



# **GOLDFIELDS LAND AND SEA COUNCIL**

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**Re:** Submission to the Department of the Attorney General on the November 2017 Options Paper

## **Reforms to the *Native Title Act 1993 (Cth)***

### **Overview**

The preamble to the *Native Title Act 1993 (Cth)* ('the Act') provides a clear guide on the purpose of, and outcomes sought by the Act. The preamble affirms that the Act is about securing land justice for Indigenous peoples. It is about providing a process for seeking and gaining formal recognition of the common law rights and interests of native title holders, or compensation for loss of those rights, and a right to negotiate with parties seeking to use land subject to native title for economic gain. It is important to note that nowhere in the preamble or the provisions of Part 11 of the Act do we find mention of an employment, business or economic development aspiration. No one would argue that these are not desirable outcomes – they are almost always secondary outcomes of determinations of native title, but they are not the primary outcomes pursued by the Act.

In this context, it is important that the Government, in its efforts to improve the economic and social well-being of the Indigenous community, does not in the process diminish or compromise the intent of the Act. The Act is a primary instrument in the process of national Reconciliation and should not be hostage to the parochial and often self-serving concerns we see expressed by the States and particular interest groups in relation to the operation of the Act from time to time. The Act is about principles and land justice, it is not about business and economics. As such, amendments couched in terms of notions of certainty, efficiency, timeliness, and unlocking economic development opportunities need to be considered carefully in terms of their impact on the rights and interests of determined and potential native title holders.

In the history of the Act, there has been only one instance of amendments with a clearly beneficial intent – the most recent amendments in response to the *McGlade decision*. In every other instance of amendment, the changes have been overwhelmingly negative in intent with respect to the people the Act is intended to assist. We hope this process follows the more recent example.

## **The Options**

In the following comments, we have considered each of the options discussed in the Options Paper in the order that they appear. We have not commented on all options – where we have no issue, and no need to voice strong support, we have gone on to the next.

### **Section 31 Agreements**

Q1,2

We agree the Act should be amended to confirm the validity of s.31 agreements made prior to the date of amendment. For the post-amendment period, we see a combination of Options 2 and 3 as the most appropriate way forward – i.e., acceptance of s.31 agreements signed by all living members of the applicant, with an alternative option of signature by a majority requiring an authorisation process.

### **Authorisation and the Applicant**

Q3

A1 to A6:

We support each of the proposals in this chapter. In A6 description, insert “which were authorised” after “Court”.

### **Alternative Agreement Making Processes**

Q4

B1: Options for alternative PBC contracts not requiring consent of native title holders:

We agree with the substance of your para 2 page 12 – i.e. that there is the opportunity under existing provisions for considerable flexibility in approach to agreement making that need not involve high transaction costs. Having said that, a good part of the flexibility rests with the native title party in terms of how their decision-making processes are framed.

It is clear that the push for increased flexibility and reduced transaction costs in agreement making comes from the non-native title parties. This in turn signals a need for extreme caution in approaching the definition of any provision contemplated, to ensure that improved flexibility does not equate with increased vulnerability and reduced rights and opportunities for the native title party.

The problem with options is that they become expectations on the part of the dominant party to negotiations and tend to become the default position rather than the exception they are intended to be. In this regard, the scope of matters that could be dealt with under such an alternative agreement making process would need to be very limited and carefully prescribed, and the alternative process would need to be an option available to the PBC, should it so choose, in clearly defined circumstances (which would include factors relating to authority granted by the common law holders for agreement to defined classes of acts, impact and threshold costs).

B2, B3: contracting out of s.211, future acts/compensation:

We are opposed to any provision allowing PBCs to contract out of s.211 or the future act/compensation provisions of the Act. These are fundamental rights recognised by the legislation and the risks associated with tampering with them are too great. The States are not backward in applying pressure in negotiation contexts based on options available under the Act and perceived as opportunities to minimise their costs.

B4: Amend s.24LA to permit low impact future acts following a determination:

The making of a determination of native title is a significant and profound event for native title holders. As such, it is not inappropriate that States be required to enter into an agreement for the doing of any activities that impact on native title – be they low impact or otherwise. This proposal would detract from the existing rights of native title holders and as such is opposed.

### **Streamlining Existing Agreement Making**

Q5

Items C1 to C3, and C5: We have no problem with the proposals.

