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SUBMISSION TO THE COMMONWEALTH ATTORNEY-GENERAL AND MINISTER FOR INDIGENOUS AFFAIRS ON REFORMS TO THE *NATIVE TITLE ACT 1993* (CTH) OPTIONS PAPER NOVEMBER 2017

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1 INTRODUCTION

The Bee Industry Council of Western Australia makes this submission in response to the options paper entitled *Reforms to the Native Title Act 1993 (Cth)* published by the Attorney-General's Department in November 2017 (**Options Paper**).

In seeking apiary permits in an area of Western Australia the subject of a positive native title determination, many participants in the WA beekeeping industry have found themselves in one of the "gaps" between the future act processes established under the *Native Title Act 1993* (Cth) (**NTA**). In this submission we outline the position of these proponents and our collective concerns, which we hope will provide a detailed and tangible example of the implications of that "gap".

We then respond to the following options raised in the Options Paper which are particularly relevant to beekeepers operating in determined areas:

- the options for addressing the relationship between state and territory natural resource management activities and native title rights including amending section 24LA to permit the doing of low-impact future acts following a determination that native title exists (Attachment B4); and

- the proposal to create an alternative agreement-making mechanism (pages 10-12 and Attachment B1).

2 THE CONTEXT

2.1 About Bee Industry Council of Western Australia

The Bee Industry Council of Western Australia (**BICWA**) is the peak body representing beekeepers in WA. BICWA was formed in 2015 by several existing WA beekeeping organisations to represent the whole industry, provide a unified voice, and drive strategic development of the industry. BICWA seeks to provide representation on all matters which may impact WA beekeepers including biosecurity, access to floral resources, and education and training opportunities.

2.2 The current situation

WA beekeepers collectively hold tenure over existing apiary permits and applications for additional apiary permits within an area the subject of a determination of exclusive possession native title.

We understand that the Department of Biodiversity, Conservation and Attractions (**DBCA**) generally issues apiary permits in Crown land in Western Australia (other than 'CALM Act land') in accordance with the low impact future act procedures under section 24LA of the NTA. However, section 24LA does not apply to future acts done after, or continuing after, a determination that native title exists in the area.

As there is no comparable provision in the NTA for the doing of low impact future acts within determined areas, new apiary permits can only be validly issued in these areas if:

(a) the issue of the permit does not constitute a future act as defined in the NTA (which is possible only where the determined native title is non-exclusive);

(b) the permit is issued in accordance with a registered Indigenous Land Use Agreement (**ILUA**); or

(c) the native title rights and interests which would be affected by the issue of the permit are first compulsorily acquired.

Further, DBCA has advised that its current policy is to only issue apiary permits in the areas of native title determinations where the proponent has negotiated and registered an applicable ILUA. While we understand that compulsory acquisition of native title would not usually be appropriate because it would not be commensurate with the level of rights granted by way of an apiary permit, this policy means that ILUAs are the industry's only option.

3 OUR CONCERNS

3.1 Risk of not reaching agreement

Beekeepers are happy to proactively engage with native title holders in relation to the grant of apiary permits, but are concerned about the implications of the ILUA negotiation process being entirely voluntary. In particular the absence of:

(a) any legal requirement for native title holders to negotiate in good faith; and

(b) any arbitral or other 'circuit breaker' process if the parties are unable to agree

effectively accords the native title holders a right to veto the grant - notwithstanding that as claimants (under section 24LA) they did not have a right to be notified.

For beekeepers, this means there is a significant risk that any negotiations entered into about the grant of apiary permits may not result in an agreement. We understand this to be consistent with other examples of where a state government has committed to a course where a project can only proceed with an ILUA - in such cases the ILUA will often not be concluded.

Further, the financial and time investments an RNTBC would need to contribute to an ILUA process (including authorisation) may not be proportionate to the benefits it would obtain from reaching agreement about the conduct of apiary activities. Even obtaining adequate engagement by a native title party in relation to apiary issues may be difficult in this context, as key RNTBC personnel are often time poor so may understandably focus on negotiations (e.g. mining) which are likely to result in greater commercial benefits.

There is also nothing to prevent native title parties who do engage from adopting rigid negotiation positions or requiring apiary proponents to agree to impractical conditions either for the grant of permits or as conditions precedent to commencing ILUA negotiations.

This can be contrasted with the process for negotiation of agreements about the grant of mining tenements, notwithstanding the activities permitted under a mining tenement have a much greater impact on native title that those permitted under an apiary permit. Once a mining tenement is notified under section 29 of the NTA, the relevant native title parties as well as the proponent and Government party *must* negotiate in good faith with a view to reaching agreement. If despite good faith negotiations, the parties cannot reach agreement, any of the negotiation parties can seek arbitration by the National Native Title Tribunal.

3.2 Cost

BICWA is also concerned about the significant financial investment required to conduct an ILUA negotiation process in light of the risk of not reaching agreement and subsequently not obtaining apiary permits.

Negotiating and registering an ILUA can be costly in any context. The costs include not only compensation payments and legal costs, but the significant costs of negotiation and authorisation meetings to meet the requirements under the NTA for registration of an ILUA.

