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Discussion paper: Leading practice agreements: maximising outcomes from native title benefits

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Australian Human Rights Commission Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs

30 November 2010

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1 Introduction

1. The Australian Human Rights Commission makes this submission in response to the *Leading practice agreements: maximising outcomes from native title benefits* discussion paper (the Agreements Discussion Paper).[1]

2. The Commission is Australia's national human rights institution and has powers and functions under the *Australian Human Rights Commission Act 1986* (Cth) and the *Racial Discrimination Act 1975* (Cth).

3. In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner) has specific responsibilities under the section 209 of the *Native Title Act 1993* (Cth) (the Native Title Act) to report annually on the operation of that Act and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.

4. This submission focuses on the options that are canvassed in the Discussion Paper for:

   - encouraging entities that receive native title payments to adopt measures to strengthen their governance
   - creating a new statutory function to review native title agreements, with the objective of improving the sustainability of these agreements
   - clarifying the requirements for good faith negotiations under the Native Title Act.

5. The Commission does not propose to make specific comment on the options in the Agreements Discussion Paper to streamline Indigenous Land Use Agreement (ILUA) processes.

6. Given the complexity of the matters under consideration, the Commission encourages the Government to continue to engage with Aboriginal and Torres Strait Islander peoples regarding the proposals set out in the Agreements Discussion Paper.

7. In particular, the Commission recommends that the Australian Government consult and cooperate with affected Aboriginal and Torres Strait Islander peoples in order to obtain their free, prior and informed consent before adopting or implementing any legislative or administrative measure in response to the Agreements Discussion Paper.

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[1] The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 23 November 2010).

2 Summary

8. The Commission recognises the importance of government support to assist native title groups to negotiate beneficial agreements and develop robust governance structures.

9. The Commission considers that such support should focus on capacity development, rather than on increased regulation, review or assessment. Without access to adequate financial resources and expert advice, Aboriginal and Torres Strait Islander peoples are unlikely to be able to enter into 'sustainable' agreements, enforce the implementation of such agreements or develop effective governance structures.

10. The Commission does not support the introduction of a new statutory review function as proposed in the Agreements Discussion Paper, for the following reasons:

    - the Government has not adequately demonstrated the need for a new statutory review function
    - the statutory function will do little to empower Aboriginal and Torres Strait Islander peoples and their representatives to negotiate beneficial agreements
    - the potential elements of the review function, as explored in the Agreements Discussion Paper, are problematic and should be reconsidered.

11. However, the Commission includes in this submission brief comments on the potential characteristics of the statutory review function that should be taken into account by the Government should it choose to pursue this reform.

12. The Commission welcomes the Government's proposal to clarify the good faith negotiation requirements in the Native Title Act. The Commission submits that the Native Title Act should be amended to include explicit criteria as to what constitutes good faith, and be supplemented by a code or framework to guide parties and the National Native Title Tribunal as to the requirements of good faith negotiation.

13. In addition, the Commission submits that the Government should give consideration to the further options for amending the right to negotiate regime set out in paragraph 76 of this submission.

3 Recommendations

Recommendation 1: That the Australian Government consult and cooperate with affected Aboriginal and Torres Strait Islander peoples in order to obtain their free, prior and informed consent before adopting or implementing any legislative or administrative measure in response to the Agreements Discussion Paper.

Recommendation 2: That the Australian Government ensure that sufficient resources, training and access to expertise are available to ensure that Aboriginal and Torres Strait Islander peoples are able to:

- develop effective and sustainable governance mechanisms
- negotiate beneficial agreements
- monitor and enforce compliance with agreements.

Recommendation 3: That the Australian Government support the establishment of an 'Indigenous Governance Institute' to develop the capacity of communities to design and implement effective governance mechanisms.

Recommendation 4: That the Australian Government not proceed with a new statutory review function as proposed in the Agreements Discussion Paper. Further, that consideration of the proposal to introduce a new statutory review function be postponed until such time that:

- the Australian Government is able provide evidence regarding the need for the function
- stakeholders are able to respond to the proposal in an informed way, based on this evidence.

Recommendation 5: That the Native Title Act should be amended to include explicit criteria as to what constitutes good faith, and be supplemented by a code or framework to guide parties and the National Native Title Tribunal as to the requirements of good faith negotiation.

