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

Dear Sir/Madam

Discussion Paper - "Leading Practice Agreements: Maximising Outcomes from Native Title Benefits"

Thank you for the opportunity to provide comments in response to the Australian Government discussion paper "*Leading Practice Agreements: Maximising Outcomes from Native Title Benefits*" dated July 2010.

Our comments (apart from the general comments immediately below) are grouped by reference to the relevant chapters of the Discussion Paper.

General Comments

South Australia has, since 1999, adopted a policy of resolving native title claims through negotiation rather than litigation. This has been done by adopting a flexible, non-technical approach aimed at reaching agreements that deliver benefits to native title holders beyond formal determinations of native title.

The process for resolving claims involves several different aspects, including Indigenous Land Use Agreements and determinations of native title by consent. Through this process, the State has been able to offer a wide range of benefits to native title claim groups, including:

- Co-management agreements over parks and reserves under the South Australian *National Parks and Wildlife Act 1972*.
- Monetary benefits
- Land transfers
- Funding to support native title holders to meet their legal and administrative obligations
- Cultural heritage protocols and surveys
- Aboriginal involvement in planning and development processes

The State continues to develop packages which aim to achieve sustainable settlements for native title parties and the equitable distribution of and best use of benefits by Aboriginal communities.

A. Governance Measures

South Australia supports and will encourage, where appropriate, entities receiving native title payments being incorporated under the Commonwealth's *Corporations (Aboriginal and Torres Strait Islander Act) 2006* and otherwise adopting good governance measures, particularly where they are involved in managing large scale native title payments. However, any policy adopted should also consider the wide range of circumstances under which native title benefits might be delivered. These may range from small scale mineral exploration project agreements to large scale development projects, or whole of claim compensation agreements. A one size fits all approach may not always be appropriate.

The adoption of governance arrangements should not be made mandatory. The State would, however, support the making of any new tax treatment conditional on entities that receive native title payments, adopting appropriate governance measures. Again, it may be appropriate to have a tiered set of requirements which recognise the different scales of operation engaged in by entities receiving native title payments, for example, based on annual income.

The measures proposed in the Discussion Paper could be further enhanced by providing training to directors and beneficiaries in good governance practices and by providing support for indigenous communities to establish and operate appropriate business entities. This should be funded and/or provided by the Commonwealth.

B. Improving Governance and Native Title Agreements

1. Review Function

South Australia notes the proposal for a body responsible for developing and promoting leading practice principles in native title agreement making to assist parties to access advice and information. However, it is noted that the Commonwealth's retraction of its native title payment offer means that settlements will largely be funded by State and Territory governments. The State is concerned that it may be unhelpful to have the Commonwealth offering advice on leading practice in native title agreements, when there is no Commonwealth funding contribution involved in establishing such agreements.

South Australia also queries the review and assessment functions of the proposed body and how these will achieve the intended aim of ensuring agreements reach their potential for relationship and capacity building and maximising wealth creation in indigenous communities. In particular:

- A centralised review body may be too removed from negotiations to provide meaningful input and may result in presenting a further step and cost in the agreement making process. For example, how will a centralised body assess the "appropriateness" of benefits which are culturally or spiritually significant to a particular Aboriginal group?
- What is the intended purpose of advising relevant Ministers in cases where parties are not prepared to adopt leading practice measures? Will there be some further Ministerial action taken in the event that parties do not adopt the principles?
- What is the purpose of requiring certain agreements to be registered and/or assessed? Will there be consequences for failing to register an agreement or submitting an agreement which does not meet particular criteria?

The State also makes the following general observations regarding the proposed functions and nature of the body:

- Any body established should be created in a manner that minimises cost and makes use of existing experience. It is suggested that such a body might be comprised of representatives from several existing entities, including ORAC and the NNTT.
- Another function of the review body may be reporting to Parliament or Ministers on the resources and funding required to ensure sustainable agreement making.
- The review body will need the capacity to follow up on agreements to determine what did or did not work in previous ones and incorporate those findings into leading practice principles.
- South Australia queries the assumption in Part B.1(iv) of the Paper that “future act” agreements related to development activity have the most potential to benefit native title groups. Other types of agreement, such as “whole of claim” settlement ILUAs currently being negotiated by South Australia also have the potential to offer significant benefits to native title parties. Such agreements are intended to provide benefits in relation to not only future acts, but also previous acts which have extinguished or impaired native title rights and interests.
- South Australia is wary of incorporating leading practice principles into legislation. Apart from being difficult to define, it may lead to additional complexity and limit the ability of the principles to evolve over time.

2. Leading Practice Agreements Toolkit

The State supports the concept of developing a leading practice agreements toolkit. The toolkit should be accessible to all parties. It should be developed with input from all stakeholders, particularly those with experience in ‘on the ground’ negotiations.

C. Future Acts Reforms

1. Streamlined ILUA Processes

The State supports measures to reduce ILUA registration timeframes.

The idea of a streamlined process for correcting slips or making minor changes to ILUAs without the need to undertake a full re-registration process, especially in circumstances where the native title holders are known, is supported. The recommendation could include changes to correct minor mapping errors and changes to communication protocols and other non-essential terms.

With respect to the proposal to include more information on the Register, it is difficult to see what could usefully be included, given the need to maintain the confidentiality of commercially and culturally sensitive information. However, assertions about commercially or culturally sensitive information should be closely examined, as restrictions are commonly sought more as a matter of course rather than because of a genuine need for confidentiality. There should be a presumption in favour of transparency for both types of information, other than on grounds that can be properly substantiated.

2. Clarifying Good Faith Requirements

The State supports the proposed clarification of the “good faith” requirement.

Conclusion

South Australia offers qualified support to the proposals in the Discussion Paper. It has reservations about the proposed review function and suggests that a full and considered dialogue with the States and Territories should be conducted before such a proposal is progressed.

If you wish to discuss any aspect of this submission, please do not hesitate to contact Jenny Hart on (08) 8207 1759 or Virginia Leek on (08) 8207 1769.

Yours faithfully

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Native Title Claim Resolution Unit