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DISCUSSION PAPER

Leading practice agreements: maximising outcomes from native title benefits

July 2010

Consultation and feedback:

The Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs invite you to make comments on the measures outlined in this discussion paper. If you would like to make a submission, please forward it **no later than 5pm on Thursday, 5 August 2010** to:

The First Assistant Secretary
Social Inclusion Division
Attorney-General's Department
3 – 5 National Circuit
BARTON ACT 2600

And/or email your submission to native.title@ag.gov.au or send your submission by facsimile to (02) 6141 4928.

Submissions received will also be provided to other relevant Commonwealth departments.

No submissions received after the above closing date will be considered.

This paper is available at: www.ag.gov.au and www.fahcsia.gov.au.

Confidentiality

All submissions and the names of persons or organisations who make a submission will be treated as public, and may be published on the Attorney-General Department's and/or FaHCSIA's website, unless the author clearly indicates to the contrary.

A REQUEST MADE UNDER THE *FREEDOM OF INFORMATION ACT 1982* FOR ACCESS TO A SUBMISSION MARKED CONFIDENTIAL WILL BE DETERMINED IN ACCORDANCE WITH THAT ACT.

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INTRODUCTION

The Government's vision for native title

The *Native Title Act 1993* (the Act) came into operation on 1 January 1994. Its main purpose is to recognise and protect native title. The Act provides for the recognition of pre-existing rights to land and waters, the doing of acts that impact native title and the resolution of claims for compensation.

The Government is committed to improving the native title system. It recognises that native title is an important property right that should be recognised and protected. Native title, particularly agreement-making, can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians. Native title negotiations can also provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships.

The Government is consulting, through this discussion paper, with stakeholders directly involved in native title on a potential package of reforms to improve native title agreement-making. The Government also welcomes the views of other interested parties and the general public.

Why is the Government considering these measures?

Native title agreements provide a valuable opportunity to establish and continue a sound relationship between Indigenous people, industry and governments. Native title agreement-making is also an ongoing feature of economic and social relations in Australia.

This discussion paper is prompted by the growing number, and increasing financial value and importance of native title payments to Aboriginal and Torres Strait Islander groups. While some determinations of native title can be of limited economic value (for example, non-exclusive rights to hunt or camp), native title agreements can be wide ranging and include substantial and ongoing financial and other benefits. Benefits can include freehold or other land title, training, employment and business opportunities, including in regional and remote areas and in a range of sectors, such as mining, agriculture, tourism, aquaculture and cultural heritage. A growing number of individual agreements deliver many millions of dollars each year to individual native title groups. Others have a lower financial value but over time have the potential to make a real impact on the lives of native title beneficiaries.

Native title agreements will often impact on the native title rights of both existing and future native title holders. Particularly where this impact is coupled with significant benefits, agreements must look to ensure benefits flow not only to the current generation, but to those in the future.

Agreements should be sustainable, both in terms of workability and providing for native title holders into the future. Sustainability means ensuring that the interests of all current and future native title holders are represented and protected in decision-making. It means ensuring that native title holders understand agreements under which they are entitled to benefits, and are provided with the information required to understand and make informed decisions about how those benefits are deployed. It means incorporating mechanisms to ensure that benefits received are adequately preserved. Most importantly, it means ensuring that benefits are deployed for the benefit of both current and future generations.

While the Act makes provision for native title agreements, the existing rules applying to them are minimal. While some Indigenous Land Use Agreements (ILUAs) require registration by the National Native Title Tribunal (NNTT), this process focuses on assessing objections to an ILUA

from other potential native title holders, rather than the content of the agreement. This contrasts with the comprehensive provision under the Act for the claims process. While the Government is aware there are some high quality and beneficial native title agreements, there is a pressing need for improved transparency and to ensure leading practice agreements.

Indigenous groups and Industry regularly bring concerns around particular negotiations or agreements to the Commonwealth's attention. Stakeholders have raised concerns about agreements that have resulted in poor outcomes, such as benefits being dispersed in ways that achieve limited outcomes for native title holders, including funds being dissipated to expert advisers and being placed at risk by poor governance and trust management practices. Poor agreements and governance arrangements risk impairing the capacity of native title groups to deliver financial security and independence for their community, now and into the future. Native title agreements are commercial agreements, however there is a need to ensure that appropriate arrangements are in place to maximise their sustainability.

