Submission to
House of Representatives
Standing Committee on Aboriginal and Torres Strait Islander Affairs
Roundtable hearing on the Native Title Amendment Bill 2012.
National Centre for Indigenous Excellence (Redfern, Sydney)
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Introduction:

The right of a registered native title claimant to be involved in negotiations under the Future Act provisions of the NTA (from the date of registration of their application for determination of native title) is one of the most important and fundamental aspects of the NTA. That right has the ability to change aboriginal peoples lives by amongst other things - enabling them to seek self-determination and restoration of their pride and independence.

Much has changed in Australian society since the NTA was enacted in 1993. In order for there to be any prospect of real reform, one must first have an understanding of what is happening at the moment. Only then can Australians reflect upon our moral foundations such that long lasting, equitable, mutually beneficial and holistic reform is able to undertaken

My experience in having consistently represented Native Title Parties from various parts of Queensland in Future Act Negotiations under the NTA over the past 15 years has provided me with a deep understanding and insight into the operation of the requirement to negotiate in good faith in an RTN negotiation.

Much has been written about and many submissions have been made to consecutive Governments about the operation of the Future Act regime, particularly about the requirement to negotiate in good faith in an RTN negotiation.

To date, there has been no serious attempt to address the well-known shortcomings of s31(1)(b) NTA.

I welcome the Governments initiative in seeking to address those shortcomings.

Background

On 3 July 2010, The Attorney General and the Minister for Families, Housing, Community Services And Indigenous Affairs released a discussion paper titled "Leading Practice Agreements: Maximising Outcomes from Native Title Benefits".

As part of that discussion paper the Government sought submissions about clarifying good faith requirements.

I was unable to provide a response to that Discussion Paper.

On 30 and 31 May 2012, I was part of a group of Iman, Mandandanji, Jangga and Birriah People from Queensland who all travelled to Canberra at their own cost and spoke to members of the Liberal, Greens and to representatives of the Attorney General Department about the failures of the "obligation to act in good faith.

Following those series of meetings, I wrote a submission at the request of several of those I met. The submissions was circulated to everyone that we met including to

members of the Attorney Generals office. A copy of that paper has already been provided to Dr. John White of the Department of the House of Representatives Standing Committee on Social Policy and Legal Affairs Standing Committee on Aboriginal and Torres Strait Islander Affairs.

On 6 June 2012 the Attorney General for Australia, The Hon Nicola Roxon MP gave a speech at the annual AIATSIS Conference in Townsville titled Echoes of Mabo. The relevant parts of that speech dealing with the Governments proposal to amend the s31 NTA obligation to negotiate in good faith are set out as follows:

"Under the right to negotiate native title, agreements must be negotiated in 'good faith'. Unfortunately, many would argue that some parties have been paying little more than lip service to the good faith provision.

So, the Government will seek to legislate criteria to outline the requirements for a good faith negotiation. No longer will parties be able to sit back and wait for the clock to tick down until an arbitrated outcome is available to them.

The Government will consult closely with indigenous groups, state and territory governments, farmers, miners and others on the terms of this legislative reform. Much work has already been done that now needs to be acted upon."

Since that speech, the Government has introduced the *Native Title Amendment Bill 2012* ("the Bill").

Purpose of this Paper

The purpose of this paper is to:

1. Provide a general overview from a Native Title Parties perspective "from the coal face" of their experiences in the current operation of s31(1)(b) NTA in Queensland;

2. Provide comment upon the problems in conducting Future Act negotiations under the NTA (particularly RTN Negotiations) in the current legislative environment;

3. Comment upon the proposed amendments to s31(1)(b) NTA as contained in the Bill; and

4. Provide suggestions as to how agreement making under the Future Act regime of the NTA can be improved.

1. GENERAL OVERVIEW

Present Position - the extraordinarily low threshold necessary to satisfy a Proponents only obligation under s31(1)(b) NTA

The limited nature of this paper does not allow (nor was it ever my intention) to provide a scholarly dissertation of the law and the accumulated jurisprudence concerning how a negotiating party might satisfy its obligation to negotiate in "good faith".

