National Native Title Council

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30 September 2013

Mr Ric Simes
Attention: Native Title Review Team
Deloitte Access Economics
PO Box N250 Grosvenor Place
SYDNEY NSW 1220

Via Email: native.title@deloitte.com.au

Dear Mr Simes

Review of the Roles and Functions of Native Title Organisations – Discussion Paper

The National Native Title Council (NNTC) welcomes the opportunity to provide comment on the Discussion Paper for the Review of the Roles and Functions of Native Title Organisations being carried out by Deloitte Access Economics (the Review).

The NNTC has long been calling for a process that will inquire into the operations of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) and therefore supports the overall purpose of the Review to ensure that the native title system assists native title holders to benefit from the emerging opportunities associated with their native title rights. The NNTC believes the Review presents a significant opportunity to strengthen the role of NTRBs and NTSPs to effectively support native title groups in achieving their aspirations not only in recognising native title rights and interests over country, but also achieving the broader goal of improving economic opportunities for their families and communities.

Please find attached a submission from the NNTC, prepared following lengthy discussions and consultation with member NTRBs and NTSPs from around the country. The NNTC looks forward to fully participating in the Review until such time as a satisfactory outcome is achieved.

I trust the attached comments are satisfactory for your purposes, however should you require any further information or have any queries please do not hesitate to contact the NNTCs Chief Executive Officer, Mr Brian Wyatt, on 03 9326 7822 at your convenience.

Yours sincerely

Brian Wyatt
Chief Executive Officer

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Submission

Review of Native Title Organisations

INTRODUCTION

In February 2013, the NNTC held a workshop with member NTRBs and NTSPs to commence the process of developing a response to the Review of Native Title Organisations (the Review). At that workshop the NNTC agreed on the following principles to guide the NNTCs submission to the Review:

- NNTC members agree with the Federal Government that native title can be a platform for intergenerational social, cultural and economic development and that to realise these benefits, native title holders must have access to an appropriate mix of support services.
- The service mix must make assistance available pre- and post-settlement to:
    - secure native title rights and interests (e.g negotiation and implementation of native title determinations, alternative and comprehensive settlements and future acts);
    - manage native title (e.g. support for agreement implementation, corporate compliance and organisational development); and
    - build on native title to pursue economic, social and cultural development (e.g. enterprise development, investment facilitation, business planning, NRM, program development, monitoring and evaluation).
- NNTC members note that there will be local variation in the services provided, depending on the changing needs of native title holders, their corporations and the opportunities afforded by the local economy.
- Two decades of federal government investment in NTRBs/NTSPs has resulted in a national network of organisations with significant institutional capacity. It is clear there is an ongoing role for these organisations to play in a mature native title system. NTRBs/NTSPs are best placed to provide ongoing

support services to native title holders post-determination. Most NTRBs/NTSPs are already doing so, to varying degrees.

- Some reform will be needed to remove the constraints to NTSPs/NTRBs performing various post-determination functions, including:

- Amending s203B of the *Native Title Act 1993* (NTA) to specifically empower NTRBs/NTSPs to provide assistance to native title holders pre- and post- settlement to ensure the good governance of the corporation and help it fulfill its land management and economic development objectives;
- Amending the FaHCSIA program funding agreement to remove any prohibition to providing such services;
- Increasing the allocation made to support Prescribed Bodies Corporate, or Registered Native Title Bodies Corporate (RNTBCs), (hereafter referred to as PBCs) under the *PBC Basic Support Funding Guidelines*;
- In some representative body areas, governance reforms may be required to properly reflect the changing relationship between NTSPs/NTRBs and PBCs;
- Amending the NTA and PBC Regulations to empower NTRBs/NSTPs to act as a default agent PBC, at the election of native title holders.

- The NNTC welcomes the Federal Government's intention to develop a framework for post-settlement support for native title holders and looks forward to working with the review team on a design that is responsive to the needs of native title holders, government and industry and is flexible enough to apply nationally.

The NNTC considers it important that these principles inform the recommendations provided to the Government.

The NNTC understands that a number of NTRBs and NTSPs have provided their own individual submissions to the Review. The comments provided by the NNTC in this submission should in no way detract from any of the submissions provided by individual NTRBs/NTSPs.

OVERVIEW

The NNTC is an alliance of NTRBs and NTSPs from around the country. We provide, amongst other things a voice on matters of national significance and represent the interests of our member organisations at the regional, national and international levels.

One of the core principles of the NNTC is to promote the rights and interests of Traditional Owners around the country and to advocate for the self-determination of Indigenous peoples to pursue their own goals and aspirations.

The NNTC has recognised that, in response to increased community expectations, the roles and functions of NTRBs and NTSPs have evolved significantly since the introduction of the NTA and have therefore been calling for a review into native title

organisations for a number of years. The NNTC believes strongly that the native title system should be formulated to ensure the effective and appropriate engagement and participation of Aboriginal and Torres Strait Islander peoples in decision-making on matters affecting their lives and their land. It is critical that Traditional Owners can fully assert their rights to make decisions about, and benefit from activities that occur on their lands and resources.
The native title system, if formulated properly should provide a significant platform for fair and reasonable decision making, particularly in relation to the negotiation of comprehensive agreements with third parties such as the extractive industry. Negotiating agreements can provide significant benefits to Traditional Owners and their communities and NTRBs and NTSPs should be fully supported to ensure this activity is undertaken for the benefit of Traditional Owners and native title groups across the country.

Agreements negotiated with Traditional Owners are increasingly important in terms of formalising conditions upon which access can occur to indigenous lands, as well as the compensation and benefit sharing arrangements. It is important to recognise that agreements not only provide benefits for Traditional Owners and their communities they also provide certainty for third parties in relation to land access and use.

Native Title Legislation

The NTA was proclaimed in 1993 following the *Mabo*[1] decision in the High Court of Australia. The NTA allowed for the recognition of native title whilst validating other forms of land tenure and walked a fine line in negotiating competing interests with the Common Law of Australia. The original spirit of the NTA is clearly stated in its preamble:

> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented ... A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation, and if not, in a manner that has due regard to their unique character.

The preamble goes on to say that Governments should facilitate negotiations that satisfy claimants' aspirations to their land, including proposals for economic use of the land.

The NTA was proclaimed with full and proper recognition that it was a special measure under both the United Nations Convention on the Elimination of All Forms

[1] *Mabo and Others v Queensland (No. 2)* [1992] HCA 23 (3 June 1992).

of Racial Discrimination and Australia's *Racial Discrimination Act 1975.* Native title therefore creates an opportunity for Indigenous peoples to benefit from the wealth of the nation.