Recommendation 6: That the Australian Government give further consideration to the broader options for reforming the right to negotiate regime set out in paragraph 76 of this submission.

4 Governance measures

14. The Agreements Discussion Paper indicates that the Government is considering options to encourage entities that receive native title payments to strengthen their governance. The Government suggests that these measures could include:

    - incorporating under the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (Cth) or the *Corporations Act 2001* (Cth)
    - appointing independent directors
    - adopting enhanced democratic controls.[2]

15. The Commission recognises the importance of effective governance. The Commission also recognises that some native title entities may consider that certain governance features, such as the appointment of independent

[2] Minister for Indigenous Affairs and the Attorney-General, above, p 6.

directors, can facilitate greater transparency, accountability and access to expertise. On this basis, some entities may choose to adopt such features.

16. However, the Commission expresses concern at the Government's suggestion that '[o]ne way to encourage adoption of the governance measures … would be to mandate them',[3] or make access to beneficial tax treatment conditional upon the adoption of such measures. The Commission submits that this approach would not empower Aboriginal and Torres Strait Islander peoples to develop governance arrangements that are legitimate, effective, and appropriate to their circumstances. It also assumes there are sufficient numbers of 'independent' directors who have the necessary cultural competency and understand how to work with Aboriginal and Torres Strait Islander peoples in this context to participate in this way.

4.1 Governance arrangements need to be the product of informed choice

17. The *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) affirms that:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[4]

18. Indigenous peoples also 'have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions', and to 'determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.[5]

19. These are not abstract concepts. Effective, sustainable governance is more likely to be achieved when Aboriginal and Torres Strait Islander peoples are able to exercise genuine decision-making authority.

20. This was demonstrated by the Indigenous Community Governance Project (the Governance Project), which was conducted by Reconciliation Australia and the Centre for Aboriginal Economic Policy Research.[6] One of key findings of the Governance Project was that:

[3] Minister for Indigenous Affairs and the Attorney-General, above, p 7.
[4] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 3. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 23 November 2010).
[5] *United Nations Declaration on the Rights of Indigenous Peoples*, above, arts 5, 32(1). See also arts 4, 20.
[6] For information on the Indigenous Community Governance Project, see Reconciliation Australia, *The Indigenous Community Governance Research Project*, http://www.reconciliation.org.au/home/projects/indigenous-governance-research-project (viewed 26 November 2010); Centre for Aboriginal Economic Policy Research, *Indigenous Community Governance*, http://caepr.anu.edu.au/governance/index.php (viewed 26 November 2010).

> [G]overnance is greatly strengthened when Indigenous people create their own rules, policies, guidelines, and codes, as well as design the mechanisms for enforcing those rules and holding leaders accountable.[7]

21. The Governance Project considered that effective governance needs to display 'two way legitimacy', that is:

> The effectiveness of Indigenous-designed rules and procedures is greatest when their legitimacy is derived from local cultural realities and they also support organisations to get things done and gain external confidence.[8]

22. 'Two way legitimacy' involves the following key elements:

- legitimate governance arrangements need to reflect, or resonate with, Indigenous views of how authority should be organised (systems and structures) *and* exercised (processes and rules)
- legitimate governance reinforces core institutional values (rules)
- legitimacy in the Indigenous domain is also achieved and assessed through effectiveness — that is, an organisation or leader who is able to deliver outcomes gains legitimacy in the eyes of their clients or members
- an effective and accountable organisation in a corporate governance sense also gains legitimacy because of its capacity to obtain and maintain funds and resources for its members from governments and other sources, and
- it gains legitimacy from external stakeholders because of its capacity to manage and account for those funds, and to deliver outcomes.[9]

23. Importantly, in order '[t]o be judged as legitimate by Indigenous people, governance arrangements need to be developed *by them* as a result of informed choice'.[10]

24. In contrast, governance models that are imposed from the top down 'will not easily be recognised as having legitimacy or credibility by Indigenous people, their leadership will be suspect, they will secure little active participation from people, and are unlikely to be sustainable'.[11]

4.2 The Government should focus on community development

25. The Commission is concerned that 'top down' approaches, such as mandating governance measures or making access to beneficial tax treatment conditional on the adoption of such measures, are most unlikely to be conducive to effective, sustainable governance.