However reference can be made to:

(a) the NNTT Guide to Future Act Decisions and its various updates; and

(b) the NNTT Submissions on the Discussion paper "Leading Practice agreements, Maximising outcomes from native title benefits " July 2010

The accumulated jurisprudence to date in the NNTT both before and after the decision of the Full Federal Court in *Puutu Kunti Kurrama & Pinikurra People v FMG Pilbara Pty Ltd & Ors ("FMG Pilbara")* has created an **extraordinarily low threshold** that must currently be met by a Proponent at law in order to satisfy its **only** obligation under s31(1)(b)NTA which is to negotiate in "good faith".

The concerns as raised by the government in Part C 2 of its Discussion Paper in response to the decision in *FMG Pilbara* have proven to be well founded.

The experience of both myself and other Native Title Parties in Queensland involved in RTN Negotiations over many years, but particularly since the decision in FMG Pilbara is that a large majority of Proponents (and their respective lawyers and advisors) deliberately and consistently seek to target and exploit the **extraordinarily low legal threshold** highlighted in the FMG Pilbara decision for their own benefit, to the detriment of the Native Title Party in order to avoid proper and equitable agreement making with the Native Title Party.

The recent decision in *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland* [2012] NNTTA 9 (6 February 2012) clearly demonstrates that to be the case.

Many of the Native Title Parties in Qld view the Drake Coal/Birri People decision (amongst others) to represent *"the low water mark"* of practice, procedure and jurisprudence in the operation of the Future Act/RTN regime in Australia and view the threshold necessary for a Proponent to satisfy its obligation to negotiate in "good faith" to be a complete farce.

Is that description of s31(1)(b) NTA, an isolated view

Absolutely not.

Over the years, numerous Proponents and their respective lawyers and advisors (but not all, as will be seen later in this paper) have privately acknowledged to me - the **extraordinarily low threshold** that is currently required to be met by Proponents and/or their clients when complying with their sole obligation under s 31(1)(b) NTA to negotiate in "good faith".

They have further acknowledged *"the understandable frustration of the Native Title Parties"* and have repeatedly commented, *"they would not like to be in my position when trying to negotiate one of these agreements"*.

Power Imbalance – the elephant in the room

In order to gain an insight into this subject, the most fundamental point that must be understood is the gross power imbalance that exists from the outset and how parties react to that imbalance.

On the one hand you have a group of highly resourced and sophisticated Proponents who are commercially robust, possessing the highly developed skills necessary to succeed in the commercial world and who (nearly by definition) are

"used to getting their own way". Those proponents range from the State of Queensland itself, to some of the largest multinational resource companies in the world, smaller (in comparison to multinational companies) but nonetheless significant publicly listed resource companies, billionaire and/or multimillionaire individuals and their associated companies through to the small miner.

On the other hand, there is the Native Title Party who are invariably commercially unsophisticated, often (but not always) lacking in formal education, sometimes illiterate or partially illiterate, regularly elderly (since they are usually recognised from a cultural perspective as being the decision makers within the claimant group) regularly of poor health and are in almost every case indigent.

Once that power imbalance is fundamentally understood, the issue is then to understand the interaction between that power imbalance and the extraordinarily low legal threshold necessary to satisfy a Proponents only obligation under s 31(1)(b) NTA and how those two factors inform the behaviour of a Proponent when addressing its obligation to act in good faith.

What actually happens in an RTN Negotiation where there is an obligation on all parties to negotiate in "good faith" exists

The short time frames to prepare this paper and the resulting ambit and scope of this paper does not allow a full examination of the issue.

From the outset, let me make it quite clear that there is some industry leading examples of Proponent behaviour in negotiations with Native Title Parties in Queensland. Generally speaking however, they are to be found within the ranks of the small number of the major Australian or foreign owned multinational resource companies.

Whilst nobody would describe those Proponents as being perfect and indeed some of the agreements had with them have been "hard fought for" – the manner in which they approach agreement making has (in comparison to others) been of a significantly higher standard and they have much to be proud of.

Outside of that small group, there are but a handful of resource and infrastructure Proponents in Queensland that engage in what one might describe as appropriate corporate socially acceptable and responsible behaviour.

So outside of that small group of Proponents in Queensland who do engage in behaviour that an ordinary Australian would expect as being socially responsible and appropriate in 2013; how do the vast majority of Proponents in Queensland balance:

(a) the advantage gained by the obvious gross power imbalance between the parties, and

(b) the added advantage presented to them by the **extraordinarily low threshold** that must be met at law in order to satisfy their sole obligation in an RTN negotiation under the NTA.

with community expectation of acceptable socially responsible corporate behaviour in 2013 – at all times remembering that the resource being exploited belongs to all of the people of Queensland – of which the Native Title Parties are part.