C4: Remove the requirement for PBCs to consult with NTRBs on native title decisions. We question the rationale behind this proposal – viz “In practice it may be difficult for the NTRB/SP to advise on the merits of the decision if it has not been close to its development. Also, there is no requirement for the PBC to take account of the NTRB/SP views.” The benefits of the requirement to consult the NTRB are that it:

- Ensures that the NTRB is aware of decisions being taken, facilitating its oversight of PBC activities;
- Provides an opportunity for the NTRB to assess and advise on the proposed decision, affording the PBC the benefit of its expertise;
- Provides a built-in alert system in the event of problems arising with the operations of the PBC; and
- Provides a ready avenue for provision of advice to the native title holders.

The fact that the PBC is not required to act on the advice of the NTRB is not an issue – the fact is they are required to consult and receive it. Where circumstances dictate, the NTRB can take further steps on the basis of information acquired to act in the interests of native title holders. In some respects, the existing provision is consistent with other proposals relating to transparency of decision making to native title holders.

Item C6: The intention here is acceptable. The means needs some care – we suggest that, after the words in relevant paragraphs “other than compensation provided for in the agreement”, something like “or compensation to be determined on an agreed basis at a future date in accordance with a provision in the agreement”.

Item C7-C8: We have no problem with the proposals.

Item C9: To rectify the issue identified, you would only need to delete “and so requests” from paragraph (f). This would make adjudication automatic in relation to any objection. This is a more reasonable approach, as it removes the built-in default approval without a hearing that would apply under the approach contemplated in the discussion paper. There is no limit on the timing of the adjudication, so we interpret your reference to objection period as the period in which objections can be made. The objection period is set at two months in paragraph (d). Presumably you are seeking to review this because it is so short a period. We agree that two months is too short. As to what would be appropriate, we would suggest 3 months.

C10: There is no issue with electronic notification where this is a practical option. In some cases, it will not be. We suggest, therefore, that it would be inappropriate to mandate electronic notification as an acceptable option in all cases. The objective here is to ensure that the notification reaches the right parties. (There are only two – the RNTBC/RNTC and the NTRB). It is hardly a major issue. Perhaps a provision allowing for acceptance of electronic transmission to parties where an

acknowledgement is received from each party would suffice. In cases where there is no RNTBC and a public notice is required, the same principle should apply. It cannot be assumed that a summary notice directing persons with a native title interest to a website will be a sufficient and appropriate means of notification of intended future acts. If this approach were to be adopted, there would be an increased onus on NTRBs to bring such notices to the attention of the relevant people. That is, it would reduce transaction costs for government, but increase costs for NTRBs. It is not clear that it would result in wider notification reach. Like electronic notifications, this would work in some cases and not in others.

C11: We have no problem with the proposal.

### **Transparent Agreement making:**

Q6

We see no problem with requiring registration of s.31 agreements and maintenance of a public register of s.31 agreements by the NNTT, identifying the parties to the agreement, the date of the agreement, and a description of the act agreed. We do not, however, see any merit whatsoever in the publication of details of the terms of the agreement, including any benefits negotiated for the native title party. This could only work to the disadvantage of all native title holders and lead to the identification and targeting of lowest common denominators in all future negotiations.

The same rationale applies in relation to ILUAs and other agreements under the Act. Where the terms of an ILUA affect or impact on the rights and obligations of individuals or organisations who are not party to the ILUA, it is clearly necessary that such individuals or organisations be apprised of those impacts. This should be the joint responsibility of the parties to the ILUA. This process, however, does not require that the ILUA be publicly available, and information passed to affected individuals and organisations would be in relation to matters that specifically affect them.

As a general comment, most agreements under the Act have significant elements that in any environment would be regarded as commercial in confidence. The release of such material, by its nature, will inevitably work to the detriment of one or both parties involved. Such detriment would be inconsistent with the Governments aspiration to see economic benefits flow from native title. Transparency does not have a place in the world of commerce – nor should it here.

### **Indigenous Decision Making (D)**

Q7

We have considerable misgivings about the proposal to change the existing requirement to use a traditional decision-making process (where one exists) to one where the group chooses between a traditional or alternative decision making process. This seems to run contrary to the underlying principle of native title, based upon the continued observance and acknowledgement of traditional laws and customs, and opens a pathway to simplified alternative decision making that could well be beyond the control or influence of group elders, and directly contribute to an erosion of traditional practice and authority structures. We are, on the other hand, relatively comfortable with the existing arrangements, and recognise that under them, as traditions evolve, practices may well change. Consequently, we would prefer to retain the existing authorisation provisions.