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[7] J Hunt & D Smith, *Indigenous Community Governance Project: Year Two Research Findings*, Centre for Aboriginal Economic Policy Research, Working Paper No 36/2007 (2007), p 34. At http://www.reconciliation.org.au/extras/file.php?id=256&file=Indigenous+Community+Governance+Research+Project+-+File+1.pdf (viewed 23 November 2010).
[8] Hunt & Smith, above.
[9] Hunt & Smith, above, pp 24–25.
[10] Hunt & Smith, above, p 24.
[11] Hunt & Smith, above, p 22.

26. The Commission considers that community development, rather than regulation, should be the focus of the Government's efforts to strengthen the governance of entities that receive native title payments.

27. As the Governance Project recommended:

> Government policy frameworks will better support the growth of 'two-way' effectiveness and accountability in Indigenous organisations by adopting a community development approach to governance, which strengthens legitimacy through capacity and institution building rather than focusing primarily on financial and technical compliance.[12]

28. The Commission supports this approach. The Commission recommends that the Government ensure that sufficient resources, training and access to expertise are available to ensure that Aboriginal and Torres Strait Islander peoples are able to:

    - develop effective and sustainable governance mechanisms
    - understand their rights as members of a native title entity
    - understand their duties within the entity (particularly as directors)
    - implement governance mechanisms or amend them where necessary.

29. Importantly, such resources should be available to assist Aboriginal and Torres Strait Islander peoples to give early consideration to governance issues — well before the final negotiation and implementation phases of an agreement.

30. The Commission specifically encourages the Government to support the establishment of an 'Indigenous Governance Institute' to develop the capacity of communities to design and implement effective governance mechanisms. As recommended by the Governance Project, such an institute would:

    - foster, encourage, communicate and disseminate best practice in Indigenous governance and design
    - encourage, facilitate and, where practicable, collaborate with relevant bodies at the national, state, territory and local levels to develop practical, culturally-informed educational and training materials, tools and resources to support the delivery of governance and organisational development at the local level
    - facilitate and implement the development of 'train the governance trainer' and mentoring courses, particularly targeted at developing a sustainable pool of Indigenous people with the requisite professional skills
    - commission and undertake applied research to support those functions.[13]

31. Such support would be consistent with article 39 of the Declaration, which provides that '[i]ndigenous peoples have the right to have access to financial

[12] Hunt & Smith, above, p 28 (recommendation 5.5.1).
[13] Hunt & Smith, above, p 34 (recommendation 6.6.1).

and technical assistance from States …, for the enjoyment of the rights contained in this Declaration’.[14]

5 A new statutory review function

32. The Agreements Discussion Paper also includes a proposal for a new ‘statutory review function’. Pursuant to this statutory function, native title parties would be required to register ‘future act’ agreements with a review body. This body could be responsible for:

- receiving and reviewing native title agreements and maintaining a confidential register of those agreements
- assessing some native title agreements against leading practice principles
- advising and assisting parties to implement leading practice in native title agreements
- research and communication to develop and promote leading practice in agreement-making
- reporting on trends and issues via an annual report tabled in Parliament
- advising relevant Ministers, including where parties are not prepared to adopt leading practice principles, or in relation to measures to further assist parties to native title agreements
- assessing access to tax benefits for financial benefit packages paid under the agreements.[15]

33. The Commission recognises the importance of government support to assist Aboriginal and Torres Strait Islander peoples to maximise positive financial and non-financial benefits from native title agreements. However, the Commission does not support the introduction of a new statutory review function.

34. In particular, the Commission submits that:

- the Government has not adequately demonstrated the need for a new statutory review function
- the statutory function will do little to empower, and may possibly undermine the capacity of, Aboriginal and Torres Strait Islander peoples and their representatives to negotiate or enforce compliance with ‘sustainable’ agreements
- the potential elements of the review function, as explored in the Agreements Discussion Paper, are problematic and should be reconsidered.

[14] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 4, art 39.
[15] Minister for Indigenous Affairs and the Attorney-General, above note 1, pp 8–9.