Put simply:

At worst (which is almost always, the case) there is little (or in many cases, no) effort made to balance those factors. In fact, Proponents (and most critically some of their advisors and lawyers) consistently seek to maximize any advantage that can be gained from those very factors in order to gouge a better deal for themselves.

It is very much a case of *"the ends justifying the means"*.

At best, in the majority of negotiations, a token effort is merely made to balance those factors within the negotiation.

The behaviour consistently experienced by Native Title Parties in Queensland can be summarised as follows:

(a) Disgraceful, contemptuous, disingenuous, offensive and ill mannered treatment of Native Title Parties within RTN negotiations;

(b) Consistently positional negotiation tactics – I have lost count of the number of times over the years that I have heard the following statement in negotiations:

"we are not here to discuss your proposal, we are here to discuss our proposal. Our proposal is our proposal - you can either take it or leave it, we don't care as we will get our tenements anyway under a FADA in the NNTT" or in some cases, there is the addition of *"we will get the State to compulsorily acquire your native title" ..... "either way we will get our tenement"*

On many occasions it is repeated many times on the same day and in the same negotiation.

(c) Ruthless, bullying, coercive and aggressive behaviour;

(d) Threats, sometimes made in the first or second meeting of referral to a FADA or seeking of compulsory acquisition by the State;

(e) Lying, deliberately deceptive, misleading and at times fraudulent misrepresentations;

(f) Deliberately divisive tactics intended to drive a wedge between or take advantage of tension between individual members of the RNTC an/or their legal representatives;

(g) The use of parallel ILUA and RTN processes, where little is offered in the ILUA process (as it is voluntary) and a lesser amount is then offered under a compulsory RTN Process conducted in parallel with the ILUA.

Once the timeframes under the compulsory RTN Process have wound out, the Proponent then presents the Native Title Party with the option of accepting the pittance under the ILUA or facing the prospect of getting nothing in a FADA under the RTN Process.

I will make further comment on the abuse of the ILUA process later in this paper. But in short, the ILUA process is voluntary and although it can be expensive, it offers many advantages to Proponents as there is no obligation

to negotiate in good faith and there is no oversight of the ILUA negotiation process by a Court or the NNTT.

(h) Refusal to properly fund the RTN process with independent chairman or mediator, independent minute takers, independent recording of the meeting by audio or visual means;

(i) Refusal to fund expert independent industry, accounting, taxation, financial advice such that the Native Title Party is in a position to give their fully informed consent.

(j) Refusal to properly fund assistance to the Native Title Party's legal representatives such that the legal representative is faced with the impossible task of being forced by him or herself to give legal advice, negotiate, attempt to provide the Native Title Party with some element of the expert assistance (referred to in (i)) keep a contemporaneous record of what occurred or minutes in circumstances where the Proponent has all of that at its disposal;

(k) Offering of incentives to negotiate without the presence or involvement of legal or other representation;

(l) Proffering of substantial agreements for execution without legal advice and demanding that such agreements be signed;

(m) Funding of meetings on condition that legal representation is not required or needed and if demanded – refusing to fund such representation, despite producing and demanding agreements for signature;

(n) Proponents and their lawyers actively seeking out meetings with Native Title Parties without the Native Title Parties having access to legal advice or representation.

(o) Failure to properly fund the authorisation process for an ILUA, such that ILUA's are being authorised by only a fraction of the claimant group. Typically the Proponent will set an unrealistic budget and agree to provide only limited travel assistance to people who the Proponent knows to be indigent. The result is that people who are forced to travel longer distances cannot afford the cost of travel and accommodation to attend the meeting.

Proponents have consistently and successfully hidden that type of behaviour behind the "cloak of confidentiality".

The result is that despite many complaints over many years to different governments of differing political persuasions at both State and Federal level – Native Title Parties struggle to be heard and critically they struggle to have people believe them.

In the discussions I had with various politicians when part of the deputation to Canberra in 2012, many senior politicians were shocked and surprised. Many stated they had "no idea that any of this was occurring". Representatives from the Attorney General's office whom we spoke to, admitted to having consistently heard similar stories (to that as described above) during the term of the current government.

Can this be possible given the existence of the NNTT and the Federal Court

Again the simple answer is that yes.

