework within which they are operating. It is unreasonable to expect that parties could conduct a negotiation process while unsure of whether their agreement will be subject to review, and it would be unjust to review agreements without advance notice being given that the agreement will later be subject to review.[15]

More broadly, the Tribunal supports the notion that exploration-related agreements should not generally be subject to review. Similarly, the Tribunal submits that to avoid placing an unsustainable burden on small-medium sized proponents, there must be clear thresholds for triggering the review function. The thresholds may arise when a defined quantum of financial benefit is reached, and/or when an agreement is to run beyond a pre-defined term.

B.2 Leading practice agreements toolkit

Introduction

The Tribunal views the leading practice toolkit proposal as a positive initiative which has the potential to deliver useful information to assist with the design and implementation of native title agreements. Various resources already exist (e.g. research papers, toolkits, databases) that provide information on similar issues to those to be addressed in the Government's proposed toolkit, however there is a strong argument to be made for the development of a more comprehensive resource. As part of the Tribunal's response to the Government's Discussion Paper a list has been compiled of the resources which have been identified as being potentially

[15] This is particularly so if there are ramifications related to failing to meet the 'leading practice' standards.

relevant and which may assist in the development of a leading practice toolkit. Please refer to Attachment A.

The Tribunal's experience in the area of native title agreement-making arises from its assistance and mediation functions. The Tribunal and/or the Registrar may assist with agreement-making under the Act, principally pursuant to the following sections:

- Indigenous Land Use Agreements:
  - sections 24 BF, 24CF and 24 DG—Tribunal assistance to parties to negotiate an agreement.
  - sections 24BG(3), 24 CG(4) and 24DH(3)—Registrar's assistance to parties to prepare an application and accompanying documents.
  - sections 24CI(2) and 24DJ(2)—Tribunal assistance to negotiate withdrawal of an objection to a certified area agreement.
- Section 31(3) – which relates to requests to mediate where the Tribunal is the arbitral body in a future act arbitration process.
- Section 44B(4) – proponents can seek Tribunal assistance to negotiate a statutory access agreement.
- Section 86B – which relates to the referral of applications from the Federal Court to the Tribunal for the purpose of mediation. Whilst not prescribed, parties to such mediation processes usually envisage that some form of native title agreement would be a desirable outcome (see also sections 87 and 87A).
- Section 86F – which relates to parties to an application under the Act, reaching agreement about the settlement of the application, including agreement about matters other than native title. Under the provision, parties can also seek the assistance of the Tribunal in this regard.

Experience generally in this context tends to indicate that a greater level of access to information and assistance about native title agreement-making would assist agreement proponents. A particular potential benefit of the toolkit concept is the planned consolidation of both new and existing resources in a 'one-stop-shop', with the information regularly updated to ensure that developments in agreement-making practice are incorporated. One of the likely impediments to this concept, as identified in the Discussion Paper, is the multi-jurisdictional context of native title agreement-making in Australia. Similarly, because of the diversity and complexity of issues and circumstances affecting Indigenous communities, agreements tend to have a focus peculiar to the circumstances of the parties involved. This can significantly reduce the utility of 'off the shelf' clauses and agreement templates.

The Tribunal notes that efforts to publish agreement-making related information in the past have been impeded because of the difficulties involved with making material of this nature publicly available. The Tribunal previously attempted to implement an on-line public agreements database using actual agreements that had been 'sanitised' to avoid disclosing sensitive information. There were nevertheless confidentiality and copyright issues with publication of this kind of material. Parties declined to agree to their agreement being used, despite 'sanitisation'. One concern raised by NTPs was that even though 'sanitised', publishing agreements as

templates might prejudice their ability to negotiate on more advantageous terms in the future. These, amongst other issues, led to the de-commissioning of this on-line resource.

The Tribunal notes that, although the Agreements, Treaties and Negotiated Settlements Project (ATNS) has published or provided links to a number of agreements on their website (http://www.atns.net.au/), they represent a small percentage of the total number of agreements listed in that database. The published agreements are generally publically available on other websites. It may be that this kind of referral function is a more effective means of making this sort of precedent available on-line.

The Tribunal also notes that AIATSIS has almost completed an Agreement Precedents and Legal Resources Project that will provide a resource for Representative Aboriginal and Torres Strait Islander Bodies and Native Title Service Providers. It will not be available to non-native title parties. It is understood that content, in the form of 'sanitised' agreements, has been provided by representative bodies for that limited purpose.

It is difficult to develop template agreements which effectively balance the interests of all the parties to the agreement. Inevitably, as was the Tribunal's experience, one or more stakeholder groups expresses concern at the degree to which they perceive that the terms of a template or precedent might be advantageous or generous to one party over another.

For example, whilst many pastoralists see pastoral access agreements as essential, native title holders do not necessarily share that view. This type of agreement has the capacity to impose significant obligations not previously imposed upon NTPs such as a requirement to hold public liability insurance and to give notice when they wish to access the lease area. Native title parties may well consider that the existence of such templates or precedents represents an institutional view that these agreements are necessary.

It may be preferable to provide template clauses (e.g. options for dealing with specific topics) rather than template agreements as the former do not give rise to the same 'balance issues'.

Another factor that is likely to be critical to the successful development of a toolkit of this nature will be identification of the target audience. There are clear groupings of stakeholders in the area of native title agreement-making. It is assumed that targeting the toolkit to the needs of these groups will be the central strategy to generating stakeholder engagement and take-up. It follows that the sustainability of such a resource must to some degree be linked to the level of engagement.

A number of questions are posed by the Discussion Paper.

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

The following information and resources are difficult to obtain:

i. Planning
   - For non native title parties

- The identity of those persons/groups with native title interests in a relevant area or those with potential interests, in circumstances where there has not been a native title determination made or where a claimant application has not been filed.