5.1 There is insufficient evidence to justify the introduction of a review function

35. The Government acknowledges that there is a lack of real information around the quality and quantity of native title agreements, and considers that a new statutory review function would make information available 'to help develop evidence based policy'.[16]

36. Yet, despite the acknowledged lack of information, the Government comments that:

> A growing number of individual agreements deliver many millions of dollars each year to individual native title groups. Others have a lower financial value but over time have the potential to make a real impact on the lives of native title beneficiaries.[17]

37. Further, the Government states that there is presently a risk that the potential of native title agreements 'will not be reached due to factors related to agreement design and structure'.[18] The Government also states that concerns about particular negotiations or agreements are regularly brought to its attention by stakeholders.[19]

38. However, the Government does not support these assertions with reference to research or evidence that could justify such regulation of private, native title agreements. On this basis, it is difficult to conclude that a statutory review mechanism would be a proportionate response to the issues that the Government has identified in the Agreements Discussion Paper.

39. The Commission submits that the Government should provide the evidence on which this proposal is based in order to enable stakeholders to respond to the Agreements Discussion Paper in an informed way.

5.2 There is a need to focus on capacity development

40. A major shortcoming of the Agreements Discussion Paper is that it does not sufficiently address the urgent need for capacity development within the native title system.

41. Aboriginal and Torres Strait Islander peoples face significant barriers to negotiating just and equitable agreements, including inadequate resources and access to appropriate professional advice (such as legal and financial advisers). There are also significant barriers embedded within native title law and policy, such as the onerous burden of proof faced by Aboriginal and Torres Strait Islander peoples. To facilitate positive outcomes from agreement-making, governments need to take action to ensure that the playing field is level.

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[16] Minister for Indigenous Affairs and the Attorney-General, above, p 5.
[17] Minister for Indigenous Affairs and the Attorney-General, above, p 4.
[18] Minister for Indigenous Affairs and the Attorney-General, above, p 8.
[19] Minister for Indigenous Affairs and the Attorney-General, above, p 5.

42. A new process of registration, review and assessment will have little impact on the ability of Aboriginal and Torres Strait Islander peoples to enter into or benefit from sustainable agreements if the wider problems of capacity and resourcing are not addressed. Aboriginal and Torres Strait Islander peoples simply may not be able to ensure that their agreements meet 'leading practice' if they do not have access to adequate expert advice.

43. The Commission considers that the Government can best meet its objective of promoting sustainable agreements by supporting Aboriginal and Torres Strait Islander peoples to develop their capacity to engage effectively in negotiations.

44. The Commission acknowledges that certain options proposed in the Agreements Discussion Paper could contribute towards broader capacity-development initiatives. For instance, a 'leading practice agreements' toolkit and the publication of model terms could provide guidance to parties on the design and structure of agreements.[20]

45. However, there is a risk that a tool kit or model clauses will not be able to encapsulate the diversity of the agreement-making environments across Australia. Further, they could potentially only reflect minimum standards and discourage the development of tailored solutions. It is important that these resources be as flexible as possible and that they be used as a starting point for discussions, rather than be treated as definitive or restrictive frameworks.

46. Rather than developing a new toolkit or creating a new statutory review function, the Government could provide further support to existing capacity-development projects. This includes the NTRB Knowledge Management: Agreement-making project, undertaken by the Australian Institute of Aboriginal and Torres Strait Islander Studies. The pilot phase of this project has resulted in the development and launch of a prototype version of a secure, online database, which contains over 100 mining and exploration-related precedents.[21]

47. Further, research projects on agreements and agreement-making, such as the Agreements, Treaties and Negotiated Settlements Project,[22] could be supported as an alternative to imposing further regulation in order to access information about agreements.

48. In addition, the Commission submits that any options for increasing access to agreements need to respect confidentiality, privacy obligations and the commercial-in-confidence content of the agreements.

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[20] Minister for Indigenous Affairs and the Attorney-General, above, pp 10, 11.
[21] For information on the project, see J Fardin, 'NTRB Knowledge Management Pilot: Agreement Making', *Native Title Newsletter*, No 5/2010 (September/October 2010), p 11. At http://www.aiatsis.gov.au/ntru/docs/publications/newsletter/SepOct10.pdf (viewed 23 November 2010).
[22] See *Agreements, Treaties and Negotiated Settlements Project*, http://www.atns.net.au/ (viewed 26 November 2010).