Finalising the first apiary ILUA is likely to be particularly long and expensive (in the realm of $200,000 or more) as to our knowledge there are no precedents, and the native title parties are likely to have little experience with the subject matter.

Particularly in light of the fact that industry proponents have been researching and investing in the Australian honey industry for decades, it is unreasonable to require further and significant financial investment without any certainty of a positive outcome.

3.3 Delay

Another concern is the time it will take to finalise an ILUA. We understand that in Western Australia, finalising an ILUA typically takes approximately 18 months because of the time involved in authorisation and registration. However, various factors could extend this period.

The key drivers of delay for an ILUA covering apiary activities are likely to be:

- the lack of an alternative process for the grant of apiary permits in determined areas; and
- the absence of any time limits or circuit breakers for ILUA negotiations.

Some other factors which could extend the negotiation period are:

- the native title party is unlikely to have experience in apiary matters;
- there is little precedent for ILUAs relating to apiary matters more generally;
- the RNTBC having unrealistic expectations of benefits driven by previous negotiations about other types of projects;
- intra-indigenous disputes or issues (for example, about the RNTBC's decision-making or consultation processes) which delay meetings and/or responses to the proponent; and
- where the native title party requires a Body Corporate ILUA but there are delays in the formation, nomination or registration of the RNTBC after the native title determination is made.

It is clear that one implication of delays in obtaining apiary permits as a result of the ILUA process is that beekeepers will be significantly delayed and may be prevented from conducting apiary activities in the areas of positive native title determinations.

Another implication of such significant delay is it raises the question of how long, and on what basis, an application for the grant or continuation of an apiary permit will be kept 'on hold' pending the finalisation of an ILUA. It will be difficult for apiarists to conduct meaningful ILUA negotiations if the native title holders are able to simply 'wait it out' to reach an outcome where apiary permits will not be granted at all.

3.4 Implications for industry

The long timeframes, level of uncertainty and financial inputs required for an ILUA process will be particularly difficult for individual beekeepers and smaller apiary companies. Our consultation with industry constituents has indicated that many operators will not have the expertise or funding capability to undertake effective ILUA negotiations, and that requiring such proponents to undertake their own ILUA negotiation process could ultimately risk such operators' continued participation in the industry. This outcome is contrary to broad policy considerations aimed at improving diversity and reducing inequity.

4 ATTACHMENT B4

4.1 Proposal to amend section 24LA

As a result of the concerns outlined above, BICWA strongly supports an amendment to section 24LA to allow the grant of apiary permits (and other low impact future acts) over determined areas.

4.2 Alternative proposal

As an alternative to amendment section 24LA to allow it to operate post-determination, BICWA would support the extension or replication of the Subdivision G or Subdivision H procedures to apply to low impact future acts in determined areas. This would require native title holders, registered claimants and representative bodies to be notified of any proposed grants of apiary permits and given the opportunity to comment. This would also mean that native title holders would accrue a right to compensation for impact on their native title rights and interests.

Any such reforms should also confirm that the non-extinguishment principle applies to the grant of apiary permits, commensurate with the low impact, temporary nature of apiary activities and with the level of procedural rights to be accorded.

We understand that a similar process has been adopted for the grant of bee farming range licences or permits under the Victorian Government's template Land Use Activity Agreement under the *Traditional Owner Settlement Act 2010* (Vic).

5 ALTERNATIVE AGREEMENT MAKING PROCESSES

Some concerns above relate to the costs and delays involved in making an ILUA. To some extent, these costs and delays arise from the authorisation and registration requirements for ILUAs. On this basis, BICWA supports the concept of reform which will:

- allow apiary permits (and other low-impact future acts) to be validly granted if agreed by the relevant RNTBC under an ordinary agreement; and
- enable the RNTBC to enter agreements about the grant of apiary permits (and other low-impact future acts) without needing to consult with or obtain the consent of the common law holders.

However, such an alternative agreement-making process will not be sufficient to address BICWA's concerns if it remains an entirely voluntary process. For low-impact future acts such as the grant of apiary permits, the potential benefits an RNTBC could obtain through even this simpler agreement-making process will still be likely to be insufficient for the RNTBC to invest in the process. In other words, this simpler process would still be akin to introducing a 'right to negotiate' about low-impact future acts, but without a time limit or the option of seeking a determination allowing the act if negotiations are unsuccessful.

The Options Paper suggests in the alternative that existing agreement-making mechanisms could be relied upon to reduce the transaction costs of future acts, and at page 11 gives the example of entry into regional agreements which provide for simplified procedures for high volume activities or opt in arrangements for third parties. BICWA agrees that a regional agreement which covers the grant of apiary permits would provide a solution to its concerns. For this reason, BICWA has sought that DBCA (either in its own right or in conjunction with other Government entities) consider leading the negotiation of an ILUA or ILUA templates for the grant of apiary permits on a regional basis. However, the negotiation of such a regional agreement is also an entirely voluntary process in that neither the RNTBC nor the relevant State government entities are obliged to participate.

6 CONCLUSIONS

This submission highlights the untenable situation WA beekeepers are facing with regards to obtaining permits to operate within areas the subject of native title determinations. BICWA sincerely hopes that the current review will address these issues and enact changes to the Act that result in a sensible and fair process for providing access to floral resources under the NTA framework.