Governments currently play a role in markets to prohibit unscrupulous behaviour, to protect consumers and to ensure appropriate standards of behaviour and transparency by the directors of companies and other commercial entities. Through this discussion paper the Government would like to explore measures to enhance the sustainability of benefits in agreements for native title groups.

There is a lack of real information around the quantity and quality of native title agreements, which can lead to differing perceptions about the nature and use of benefits obtained through them, and lead to concerns. The review function discussed below would enable greater information to be available, by maintaining data to help develop evidence based policy and guide future initiatives in this part of the native title system.

The Government's approach involves improving the future acts regime and promoting leading practice in agreement making, including through a review mechanism. The paper canvasses these important measures.

Background to the discussion paper

The discussion paper is a result of consideration by the Government as to how best to ensure that native title agreements deliver practical and sustainable outcomes for native title groups and their communities, both existing and future. It draws on and complements:

- the report of the Native Title Payments Working Group
- the subsequent Australian Government discussion paper on optimising benefits from native title agreements
- the workshop convened on 8 April 2010 by the Joint Working Group on Indigenous Land Settlements (JWILS) to consider what governments can do through native title settlement agreements to support Indigenous communities to achieve effective governance and sustainable economic outcomes, and
- the Treasury consultation paper titled "Native Title, Indigenous Economic Development and Tax" (the Treasury Paper) seeking views on a range of tax options aimed at reducing complexity in tax rules for native title payments and supporting effective benefits management under native title agreements.

On 3 June, the Attorney-General and Minister Macklin announced the Government will conduct consultations on a package of reforms that will promote leading practice in the governance of native payments and in agreement-making. The package of potential reforms is set out in this discussion paper and constitutes the Government's initial response to the JWILS 2009-10 terms of reference and its response to the report of the Native Title Payments Working Group.

A GOVERNANCE MEASURES

The Government is considering measures to encourage entities that receive native title payments to adopt measures to strengthen governance, such as:

- incorporating under either the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (the CATSI Act) or the *Corporations Act 2001* (Corporations Act)
- appointing one or two independent directors, and
- adopting enhanced democratic controls, such as by encouraging transparency and accountability to beneficiaries, including through measures that enable beneficiaries to hold directors to account in discharging their functions, and by requiring directors to inform and explain to members details of payments received under native title agreements and disbursements of the resulting funds (these rights and obligations would not duplicate those already contained in the CATSI or Corporations Act).

Many of these governance features are relatively common. Incorporation under Commonwealth laws may be appropriate given the responsibilities of organisations under native title agreements, particularly as they grow and take on commercial opportunities. Indigenous organisations and commercial enterprises routinely incorporate under the CATSI Act or Corporations Act, and the regimes in those Acts have transparency mechanisms that encourage accountability to members. Access to programs offered by the Office of the Registrar of Indigenous Corporations (ORIC) would help develop business skills and knowledge within those corporations. Independent directors are increasingly used by corporations in Australia and overseas as a strategy to reduce conflicts of interest and to raise standards of corporate governance, and are recommended in the Australian Stock Exchange guidelines.

Consultation questions:

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

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

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

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

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

The Government is also considering measures to encourage entities that receive native title benefits to adopt the leading practice principles against which the review function would assess agreements, set out in section B.1 below.

One way to encourage adoption of the governance measures and leading practice principles would be to mandate them. Another way would be make any new tax treatment implemented in response to consultations on the Treasury Paper conditional on entities that receive native title payments adopting the governance measures and leading practice principles. Eligibility could be assessed by the review function discussed in section B.1 below or by another entity such as the Commissioner for Taxation.