49. The Commission also emphasises that the need for greater capacity development is not confined to pre-agreement stages. Even a ‘leading practice’ agreement may not in reality benefit Aboriginal and Torres Strait Islander peoples if they are not able, due to a lack of resources, to monitor and enforce compliance with its terms.

50. The Commission also considers that the Government should explore options for the provision of monitoring and compliance support. For example, further resources could be provided to Native Title Representative Bodies and Native Title Service Providers to employ compliance officers.

51. The Commission further notes that there is also a need for Aboriginal and Torres Strait Islander peoples to be able to access the expertise required to leverage the benefits derived from agreements. The Commission encourages the Government to explore further options for resourcing Aboriginal and Torres Strait Islander peoples to access this expertise.

5.3 Comments on specific features of the proposed statutory review function

52. The Commission submits that several key elements of the model of the review function as set out in the Agreements Discussion Paper are problematic and should be reconsidered by the Government.

(a) Agreements subject to registration

53. The type of agreements that would be subject to registration is poorly defined. The Agreements Discussion Paper suggests that ‘future act’ agreements (Indigenous Land Use Agreements and s 31 agreements) would be required to be registered with the body. This would require agreements to be registered regardless of their nature or size, and risks regulatory overreach.

54. This issue highlights the Government’s failure to articulate adequately the case for the review function. For example, it is unclear whether the Government has evidence or specific concerns relating to a particular type of agreement.

(b) Review against leading practice principles

55. The Government states that:

> Review of agreements by the body would be aimed at identifying the capacity of agreements to contribute to the intergenerational, social and economic development of native title holders and claimants, including whether the agreements incorporate leading practice.[23]

[23] Minister for Indigenous Affairs and the Attorney-General, above note 1, p 9.

56. The Commission considers that, in general, there may be merit in an agreement containing the leading practice elements suggested in the Agreements Discussion Paper. These elements include:

    - regular, funded reviews of agreement performance, including mechanisms to respond to agreement review findings
    - financial provision for administration of the agreement
    - processes and funding for ongoing communication and decision-making regarding agreement matters amongst the native title group
    - dispute resolution provisions
    - the agreement and benefits management structures utilised are appropriate, and
    - the financial benefits package is sustainable, both in workability and in providing benefits to future generations of native title holders.[24]

57. However, there are significant, practical problems with the proposal to review and assess agreements against 'leading practice principles' (LPPs). The Commission considers that:

    - particularly if incorporated in legislation, the LPPs may become inflexible and difficult to amend
    - it may be difficult, if not impossible, for a body removed from the negotiation process to understand the unique economic, social and cultural context in which agreements are negotiated
    - LPPs are difficult to define, particularly given the wide range of agreements from across Australia that might be subject to assessment
    - the LPPs could become viewed as minimum standards, promoting a 'rush for the bottom' and stifling innovation
    - the diverse cultural, social and economic development aspirations of Aboriginal and Torres Strait Islander peoples cannot simply be reduced to a set of LPPs.

58. These issues, and the potential for over-regulation, would be exacerbated if the LLPs were mandated as suggested in the Agreements Discussion Paper.[25]

(c) Assessment

59. The Government suggests that, following an assessment of an agreement, the body would provide a report to the parties and make recommendations where leading practice was not met. The body could then assist the parties to identify and implement amendments in accordance with the LPPs.[26]

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[24] Minister for Indigenous Affairs and the Attorney-General, above, pp 9–10.
[25] Minister for Indigenous Affairs and the Attorney-General, above, p 7.
[26] Minister for Indigenous Affairs and the Attorney-General, above, p 10.

60. This process could unnecessarily prolong the timeframes, and increase the costs, associated with agreement-making. For instance, if the review body recommends amendments to an agreement, Aboriginal and Torres Strait Islander peoples may need to re-engage in internal decision-making processes. In some cases, this could involve reconvening expensive community meetings in remote locations in order to provide instructions to their representatives or to authorise amendments.