- For native title and non native title parties
  - Timely and expert legal advice (especially in the case of native title parties). A specialist accreditation list may be useful.
  - Information about the range of agreement-making assistance available
  - Information about the range or varieties of agreements that might be suitable for particular circumstances
  - Access to case studies that example best practice agreements
  - Access to precedent clauses/agreement templates
  - Information about resources available to assist with implementation and sustainability of agreements
  - Information or advice about common requirements of the negotiation phase such as questions to consider e.g. whether to engage a facilitator, or whether a time limit is set for the negotiation?

ii. Negotiating

- A range of resources to facilitate negotiation – this includes facilitators (if required), logistical support, land tenure information and geospatial data etc. Land tenure information is particularly important because, no-matter what the variety of the agreement, the rights and the standing with respect to which each party negotiates are subject to the nature of the underlying tenure. Tenure may dictate what is permissible over the relevant land or waters.

iii. Implementation

- Information about the implementation and resourcing issues. For example, the toolkit could reference some important aspects of developing a management plan for implementation.[16] Some such important aspects might include review mechanisms, formal implementation arrangements and a dispute resolution process.
- Information about dispute resolution options. Implementation of agreements can give rise to unforeseen issues which may in turn result in disputes amongst parties. In some instances dispute resolution processes need to be more comprehensive than those commonly provided for within the terms of an agreement. Resources and information about alternative dispute resolution processes may assist to fill in 'implementation gaps' which parties have failed to provide for.

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

The toolkit should provide information about the different forms of agreement that might be negotiated (e.g. ILUA, private contract, memorandum of understanding (MOU)). The form of agreement may be determined by the subject matter, the purpose, or the effect of the agreement

[16] Taken from Allbrook and Jebb, *Implementation and Resourcing of Native Title and Related Agreements,* National Native Title Tribunal May 2004

on native title rights and interests. Consequently, it may be prudent to establish appropriate categories to assist proponents to decide on what kind of agreement to negotiate. See suggested categories of subject matter under the *content* heading below.

i. Process considerations

- The toolkit might set out a very general outline or suggested steps to negotiating an agreement (see above under each of these headings). An example of common phases as outlined in these questions are:
  - Planning
  - Negotiation
  - Implementation

  Note that the more detailed a suggested process becomes the more specific it might need to be to the particular jurisdiction to account regional requirements.
- The toolkit could respond to frequently asked questions about native title agreements
  - Why make agreements about native title? What are the benefits?
  - What type of agreements is best for particular purposes?
  - What are the drawbacks or risk issues associated with native title agreements?

ii. Content

- Common subject matter or content ideas for native title agreements
  - Future Act
  - Infrastructure
  - Cultural Heritage
  - Mining—exploration and development and productive mining
  - Pastoral—use and access
  - Local government
  - Management of national parks or conservation reserves
  - Community living areas
- Resources and useful information (perhaps organised under the planning, negotiation and implementation headings)
  - Contact details for Native Title Representative Bodies in each State
  - Register of native title legal practitioners, and also some indication of which ones are available to provide pro bono advice
  - List agreement-making references accessible via the NNTT website as produced by the NNTT
  - Links to other resources such as AIATSIS and the Agreements, Treaties and Negotiated Settlements Project (ATNS)

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

i. Obvious stakeholders would be native title parties and interested non-native title proponents. It is of critical importance in the development phase to identify those with the greatest need of the assistance that might be available via the toolkit and to ensure that they are identified as the target stakeholders or audience.

ii. Commonwealth, State and Local Government agencies and statutory authorities are commonly parties to native title agreements, frequently dealing with similar issues. They

may benefit from having access to template agreements and precedent clauses dealing with 'universal' access, land management type issues.

iii. Native Title Representative Body and other native title legal practitioners may also use the toolkit to assist in advising their clients or to develop their knowledge of the native title agreement-making context to benefit their professional development.

iv. Academics and researchers seeking to add to the toolkit resources by publishing their own work, or accessing for research purposes.

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

i. Implementation and review may not be phases regularly considered by the parties when planning an agreement or the negotiations. Devoting some attention to these issues in the toolkit helps to ensure more attention is paid to this important facet of sustainable agreements.

ii. Many agreements, if not the majority, are negotiated on a confidential basis making it difficult for parties to take advantage of precedents and templates. The toolkit could consolidate all references to publicly available information pertaining to the drafting of native title agreements.

iii. A focus on comprehensive and informed planning enhances the prospects of an agreement because it ensures that proponents think about resources and capacity.

iv. As outlined above, in light of difficulties and issues associated with capturing actual sanitised versions of whole agreements as precedents or templates, it might be more effective to provide model clauses aimed at addressing common topics. Dedicated portals or area access for either native title or non-native title interests might be another way of catering for the more specific needs of each stakeholder group.

C. Future Acts Reforms

C.1 Streamlined ILUA processes

Introduction

The process and requirements for registering an ILUAs are set out in Part 2, Division 3, Subdivisions B, C and D of the Act and the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the Regulations).

An application for the registration of an agreement as an ILUA must include, or be accompanied by, the documents and information specified by the Act and regulations. The Native Title Registrar can only include an agreement on the Register of ILUAs which is an ILUA[17] and meets all of the conditions for registration contained in the Act. The Registrar is responsible for

[17] See for example *Fesl* and *QGC*.

assessing each application for registration, notifying certain people and organisations of the application to register an agreement and considering any submissions opposing the registration of the agreement or any other potential barriers to registration that may arise during the notification period.

A flowchart depicting the various steps in the ILUA registration process and the indicative timeframes for registration is attached at Attachment B.

The statistics attached at Attachment C show the number and type of registered ILUAs nationally and by state as at 16 November 2010.

The registration statistics at Attachment D reflect, in particular, the numbers of agreements that have been placed on the ILUA register following consideration of the statutory requirements as at 30 September 2010.