### **Claims Resolution and Process**

Q8

E1: Repeal s.138B(2)(b). The rationale for this proposal seems to be that by dispensing with the need for the applicant to consent to an inquiry, the provision will cease to be underutilised and the Court will be more likely to order inquiries. This might hold if the problem in the past has been that applicants have declined to consent to inquiries proposed by the Court. However, we don't

understand this to be the case. We suspect it has more to do with the Court's recognition of the limitations imposed on the NNTT in terms of resource constraints. In any event, we have no objection to the proposal.

E2 to E6: We have no problem with the proposals. (In E5, the reference to "claimant" (first line under heading "Current Practice") should be to "compensation").

### **Post-Determination Dispute Management**

Q9

F1 to F7: We have no problem with the proposals.

F8: We agree that the PBCs should be required to account and report on native title benefits received by the PBC, and the disposition of those funds. In addition, we see a case for requiring PBCs to provide an audited annual balance sheet reflecting the consolidated native title estate of the group of native title holders to each AGM and provide a copy to the Registrar along with its own financial statements.

F9 – F10: We have no problem with the proposals.

F11: This one is a bit tricky, as it would introduce a second formal source of assistance with first effort mediations, and inevitably lead to forum shopping, particularly where a party to a dispute is aware that the relevant NTRB has a good grasp of the circumstances of the dispute and knows that this is unlikely to work in their favour. To prevent forum shopping and avoid wholesale duplication, we suggest that the Act be amended to provide that NTRB/SPs may opt in certain circumstances to refer a matter in dispute to the NNTT for mediation or arbitration.

The relevant circumstances would include where the NTRB has established the circumstances and nature of the matters in dispute and, after attempting to resolve the dispute through mediation, has been unable to reach a resolution acceptable to both parties. In such cases, the NTRB would be able to refer the matter to the NNTT for mediation or arbitration and provide the NNTT with a report on its assessment of the circumstances of the dispute. The NNTT could be given arbitration powers in relation to disputes so referred and the discretion as to whether mediation or arbitration was appropriate for any referral, on its take of the circumstances.

The NNTT could also be given a power of arbitration in relation to matters self-referred to the Tribunal for arbitration by PBCs or individual native title holders. This would work along the lines envisaged in your F10, but only in relation to matters on which referring parties seek arbitration. Under this scenario, NTRB/SPs would be first port of call for parties seeking dispute resolution, and the NNTT would be first port of call if either party wished to dispense with attempts at resolution and seek arbitration by an independent party at the outset.

Making the Federal Court's jurisdiction exclusive would seem sensible.

### **State and Territory Proposals:**

G1: Shorten objection period where determination exists. We do not support this proposal. It is important that the period allowed for objections be sufficient to allow for the range of circumstances that apply for RNTBCs, including issues to do with capacity and remoteness. The period proposed by this option is patently unrealistic and reflects a lack of balance in the perspective of the proponents, as well as the degree of their disregard for the interests of the native title holders.

G2: Minor defect in s.29 notification should not invalidate notice. We have no problem in principle with this, though care would be needed in defining what was meant by “minor” (for example, to exclude any defect that could reasonably be expected to have some effect on the native title parties understanding of the proposal).

G3: Digital communications – see comments on c10.

G4: S.141(2) parties, G5 alternative scheme agreements, and G6 limitations on applicant authority. We have no problem with these proposals.

G7: Area agreements negotiated as part of a consent determination. We have some concerns here, in that if the area agreement is a precondition to consent agreement, it has the status of an area agreement in an undetermined area and should be treated accordingly. By relaxing the notification requirements ahead of the determination process, we are putting the cart before the horse. In addition, it is not clear what the concern is, in this situation, with the standard area agreement notification process. If it is merely timing, this would not seem sufficient reason for the change.

G8: Remove sunset clause from s.24JAA(1)(d). We are strongly opposed to this proposal – see our comments of 14 August in response to an invitation to comment on this issue. In summary, there are better ways of facilitating the construction of public assets on native title land than by disempowering native title holders and ignoring their views.

G9: Compulsory acquisition/grant of new interest: We are not clear on exactly what the issue is here, due to insufficient information, and therefore are unable to comment.

G10: Amend ss.24MD6B/253 to expand definition of waste facilities: Again, intent is not clear. Current definition of infrastructure facility in s.253 includes provision for Minister to declare by legislative instrument a facility to be an infrastructure facility, should there be a case for it.

G11: Insert “or” between s.24KA(8)(c) and (d). We question the rationale for seeking this change, as it is clearly no impost to forward a notification to both parties, and certainly in the interests of claimants to have notification sent to the relevant NTRB. We would argue it is more appropriate to include the word “and”.