61. This would be inconsistent with the Government's efforts to promote agreement-making, such as the proposals in the Agreements Discussion Paper to streamline ILUA processes.[27]

62. The Commission encourages the Government to avoid implementing a review model that has the unintended consequence of discouraging or prolonging agreement-making processes.

63. In addition, this assessment process will only be of assistance to Aboriginal and Torres Strait Islander peoples if proponents are willing to amend the agreement. There appears to be little incentive for proponents to renegotiate or amend an agreement post-assessment.

(d) Characteristics of the review function

64. As stated above, the Commission does not support the introduction of a new statutory review function. However, should the Government pursue the proposed statutory function, the Commission considers that:

    - the body responsible for exercising the review function should be independent of the Government, and could be comprised of a panel of experts drawn from various sectors (in particular, it should include representatives of Aboriginal and Torres Strait Islander peoples)
    - the body's decision to subject an agreement to a full assessment against LPPs should be made in accordance with relevant, publicly available criteria
    - the review should be subject to strict statutory timeframes
    - the body should provide written reasons for its recommendations or decisions, within a strict statutory timeframe
    - parties should be able to seek a review of the body's decisions
    - the body should not be able to veto any terms of an agreement
    - all terms of all registered agreements should remain confidential, unless all parties agree to publication
    - the list of LPPs should be developed in partnership with Aboriginal and Torres Strait Islander peoples and their representatives

[27] Minister for Indigenous Affairs and the Attorney-General, above, p 12.

- mechanisms should be in place to ensure that the LPPs are flexible enough to respond to a diverse range of circumstances, and that they are able to be amended easily
- the LPPs should not require parties to an agreement to provide for basic services that are the responsibility of governments (such as education and health services).

65. The Commission does not consider that it would be appropriate for the body to advise Ministers 'where parties are not prepared to adopt leading practice principles'.[28] This would not be consistent with standards of confidentiality, and could politicise the work of the body.

66. The Agreements Discussion Paper also suggests that a registration fee may be charged.[29] The Commission considers the proponent of development should be responsible for any registration fee.

6 Reforms to clarify the requirement to negotiate in good faith

67. Following his visit to Australia in August 2009, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people recommended that:

> The Commonwealth and state governments should ensure that all laws and administrative practices related to lands and natural resources align with international standards concerning indigenous rights to lands, territories and resources. To this end, the Government should establish a mechanism to undertake a comprehensive review at the national level of all such laws and related institutions and procedures, giving due attention to the relevant reports of the Australian Human Rights Commission and the Committee on the Elimination of All Forms of Racial Discrimination.[30]

68. The Commission supports this recommendation, and considers that the Australian Government should establish an independent review of the Native Title Act.

69. The terms of reference for any such review should be developed in consultation with all affected groups, particularly Aboriginal and Torres Strait Islander peoples. However, the Commission considers that the compatibility of the future act regime with human rights standards, including the standard of free, prior and informed consent,[31] should be specifically examined as part of this review.

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[28] Minister for Indigenous Affairs and the Attorney-General, above, p 9.
[29] Minister for Indigenous Affairs and the Attorney-General, above, pp 9, 10.
[30] J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 85. At http://unsr.jamesanaya.org/PDFs/Australia%20Report%20EN.pdf (viewed 23 November 2010).
[31] *United Nations Declaration on the Rights of Indigenous Peoples*, above note 4, art 19.

70. However, in the interim, the Commission welcomes the Government's decision to clarify the good faith negotiation requirements in the Native Title Act following the High Court's decision[32] to refuse special leave to appeal the decision of the Full Federal Court in *FMG Pilbara Pty Ltd v Cox* (*FMG*).[33]

71. In the *Native Title Report 2009* the then Social Justice Commissioner considered that the good faith negotiation requirement is one of the few legal safeguards that native title parties have under the future act regime. However, the *FMG* decision demonstrates that the Native Title Act provides insufficient legal protections for native title parties.[34]

72. The Commission submits that the requirement to negotiate in good faith could be strengthened by including explicit criteria as to what constitutes good faith in the Native Title Act.