The native title process is a framework whereby native title groups can assert their rights over traditional country and pursue their aspirations for their families and communities. Whilst the process of prosecuting claims is a long and complex journey for Traditional Owners, the benefits of recognising native title rights and interests can deliver significant cultural, social and economic outcomes. It is the role of NTRBs and NTSPs to assist Traditional Owners to achieve the best possible outcomes through the native title process.

The NNTC has been pushing for amendments to the NTA that will improve the native title system, in particular to relieve the crushing burden of proof that is required under the Act. The NNTC will continue to call on the Federal Government to amend the NTA so that some elements of the burden of proof are lifted from traditional owners and their families. This could be satisfied by introducing a rebuttable presumption of continuity, reversing the onus of proof so that the State (or other respondent parties to a claim) bears the burden of rebutting such a presumption.

Given that in many instances (particularly in remote locations) there is little foundation for significant dispute over native title applicants' continuous connection to their traditional lands, the adoption of a rebuttable presumption should help reduce the resource burden on the native title system, helping facilitate the expeditious resolution of native title claims. Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonized or asserted its sovereignty over a claim area. This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.

Importantly, the burden placed on the State by virtue of such a presumption may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken through colonisation or other breaches of international human rights law. In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.

A rebuttable presumption would also have a significant impact on the negotiation process. With third parties, generally State or Territory governments, being required to rebut continuity and justify extinguishment with the associated costs involved they may be more inclined to negotiate earlier and more openly with the aim of

spending less on the process and more on possible opportunities for Traditional Owners.

Once native title has been determined, the framework for managing native title rights and interests is also complex and requires significant resources. NTRBs/NTSPs continue to assist and facilitate native title groups through the process of establishing and, more often than not, managing, a PBC. Having a determined native title claim allows groups to participate in the local, regional, national and even the global economy.

The NNTC will continue to call for amendments to the Act for the benefit of Traditional Owners, particularly for an introduction of a rebuttable presumption of continuity that will alleviate some of the burden of Traditional Owners in proving connection to country.

The Native Title Continuum

There are 15 NTRBs and NTSPs around Australia. Significantly, and as acknowledged in the Discussion Paper to the Review, these organisations are at different stages of the native title process. Some NTRBs/NTSPs are more heavily engaged in prosecuting native title claims, whilst others have already achieved many determinations and are building capacity to support native title groups in a post-determination environment.

To respond to the full needs of NTRBs/NTSPs it is therefore important to understand that they are operating at different stages on what could be best described as a native title continuum ranging from the provision of pre-determination services through to post-determination services. The NNTC would suggest that it is critical that a flexible response is provided through the Review to ensure all NTRBs/NTSPs are fully and effectively equipped to undertake their activities no matter what the stage of the continuum they are at.

Over a period of time, the NNTC has advocated for the recognition of the rights and interests of native title groups over country in all aspects of policy development and legislative reform. There are mechanisms, such as the UN Declaration on the Rights of Indigenous Peoples that provide support to native title groups to strengthen claims for recognition of native title rights and interests. The native title process allows Traditional Owners an opportunity to assert their traditional rights over country as well as allow the pursuit of other aspirations such as economic participation in the mainstream economy.

NTRBs and NTSPs have statutory responsibilities to assist and facilitate native title claims on behalf of native title groups. Throughout the pre-determination process, NTRBs and NTSPs can become involved in activities on behalf of native title groups to provide intergenerational, cultural, social and economic benefits. Such activities

could be agreement making with the private sector or undertaking activities on traditional country such as natural resource management or carbon farming initiatives that provide employment and training for the broader Indigenous community.

Whilst prosecuting native title claims is a long, complex and arduous process for native title groups, it is a framework that allows for the recognition and protection of native title rights and interests. The native title framework therefore allows Aboriginal and Torres Strait Islander peoples to be recognised as the Traditional Owners of their country ultimately providing access to traditional country to carry out responsibilities such as protecting heritage sites and caring for country in a culturally appropriate manner.

Economic development has certainly emerged as one of the key elements, not only of the Commonwealth Government's 'Close the Gap' campaign, but also as a key aspiration of native title groups across the country. NTRBs/NTSPs have become increasingly involved in negotiating agreements with the private sector, in particular the extractive industry, and this activity is providing significant benefits for native title groups, such as employment and training opportunities, business development and caring for country.

The NNTC considers that NTRBs/NTSPs need to be fully resourced to enable them to support native title groups in the agreement process. Currently, there are insufficient resources in the system to fully cater for the growing needs of native title groups as they establish themselves socially and economically as well as culturally. Some NTRBs/NTSPs have already begun to adjust the structure of their organisations to accommodate the emerging needs of their constituents, however resources still need to be provided so that native title groups can benefit properly from all opportunities within their regions.

Recommendations

1. That amendments to the NTA, including a rebuttable presumption of continuity, be introduced into Parliament.
2. That Native Title Organisations be provided with adequate resources to carry out their functions and operations to support the aspirations of native title groups in both a pre-determination and post-determination environment.
3. That the appropriation to the native title program be increased in order to provide additional funding to NTRBs/NTSPs to fully and effectively carry out both pre-determination and post-determination activities for the benefit of native title groups.

Discussion Points 1 – Roles and Functions of NTRBs/NTSPs

Under Section 203B of the NTA, NTRBs and NTSPs have the following statutory functions:

- Facilitation and assistance;
- Certification;
- Dispute resolution;
- Notification;
- Agreement making;
- Internal review; and
- Other functions.

The facilitation and assistance, certification, dispute resolution and notification functions occur as part of the pre-determination stages in the native title continuum; whilst agreement making, internal review and various other functions can occur in both the pre-determination and post-determination stages. NTRBs and NTSPs, however, are often under increasing pressure to meet additional expectations from communities to become involved in activities over and above those functions set out in the NTA. These activities are generally land related and are therefore closely associated with the rights and interests of Traditional Owners under the native title system.

As outlined above, NTRBs/NTSPs operate at various stages of the native title continuum through the delivery of pre- and post-determination services. Whilst some roles and functions of NTRBs and NTSPs change as native title groups move along that continuum, some activities have a significant impact on resources no matter what phase they are operating at.

For example, a number of NTRBs and NTSPs have moved into activities that relate to country, such as natural resource management, ranger programs, caring for country, managing and protecting cultural heritage sites of significance and more recently, assisting Traditional Owner groups enter into the carbon market through the Carbon Farming Initiative. All of these types of activities impact on the capacity of NTRBs/NTSPs to provide assistance and advice to native title groups.

