National Farmers' Federation

Submission to Commonwealth Attorney-General in relation to proposed Native

Title Act Reforms

5 March 2018

NFF Member Organisations

The National Farmers' Federation (NFF) is the voice of Australian farmers.

The NFF was established in 1979 as the national peak body representing farmers and more broadly, agriculture across Australia. The NFF's membership comprises all of Australia's major agricultural commodities across the breadth and the length of the supply chain.

Operating under a federated structure, individual farmers join their respective state farm organisation and/or national commodity council. These organisations form the NFF.

The NFF represents Australian agriculture on national and foreign policy issues including workplace relations, trade and natural resource management. Our members complement this work through the delivery of direct 'grass roots' member services as well as state-based policy and commodity-specific interests.

Statistics on Australian Agriculture

Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

Social >

There are approximately 85,681 farm businesses in Australia, 99 per cent of which are wholly Australian owned and operated.

Each Australian farmer produces enough food to feed 600 people, 150 at home and 450 overseas. Australian farms produce around 93 per cent of the total volume of food consumed in Australia.

Economic >

The agricultural sector, at farm-gate, contributes 2 per cent to Australia's total Gross Domestic Product (GDP). The gross value of Australian farm production in 2016-17 is forecast at 58.5 billion – a 12 per cent increase from the previous financial year.

Together with vital value-adding processes for food and fibre after it leaves the farm, along with the value of farm input activities, agriculture's contribution to GDP averages out at around 12 per cent (over $155 billion).

Workplace >

The agriculture, forestry and fishing sector employs approximately 304,200 employees, including full time (217,000) and part time employees (87,200).

Seasonal conditions affect the sector's capacity to employ. Permanent employment is the main form of employment in the sector, but more than 28 per cent of the employed workforce is casual.

Environmental >

Australian farmers are environmental stewards, owning, managing and caring for 48 per cent of Australia's land mass. Farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 6.8 million hectares of agricultural land set aside by Australian farmers purely for conservation/protection purposes.

The NFF was a founding partner of the Landcare movement, which recently celebrated its 20th anniversary.

Introduction

This submission to the Commonwealth Attorney-General in relation to proposed Native Title Act Reforms is from the National Farmers Federation including specifically New South Wales Farmers Association, Agforce Queensland Farmers and the Northern Territory Cattlemen's Association.

Pastoralists and farmers engage with the native title system in two main ways, by:

(1) undertaking activities on their properties or upgrading their tenure which require a native title consent, and

(2) being respondents to native title claims.

In relation to (1), obtaining a native title consent can, for individual farming families, be difficult. As a general rule, they do not have expertise in agreement making with indigenous people. They almost certainly have little experience with the complex provisions of the Native Title Act 1993 (Cth)(NTA) or its regulations. They also often have strong views about the innate fairness of negotiations and treatments by Governments.
Consequently, engagement with indigenous people does not always come naturally or easily. In addition, families do not know even what their basic options are if they cannot reach agreement. They therefore become reliant on Government funding or peak body assistance to engage on what they consider to be a level playing field. Legal advice is expensive. They consider that indigenous people can obtain access to such advice through Native Title Representative Bodies (NTRBs), which is not available as easily to them. This is particularly important in relation to their position as front-line respondents in native title claims (item (2) above).

For example, in the Northern Territory, the native title claims prosecuted by the Northern Land Council (NLC) take a significant amount of time to negotiate. Some have been on the Federal Court docket since 2000, with no end in sight for their resolution. Although there may be future act negations underway with mineral and petroleum parties which somewhat validates the need to keep these claims on foot, there is little prospect of those native title applications being resolved within the next 5 years. The NLC does not appear to have the resources to follow through with these applications.

The Federal Court has placed a lot of pressure on the NLC to remove claims which are not going to be determined in the coming years and they are continuing to do so. This leaves pastoralist up in the air for years in relation to native title holders, and having to be involved for extended periods of time in what can be a confusing court process.
The Central Land Council (CLC) have a much more efficient method of processing claims and only make a court application once they have completed all the background work - such as extinguishment, connection and tenure reports. This means that their applications

only take about 2-3 years maximum and are managed by the Registrar without intervention by the judge until the time of determination.