The limitations of this paper prevent a historical analysis of why that is so, but in essence (and I accept perhaps simplistically so) there are in my mind three fundamental reasons:

(a) The good faith requirement as it appears in s31(1)(b) NTA was the result of many of the various compromises made (in the face of significant opposition from the Resource Industry) in order to enact the NTA;

(b) In the absence of clear intent by Parliament, there was an ensuing lack of certainty about what "good faith" actually meant; and

(c) It was left to the NNTT and the Courts to determine what "good faith " meant. In the absence of clear statutory intent, Courts and especially Tribunals such as the NNTT are reluctant to create or make the law. Consequently when a black letter approach is taken to the subject, it inevitably leads to a narrowing of the construction of the term in question.

In the absence of clear statutory intent, the law gives scant (if any) consideration to issues requiring a consideration of the "social justice" of a particular issue.

That is a matter for Parliament.

The right to negotiate regime was recognised by the Full Federal Court in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49; (2009) 175 FCR 141 (at 145/[18]) as "*an element of the protection of native title which is one of the main objects of the Act and that it is not to be narrowly construed.*"

Yet in the absence of clear statutory intent, that is exactly what has occurred – it has been narrowly construed.

The requirement to "negotiate in good faith" have now been so narrowly construed by the Courts and the NNTT, that it provides no real form of protection for the most vulnerable party in a RTN Negotiation and its application is now for all intents and purposes a complete farce.

One might well ask – if that level of behaviour is so prevalent why haven't Native Title Parties sought relief from the Courts or the NNTT.

The answer is surprisingly simple. Native Title Parties and their lawyers are forced to be realists, as they do not have the money to throw around in litigation that is doomed to failure. Since the enactment of the NTA there has been a mere handful of successful challenges to the manner in which a Proponents has purported to have satisfied its "good faith" obligation.

The behaviour described in this paper is not isolated. Simple logic tells anyone that not all Proponents are angels. The success rate of Native Title Parties in the NNTT is in itself a sad indictment about the way the jurisprudence about what constitutes "good faith" negotiation has developed.

The reality is that a Native Title Party is forced to cop it, as it is a well-known waste of time, effort and scarce resources litigating the matter.

What is the result

In the Northern Territory – Native Title Parties are able to consistently negotiate superior agreements as they have a right to deny Proponents access to mineral resources under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth),

In Western Australia recent media reports confirm that although instances of the behaviour previously described still occur; it is the case that superior agreement making has been able to be achieved. Anecdotally it is my understanding, that part of the reason is that the Resource Industry in Western Australia is dominated by some of the largest resource companies who (to a greater or lesser extent) take their corporate social responsibility obligations more seriously than their counterparts in Queensland. In doing so, they seek to reach commercial agreements as opposed to ones which are the result of an exploitation of the power imbalance between the parties and the current state of the law.

I am unaware of what occurs in other States.

However in Queensland, the type of behaviour described above has and continues to occur on a daily basis since the enactment of the NTA.

Despite the existence of a Commonwealth Native Title Act – where all parties affected by it are theoretically treated equally, there is:

(a) Gross disparity between negotiated outcomes that are able to be achieved in different States - save and except the Northern Territory (see above);

(b) A extremely poor record of outcomes that have been able to be achieved in Queensland;

(c) A high level of disenchantment, disappointment, bitterness and cynicism amongst Native Title Parties in Queensland;

(d) A loss of significant opportunity for Native Title Parties in Queensland;

(e) A high and at times volatile level of mistrust as between Native Title Parties and sectors of the Resource Industry in Queensland;

Presently in Queensland:

(a) It is far cheaper for a Resource Industry/Infrastructure Proponent to file a FADA and seek a determination in the NNTT, rather than engage in genuine agreement making with the Native Title Party. The treatment recently meted out to the Birri People in *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/State of Queensland* [2012] NNTTA 9 (6 February 2012) is a classic example of this very point.

(b) There are many, many examples of gross and fundamental breach of RTN and ILUA's by Resource/Infrastructure Industry Proponent that are unable to be enforced by the Native Title Party due to a lack of resources to do so.

(c) Resource/Infrastructure Industry Proponents are well known to effectively please themselves what they do and to completely ignore their contractual obligations under the RTN or ILUA Agreement. When challenged, Resource/Infrastructure Industry Proponents and/or their representatives

have been known to state, *"we know we are wrong – so what are you going to do about it – sue us"*.