Some of the key challenges identified by NTRBs and NTSPs in supporting native title holders to fulfill the aspirations of their communities relate to resources associated with operational activities, including, but not limited to:

- A diverse and complex workload;
- Pressure associated with litigation and demands of the Federal Court;
- Increased future acts due to the approvals process of State/Territory governments;
- Intra-claim disputes and conflict management;
- Attracting and retaining quality staff;
- Government priorities beyond native title;
- The complicated, piecemeal and inadequate funding; and

- Providing assistance to PBCs.

The range of functions allowed to NTRBs and NTSPs under the NTA is quite constrained and designed to address the formal operation of the Act. The functions do not anticipate the roles required to successfully implement the logical outcomes of the process, such as to assist PBCs or implement the outcomes of agreements or deal with the implications of determinations of native title. This constraint may be seen as intentional or as a lack of foresight.

The reality in practice is that to "make sense" of native title for claimants and native title holders, NTRBs/NTSPs have sought and been required to integrate native title structures and processes with broader community concerns. This can be seen in many forms around the country from engagement with ranger programs and joint management and other land management regimes, to engagement with multi-party agreements and social endeavours aimed at "closing the gap" where the claim group is the primary basis for engagement between governments, and agencies, NGOs and others, and the Aboriginal community. There are numerous examples relating to land, economic and social development and culture.

The broadening of the role and relevance of native title structures (NTRBs/NTSPs and in some cases PBCs) is often reported to be a response to the contraction of other services and government effort, particularly in remote areas. The end of ATSIC and wind down of CDEP has probably contributed to increased expectations on native title structures to mediate between the Aboriginal communities, (now more clearly visible, and explained, and engaged through native title research and determination processes), and the broader Australian community. In addition, the impact of this shift in Government policy for the native title system meant that NTRBs/NTSPs were under increasing pressure to provide political representation on behalf of Traditional Owners and their communities.

The diverse nature of native title operations, environments and social situations across the country naturally dictates that the form of evolution and adaption of NTRBs/NTSPs and service provision varies significantly.

For many years there was a resistance by governments at all levels to acknowledge the broader relevance of native title and native title structures and to acknowledge these structures as having any formal role beyond the narrow, legalistic, and often unhelpful confines of the NTA. The reasons for this constraint and reluctance may be attributed to a range of reasons – ideology, bureaucratic caution or indifference, historical inertia, failure of imagination, concern about duplication and cost, etcetera.

The funding of NTRBs/NTSPs has been marginal and in places inadequate, even for the basic prosecution of responsibilities under the NTA. The interpretation of how money was spent has (sometimes understandably) been quite strict – increasingly so with the oversight moving from ATSIC to the Commonwealth.

The range of roles provided by NTRBs/NTSPs means that the sources of funding have diversified, as the services provided by NTRBs/NTSPs relate to State Government, industry and other imperatives. The need for NTRBs/NTSPs to draw on multiple sources complicates the reporting regimes.

The different scales purposes and conditions around grants or payments from different sources create a complicated accounting environment for NTRB/NTSP (and PBC) staff and governance structures. This has implications for the efficacy of programs which stop and start according to short term grant cycles, involve frequent and disproportionate time spent in acquittal and so on. This adds to problems with reliability and staff retention.

Native title structures are becoming more adept at articulating long term goals. It may be worth investigating whether longer term and simplified funding arrangements can be geared to strategic plans and longer term vision by NTRBs/NTSPs and PBCs, if there is acceptance that these structures are now established in the landscape (literally, and in a policy, service delivery, and political sense).

Having been a policy orphan for many years there is some evidence that governments are recognizing the relevance of native title structures to do more than enable the recognition of a limited bundle of rights. An opening in the dialogue about the relevance of native title to wider demands appeared in mid 2008 with the beginning of Government discussion of 'broader land settlements', and the formation of a Joint Working Group on Indigenous Land Settlements. In part this approach may have been a response to alarm over the crisis in Aboriginal living conditions, health, and a perceived widespread failure to thrive.

Ministerial releases at the time acknowledge broad agreement among Federal and State Ministers that the system had more certainty and the potential for a broad range of outcomes. The Joint Working Group published Guidelines for Best Practice in Flexible and Sustainable Agreement Making and produced a Draft Native Title National Partnership Agreement which sought to "resolve native title determination and compensation claims in a way that enhances the economic, cultural and social development of native title claim groups, recognises their relationship with their traditional lands and reduces the cost and time of native title litigation"[2].

The JWGILS also acknowledged the need for effective implementation of agreements. Much of the deliberation has been about the respective liabilities of the Commonwealth and the State in funding and resourcing the outcomes.

The joint acknowledgement by States and the Commonwealth that native title could form a useful part in Aboriginal development (defined as contributing to Council of Australian Government "Closing the Gap" targets), and that they should "work together to find a better way to produce negotiated settlements which result in full and final resolution" provide practical benefits to native title claim groups such as

[2] Report of the Joint Working Group on Indigenous Land Settlements, 2008-09.

the buy back of licences and opportunities to co-manage and access land is mainly remarkable in that it appeared in 2009, fifteen years after the commencement of the NTA, but it does potentially open up the discussion about NTRB/NTSP and PBC futures and funding in ways which reflect commonly held values and aspirations with broad legitimacy, rather than narrow process driven constraints and artificial separation of "native title" from all else.

The NNTC has most recently commenced some discussion about more effective ways of providing support to NTRBs and NTSPs beyond that of their statutory functions as they relate to supporting native title groups. Organisations have been established to assist with:

- Research (the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS));
- Staff training and development (the Aurora Project); and
- Capacity building for PBCs (the Office of the Registrar of Indigenous Corporations).

The NNTC believes that the roles and functions of these organisations should also be subject to some form of review to ensure they are best able to support NTRBs/NTSPs and PBCs and to alleviate any overlap or duplication or service.

The expertise of AIATSIS in developing an evidence-based body of research is fully acknowledged and appreciated by NTRBs and NTSPs and it is our view that the research work of AIATSIS should be used to support and complement the work of the native title sector, including the NNTC and its member organisations. Similarly, the Aurora Project provides valuable training programs to NTRB and NTSP staff. The NNTC believes that there needs to be more funds in the native title program to support all service provider organisations to provide effective support to NTRBs and NTSPs.

Another concern of the NNTC is the potential prevalence of duplication and overlap of some functions amongst service providers that play a key role in one way or another to support the operations of NTRBs, NTSPs and PBCs across the country. The NNTC therefore believes that there needs to be some rationalisation of the roles and functions of these organisations not only to ensure value for money but also to provide the best value in terms of service provision. The NNTC would also consider that there may be some services that are currently not being provided.

By way of example, one potential area of overlap is training and support provided for PBCs. The Aurora Project offers programs to assist PBCs to better manage and protect their native title; AIATSIS offers a PBC Support Project which supports the needs and interests of PBCs and building the capacity of PBCs to promote their interests; and the Office of the Registrar of Indigenous Corporations also offers a program to assist PBCs in governance and compliance with the CATSI Act. All of these programs are funded through the native title program of FaHCSIA.