The Map at Attachment E visualises the location as at 30 September 2010 of registered ILUAs and ILUAs being considered for registered (where notice has been given).

Proposals to reduce the ILUA registration period include:

- reducing the one month notification period for body corporate ILUAs and the three month notification period for area and alternative procedure ILUAs;
- implementing safeguards to protect against lengthy delays caused by vexatious or frivolous objections to ILUA registration;
- reducing the duplication of registration requirements by creating an alternative registration process when an ILUA has been certified by a Native Title Representative Body (NTRB);

A number of questions are posed in the Discussion Paper.

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

The Tribunal does not recommend changes that would shorten, and potentially compromise the integrity of registration process.

The consequences of registration of an ILUA can be significant. For native title parties, the registration of an ILUA can allow for the extinguishment by surrender or impairment of their native title rights and interests. The Act also operates to bind native title holders to a registered agreement in circumstances where they are not:

- parties to the agreement themselves (including future generations);
- did not necessarily authorise the making of the agreement;
- even aware that the agreement was made.[18]

[18] Section 24EA.

Consequently, the current process for registering ILUAs provides various checks and balances to ensure that the interests of all potential native title holders are considered prior to registration.[19] These checks and balances, which include the statutory notification of the agreement, take time to be properly discharged.

In addition it is the Tribunal's experience that many non-native title parties, particularly in the case of Area Agreements, appreciate the benefits obtained from having a robust registration process that is seen to provide a high level of assurance that they are dealing with the right people and that the native title party has appropriately understood and authorised the agreement.
An example of the appeal of the robust ILUA registration process is being seen by the Tribunal in Victoria, where parties continue to use ILUAs to settle matters under the Victorian Native Title Settlement Framework to provide practical benefits to parties.

While the time taken to register an ILUA can be frustrating to parties in some circumstances, it is important to remember that ILUAs are not the only tool available to resolve all issues in all cases—or necessarily the most suitable. ILUAs are particularly beneficial where a high level of confidence is required including ensuring that the future acts covered by the agreement are valid and the agreement binds all the NTPs.

Where such a robust process is *not* required, other less secure agreement options are available to resolve native title issues, for example:

- Pastoral use and access agreements available under Queensland legislation to encourage positive relationships between traditional owners and pastoralists in exchange for the grant of longer term leases. Whilst the tool remains available the pastoralists' peak body, AgForce, has chosen to recommend to its members that ILUAs provide a more appropriate, secure form of agreement. Negotiations between AgForce representatives, two of the State's Native Title Representative Bodies and the State are progressing with the aim of completing a template ILUA that each party can recommend to their constituents.
- Traditional Use Marine Resource Agreements (TUMRAs) as a means of securing agreements to regulate the traditional take of marine resources are seen by some as an appropriate tool, but their shortcomings are also clearly recognised (such as having a lack of security in the longer term). TUMRAs are modelled on the ILUA structure except for the robust authorisation and registration requirements of an ILUA.

The increasing number of registered ILUAs indicates, in the Tribunal's view, that there is a general acceptance amongst native title parties and practitioners that they provide a useful option to resolve a range of issues.

[19] It is clear that careful consideration was given to structuring the current provisions to ensure that appropriate safeguards were incorporated into the three schemes for registration of the three different types of agreement.

In the Tribunal's experience, the process of registering an ILUA is not ordinarily the component that takes the longest time. In most cases, the time taken to negotiate the agreement far exceeds the length of time taken to register the agreement. The reason that registration is sometimes seen as being the impediment is not because it is the longest stage, or the most difficult stage, of the process but because, either:

- parties have not allowed sufficient time for the authorisation/approval and subsequent registration process;[20] or
- the registration process is generally a period of little involvement for the parties after a period of serious engagement in negotiations.

If there is a need for a quicker, less secure and less formal agreement mechanism for some types of agreements then perhaps a new form of agreement, conceptually modelled on the Act's s. 31 agreement, is a possible alternative. This may be of value for purely relationship agreements or where the duration of the agreement and/or the quantum of benefits under the agreement are limited. In short, consideration may be given to providing for an additional form of registrable agreement that has a simplified registration process if certain defined conditions are met and if there is seen to be a genuine need.

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?

The Tribunal considers that there would be little benefit and some significant disadvantages in altering the registration process in circumstances when an ILUA has been certified by a NTRB.
The registration of a certified ILUA involves no duplication of the work of the Registrar and the NTRB. Where an application to register an ILUA has been certified by an NTRB, the Registrar does not generally 'look behind' the certificate provided by the NTRB and does not need to otherwise be independently satisfied that the agreement has been properly authorised unless or until the Registrar receives a valid objection during the notification period.

It is also important to bear in mind that NTRBs that certify ILUAs are only certifying that two of the registration requirements have been addressed, namely that:

- all reasonable steps have been taken to identify the persons who hold or may hold native title, and
- those persons, so identified, have authorised the making of the agreement.[21]

NTRBs are *not* certifying that the other application and registration conditions have been met, nor do they currently assess whether the agreement is an ILUA which is capable of registration.[22] The Registrar is still required to assess the agreement against these requirements.

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[20] There may be delays in the registration process but they generally arise because there are issues with the application or the agreement lodged by the parties or a person, unhappy with the agreement, lodges an objection to its registration or takes other steps to delay or prevent registration of the agreement.
[21] Section 203BE(5).
[22] *Fesl*, *QGC*, *Kemp* and *Murray*.

If certification of an agreement is to carry some greater weight than it does currently, this would increase the risks for NTRBs that their certification will be reviewed or challenged and potentially expose them to further litigation and the costs associated with that.[23] The Tribunal notes that some NTRBs and service providers are already reluctant to exercise their certification function for this reason. Increasing the significance of certification may in fact lead to even more NTRBs deciding not to certify applications.