Such behaviour/breaches regularly occur despite the fact that the tenements sought have been granted, infrastructure constructed and project consents provided by the ILUA/RTN Agreement being enjoyed and exploited for the benefit of the Proponent and its shareholders, sometimes over many, many years.

(d) Proponents will regularly use the most technical and minor and/or mundane of issues to refuse to honor their obligations under RTN and ILUA Agreements, despite the fact that the tenements sought have been granted, infrastructure constructed and project consents provided by the ILUA/RTN Agreement being enjoyed and exploited for the benefit of the Proponent and its shareholders.

(e) Many of the hard (and in some cases, bitterly) fought for employment, training, contracting and tendering opportunities as contained in RTN and ILUA Agreements with the Resource/Infrastructure Industry Proponents in Qld have been lost.

There are current instances, where a large proportion of the major infrastructure to be constructed on a Native Title Parties country is all but complete, yet despite the best efforts of the Native Title Party; the Proponent is still only at the stage of wanting to talk about employment and training opportunities.

(f) Much of the behaviour of the Resource/Infrastructure Industry Proponents in Qld as described above is an every day occurrence and there are many current examples of such behaviour available at anytime right throughout Qld.

In a discussion I recently had with a leading Resource Industry executive and their solicitor (both of whom, I hold in very high regard), the executive described the situation in Queensland as follows:

"Look Mike, I don't personally agree with this, but you have got to understand that resource companies are commercial animals – they look at the Native Title scene generally and see the law as being weak. They look at the Native Title scene in Queensland and see a government that is broke, that is desperate for royalty income and will do anything to attract the miners.

They see a market opportunity that can be readily exploited as compared to other States. They see Native Title as a commodity, nothing more nothing less. Native Title has been "commoditized". Compliance with the NTA is a cost of doing business. Mining is a competitive business. As a result, resource companies will always try to reduce the cost of doing business.

If you add in the fact that you have lawyers and Proponents who can afford and who are prepared to consistently test the limits of the law – you get the current situation.

You have to understand - it is nothing personal, it is just business, they don't care about social justice issues or what is appropriate corporate socially responsible behaviour or what is right or wrong. It is all about what they can get away with. Look

around you, read the papers, it doesn't just happen in Native Title – look at all of the other corporate scandals in Australia.

It is just the way it is done. It is business. Until such time as there is a change in the law, they can and will continue to try to get away with almost anything in Queensland. It is as simple as that".

That conversation, together with my own experiences across Queensland over the last 15 years, fairly well encapsulated the current state of play in Queensland and I suspect other States as well.

2. FAILURES IN THE CURRENT LAW AND NTA

In my view, the major failures in the current law can be summarised as follows:

(a) The lack of codification of what is meant by "good faith" and the resulting failure by Parliament to give direction as to its true intent to the Courts, Native Title Parties, Industry and others so affected;

(b) The failure by Parliament to insert provisions to "even out" the bargaining position of the parties so as to ensure a higher chance of more equitable agreement making;

(c) The concept of "good faith" negotiations was originally developed in American labor laws.

The development of the jurisprudence about what constitutes "good faith" in Australia has ignored a concept long recognised in American jurisprudence that identifies "surface bargaining" as being an unfair practice.

"Surface Bargaining" is described as follows:

"Surface bargaining has been found where an employer rejected a union's proposal tended its own, and did not try to reconcile the differences. Likewise, the offering of a proposal that cannot be accepted, coupled with an inflexible attitude on major issues and no proposal of reasonable alterations has breached the Good Faith Bargaining obligation".

Hardis P, *The Developing Labor Law, 3rd Edition 1988 American bar Association, 608 – 609.*

Surface Bargaining is a skill that is been finely honed by Proponents and their lawyers and advisors who engage in "good faith" negotiations in Queensland.

In essence, anyone with a reasonable understanding of the law about what constitutes "good faith negotiations" as developed under the NTA, who has a reasonable level of negotiation experience - can easily comply with the law about what constitutes "good faith' bargaining and yet offer nothing of substance, in the full knowledge it will be rejected and engage in the types of behaviour previously described.

This is an every day event in Queensland.

(d) The concept of negotiations having to conducted in "good faith" (for all of its faults) only applies to a Right to Negotiate (RTN) process.