The NNTC believes that there needs to be an investigation into these and other key organisations operating within the native title sector to identify where overlaps and duplications exist and develop a strategy that will better coordinate the programs that have been developed to assist and support the work of NTRBs, NTSPs and PBCs.

Recommendations

4. Amend the NTA to include new NTRB/NTSP functions for the provision of post-determination services, such as agreement making.
5. That further funding is provided to NTRBs/NTSPs to provide post-determination support services (on request) to PBCs.
6. That a review of organizations that provide support to the native title system, including AIATSIS, the Aurora Project and ORIC be undertaken to rationalize any duplication, overlap or gaps in services and increase funding if deemed necessary.

Discussion Points 2 – Agreements

One of the more recent and influential emerging roles for NTRBs and NTSPs is that of negotiating agreements on behalf of Traditional Owners and native title groups. This area of activity is a significant focus for a number of NTRBs and NTSPs, in particular for those organisations in areas with high levels of extractive industry activity.

The extractive industry negotiates agreements with native title groups for access to land under the right to negotiate provision of the Native Title Act. This provision allows for the extractive industry to negotiate with those native title groups that still have their registered claims to be resolved as well as those with fully determined native title rights and interests. This provision has also provided a "seat at the negotiating table" for native title groups resulting, in some cases, with significant economic benefits for Traditional Owners, their families and communities.

With over 400 native title claims yet to be determined, the right to negotiate continues to provide a fundamental right for Traditional Owners to negotiate benefits for what will inevitably mean access to traditional land for the extractive industry. This is particularly important given that 60% of mining activity neighbours Indigenous communities and the extractive industry has become one of the biggest employers of Indigenous peoples outside the Government sector.

Through negotiations such as native title agreements, communities are beginning to benefit from opportunities in employment and in a lesser way with enterprise development. It is clear that Indigenous people's relationship with the extractive industry is important and has significantly improved over a relatively short period of time.

In regional and remote areas the extractive industry has the potential to contribute to employment outcomes for indigenous people both in the mining sector (directly) and, in the many communities adjoining mining sites (indirectly). Agreements usually set out long term benefits through investment, employment and training. The distribution of benefits from native title, in particular through future act agreements, also assists in creating independent Indigenous organisations that engage in commercial, social and private sector partnerships.

Agreements also provide other, less tangible, outcomes for native title groups such as political empowerment and strengthening Indigenous peoples both emotionally and psychologically, resulting in the ability to forge stronger and more constructive and sustainable partnerships with key stakeholders. Improving implementation and compliance mechanisms for Agreements is a way to ensure these outcomes continue.

NTRBs/NTSPs would be keen to receive funding to augment their current activities. Additional funding utilised in ways suggested below would actively complement current Government policies, in particular the shift from litigation towards negotiating broader land settlements and 'closing the gap'. Additional funding could be used to target the following areas:

- Agreement making and implementation – additional resources may be required by some NTRBs/NTSPs to enable them to effectively represent the interests of their clients both through the negotiation process as well as the implementation of agreements;
- Agreement compliance – currently NTRBs/NTSPs do not have sufficient resources to monitor the compliance of agreements. Supplementary funding would assist NTRBs/NTSPs in ensuring parties comply with agreements;
- Financial benefits structures – NTRBs/NTSPs do not have the expertise to provide financial advice to their clients about the best benefits to negotiate for through the agreement process;
- Economic development – in some instances NTRBs/NTSPs would benefit from additional funding to assist in developing strategic partnerships to engage private industry and Governments. Initiatives would integrate economic activity with social concerns, cultural priorities and legal rights, as well as effective governance systems. NTRBs/NTSPs could also assist in building the capacity of communities to be able to manage and govern effectively as well as negotiate and engage with other stakeholders;
- Community development and land use planning – NTRBs/NTSPs are becoming increasingly involved in community development activities, including the development of plans for community growth and expansion. Funding would assist In building the capacity of Traditional Owners and their communities to plan local/regional priorities and make decisions, build relationships and mutual

understanding, and to set, implement and achieve their development goals as well as build relationships with other stakeholders;

- NTRB/NTSPs are well placed (but not funded) to be a conduit for all of government to get appropriate and considered community engagement and consultation. NTRBs/NTSPs have the networks and the skills to facilitate well attended and representative meetings which can be utilised to facilitate appropriate and informed bottom up decision making processes; and
- Natural resource management – this could include mine rehabilitation, environmental management, climate change and management of water resources. Whilst funding is available through relevant Departments, NTRBs/NTSPs are increasingly being expected to play a role in environmental and management of land.

Recently, the Tax Laws Amendment (2012 Measures No. 6) Bill 2012 (the 'Amendment Bill') was introduced into Parliament that clarified the tax treatment of native title payments. The NNTC and its members were active in supporting these amendments both through submissions and providing evidence before the House Economics Committee. The Amendment Bill was a welcome and positive step towards facilitating greater economic development opportunities for Indigenous communities. The provisions set out in the Amendment Bill exempt payments and non-monetary benefits that are made under an agreement relating to native title and/or payments and non-monetary benefits that are compensation for the effect of actions on native title rights and interests (native title compensation). The NNTC fully supports these amendments.

In addition to the recent amendments to the Income Tax Assessment Act, the NNTC and the Minerals Council of Australia have collaborated with other experts to develop a tax entity: the Indigenous Community Development Corporation (ICDC). The ICDC is an opt-in model that aims to create a new category of entity for tax purposes as an alternative entity for use when considering appropriate structures for the management of payments and benefits negotiated by Indigenous communities and groups, whether these benefits come from the public or private sector including, but not limited to, agreements centred on the statutory entitlements of native title groups. An ICDC also provides for a model constitution/trust deed with appropriate governance provisions. A brief description of an ICDC is attached.

The NNTC was therefore pleased when the introduction of an ICDC was included in the recommendations of the Treasury-led Working Group on Native Title Taxation and Governance as part of its response to the tax amendments.

The NNTC would therefore urge the Government to introduce enabling legislation to include an Indigenous Community Development Corporation model in the suite of options available to manage native title benefits.

There are a number of principles that should be introduced into legislation to support Traditional Owners and their representative bodies in the agreement making process. These principles are outlined below, and the NNTC believes that the adoption of such principles within the native title legislative framework will assist in strengthening not only the rights of Traditional Owners over their traditional lands, but will also support the activities of NTRBs, NTSPs and PBCs.

Free, Prior and Informed Consent

Article 32 of the UN Declaration on the Rights of Indigenous Peoples provides for the right of Indigenous peoples to determine their own priorities for the development or use of their lands as well as the right to free, prior and informed consent for any project affecting their lands or territories.