In general, the pastoral industry would like to see more fairness generally in the native title system, more transparency in relation to what is available to different stakeholders in terms of funding and legal assistance and more education about their rights in relation to agreement making and involvement as respondents in native title claims.
Pastoralists can obtain funding to respond to native title claims through the Attorney-general's funding scheme. But they cannot use such funding to contest connection in relation to the native title. This is another example of where there is one rule for funding for them and another rule for indigenous people. Explanation needs to be given as to why this is still the case.

Each of the issues raised in this submission has these fundamental principles of fairness and flexibility at their heart. This will help the pastoral sector to manage the time involved and the costs incurred in dealing with native title affecting their businesses on pastoral land (which is also native title land).

The Specific Proposals

Transparency of the contents of agreements

Pastoralists want to understand the reasons for the confidentiality of agreements and of connection reports in native title claim cases. They appreciate that one person's "good deal" with a native title group might be another person's rod for their own back. They also appreciate that there is secret and sacred information in connection material that ought not to be made generally available.
But in both the case of agreement content and connection material, there might be matters which everyone agrees could be made public without prejudice to any party. They would like to work through what those matters could be, and provide information on a register (perhaps) which helps to educate people about what deals are possible, what their content could be, and how evidentiary assertions in connection material might be handled appropriately in native title claims to ensure fairness to all parties

The revival of native title on national parks and conservation land

In general the compromises struck in the 1998 amendments in sections 47, 47A and 478 of the NTA are enough. It is understood by the pastoral sector that in the circumstances of pastoral land owned by Indigenous Australians when claimed by them as native title land, Crown land or reserve land set aside for Indigenous Australians can properly be available for revival of exclusive native title. This goes some way towards addressing injustices felt by Indigenous Australians in relation to dispossession of their native title over time.

However, pastoralists will need to be persuaded to add these to create a 47C (for example), given that national parks and conservation land are gazetted for the benefit of all Australians. These areas are being set aside for the common good, and should be owned and managed by the State. Many State regimes for National Parks now make provision for joint management by Indigenous Australians in any event.

A more flexible negotiation mechanism as a kind of hybrid between an /LUA and RTN agreement for pastoral activities not covered by Subdivision G of Division 3 of the Part 2 of the Native Title Act 1993

The main issue here is the cost of and time taken to obtain authorisation of an ILUA. The purpose of suggesting this more flexible agreement-making mechanism is to manage the extensive time and cost incurred in negotiating an Indigenous Land Use Agreement (ILUA). The authorisation costs alone can amount to tens of thousands

of dollars, often well beyond the resources of many pastoral families.

One example from Queensland will suffice. A pastoralist owning Occupation Licences (Ols) has tried for 15 to 20 years to achieve an upgrade of the Ols to term leases for grazing. The difference in incidents of lease tenure from the licences is essentially one: the length of the term. An OL is for one year, with renewal at the discretion of the Minister. A term lease for grazing can be for up to 50 years, with rolling terms.

The ILUA negotiations have been going for at least ten years, with multiple offers being made by the pastoralist and being rejected by the native title holders. The upgrade cannot proceed without the ILUA. The OL holder simply wants the term lease for grazing to be able to transmit it to family members by will. The Ols cannot be passed on this way, but the term lease can, with Ministerial consent.

A second example from NSW is leases and licences for oyster farmers. These do not appear to be capable of valid grant over land next to oyster beds for sheds to house equipment, without a full lLUA being negotiated. In reality for small sheds such as these, an ILUA is unviable commercially as a mechanism to reach agreement about such a simple thing.

This hybrid might use the front end provisions of the Right to Negotiate (RTN), adopt the negotiation aspects of the expedited procedure under section 32 of the NT A, and not require authorisation at all. It will require the applicants at no cost to the pastoralists to canvass opinion from the broader family groups in the claim. For Prescribed Bodies Corporate ILUAs, the native title regulations should not apply in their entirety, as these mandate what is effectively an authorisation process by means of the provision of a "Regulation 9 certificate".