G12: Require RNTBCs to be bound by arrangements negotiated prior to determination: This proposal is fraught. Where agreements have been negotiated prior to determination, the parties to those agreements continue to be bound by the terms of the agreements. Where the agreement involves the applicant as representative of the native title holders, the native title holders remain bound, irrespective of whether the RNTBC as a corporate body is bound. Any action by the RNTBC that affected the matters covered by such an agreement would need to consider this fact. The status of any agreements entered with parties other than the determined native title holders, of course, would be an entirely different matter.

G13: “Amend s.211 to ensure adequate protection for native title rights against the government’s need to regulate certain actions for public purposes, e.g. hunting with firearms in national parks or hunting endangered species”. It is not clear what this means, particularly when you describe the current status as “Section 211 relieves native title holders of the need to hold licences under state, Commonwealth or territory laws for hunting, fishing, gathering and for cultural or spiritual activities”. Is the intent of this proposal to water down s.211, or strengthen it by providing

“protection ... against ... (regulation)”? We would be opposed to any change that sought to weaken the protection afforded native title holders under s.211.

G14: Amend the Act to allow WA to legislate to validate particular past invalid acts affecting native title: This proposal would in effect be an agreement by the Commonwealth to the extinguishment of native title in retrospect, denying native title holders the opportunity to seek recompense for that extinguishment. We are strongly opposed to this proposal.

G15: Amend s.26D(1)(a) to define renewal of mining leases to include replacement of many leases with one lease, or one lease with many leases. We are opposed to this proposal. This proposal would in effect deny native title holders the opportunity to seek recompense through the right to negotiate in relation to proposals that were implemented prior to the advent of the Act and now are proposed to be varied for (inevitably) the commercial advantage of the mining proponent. From the perspective of the native title holders, a fairer and more just proposition would be to amend ss.24C(2) and 2A to define renewals as renewals per se, in line with s.26D(1)(a)(i).

G16: Allow hearing of native title and compensation applications together: It is not clear as to what the motivation of State and Territory governments is here. The two matters are separate issues. Usually, the proceedings and negotiations relating to a claimant application will be demanding enough, without the added burden of a compensation claim. The mere identification of extinguishment in relation to a claimant application is simply the first rung in relation to a compensation claim. There are also clear disadvantages in pursuing both at the same time for the native title party, in that this provides an opportunity for the State to play one against the other in its negotiation of a consent determination. From the native title party's point of view, there is no merit in this proposal. Equally, it is probably unnecessary as there seems to be nothing preventing such a course, were the native title party inclined, and in a position, to pursue it. A further point against this proposal is the simple fact that an amendment to this effect would potentially be seen as an advantageous position to pursue by the States and become an expectation, placing a burden on NTRBs and slowing the progress with claimant determinations.

G18: Agreement only with respect to relevant part of proceedings – s.87(3): We have no problem with this proposal.

G19 to G24: We have no problem with these clarification proposals and note that some have been clarified in the Court.

G25: Provisions to ensure that native title holders are represented on any default PBC: It is not clear how this proposal could work in practice. How could native title holders be members of the ILC, and to what end? Ditto re NLC. On the face of it, this proposal is both impractical and unnecessary. The appointment of a default PBC arises from a failure, or a choice, of the native title holders. It is likely in most cases to be a temporary arrangement, and so long as the default PBC meets its obligations to the native title holders with respect to native title decisions, there is no cause for concern and no need for contortions of the kind involved with this proposal.

G26: Amend the Act to ensure that the Commonwealth may fund a PBC. We note that the Commonwealth currently provides funding assistance for PBCs, both indirectly through NTRB/SPs and directly where appropriate through the IAS. An amendment to permit this is not necessary or helpful. Perhaps an amendment to provide that the States may fund PBCs would be helpful as a reminder that they need to take some responsibility in this area (though again it would not be necessary in the sense of providing permission to act).

G27: Amend Part 11 Div. 3 to enable NTRBs to address alternative settlements. We note that there is an issue in relation to NTRB assistance for PBC equivalent organisations under the Victorian TSA arrangements. Whilst assistance can be provided under the IAS white paper provision, it is not clear that this will be continued beyond the forward estimates period and it is not encompassed by the commitment under the Act to resource a network of service providers to provide assistance with native title.

### **Conclusion**

Unless there is a matter specifically addressed in this submission contrary to the position contained in the NNTC submission, the GLSC supports and endorses the views contained in the NNTC submission.

We hope this submission is of assistance in your deliberations.

**Goldfields Land and Sea Council**

**28 February 2018**