The NTA has provided the opportunity for Traditional Owners and native title groups in Australia to practice their right to self-determination (Article 3), in particular to determine their own priorities for their communities. This principle also includes the right of Traditional Owners to determine their own priorities for the development and use of their traditional lands.

Under the NTA, extractive industry practices have evolved so that a process of negotiation enables Traditional Owners to protect sites of cultural significance and gain economic outcomes for their communities. To this end, the successful operation of the native title system is dependent on the effective and appropriate engagement and participation of Aboriginal and Torres Strait Islander peoples in decision-making.

Like self-determination, free, prior and informed consent reinforces all of the rights contained within the Declaration. According to the UN Human Rights Council, free, prior and informed consent has been identified as a 'requirement, prerequisite and manifestation of the exercise of our right to self-determination'.[3]

In Australia, free, prior and informed consent has formed a significant platform for fair and reasonable decision making, particularly in relation to the negotiation of comprehensive agreements with the extractive industry. Negotiating agreements are becoming common practice and native title groups are gaining confidence in determining their own beneficial outcomes.

Agreements negotiated between mining companies and indigenous communities are increasingly important in terms of formalising the conditions upon which mining can take place on indigenous lands, as well as the compensation and benefit sharing

[3] Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, para 34. At http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3 (viewed 26 September 2011)

arrangements that flow from mining. Agreements are one way for communities and companies to seek to achieve greater certainty about development benefits.

However, native title groups are not able to fully experience the benefits of free, prior and informed consent. In Australia today, Aboriginal and Torres Strait Islander peoples do not have genuine decision-making authority and power over their lives and futures. That power and authority continues to rest in the hands of governments.[4]

International Standards

According to a follow-up report by the UN Human Rights Council there are three pillars of the Guiding Principles on business and human rights as they relate to Indigenous peoples and the right to participate in decision making. In particular, the report examines the right of Indigenous people to participate in decision making as it relates to their relationship with the extractive industry.

The report sets out the "international standards on the respective roles and responsibilities of States and businesses with regard to the human rights impacts of business-related activities, which are also applicable to situations often facing indigenous peoples in the context of extractive industry operations". [5]

The framework set out in the follow-up report rests on three mail pillars, being "the State's duty to protect against human rights abuses by third parties ... the corporate responsibility to respect human rights ... and the need for greater access to remedy".[6]

The following provides some commentary on the relationship between Indigenous peoples and the extractive industry as they relate to the three main pillars of the Guiding Principles.

(a) State's duty to protect against human rights abuse by third parties

According to this pillar, a State's duty to protect against human rights abuses includes the rights of Indigenous peoples when granting development licences and permits over their traditional lands. In particular this relates to the full participation of Indigenous peoples at all stages of decision making throughout the approvals process.

[4] D Smith, J Hunt, *Do They Get It? Indigenous Governance: The Research Evidence and Possibilities for a Policy Dialogue with Australian Governments* (Presentation delivered at the Inaugural National Indigenous Policy and Dialogue Conference, University of New South Wales, Sydney, 18 November 2010). At http://nipdc.arts.unsw.edu.au/assets/Powerpoints/Smith_Hunt.pdf (viewed 17 September 2011).

[5] Human Rights Council, 30 April 2012, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2012/2, p. 7

[6] ibid, p. 7

Under its international human rights obligations, the Commonwealth has a duty to establish legal and policy frameworks that effectively monitor and enforce relevant international laws, norms and standards, including the right to free, prior and informed consent. Those Departments with specific mandates to address Indigenous affairs should also provide mandatory information, training and support.[7]

Under this pillar, Australia would not satisfy its international human rights obligations in relation to the processes available for native title legislation. As mentioned earlier, Indigenous peoples can not practice their right to free, prior and informed consent for access to traditional lands as they do not have the right to veto over development projects.

Rather than improve legal and policy frameworks to effectively allow for the full and effective participation in decision making and the negotiation of agreements with the extractive industry, Australia has attempted to bring in legal and policy frameworks to control the flow of benefits from mining agreements. Without the right to veto over extractive industry activity on traditional lands, Traditional Owners have to negotiate for the best deal they possibly can to ensure satisfactory benefits flow to their communities.

(b) Corporate responsibility to respect human rights

The responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur.[8] Through the activities of the extractive industry, this should ensure that any cultural site of significance that may be impacted by the activities of the business enterprise is protected.

Due diligence processes should be in place to ensure that Indigenous peoples have the right to free, prior and informed consent for the protection of their cultural heritage as well as the continuation of their rights to access their traditional lands.

In Australia and through the relationship between native title groups, their representatives and other parties, there is a genuine dialogue about how best to protect the rights of Indigenous peoples and their cultural heritage whilst at the same time allow access to land for development projects. However, some business enterprises fail to reach the threshold in terms of best practice negotiations for access to traditional lands.

(c) Access to remedy

Australia must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when human rights abuses occur, those affected, including Indigenous peoples, have access to remedy.[9]

[7] ibid, p. 8
[8] ibid, p. 9
[9] ibid, p. 10

In many instances, the rights of Indigenous peoples over their traditional lands are subordinate to other interest holders. As an example, current legislation in the jurisdiction of Western Australia for the protection of cultural heritage allows for a project proponent to appeal a decision by the Minister yet there is no corresponding right for Indigenous peoples.

This means that if a clearance has been given to a project proponent to carry out an activity that may impact on a cultural heritage site, there is no access to remedy should there be potential for the heritage site to be damaged or destroyed.

Recommendations

7. That the Commonwealth Introduce enabling legislation for the development of an Indigenous Community Development Corporation model.
8. That amendments to the NTA be introduced to reflect the principles contained in the United Nations Declaration on the Rights of Indigenous Peoples.
9. Explore the possibility of supporting the NNTC to establish a national centre of excellence in native title and Indigenous development by making a once-off capital injection to establish a partnership with an appropriate research institution and a small staff of experts in resource economics, strategic negotiation and NRM planning that members can access on fee-for-service basis. This will obviate the need for all NTRBs/NTSPs to develop in-house capability in these areas until they are operating predominately in a post-determination environment, by which time this in-house capacity can be funded by re-prioritisation of existing funds

DISCUSSION POINTS 3 – RECOGNITION

NTRBs are recognized by the Minister under Section 203A of the NTA. NTSPs are not subject to the same statutory requirements for recognition, nor are their funding periods determined by the recognition process. The Federal Minister may also revoke an invitation for recognition or withdraw the recognition of a body as the representative body under certain circumstances.