It does not apply to an Indigenous Land Use Agreement ("ILUA") process. That is particularly inequitable in circumstances where the ILUA is binding on all future generations of Native Title Holders.

I have been involved in many ILUA negotiations, where the Proponent has quickly and robustly reminded the Native Title Parties of that fact from the very outset of the negotiation.

(e) Negotiations between Native Title Parties and proponents are not limited to those prescribed by the *Native Title Act 1993* for RTN purposes.

In a Future Act context, negotiations also occur commonly in respect of the following:-

(a) As mentioned, Indigenous land use agreements under Part 2 Division 3 Subdivisions B, C and D of the *Native Title Act 1993*.

(b) Compulsory acquisitions of native title under Part 2 Division 3 Subdivision M of the *Native Title Act 1993*. Although those provisions enable the compulsory acquisition of native title in certain circumstances, the powers, procedures and practices for undertaking compulsory the States and Territories primarily prescribe acquisitions. Different legislation applies in the different jurisdictions. In Queensland native title negotiations for compulsory acquisition purposes can occur in the following circumstances:-

(i) Acquisitions of native title undertaken by government related entities under the *Acquisition of Land Act 1967* (Qld) for public purposes.

(ii) Acquisitions of native title undertaken by the Coordinator-General of Queensland under the *State Development and Public Works Organisation Act 1971* (Qld). These may be for public purposes, but may also be for the purpose of private infrastructure facilities. In late 2012, the Queensland Government enacted the *Economic Development Act 2012* (Qld) making provision for private infrastructure facilities to be the subject of such compulsory acquisition.

(iii) Acquisitions of native title undertaken by the Coordinator-General of Queensland under Part 5 Petroleum and Gas (Production and Safety) Act 2004.

For acquisitions of native title under the *Acquisition of Land Act 1967*, some government entities in Queensland, particularly local governments, have as a matter of policy negotiated with native title parties for their agreement to allow the acquisition to proceed without objection and for the purpose of settling associated native title compensation liabilities. It is reasonable that the compulsory acquisition of native title and non-native title rights and interests in land is sometimes undertaken in the public interest (i.e. for public purposes).

However the *Native Title Act 1993* should specifically provide for and indeed encourage negotiations which enable such acquisitions to be undertaken by

agreement with Native Title Parties wherever possible, including for the purpose of settling native title compensation liabilities arising out of such acquisitions.

(f) Compulsory acquisition by government (the Coordinator-General) for private purposes is however another matter entirely. The Queensland *State Development and Public Works Organisation Act 1971* was recently amended by the *Economic Development Act 2012* to provide as follows:-

"Section 153AH(1). The Coordinator-General must not take land for a private infrastructure facility under section 125(1)(f) unless satisfied:-

.....

(c) if native title exists in relation to the land, the proponent has taken reasonable steps to enter into an Indigenous land use agreement for the land".

This is far less than even the modest protections involving the requirement for RTN good faith negotiations proposed by the *Native Title Amendment Bill 2012*. Furthermore, section 174(1) of the Act empowers the Coordinator-General, without any community consultation or other appropriate protections, to *"make guidelines about the matters mentioned in Schedule 1B"*. Paragraph 8 in Schedule 1B says that such guidelines can include *"guidance on native title matters relevant to this Act"*.

There are almost no statutory protections for Native Title Parties in the context of native title negotiations in this situation at all. It is all too easy for a Proponent to make nominal attempts to negotiate an ILUA with the luxury of being able to fall back on compulsory acquisition by the Coordinator-General. Some Proponents may use their ready access to the compulsory acquisition power as a leverage tool to negotiate unfair compensation and other outcomes as part of their *"reasonable"* attempts to negotiate an ILUA.

Of further concern, new section 153AH(4) of the *State Development and Public Works Organisation Act 1971* is discriminatory. It provides as follows:-

"Section 153AH(4). The Coordinator-General may take the land under section 125(1)(f) if the proponent and the registered owner agree, in writing, to the taking of the land by the Coordinator-General".

The definition of registered owner is limited to persons who hold registered non-native title interests in land. It does not include Native Title Parties. Given the complexity, cost and time factors associated with the ILUA option for native title agreement-making, there should be provision for acquisitions by voluntary agreement with registered native title claimants and registered native title bodies corporate of a non-ILUA kind. There should be appropriate good faith protections in relation to negotiations for agreements like that, especially where private infrastructure facilities are proposed.