73. Section 228 of the *Fair Work Act 2009* (Cth) (the Fair Work Act) could provide a model for developing such 'good faith' criteria. That section provides:

> (1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:
>
> (a) attending, and participating in, meetings at reasonable times;
>
> (b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
>
> (c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;
>
> (d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;
>
> (e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;
>
> (f) recognising and bargaining with the other bargaining representatives for the agreement.
>
> (2) The good faith bargaining requirements do not require:
>
> (a) a bargaining representative to make concessions during bargaining for the agreement; or
>
> (b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

74. The criteria from the Fair Work Act could be adapted as appropriate to the context of good faith negotiation within the native title system. Further criteria could be drawn from the 'good faith' requirements under the *Employment*

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[32] Transcript of proceedings, *Cox v FMG Pilbara Pty Ltd* [2009] HCATrans 277 (14 October 2009). At http://www.austlii.edu.au/au/other/HCATrans/2009/277.html (viewed 25 November 2010).
[33] (2009) 175 FCR 141. This decision was profiled in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 25 November 2010).
[34] Calma, above, p 34.

Relations Act 2000 (NZ) (the Employment Relations Act). This could include a requirement to:

- agree upon a negotiation process as soon as possible[35]
- be active and constructive in establishing and maintaining a productive negotiating relationship in which the parties are, among other things, responsive and communicative[36]
- refrain from misleading and deceptive conduct.[37]

75. The legislative provisions outlining the elements of good faith could be supplemented by a code or framework to guide the parties as to their duty to act in good faith. The National Native Title Tribunal could also have regard to the code or framework in determining whether or not parties have met the good faith requirements. Such a code or framework could be modelled on the New Zealand *Code of Good Faith in Collective Bargaining* made pursuant to section 35 of the Employment Relations Act.[38] This could include some, or all, of the indicia of whether a party has negotiated in good faith set out in *Western Australia v Taylor* (1996) 134 FLR 211.[39]

76. Further, the Government could review the uniformity and brevity of the time limits under the right to negotiate regime and give further consideration to amending the Native Title Act to:

- specifically require parties to make all reasonable efforts to negotiate in good faith and to ensure that the negotiation is substantive
- require parties to have reached a certain stage in negotiations before they may apply for a determination
- shift the evidentiary burden of establishing good faith onto the party asserting that they have negotiated in good faith

[35] This proposal is modelled on section 32(1)(a) of the *Employment Relations Act 2000* (NZ).
[36] This proposal is modelled on section 4(1A)(b) of the *Employment Relations Act 2000* (NZ).
[37] This could be merged with the requirement in section 228(1)(e) of the *Fair Work Act 2009* (Cth) to refrain from capricious or unfair conduct (the proposal is modelled on section 4(1)(b) of the *Employment Relations Act 2000* (NZ)).
[38] *Code of Good Faith in Collective Bargaining 2005* (NZ). At http://www.ers.govt.nz/goodfaith/code.html (viewed 25 November 2010).
[39] These indicia include: unreasonable delay in initiating communications in the first instance; failure to make proposals in the first place; the unexplained failure to communicate with the other parties within a reasonable time; failure to contact one or more of the parties; failure to follow up a lack of response from the other parties; failure to attempt to organise a meeting between the native title and grantee parties; failure to take reasonable steps to facilitate and engage in discussions between the parties; failing to respond to reasonable requests for relevant information within a reasonable time; stalling negotiations by unexplained delays in responding to correspondence or telephone calls; unnecessary postponement of meetings; sending negotiators without authority to do more than argue or listen; refusing to agree on trivial matters; shifting position just as agreement seems in sight; adopting a rigid non-negotiable position; failure to make counter proposals; unilateral conduct which harms the negotiating process; refusal to sign a written agreement in respect of the negotiation process or otherwise; and failure to do what a reasonable person would do in the circumstances. *Western Australia v Taylor* (1996) 134 FLR 211, 224–225 (Member Sumner).

- include a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith
- insert a 'reasonable person' test, which may be used in assessing the actions of a proponent seeking a determination when negotiations are at a very early stage.[40]

[40] For further information on these options, see Calma, above note 33, pp 31–35, 104–107; S Burnisde, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, p 15. At www.aiatsis.gov.au/ntru/docs/publications/issues/ip09v4n3.pdf (viewed 26 November 2010).