The NNTC submits that the Ministerial recognition process for NTRBs is cumbersome and can be onerous when added to all other levels of reporting requirements, including ORIC (or ASIC), FaHCSIA, the Australian Charities and Not-for-profits Commission and other funding bodies.

The responsibility for funding NTRBs/NTSPs is carried out by FaHCSIA, which provides annual contributions under a Program Funding Agreement in response to a detailed budget and operational plan. Given that both NTRBs/NTSPs develop strategic plans, the government sets funding levels under the PFA over a two or three year cycle and the PFA gives government the ability to withhold funding, the process of recognition every three is becoming increasingly unnecessary. In the absence of any strong reason to retain the recognition provisions, NNTC

recommends that they be removed from the NTA.

Conversely, a decision to discontinue the recognition process without nominating an alternate process by which service providers are selected could open up the system to private agents who are not subject to the same regulatory regime as NTRBs under Part 11 of the NTA. Such a situation should be avoided and the NNTC recommends that if the recognition provisions are removed, the Government consider developing an alternate periodic tender process for the provision of NTRB/NTSP-type services (such as is used to engage Aboriginal and Torres Strait Islander Legal Services) containing strict selection criteria necessary to proper performance of NTRB functions. Needless to say, the NNTC and its membership would expect to be consulted in the design of such a process.

Recommendations

10. Amend the NTA to remove NTRB recognition provisions.
11. If removing the recognition provisions, consider the introduction of a competitive tender process for provision of NTRB/NTSP services, containing strict selection criteria necessary to proper performance of NTRB functions.

Discussion Points 4 – Rationalisation

The NNTC would strongly argue AGAINST any rationalisation of the number of NTRBs/NTSPs currently operating in the native title system. As the Discussion Paper acknowledges, some regions were rationalised in 2007 leaving limited scope for further amalgamations. It is the view of the NNTC and its members that any amalgamation of NTRBs/NTSPs across state or territory jurisdictions would result in a significant resource impost on the operations of NTRBs/NTSPs.

Land tenure is a complex area of policy throughout Australia. Not only are there different legislative frameworks across the States and Territories but there are also different tenure systems that impact on the capacity of Indigenous Australians to benefit significantly from traditional lands. Should an amalgamation take place across a State or Territory jurisdiction the affected NTRB/NTSP would require increased resources to ensure it is sufficiently equipped to operate within the different legislative frameworks.

In addition, the NNTCs workshop held in February raised these specific points in relation to point 4 of the Terms of Reference for the Review:

- Rationalisation/amalgamation would cause further complications and challenges;
- Under no circumstances should amalgamations go beyond State/Territory boundaries;

- De-centralised service delivery and large number of discrete groups in some States militates against any further amalgamations;
- More cross border claims will emerge – current structure allows cross border claims to be properly represented – is far more cost-effective than briefing one or both matters out;
- There are different situations in different states – operational capacity of NTSPs in different states is geared toward effective operation;
- Rationalisation would not deliver efficiency gains;
- Would exacerbate tensions that already exist for NTRBs and NTSPs being too remote from its fringe areas as well as create further difficulties for the representation of more culturally diverse groups;
- Rationalisation/amalgamation would dilute the effectiveness of services being provided;
- One size doesn't fit all – unique situation of individual jurisdictions;
- Existing NTRBs/NTSPs have developed specialised services tailored to the needs of their region, which are unique and reflective of the diversity of traditional and customary systems of governance. There are also local climatic and environmental conditions that have an influence on the operation of services;
- Many land Councils that are rep bodies have been operating as land councils long before the statutory recognition of NTRBs/NTSPs. Some minor changes to the boundary of NTRBs could be required, where it is recognised that the NTRB or NTSP area has not matched the traditional area of representation of a region of people; and
- Any proposal to rational the number of NTRBs/NTSPs will need to balance the impact that increasing the number of regions affects the economics of scale and efficiency of resourcing and too few regions affects the quality of service and the effectiveness of local governance and self determination.

The NNTC would argue that any increase in the number of regions will affect the economies of scale and efficiency of resourcing whilst any decrease in the number of regions will affect the quality of service as well as the effectiveness of local governance and self determination.

The NNTC would strongly resist any proposal that would further rationalise the number of NTRBs/NTSPs across the country.

Recommendations

12. That the Government not consider or develop any proposal to rationalise the numbers of NTRBs/NTSPs.

DISCUSSION POINTS 5 AND 6 – PBCS AND NTRB/NTSP SUPPORT

As at 14 August 2013 there were 112 PBCs throughout Australia, the largest number having been established in Queensland (54). Importantly, this number will increase over time as more native title determinations are achieved.[10] PBCs hold formal land management and community development responsibilities over their native title lands which collectively comprise over 20 per cent of the Australian continent.[11] As at June 2013 the area of land that has a native title determination and a PBC in place was 1,397,000 sq kms, or approximately 18.2% of the Australian land mass.

The NNTC notes that whilst there is currently no legislative mechanism for NTRBs/NTSPs to carry out any particular function on behalf of PBCs, Section 203B(4) of the NTA specifically states that a "representative body must give priority to the protection of the interests of native title holders".

One of the key gaps in supporting PBCs is the lack of government resources in the overall native title system. The NNTC acknowledges that some PBCs are being established under the auspices of agreements with the extractive industry and are becoming increasingly self-sufficient and autonomous. However, for those PBCs that do not have access to extractive industry benefit arrangements, only around $2m is made available annually to support the establishment and management of PBCs Australia wide. Given the ever increasing number of PBCs the current funding level is woefully inadequate and more funds should be made available. The NNTC believes that the Commonwealth government has a moral obligation to support PBCs given they are established under an Australian statute (Section 56 of the NTA), and determined by the Federal Court.

Furthermore, the NNTC submits that whilst the roles and responsibilities of NTRBs/NTSPs has increased and evolved over time giving them sufficient time to adjust their operations, the roles and functions of PBCs have not adjusted since the introduction of the NTA in 1993. The NNTC therefore believes that the Review is timely in order that PBCs can be given an opportunity to adjust to the real operational environment of the native title system as well as the aspirations of Traditional Owners and their communities.

Currently, FaHCSIA through NTRBs/NTSPs, have the responsibility to support the operations of PBCs, however in competition with other core business. This is

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[10] Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Registered Native Title Bodies Corporate (RNTBC) and Prescribed Bodies Corporate (PBC) Summary' (Summary prepared by the Native Title Research Unit, 27 June 2013) http://www.aiatsis.gov.au/ntru/docs/resources/issues/RNTBCsummary.pdf (accessed 30 September 2013).