In regard to ILUA registrations, one or more objections have been received in response to 58 (12%) of 489 ILUA applications, but only two of those applications were ultimately not accepted for registration as a result of a valid objection. It is interesting to note that both were certified agreements (see Attachment D).

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?

Please refer to the comment regarding C.1(i)(a) above.

Feedback provided to the Tribunal from people who hold or may hold native title in relation to proposed ILUA areas indicates that the current notification period is not too lengthy.

As a result of the potentially significant consequences of registration for people's native title rights, it is important that they are given enough time:

- to receive notice of the ILUA,
- to consider whether they support the registration of the agreement, and
- to take steps to oppose the registration of the agreement if they think that is the appropriate course of action.

In most cases people are not making these decisions or taking these actions in isolation from others. Sufficient time needs to be allowed for people to come together and discuss the agreement and their response to it. In circumstances where the people asserting to hold native title are widely dispersed or do not meet regularly, more time may be needed than in circumstances where they are co-located or living in close proximity to each other.

It is also worth noting that postal deliveries in remote areas of Australia[24] are often much slower than in the more densely populated areas and allowing sufficient time for notice to be received in these areas is important. Additionally, it is noted that other disruptions, such as inclement weather conditions in remote or tropical regions, affect notification periods from time to time. Hence allowing a three month response time to notify dispersed, remote and sometimes not well defined groups of Traditional Owners in our view is not excessive.

In summary, because of the binding nature of ILUAs on the whole group of present and future potential native title holders, the wide range of future acts that can be done validly under an

[23] There may also be issues with conflict of interest as the NTRB may represent one NTP and another NTP may also claim rights and interests in the area. If the latter group are also *persons who may hold native title* they would also have to authorise the making of the agreement.

[24] For example, when the Native Title Registrar gives notice under s. 24CH(1)(a)(v) of the Act.

ILUA including the surrender of native title which is intended to extinguish native title rights and interests, the long term relationships between co-existing property and proprietary rights that can be governed by ILUAs, and the significant benefits that can arise under the terms of ILUAs, the Tribunal does *not* recommend shortening the statutory notification period of three months. Little gain would be achieved in the total period ordinarily taken to negotiate, authorise and register ILUAs by shortening the notification period, but the legal and reputational risk would increase disproportionately.

If there is seen to be a genuine need for a less robust registration process then an additional, different form of agreement is recommended. (Please refer to the comment regarding C.1(i)(a) above.)

Another option that could be considered is for a legislative amendment to mandate that the Registrar make a preliminary compliance decision prior to notification of an ILUA. The Registrar would have the ability to decide not to notify an application to register an ILUA in the event it is likely that the ILUA will fail registration. This would have the effect of identifying at an early stage each application that does not meet the registration requirements and dispensing with it quickly instead of spending time and money notifying an agreement only to decide post-notification that it is incapable of being registered. Parties would not be disadvantaged by this approach as they would have an opportunity to re-lodge their application once they had remedied any defects with it.

Until recently, the Registrar's practice had been to make a preliminary compliance decision[25] prior to notifying applications as in the Registrar's view there were sound public policy reasons not to spend public money giving notice of an agreement that was not capable of being accepted for registration post-notification. However, since the decision of Reeves J in *QGC,* this practice has ceased as his Honour took the view that the Act only allowed for a decision as to whether an agreement complied with the requirements of ss. 24CB to 24CE as part of the final registration decision.

(ii) Increase information included on the Register of Indigenous land Use Agreements:

The Discussion Paper identifies some support for increased transparency of agreement-making. One way to increase transparency is to include more information on the public area of the Register. The following possible benefits and disadvantages were identified:

Possible benefits:

- increased accountability in agreement-making;
- improved quality of agreements.

Possible disadvantages:

- possible reluctance or delay in registering agreements;
- focus on form rather than substance.

[25] This is not a hypothetical issue. Some agreements may not be ILUAs and therefore cannot be registered on the Register of ILUAs (see *Fesl*). It would be a waste of public money to give notice of an agreement despite being of the view that it could never be registered because it is not an ILUA as defined by the Act.

The Discussion Paper poses a number of questions

a) Would there be benefit in broadening the information included on the Register?[26]

In practice, there would be little benefit in mandating that more information be included on the Register of Indigenous Land Use Agreements. Those who work and provide advice in the field of native title agreements have developed their own templates and/or networks to obtain template clauses and agreements. Agreements, by their nature, contain trade-offs and gains. Parties who wish to keep agreements confidential are usually concerned about criticism or peer pressure being applied in response to the points perceived to have been 'traded away' to secure agreements, or do not wish to divulge commercially sensitive material. Forcing parties to divulge more of their information, even if it is only points of political sensitivities, will make the agreement-making process less attractive, for little or no gain.

Further, publication of more agreement information against the wishes of the parties may encourage the parties to develop a two agreement approach to agreement-making as has happened with s. 31 agreements. The ILUA then would include the consent to the doing of the future act and possibly little else. The substantive agreement would not be registered. (Please refer to the comments in the Introduction and regarding B.1(iv)(a) above).

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?

It is unlikely that there is anything of substance that would significantly assist.[27] This matter is probably better dealt with by developing the leading practice agreement toolkit. (Please refer comments regarding B2 above.) In the meantime, the Agreements, Treaties and Negotiated Settlements database provides access to agreements where parties have agreed to make them publicly available and is a useful resource.

(iii) Streamline the registration process for minor ILUA amendments

The Discussion Paper raises the question whether there should be a streamlined registration process for registering amended agreements where a currently registered ILUA is amended in a minor way. It identifies a number of possible benefits, and disadvantages as follows:

Possible benefits:

- enhancing flexibility of ILUAs to enable parties to respond to changing circumstances throughout the life of the agreement and promote the use of review mechanisms;
- minimising costs and time involved in registration processes.