(g) Confidentiality Clauses should not be able to be used to cover up what has occurred in the negotiation and the content of agreement.

(h) The mediation service provided by the NNTT is weak.

I have read numerous books and articles, undertaken numerous negotiation and mediation courses and am a nationally accredited meditator. I have been involved in several mediations in the NNTT and have never seen any of the mediation strategies that I have read about or been taught used in the NNTT.

I might also mention that the mediation strategies I refer to are at the core of the Harvard Law School Program on Negotiation.

(i) Lack of a Safety Net.

The Fair Work Act 2009, contains minimum conditions about wages and conditions, which are set out in Awards.

The NTA has no such "safety net" or minimum set of terms and conditions. The Native Title Parties are left to fend for themselves.

(j) Unfair and/or Unconscionable Conditions

Under the Fair Work Act 2009, the Fair Work Commission approves Enterprise Agreements.

That approval process is open and transparent and importantly contains processes to detect and refuse to register agreements containing "Unlawful Content". Examples of Unlawful Content are made publicly available.

The NTA contains no such processes and thereby does not have any form of protection about the content of agreements made under the NTA with some of the most vulnerable people in this country.

By way of example:

(i) Most ILUA's and RTN Agreements contain express conditions that remove the right of a Native Title Party to terminate the agreement in the event of breach – including fundamental breach.

The right to terminate in the event of fundamental breach is one of the most fundamental rights available to anyone in contract law.

I have continually argued for some 15 years that such provisions are unconscionable and unenforceable. In some cases, I have been successful.

In others, I have not and the argument has been met by threat of a FADA or in some circumstances with threats of compulsory acquisition by the State.

(ii) Express provisions are inserted into all ILUA's and RTN agreements to ensure they do not become a condition of the grant of the tenement or project approval.

The intent in doing so is to separate the tenement conditions from the ILUA or RTN agreements so that in the event of breach, the Proponents tenement or project approval remains unaffected and the Native Title Party is only left with an action in the Federal Court to enforce a contract and (as previously mentioned) is pitted in that

action against some of the biggest multinational companies in the world.

The practical reality is that unless the Native Title Party is able to persuade a solicitor to act on a "speculative" or "pro bono" basis, the cost of pursuing that litigation is beyond the means of most (if not all) Native Title Parties in Queensland.

Consequently, it is always the case that Proponents act with almost complete indifference and impunity to the threat of litigation and rarely comply with all (or in some case, any) of their obligations under the ILUA or RTN Agreement.

Once again, I have continually argued for some 15 years that such provisions are unconscionable and unenforceable. In some cases, I have been successful.

In many cases, I have not been successful and my argument has again been met by threat of a FADA or in some circumstances with threats of compulsory acquisition by the State.

(k) The role of the State

Unless it involves an agreement where native title is extinguished, the State is not involved in ILUA negotiations.

In RTN Agreements, the State is a party to those negotiations under the NTA and like all other parties has an obligation under s 31(1)(b) NTA to negotiate in good faith.

Yet it in all of my 15 or so years in native title practice in Queensland involving RTN processes under the Future Act provisions of the NTA, I have never observed the State do anything other than send junior officers who at most take nothing more than spectator interest in the negotiations and rarely (if ever) actually engage in the negotiations themselves. In doing so, the State most certainly does not make any attempt of any nature whatsoever to comply with its obligation to negotiate in good faith.

The role of the State in such RTN processes is compromised in that it is conflicted from the outset as it is in the States best interest to have the tenement granted in order that it will be the beneficiary of royalties flows once the tenement goes into production.

As a direct consequence, I have been involved in many negotiations where the assistance of the State has been sought by the Native Title Party to assist them in dealing with the types of Proponent behaviour previously referred to (including threats by the Proponent of it seeking compulsory acquisition by the State) and the State has done absolutely nothing.

In fact, I have had instances where State Ministers have refused to meet Native Title Parties and despite multiple complaints of coercive and threatening behaviour by Proponents (threatening compulsory acquisition) the State has refused to intervene.

(l) Lack of Consumer Protection laws in under s 31(1)(b) NTA

The only protection afforded to a Native Title Party in any form of agreement making under the NTA is that in an RTN process only all parties must "negotiate in good faith".

None of the other Federal or State consumer protection laws apply.