[11] National native Title Tribunal, *Determinations of Native Title* (30 June 2013) http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations_map.pdf (accessed 30 September 2013).

particularly the case in regions where there are no outside economic opportunities such as those offered through extractive industry activity. The NNTC therefore believes that PBCs need specific funding assistance to:

- Engage sufficient resources and purchase equipment to be able to carry out business effectively and efficiently;
- Develop robust governance structures – including trust management and capacity building; and
- Develop genealogy databases. Whilst the native title process provides a specific context for collecting genealogical information, communities often seek their own family genealogies. PBCs would be best placed to develop genealogy databases for their communities. There are also often restrictions on what anthropological material can be provided by the relevant NTRB/NTSP. PBCs therefore need to be able to develop their own genealogical information database as a means of identifying their membership and knowing who they should be consulting when responding to project proposals or other matters. Resources are required to develop such an initiative, with the initial work likely requiring the services of a consultant anthropologist.

It is critical that PBCs are afforded every opportunity to develop their own autonomous and sustainable structures. Some PBCs are becoming increasingly involved in agreement making as well as supporting sustainable benefits management. However, there remains a number of PBCs that still rely on the support of NTRBs/NTSPs to assist not only in the agreement making process, but also the day to day management of PBCs as Aboriginal Corporations. The needs of NTRBs/NTSPs in assisting PBCs need to be assessed and appropriate funding mechanisms put in place until such time as PBCs have developed the capacity to operate in their own right.

Assistance for PBCs, and NTRBs/NTSPs, should be provided to assist in negotiating agreements and achieving the best possible outcomes for Traditional Owners and their communities. Whilst, generally speaking, staffing arrangements for NTRBs/NTSPs are established to prosecute and manage native title claims, the negotiation of agreements and establishing structures to manage sustainable benefits require specific skills and expertise. In this regard, NTRBs/NTSPs and PBCs would need financial resources to support new staffing positions to fulfil Traditional Owner requirements in relation to negotiation agreements, providing financial advice as well as compliance of agreements once they are in place.

While it is noted that ORIC is available to assist PBCs with governance training, the NNTC understands that this training is not specific to the particular requirements of PBCs, nor are they able to assist with other capacity building costs. Many PBCs require assistance for strategic and business planning as well as financial management and negotiation training. These things are beyond the scope of ORIC's training program but are critical to the ongoing operation of PBCs and

their ability to engage with other parties in the way envisaged by the NTA.

Because of a lack of capacity and resources, many PBCs struggle to operate as effectively as they might. Problems include lack of organisational skills and office experience and lack of basic infrastructure and equipment. Under the current arrangements this situation will continue. Without additional capacity and resources, NTRBs and NTSPs will not be able to provide the level of support necessary to ensure effectively functioning PBCs that would benefit both native title holders who become self-sufficient over time and those that would do business with them.

Unless there is a recognised commitment by the Government to the funding of intensive governance training and other relevant capacity building, the NNTC is apprehensive that many PBCs will fail in acquitting their statutory responsibilities, and will not become viable agencies to which third party stakeholders can reliably relate in relation to native title transactions.

The CATSI Act provides for Indigenous groups to form Corporations and register with the Registrar of Indigenous Corporations. Currently, negotiations of funds and benefits with native title holders or Indigenous communities mostly occur through a corporation registered under the CATSI Act.

In areas where native title has been determined, agreements are negotiated with Traditional Owners through a PBC. The NTA provides that when there is a determination of native title by the Federal Court, the recognised native title right and interests must be held in trust or managed on behalf of the native title holders by a PBC.

Under the NTA and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), a PBC must be registered as an Aboriginal and Torres Strait Islander corporation under the Corporations (Aboriginal and Torres Strait Islander) Act (CATSI Act). The CATSI Act has tailored provisions to ensure that PBCs do not have conflicting obligations between the CATSI Act and the NTA.

The NNTC understands that the National Party has a policy position whereby Registration of Indigenous Corporations with the Office of the Registrar of Indigenous Organisations (ORIC) will be mandatory. According to ORIC, registration under the CATSI Act is mostly voluntary. However, some corporations, such as PBCs set up under the NTA, are required to register under the CATSI Act.

The NNTC acknowledges that ORIC has been established to provides a tailored service to Indigenous Corporations that responds to the particular needs of Indigenous groups, Corporations should also be provided with the flexibility to determine which statutory authority is best placed to service the particular needs of an organisation.

The NNTC does not agree that the registration of Aboriginal and Torres Strait Islander organisations should be mandatory to any particular statutory authority. There are many options available for Indigenous organisations to gain assistance with the establishment, compliance and governance for their corporations and mandating this activity should be avoided.

The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 ('the Amendment Regulations') came in to effect on 14 December 2011. The Amendment Regulations included a provision that defines a PBC to also include the Indigenous Land Corporation (ILC). This provision allows for the Federal Court to determine the ILC as agent PBC for the native title group in circumstances where no PBC has been nominated, or a liquidator has been appointed to wind up an existing PBC and no replacement has been nominated.

In this regard, a final comment that the NNTC would like to make is that this provision should be further amended to allow for other organisations to be nominated as a default PBC, such as a NTRB or NTSP or even a credible community organisation already in operation within the relevant region.

Recommendations

13. Increase the appropriation to the native title program to provide limited additional resources to support and build capacity of PBCs.
14. Governance training and capacity building should be included as aspects of PBC administration that can be supported, where other funding avenues are not available.
15. Ensure there is capacity to rationalise the number of PBCs to a regional PBC, governed by rules and administered by the regional service provider to deliver economies of scale.
16. Ensure maximum flexibility for native title holders to adjust corporations post-determination depending on individual needs.
17. That other organisations, such as community organisations and NTRBs/NTSPs, as well as the Indigenous Land Corporation, be considered as appropriate organisations to act as a default PBC should the need arise.

Discussion Points 7 – Private Agents

Members of the NNTC are increasingly concerned about the growing prevalence of predatory behaviour by agents other than recognised NTRBs/NTSPs seeking to represent native title parties (i.e. registered native title claimants and registered native title bodies corporate) in the negotiation of future act agreements, Indigenous Land Use Agreements (ILUAs) and other settlements contributing to the resolution of native title claims. This is particularly the case in resource-rich regions of Australia. Such behaviour is already generating significant negative legal, social

and economic impacts for native title parties. Driving these impacts is the divisive and disruptive effect of the behaviour.

Such behaviour is creating new fractures and disputes within native title parties, which in turn are leading to further complexities and delays on significant decisions pertaining to claim business and the authorisation of agreements. This creates new challenges and pressures for NTRBs/NTSPs legal representatives seeking instructions from their clients on the basis of free, prior and informed consent. It also inevitably slows down any progress toward claim resolution.