Activities which might be covered he operation of this proposed truncated agreement mechanism include:

(1) pastoral activities not covered by subdivision G of the NTA;
(2) tenure upgrades such as the one described above; and
(3) other activities with greater impact than activities authorised as primary production activities under Subdivision G of Division 3 of Part 2 of the NT A (section 24GA to 24GE; for example, acts covered by section 24GB(4) are currently not valid under Subdivision G but could be activities to which these agreement process could apply);
(4) irrigation works;
(5) timber harvesting; and
(6) quarrying for road base and borrow pits.

There is no intention to circumvent State and Territory approvals for undertaking such activities. The general law will still apply to these activities. The suggestion here is that an ILUA will not be required to ensure the validity of such activities, but an agreement under this hybrid proposal would be.

Technical amendments relating to /LUA registration of pastoral land ILUAs

Currently, section 1998(4) of the NTA only allows the Registrar to update a change in address. This does not allow the register to be searched by interested parties to understand who the pastoralist is that is subject to the ILUA and enable them to engage about the terms of the ILUA to be assigned.
These are minor but important technical amendments to the registration provisions that are uncontroversial. The purpose is to enable the ILUA register to be updated to record the transfer of a pastoral property which is subject to an ILUA, and to update details of the new owners.

Intra-indigenous disputes and their effect on negotiation authority, timelines and finalisation of the agreement

Sometimes, indigenous groups can have internal disagreements. These are often not visible to third parties. This is not unreasonable, given that they are matters internal to the native title group concerned. The difficulty for third parties trying to negotiate an agreement with the relevant indigenous or native title parties is that they cannot make out what the problem is which affects the capacity to move smoothly to a negotiated solution. The third party may also have limited skills, expertise or resources to help the native title parties sort out their differences.

The first issue relates to governance of a corporation which may be authorised to run a negotiation in relation to development. If one family group in the native title group dominates the corporation and controls its board, there can be challenges to that authority, attempts to wrest control of the board from the dominant family, or an inability to make any decisions which can meaningfully progress the negotiations. Third parties such as pastoralists often have no idea of such issues, and negotiate in good faith with people claiming relevant authority to negotiate, only to be find that two or even three parties assert that authority. No one seems to be able to sort out who has the appropriate authority.

This can play out all the way to authorisation in relation to an ILUA, and spill out onto the floor of the meeting called to authorise the agreement. No pastoralist can intervene in such issues, nor does this submission suggest that they should. But it can cause huge delays and even then, no outcome might be forthcoming.

Delays in such negotiations cost money. The pastoralist, as they are usually the developer seeking the native title consent, often has to foot the lion's share if not all of this cost and time. It can be frustrating and tiring to negotiate in such circumstances, particularly if there is no "Plan B".

With an ILUA negotiation, there may be no fall-back option available if agreement cannot be reached. Obtaining an indigenous consent through an ILUA may be the only valid way to undertake the development activity the subject of the agreement. If no agreement can be reached, the development may not be able to occur. This could cause significant damage to the pastoral business. For instance, obtaining a tenure upgrade requires an ILUA in Queensland. If agreement cannot be reached as to the terms of the ILUA, the upgrade cannot be processed by the relevant State government (this mainly applies to Queensland).

The proposals for more streamlined agreement-making mechanisms set out above may assist with this. The provisions of the Attorney-General's Options Paper for these proposed native title reforms which propose ways and means to address intra-indigenous disputation will also certainly help. Pastoralists as an industry have little to offer in relation to intra-indigenous dispute resolution, as it is not part of the sector's expertise.

But the sector certainly supports the fact that they are needed.

Conclusion

The pastoral and farming sectors welcome the opportunity to make these submissions. The industry seeks as much fairness and flexibility for pastoralists and farmers in engaging with the native title system, both for agreement making and for native title claims. Fairness comes in treating pastoralists in a manner similar to indigenous people in assisting them to engage with the system. Flexibility is needed to ensure that it is recognised that the business of farming and pastoral activity occurs ion land which is also the home of the pastoralist. The laws require them to co-exist with native title holders, whose home it is also. Sharing your home is difficult unless you know what the rules are which govern the sharing. At present, those rules are not easy to follow or understand for either pastoralists or indigenous people. Anything which can make things easier to share is supported by the sector.