Possible disadvantages:

- less scrutiny over minor changes to ILUAs including reduced opportunities to object;
- 'scope creep' as parties seek to include more extensive amendments into new procedure.

[26] Noting that the Registrar can already enter any information on the Register about the agreement that the Registrar considers appropriate (s. 199B(2)). Section 199E requires that, except for the information specified in s. 199B(1), the Registrar must keep the other information on the Register confidential if requested to do so by the parties.

[27] While it is not part of the subjects covered by the Discussion Paper, it would be desirable if the Act required any surrender areas to be identified in the Register.

A number of questions are posed in the Discussion Paper.

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

It is not clear that minor amendments to ILUAs require the amended agreement to be registered. Please refer to the Government's Response dated November 2005 to the Nineteenth Report: Second Interim Report for the s. 206(d) Inquiry—Indigenous Land Use Agreements by the Native Title and the Aboriginal and Torres Strait Islander Land Fund Committee.[28] It makes useful comments concerning amendments to ILUAs at [70] to [75] and addresses this point.

If a streamlined process is to be developed, an important requirement would be to ensure that no changes are permitted that are perceived to change the scope or nature of the agreement without an appropriate additional authorisation process. Further, changes to an agreement which alter the information that appears in the public notice should not be allowed to be made by way of the streamlined process. These changes include increasing the area covered by the agreement and adding consent to the doing of new future acts not previously covered by the existing ILUA.

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

If the scope and nature of the agreement is not changed without authorisation, the advantage is to ensure the Register (to the extent it discloses the minor amendment) is up-to-date and more accurately reflects the current state of affairs. For example, searches that are requested in regard to a particular real property description may produce a nil result because there is a new property description reference arising from a subdivision of the area covered by the real property description referred to in the ILUA. There may also be lease renewals and amalgamations that give rise to new property descriptions without impacting the validity of the agreement. Recording these changes would enhance the ongoing reliability and utility of the Register.

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

Any changes of a minor nature, not requiring re-negotiation or re-authorisation or re-approval, should only be of a technical nature (as suggested in C.1(iii)(d) below) that enhances the currency of the information on the Register. It should not change the terms of the agreement without the parties clearly indicating that they approve the change. Any substantive potential changes that are envisaged at the time the agreement is made should be approved under the terms of the agreement.

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

Minor amendments could include:

- updating legal property descriptors in the ILUA, for example, to record new descriptors resulting from tenure changes envisaged by the agreement. (Note: such amendments

[28] http://www.aph.gov.au/Senate/committee/ntlf_ctte/completed_inquiries/1999-02/report_19/index.htm.

could be made provided they do not change the geographic area covered by the ILUA in practice.) Such updates would facilitate searches without changing the benefits of the agreement

- updating the legal description identifying the party, if appropriate, whether individuals or companies (e.g. where parties have assumed or transferred responsibility under the agreement)[29] or
- updating the legal description identifying contact details (can be changed now).

C.2 Clarifying good faith requirements

Introduction

According to the Discussion Paper, the Full Federal Court's decision in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 has raised concerns that an application may be made to an arbitral body such as the Tribunal for 'a determination that a particular future act proceed, even if there have been no substantive negotiations about the doing of that act'. As a result of those concerns, the Australian Government has decided to amend the Act in order to 'provide clarification on what negotiation in good faith entails' and to 'encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions'. The amendments are said to be intended to achieve three objectives:

- improve the benefits from negotiations 'by encouraging more meaningful and transparent negotiations between parties' (the 'benefits' objective)
- improve the efficiency of negotiations 'by providing clear guidance on what is needed to satisfy' the good faith requirement' (the 'efficiency' objective), and
- facilitate 'greater consideration of the ability and requirements of all parties to engage in the negotiation process' (the 'engagement' objective).

After setting out these objectives, the Discussion Paper poses three questions, each of which is set out below. An extract from the Tribunal's Guide to future act decisions made under the right to negotiate scheme is attached (see Attachment F). It sets out the approach taken but the Tribunal and the Federal Court to the interpretation of s. 31(1)(b) of the Act both as originally enacted and as subsequently amended. Where appropriate, reference will be made to the Guide in these submissions.

The Full Court of the Federal Court decision in *FMG v Cox*

It could be said that the decision in *FMG v Cox* was not, per se, about what it means to negotiate in good faith. Rather, it dealt with what it means to negotiate in good faith *with a view to obtaining* the native title parties agreement to the doing of *a particular future act*, with or without conditions.

In *FMG v Cox*, FMG Pilbara Pty Ltd appealed under s. 169 of the Act from the Tribunal's decision in *Cox/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* [2008] NNTTA 90 (*Cox/WGAC/WA/FMG*) where Deputy President Sosso had found that it had not satisfied the requirement found in s. 31(1)(b) of the Act. FMG Pilbara Pty Ltd had negotiated with a view to entering into a comprehensive land access agreement (LAA) with each of two native

[29] Some of these examples may not involve amendment of the ILUA but rather involve an assignment of interest in the agreement.

title parties in relation to its interests in the Pilbara region of Western Australia. According to the Full Court:

> Under each of the draft LAAs, FMG [Pilbara Pty Ltd] negotiated with ... [each native title party] on a 'whole of claim' basis. The initial draft LAAs ... were in similar terms. Each provided that in return for compensation from FMG, the native title parties would agree to future activities that might be conducted. Those acts could not be specifically identified in advance. It was clear however and common ground that the breadth of the description of projects in each draft LAA as well as the geographic location, embraced the Proposed Tenement [a mining lease]—at [5].