Consultation questions:

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

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

B IMPROVING GOVERNANCE AND NATIVE TITLE AGREEMENTS

B.1 Review function

The Government believes that native title agreements offer opportunities for relationship building and capacity building, and wealth creation for native title groups and their communities. Some agreements may be significant 'one off' deals, others may be for regular small amounts, but whatever the circumstances there is a risk at present that their potential will not be reached due to factors related to agreement design and structure.

i) Overview

The Government is considering the benefit a new statutory function could have in supporting parties to native title agreements, particularly native title parties, to maximise the positive financial and non-financial benefits from native title agreements now and for future generations.

The function could have the following characteristics and roles:

- be independent of Government
- review the sustainability of the benefits packages, not their quantum: it would not have a veto right over the commercial terms of the agreement, and negotiations of the terms and conditions of native title agreements would be the sole responsibility of the parties
- the review function would be subject to strict statutory timeframes
- all registered agreements would remain confidential, unless all parties agree to publication.

B.1.(i) Consultation questions:

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?

b) Are there alternatives to the function proposed?

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?

ii) Functions

The functions would not duplicate those of any existing body. It could have the following functions:

- receiving and reviewing native title agreements and maintaining a confidential register of those agreements
- assessing some native title agreements against leading practice principles
- advising and assisting parties to implement leading practice in native title agreements
- research and communication to develop and promote leading practice in agreement-making

- reporting on trends and issues via an annual report tabled in Parliament, and
- advising relevant Ministers, including where parties are not prepared to adopt leading practice principles, or in relation to measures to further assist parties to native title agreements.

It may also have the function of assessing access to tax benefits for financial benefit packages paid under the agreements. This is considered further below.

B.1.(ii) Consultation questions:

a) What are your views about these functions?

b) Are there other functions you would suggest?

iii) Establishing the body

This function could be provided to an existing independent body such as ORIC. Alternatively, the statutory function could be vested in a newly created independent body or work could be carried out by private firms.

B.1.(iii) Consultation questions:

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

iv) Agreements subject to registration

Only 'future act' agreements related to development activity that affects native title would be required to be registered with the body. These are the agreements that have the most potential to benefit native title groups. In general, such agreements take two forms: future act related ILUAs, and section 31 agreements under the Act.

'Future act' agreements may or may not include ancillary or related agreements. If ancillary agreements form part of the agreement, these would require registration.

B.1.(iv) Consultation questions:

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

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

v) Review against leading practice principles

Review of agreements by the body would be aimed at identifying the capacity of agreements to contribute to the intergenerational, social and economic development of native title holders and claimants, including whether the agreements incorporate leading practice.

Leading practice sustainability elements may include:

- regular, funded reviews of agreement performance, including mechanisms to respond to agreement review findings

- financial provision for administration of the agreement
- processes and funding for ongoing communication and decision-making regarding agreement matters amongst the native title group
- dispute resolution provisions
- the agreement and benefits management structures utilised are appropriate, and
- the financial benefits package is sustainable, both in workability and in providing benefits to future generations of native title holders.

These elements would be published in advance of the body commencing operation. It may be appropriate to provide model terms for use by the parties that would meet the leading practice principles.

Agreements would be required to be submitted, possibly with a form that summarised the relevant sustainability elements of the agreement. A registration fee may be charged.

B.1.(v) Consultation questions:

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

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

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

vi) Assessment

The body would be granted discretion to determine which agreements are assessed, so that while all native title agreements requiring registration with the body would be reviewed, only some would undergo assessment.

Where an assessment is conducted, the body would provide a report to the agreement parties that would include recommendations where leading practice was not met.

While the assessment would not operate as a veto over the agreement, and neither the detail nor the assessment of the agreements would be made public, the body could have the capacity to assist parties to native title agreements to identify and implement amendments in accordance with the leading practice principles.

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?

B.2 Leading practice agreements toolkit

The Government is considering developing a leading practice toolkit to provide parties with practical guidance and resources to assist with the design and implementation of native title agreements. The toolkit would complement the leading practice principles against which the review function would assess agreements, by providing detailed information on how those principles could be implemented, as well as guidance on agreement planning, negotiation, drafting and implementation.

The toolkit would provide a consolidated 'one-stop-shop' information resource and include checklists and guidance materials, taking into account jurisdiction specific processes. It could also include a consolidated list of links to existing government programs and resources that provide support, advice, training/capacity development and business development opportunities.