These new divisions are also creating real distress for community members, many of whom are senior Traditional Owners and have been waiting over a decade for recognition of their native title rights and interests. NTRBs/NTSPs have drawn on their expertise and experience to establish tailored governance arrangements appropriate to the native title context in order to prevent such confusion, handle disputes and ensure transparent and legitimate decision-making processes.

The unprofessional conduct by third party agents is jeopardising the capacity of groups to leverage their rights and interests for economic development. Any benefits that flow from native title agreements need to be managed collectively, for the benefit of the whole community. Such behaviour will also create uncertainty for industry parties looking for guarantees that financial benefits will be managed effectively and lead to sustained employment and business development opportunities.

NTRBs/NTSPs have worked intensively with industry and government over the last decade and parties have worked collectively to identify best practice and build the capacity of native title parties in this area. The disruptive and divisive behaviour of third parties is undermining these achievements and threatening to significantly reduce the potential for native title to deliver real, practical economic outcomes for future generations of native title holders.

The NNTC is also concerned that compensatory benefits provided to native title parties through agreements may be significantly eroded to cover unreasonably high fees for service incurred during the negotiation process.

Under s 203B(1)(a) and (e) of the NTA, NTRBs/NTSPs have functions in relation to their defined area to represent native title parties in pursuing native title determination applications, compensation applications, future act agreements and ILUAs. In general these functions can only be performed at the request of the native title parties. In performing these functions NTRBs are bound by the extensive regulatory regime contained in Part 11 of the NTA. In addition, the legal practitioners employed by NTRBs to undertake these functions are bound by the legislative and ethical standards applicable to the broader legal profession under the

relevant professional conduct rules. Under s 203FE, NTSPs are subject to essentially the same regulatory regimes, as are their employed legal practitioners.

Further, both NTRBs and NTSPs are subject to the prescriptive terms of their Program Funding Agreements (PFAs). The current PFAs include requirements going to (*inter alia*) consultation with the Department of Families, Housing, Community Services and Indigenous Affairs, (FaHCSIA)[12] regarding key personnel appointments and accounting for "program generated funds", which would include fees or commissions arising from future act negotiations. The ability of FaHCSIA to withdraw funding from an NTRB/NTSP operates effectively as a further regulatory mechanism. Finally, decisions made under 203BB by NTRBs/NTSPs are subject to external review pursuant to s203FB.

There is nothing in the NTA that requires native title parties to utilise the services of NTRBs/NTSPs in pursuing native title determination applications, compensation applications, future act agreements and ILUAs. In addition, while a party can be represented in the Federal Court by a person other than a legal practitioner only by leave of the Court (s 85), there is no such limitation in relation to future act proceedings before the National Native Title Tribunal (NNTT).

In practice, the funding provided to NTRBs/NTSPs to pursue native title determination applications and the "no costs" provision contained in s 85A ensures that, with few exceptions, only NTRBs/NTSPs (or legal practices funded by NTRBs/NTSPs) represent native title claimants in determination application and compensation application proceedings. The same is not true in relation to future act negotiations and agreements.

The current scheme of the NTA allows native title parties to appoint an "agent" (not being an NTRB/NTSP) in relation to future act negotiations and for that agent to secure for themselves a proportion of any benefits arising from those future act negotiations. In the case of future acts involving mining projects, even a small percentage of the benefits arising from the proposals can represent a significant amount that would otherwise be available for the native title parties.

In the event that these agents are a legal practice the only regulatory regime is that applicable under the relevant professional conduct rules. In the event an agent is an entity that is not a legal practice, even one that employs legally qualified staff, there is no regulatory regime.

[12] This submission refers to the Department of Families, Housing, Communities and Indigenous Affairs (FaHCSIA), as established under the former government. However, the NNTC acknowledges that there will be changes to the Department following the recent election with responsibility for Indigenous Affairs being moved to the Department of Prime Minister and Cabinet. Therefore any reference to FaHCSIA will also relate to the new arrangements for Indigenous Affairs established under the new government.

On a simple analysis the situation described could be characterised as one of contestability or freedom to contract. On this analysis the native title party should be able to appoint any entity they chose as their agents in future act negotiations. However a number of factors militate against such a simple analysis. The unprofessional conduct that NNTC members are currently observing has a number of serious policy implications for the Commonwealth Government and suggest that the area may be one appropriate for some level of regulation.

Major policy implications include:

- the costs of administration of the future act regime are a cost borne predominantly by Commonwealth and States/Territory Governments[13] and industry;
- the future act regime was established by the Commonwealth to reflect its perception of the concept of equality before the law under the *Racial Discrimination Act 1975* (Cth) and facilitated the delivery of benefits to native title parties;
- the extensive regulation regime of NTRBs/NTSPs was established (in part) to ensure best practice in future act negotiations;
- many native title parties may be yet to develop the governance capacity to make informed decisions as to the appointment of agents;
- the Commonwealth Government's broader policy objectives, including its commitments to reaching the Closing the Gap targets, are best served by ensuring thoughtful structuring of future act benefits;
- existing legal professional conduct rules are ill-suited to regulate relations "in the field" in the context of taking instructions from native title parties;
- the involvement of agents may delay the overriding imperative to expeditiously resolve claimant applications; and
- a lacuna in the NTA is being exploited whereby these agents are receiving financial reward from native title claim group monies but are only accountable to a proportionally miniscule group of people, being those who make up the applicant (s61) or registered native title claimants (s253). In contrast, NTRB/NTSPs do not charge the claim group for the same services and are accountable to all the people who hold or may hold native title (who, depending on the evidence, may or may not include the Applicant/registered native title claimants).

These factors suggest that some form of regulation of the activities of agents in their involvement in future act negotiations may be appropriate. The NNTC

[13] Jurisdiction over land and resource management is vested in the State and Territories. Paramount jurisdiction with respect to 'people of any race' is vested in the Commonwealth. The NTA sought to give effect to State and Territory jurisdiction whilst securing a 'nationally consistent approach to the recognition and protection of native title': NTA 1993 s 207A(2).

participated in the in Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, supports further discussion and development about the options for reform advanced in its final report, namely:

- Development of a system of regulation of private agents involved in negotiating future act agreements;
- Establishment of a statutory trust to hold native title agreement funds where there is no PBC, ICDC or other appropriate entity to receive them;
- Development of a process for the registration of s31 agreements.

The NNTC earlier provided the review team with a copy of its *Issues Paper on Consumer Protection for Native Title Parties* which develops some of these ideas. The NNTC submits that government, in consultation with the NNTC and its members, develop a package of legislative and policy measures aimed at addressing the issue of unethical private agents and ensuring the protection of Indigenous community benefits.

Recommendations

18. That the government, in consultation with the NNTC and its members, develop a package of legislative and policy measures designed to regulate private agents and ensure the protection of agreement monies paid for the benefit of the native title holding community.