In summary, the main findings of the Full Court (Spender, Sundberg and McKerracher JJ) were that:

- There is no requirement in s. 31(1)(b) for negotiations to have reached a certain stage before an application for a future act determination can be made to the arbitral body;
- The Tribunal's interpretation that this was required put 'a gloss on the statutory provisions' and placed 'a fetter on a negotiation party's entitlement to make an application under s 35 in order to obtain an arbitral determination'
- There could only have been a conclusion of lack of good faith within the meaning of s. 31(1)(b) in this case if the fact that the negotiations had not passed an 'embryonic' stage was because of some 'breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct'
- Paragraph 31(1)(b) requires no more that that the grantee party negotiate in good faith 'during the six month period with a view to reaching the ... agreement' with the native title parties that the future act may be done, with or without conditions to be complied with by any of the parties
- Whole of claim or project negotiations are appropriate but to require that the grantee party 'revert to negotiate specifically' about the future act in question before applying to the Tribunal for a future act determination if those negotiations are unsuccessful is to 'impose an additional requirement' which is not found in s. 31(1)(b)
- Section 39 provides some guidance 'as to the matters ... that may reasonably be expected to form part of the negotiations but the Act does not prescribe the 'manner in which they are dealt with ... apart from a good faith obligation with a view to obtaining agreement'
- Providing what is 'discussed and proposed' is 'conducted in good faith' and 'with a view to obtaining agreement about the doing of the future act, then the requirement under s 31(1)(b) will be satisfied',
- To negotiate in good faith for six month or more in order to reach an indigenous land use agreement, where those negotiations encompass the future act in question, 'can only be conduct within the requirements of s 31(1)(b)'— held at [23], [27], [28], [35], [38], [42], referring at [35] to Lee J in Brownley v Western *Australia* (1999) 95 FCR 152 at [24], [25].

Elements of this decision echo the findings of Nicholson J in *Strickland v Western Australia* (1998) 85 FCR 303 at 322 that:

- the obligation under s. 31(1)(b) cannot be interpreted as an obligation to continue negotiations until some particular point negotiations has been reached;
- the consequence of the statutory right to lodge an application under s. 35 is that the act of lodgement cannot be relied upon to establish bad faith in the negotiating process.

At the heart of the issues arising from these decisions is what it means in s. 31(1)(b) when it says that the parties must:

> [N]egotiate in good faith *with a view to obtaining* the agreement of each of the native title parties to ... the doing of *the act* ... or ... the doing of the act subject to conditions to be complied with by any of the parties (emphasis added).

The Full Court's decision is that there is no requirement to negotiate specifically about the particular future act if the proposal to do that act is embraced in wider negotiations (even in a minor or general way), provided the relevant party acts in good faith (as that term has come to be understood under the Act) in those negotiations during the requisite six-month period.

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

Codifying good faith indicia

One of the options mentioned in relation to this question during the public consultations Tribunal staff attended in Perth on 4 November 2010, was an amendment to insert a provision drafted along the lines of s. 228 of the *Fair Work Act 2009* (Cwlth) (FWA). However, most of the relevant matters addressed by that provision are covered by the indicia the Tribunal applies when determining whether or not negotiation in good faith has taken place. These indicia emerged initially from the Tribunal's reasons for decision in *Western Australia v Taylor* (1996) 134 FLR 211. They are commonly referred to as the Njamal indicia. Subsequent to the amendments made to s. 31 by the *Native Title Amendment Act 1998* (Cwlth), these indicia were modified to take account of the fact that the obligation found in s. 31(1)(b) is now cast upon all of the negotiation parties, not just the government party as had previously been the case. A summary of both the indicia applied by the Tribunal and the relevant case law can be found at Attachment F.

In the Tribunal's submission, codifying the indicia going to show good faith may serve little purpose. As Member O'Dea noted in *FMG Pilbara/Cheedy/Western Australia* [2009] NNTTA 38 at [71], determining whether or not parties have negotiated in good faith during the prescribed six-month period 'is not a formulaic exercise'. In any particular case, the arbitral body must assess 'whether the parties have behaved reasonably and fairly to put their mind to reach an accord over the doing of the act'. Further, the indicia applied by the Tribunal are not closed. They may be developed in an appropriate case. Any such developments could be informed by developments in other areas of law such as workplace relations but would be made in a native title context.

In any case, these indicia were not in issue in *FMG v Cox*. Any codification of them would not address the fundamental issue, which is: "What is the 'good faith' obligation' intended to achieve'" — see *FMG v Cox* at [27].

However, if it is decided to codify the indicia, then it is submitted that:

- the indicia identified to date by the Tribunal should form the basis of any amendment to the Act, rather than s. 228 of the FWA, and

- a provision similar to s. 39(1)(f) should be included to ensure that the arbitral body has a discretion to take into account any other matter it considers relevant.

Clarification of the effect of s. 31(2)
It would be helpful if the intent behind s. 31(2), including its interaction with ss. 33 and 39, was clarified.

When the *Native Title Amendment Act 1998* (Cwlth) commenced, in addition to casting the obligation found in s. 31(1)(b) on all of the negotiation parties, a new s 31(2) was inserted. It provides that:

> *Negotiation in good faith*
>
> (2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.

The significance of s. 31(2) was not considered in *FMG v Cox*. (Indeed, the operation of this provision has not been explored judicially.) It apparently relieves the negotiation parties from having to negotiate about any matter unrelated to the effect of the proposed future act on the native title parties' registered native title rights and interests. This seems to be at odds with some of the objectives identified in the Discussion Paper noted above.

The Explanatory Memorandum to the Native Title Amendment Bill 1997 at [20.31] stated that what became s. 31(2) was intended to ensure 'that the negotiations should focus on relevant matters'. The Tribunal is unable to locate any further explanation as to why it was inserted in any of the other extrinsic materials, such as the second reading speech to the Bill.