The toolkit could cover the diverse range of agreements to which native title holders are party, providing precedent clauses and agreement templates that implement the leading practice principles developed by the review function. The content could also be informed by a review of current benefits distribution/trust structures and models used for different types and sizes of agreements to identify leading practice elements (for example use of decision structures that appropriately represent native title parties and/or omnibus structures).

The content of the toolkit would need to be regularly updated, particularly as the role of the review function evolves, and as current agreement-making practices are reviewed. Government would need to take into account and build on existing guidance materials, templates and resources used by Indigenous and industry groups, as well as the Commonwealth, State and Territory governments.

Possible benefits:

- provides a comprehensive guide to planning, negotiating and implementing native title agreements and benefits distribution structures
- improves the quality of agreement outcomes
- promotes leading practice for native title agreements

Possible disadvantages:

- potential limits to accessibility, if the toolkit is implemented solely online
- potential difficulties in creating a standardised toolkit across different jurisdictions, regions and kinds of agreements

Questions:

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

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

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

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

C FUTURE ACTS REFORMS

C.1 Streamlined ILUA processes

The processes involved in the lodgement and registration of ILUAs can result in some delay before ILUAs are registered. The proposals below outline possible measures to streamline these processes and improve transparency in native title agreements. The proposals may be progressed either individually or as a package of measures.

i) Reduction of ILUA registration period

In prior Government consultations on amendments to the Act, some stakeholders raised concerns about the length of time and the resource intensive nature of the ILUA registration process. It was noted that these factors can discourage parties from agreement-making. Various proposals were put forward in these submissions as possible measures to reduce the overall registration timeframes. In general these proposals included:

- 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.
- A reduction in the duplication of registration requirements by creating an alternative registration process when an ILUA has been certified by a Native Title Representative Body.

The Government is interested in receiving further submissions on possible amendments to the Act which would facilitate an overall reduction in the timeframes for ILUA registration.

Questions:

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

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?

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?

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

The Government's recent consultation on native title agreements has revealed some support for increased transparency in agreement-making. One way to increase transparency would be to broaden the information available for public inspection after an ILUA is registered.

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

Questions:

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

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?

iii) Streamline the registration process for minor ILUA amendments

The Act does not currently provide an explicit process to enable minor amendments to be made to ILUAs, short of re-registering the entire amended ILUA. Given the time and risk associated with the registration process, parties can be discouraged from reviewing their ILUAs and amending them as necessary to meet changing circumstances.

One way of addressing these concerns would be to amend the Act to provide an alternative and streamlined registration procedure for minor amendments to ILUAs.

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

Questions:

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

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

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

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

C.2 Clarifying good faith requirements

On 14 October 2009, the High Court dismissed the native title party's application seeking leave to appeal the Full Federal Court decision in *Puutu Kunti Kurrama & Pinikurra People v FMG Pilbara Pty Ltd & Ors*. The application challenged a Full Federal Court decision regarding the interpretation of the good faith negotiation requirements in the right to negotiate provisions of the Act.

The Full Federal Court found that the good faith requirement does not require negotiations to reach a certain stage nor prescribe the manner and content of negotiations by compelling parties to negotiate in a particular way over specified matters. Rather, the Court found that providing what was discussed and proposed was conducted in good faith, with a view to obtaining agreement to the doing of the future act, the good faith requirement would be satisfied.

This decision has been criticised on the basis that it could enable parties to approach the NNTT for a determination that a particular future act proceed, even if there have been no substantive negotiations about the doing of that act. It has therefore been suggested that the decision could discourage parties to actively engage in negotiations to reach broad and practical agreements. The Government has decided to amend the Act to provide clarification for parties 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 Government sees this amendment as having a number of benefits:

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

In preparing the amendments, the Government is aware that the following issues should be considered:

- setting statutory requirements for negotiations in good faith could limit the ability of the parties to adapt negotiation processes to meet their purpose
- this amendment could encourage compliance with the minimum standard only, and
- any new requirements must be clear to prevent legal uncertainty regarding their satisfaction.

Questions:

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?

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?

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?