It may be that s. 31(2) was inserted to clarify any doubt as to the scope of the obligation under s. 31(1)(b). For example, in *Brownley* at [21] to [25], Lee J said (among other things) that:

> A government exercising sovereign power and a claimant to native title are not on equal terms and, under s 31, they are not engaged in making a contract for purposes of trade or commerce. The negotiation under s 31 is directed to obtaining an accord between a government and a native title claimant for the exercise of a power of a government in respect of the use of land in a manner that respects the connection with that land of indigenous people.
>
> It is a moral conception involving a moral duty owed by a government party to a registered native title claimant: see *Maclay v Dixon* [1944] 1 All ER 22. The moral duty of the government party is to properly engage in a process of negotiation with a native title claimant. The obligation placed on a government by the Act may be a statutory recognition of a duty already understood under the general law. As Lamer CJ stated in *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1123-1124, when referring to the prospect of the State of British Columbia undertaking negotiations with indigenous people over their claim to Aboriginal title and rights exercisable thereunder:
>
> > " ... the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *R v Vanderpeet* [1996] 2 SCR 507 at para 31, to be a basic purpose of

> s 35(1) [of the *Constitution Act 1982* (Can)] — "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay."
>
> The duty to negotiate in good faith imposed by s 31 incorporates, at least, some part of the duty as understood by the general law, namely an obligation to act honestly, with no ulterior motive or purpose, albeit that the negotiation may be conducted negligently or incompetently... . Having regard to the purpose of the Act, the concept applied by the legal system of the Netherlands in contract law would appear to be appropriate so that a government would allow its conduct to be guided by the legitimate interests of a native title claimant ... .
>
> The intention of Parliament is that a government party engage in negotiation with a native title claimant with an open mind, willingness to listen, and willingness to compromise, to reach an agreement under which the native title claimant will agree to government doing the act it proposes. As was acknowledged by the Tribunal, the terms of s 39 of the Act indicate the scope of matters in respect of which negotiations may be conducted. Section 39 alerts a government party to the various interests in respect of which a native title claimant may seek to reach accord with government for the doing of a proposed act in a manner that respects those interests.
>
> If a government party ignores the requirement of the Act and seeks to exercise power without considering, and responding to, any submissions put to it by a native title claimant, relevant to the matters referred to in s 39, it will not be negotiating in good faith. Similarly, if a State purports to engage in negotiation, but, in truth, its conduct serves an ulterior and undisclosed purpose antithetical to the making of an agreement with a native title claimant, it will not be negotiating in good faith. Delay, obfuscation, intransigence, and pettifoggery would be indicia of such conduct.

As noted, after the Act was amended in 1998, the obligation found in s. 31(1)(b) fell on all of the negotiation parties, and not just the government party. Parliament might have wanted to ensure that those parties could rely on s. 31(2) to identify the 'relevant matters' for the negotiations. In practice, in relation to exploration and mining future acts, it is the miner or explorer respectively that usually negotiate with the native title party, not the government party.

The Tribunal has found that s. 31(2) limits the scope of the negotiations that must be conducted as a precondition to the making of an application to the Tribunal pursuant to s. 35 in relation to the effect of the future act on the native title parties' registered native title rights and interests. However, the Tribunal takes the view that this includes the matters related to those rights and interest found in s. 39(1)(a). This is because construing s. 31(2) narrowly might lead to finding that the obligation to negotiate in good faith was only related to s. 39(1)(a)(i), which specifically refers to the effect of the act on the enjoyment of registered native title rights and interests: see *The Griffin Coal Mining Co Pty Ltd v Western Australia* (2005) 196 FLR 319; [2005] NNTTA 100 (*Griffin Coal*) at [31], [34] and *Western Australia/West Australian Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/ Leslie Hayes, Glenys Hayes, Judy Hayes, John Ard, Douglas Fazeldean, Valerie Ashburton, Laura Hicks and Albert Hayes on behalf of the Thalanyji People* [2001] NNTTA 18 at [18] to [19].

A related issue arises as to whether s. 31(1)(b) encompasses negotiations about compensation and other benefits. The Tribunal takes the view that this is integral to the obligation to negotiate in good faith because it can be directly related to the effect of the future act on registered native title rights and interests.

In *Cox/WGAC/WA/FMG*, one of the native title parties argued that FMG Pilbara Pty Ltd had not negotiated in good faith because the financial package it proposed in the LAA negotiations did not contain a component based upon the amount of profits made, any income derived or any things produced, a reference to s. 33(1) of the Act. This argument was not pursued and, in any case, the Tribunal rejected it. However, the question remains as to whether the matters referred to in s. 33(1) are related to the effect of the act on the registered native title rights and interests of the native title party for the purposes of s. 31(2). If they are not, then the terms of s. 31(2) indicate that a failure to negotiate in good faith about those matters could not constitute a failure to negotiate as required by s. 31(1)(b).

Section 33(1), which is headed 'Negotiations to include certain things', provides that:

> *Profits, income etc.*
> (1) Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:
> (a) the amount of profits made, or
> (b) any income derived; or
> (c) any things produced;
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.
>
> *Existing rights, interests and use*
> (2) Without limiting the scope of any negotiations, the nature and extent of the following may be taken into account:
> (a) existing non-native title rights and interests in relation to the land or waters concerned;
> (b) existing use of the land or waters concerned by persons other than native title parties;
> (c) the practical effect of the exercise of those existing rights and interests, and that existing use, on the exercise of any native title rights and interests in relation to the land or waters concerned.

In *Western Australia v Dimer* (2000) 163 FLR 426; [2000] NNTTA 290 (*Dimer*) at [126], determined after s. 31(2) had been inserted, Member Lane said:

> The question of negotiation about compensation under the right to negotiate regime was considered by Lee J in *Brownley* paras 48-57. Although that decision considered the obligation of the government party, it is relevant to the present case. Section 33 of the Act plainly contemplates that the parties may include compensation and royalty issues in their negotiations. Paraphrasing what Lee J said in *Brownley* at para 55, the grantee party may not be obliged to reach agreement, but it is required to receive and consider, a proposal from the native title party in a manner that has regard to the particular facts of the case and to the merits of the proposal. Bearing in mind the fact that it is the responsibility of the government party ultimately to pay compensation, it is nevertheless open to the government to permit the native title party and grantee party to negotiate about monetary payments in consideration for the grant of the tenement.

The Tribunal found the grantee party's behaviour in relation to compensation negotiations was a factor in its decision that, overall, the grantee party had not negotiated in good faith. However, as the Tribunal pointed out in *South Blackwater Coal Ltd v Queensland* (2001) 165 FLR 232; [2001] NNTTA 23 (*South Blackwater*) at [35], whether the obligation has been satisfied will be highly fact

specific. This is apparent from the qualified terms in which s. 33(1) is expressed, i.e. 'Without limiting the scope of any negotiations, *they may, if relevant, include the possibility* of including a condition that has the effect ... ' (emphasis added). In *Griffin Coal* at [44], after noting that neither of these decisions specifically considered whether the insertion of s 31(2) affected the authority of *Brownley*, Deputy President Sumner found that it had not because:

> S[ubs]ection 33(1) payments are a mechanism whereby compensation for the effect of a future act on native title rights and interests may be paid. Compensation for the effect of a mining tenement on native title rights and interests itself is not assessed by reference to royalty-type payments but in the manner referred to above under Part 2, Division 5 of the Act. However, if a native title party wishes to request the grantee party to satisfy any obligation to pay compensation by s 33(1) payments then it can make a proposal to this effect and the grantee party would be obliged to consider it in the manner explained in *Brownley*. To satisfy the jurisdictional precondition of negotiation in good faith there is no obligation at large on the grantee party to negotiate in good faith about s 33(1) payments but only insofar as they are seen as a means of satisfying the obligation to pay compensation for the effect of the future act on native title. Such negotiations are not excluded by s 31(2).

It is submitted that the Act should be amended to clarify the effect of s. 31(2).

Question (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?

During the public consultations in Perth, the Tribunal sought clarification as to what was meant by 'substantive agreement'. This is because, if there was a 'substantive agreement', then it would seem to be an agreement for the purposes of s. 31(1)(b) and so an application under s. 35 would be unlikely, other than one made for technical purposes or to resolve some limited issues. The response was that the question was really directed at whether there would be a benefit in a statutory requirement that parties must conduct 'substantive negotiations' before an application is made to the arbitral body for a future act determination.

In the light of the fact that Question (c) concerns whether there should be a requirement that parties must negotiate about the particular future act in question, Question (b) is taken to be addressing a proposal to amend to require more than, say, negotiations leading to a negotiation protocol. In other words, to discharge the obligation under s. 31(1)(b), the negotiations would have to address substantive issues, whether through negotiations about each specific future act or a 'whole of claim' or 'whole of project' agreement that embraces those future acts.

There may be merit in an amendment requiring negotiation parties to address substantive issues. In particular, there may be merit in clarifying what is meant by negotiating 'with a view to obtaining' the native title parties' agreement. As Hayne J noted in hearing an application for special leave to appeal against the judgment in *FMG v Cox* brought by one of the native title parties:

> It perhaps should be said ... that the further you are away in your negotiating stance from the terms of an agreement, the closer may be the scrutiny that has to be applied to what is

> happening. That is a question of fact in a particular case ... but when you are talking about the size of paper on which the agreement might be recorded, rather than what might be recorded, there might be some question about whether the negotiation is "with a view to": *Cox v FMG Pilbara Pty Ltd* [2009] HCATrans 277.

However, in the absence of a specific proposal for amendment, it is difficult to comment further on such a proposal other than to note that the Tribunal agrees with Hayne J.

Question (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?

There are advantages and disadvantages to this proposal. If a large project is under consideration and it comprises multiple future acts, then comprehensive negotiations may result in better outcomes for all parties. The difficulty for the native title party is how to effectively manage the process so as to take best advantage of the wider negotiations while keeping a weather eye on future acts involved in those discussion that are subject to a notice under s. 29 of the Act. An amendment as contemplated may be attractive to the native title parties (and possibly other parties), but only if it does not take away the opportunity for broader negotiations.

On this point, the issue that arose in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141; [2009] FCAFC 49 (*FMG v Cox)* was that FMG Pilbara Pty Ltd made application to the Tribunal for a future act determination in relation to a proposed mining lease without drawing it to the native title parties' attention to the same extent as it had in relation to other tenements it had identified as priority tenements. If this is seen to be an issue, then an amendment could be made so that the arbitral body does not have power to make a future act determination in such a case unless the native title party had been given adequate notice that the grantee party intended to apply to the arbitral body in relation to a future act otherwise covered by broader negotiations. Alternatively, the Act could provide that, if it is agreed that the particular future act is to be encompassed by negotiations for a broader agreement, then there must also be an agreement that the native title party is notified and given a reasonable opportunity to negotiate in relation to that future act before any application for a future act determination is made to the arbitral body.

However, as with Question (b), in the absence of a specific proposal to amend, it is not possible for the Tribunal to comment further other than to say that it could be made clear that negotiations must address the particular future act even if that occur in the context of broader negotiations,.

Conclusion

The Tribunal supports, in principle, many of the proposals identified in the Discussion Paper (please refer to the Summary).

The Tribunal would appreciate the opportunity to comment on any draft legislation prepared to address the policy issues identified in the Discussion Paper. It stands ready to assist in further refinement of the mechanisms by which the relevant policies are implemented.

If you have any questions in relation to these submissions, please contact Dr Stephen Sparkes on 08-9425 1046 or at stephen.sparkes@nntt.gov.au.