(l) Lack of funding for Future Act matters arising under the NTA

There are no sources of government funding provided by FHCSIA to Native Title Parties in order to assist them to participate in RTN and ILUA negotiation processes and if necessary to contest outcomes purportedly derived from RTN and ILUA negotiation processes.

That is the case regardless of whether Native Title Parties are represented in the Future Act processes by a NTRB or by private lawyers. It is my understanding that for every $ received from FHACSIA by an NTRB for Future Act related matters, that a similar amount is deducted from the NTRB's claims resolution budget.

Most Native Title Parties in Queensland are indigent. Given the paucity of outcomes from Future Act related negotiations in Queensland, those Native Title Parties that have managed to negotiate some small measure of financial benefits actively seek to protect that money for community benefit rather than being forced to spend it on meetings with Proponents.

As a result in Queensland, Native Title Parties are almost entirely reliant upon a Proponent funding such processes.

Due to that reliance for funding a Proponent is thereby placed in an even stronger bargaining position in that it can and does regularly:

(a) Refuse to comply with reasonable requests for provision of competent expert legal, financial, accounting, valuation, anthropological, ethnographic or archaeological assistance;

(b) Refuse to provide independent secretarial and minute taking services;

(c) Dictate the regularity, pace, content and tone of agenda's and meetings generally;

(d) Threatens withdrawal of financial support unless Native Title Parties comply with demands made in negotiations;

(e) Controls the amount and quality of information flowing to Native Title Parties about the Project itself and about other similar Projects undertaken by the Proponent itself or by other Proponents in Qld or in other States;

(f) Seek to place the Native Title party in a negotiating vacuum; and

(g) Has a fundamental understanding from the outset that it has all of the power and is all but immune from successful challenge as the Native Title Party inherently (and almost by definition) lacks the ability to do so.

As a direct result, a Proponent is able to control the outcomes of negotiations by depriving the Native Title Party of the support needed to assist the Native Title Party to make a fully informed decision.

3. NATIVE TITLE PARTIES CONCERNS ABOUT THE BILL

In respect to the substantive amendments proposed in Schedule 2 – Negotiations of the Bill, I make the following comments:

3 At the end of subsection 31(1)

Add:
; and (c) the negotiations must include consideration of the effect of the doing of the act on the registered native title rights and interests of the native title parties.

Comment: Agreed

6 After section 31

Insert

31A The good faith negotiation requirements

(1) The ***good faith negotiation requirements*** in relation to a proposed agreement of a kind mentioned in paragraph 31(1)(b) in respect of an act are that negotiation parties use all reasonable efforts to:
  (a) reach agreement; and
  (b) establish productive, responsive and communicative relationships between the negotiation parties.

(2) Without limiting subsection (1), in deciding whether or not a negotiation party has negotiated in accordance with the good faith negotiation requirements, regard is to be had to whether the negotiation party has done the following:
  (a) attended, and participated in, meetings at reasonable times;
  (b) disclosed relevant information (other than confidential or commercially sensitive information) in a timely manner;
  (c) made reasonable offers and counter offers;
  (d) responded to proposals made by other negotiation parties for the agreement in a timely manner;
  (e) given genuine consideration to the proposals of other negotiation parties;
  (f) refrained from capricious or unfair conduct that undermined negotiation;
  (g) recognised and negotiated with the other negotiation parties or their representatives;
  (h) refrained from acting for an improper purpose in relation to the negotiations.

(3) The good faith negotiation requirements do not require a negotiation party to:
  (a) make concessions during negotiations; or

(b) reach agreement on the terms that are to be included in an agreement.

Comment:

(a) Conceptually and philosophically, I support the codification of the requirements of good faith negotiations;

(b) I do not believe that the proposed s 31A will address any of the substantive behavioral issues as previously described in this paper;

(c) The proposed s 31A does not address the fundamental imbalance in power and bargaining position that is at all times fundamental and inherent in these negotiations;

(d) How will "reasonable" be defined? In my experience, if a Court or Tribunal is asked that question they will say, "what is reasonable in all of the circumstances".

In my view, Parliament should state what is reasonable and in doing so set the standard expected of a negotiation party – particularly a Proponent. It should not again leave it to a Court or Tribunal to narrowly construe what is or is not reasonable.

Due to the specialised and unique nature of Future Act negotiations, very few (if any) Judges or Tribunal Members have any idea of what actually occurs within that space. In those circumstances, how can a Judge or Tribunal member be expected to have any understanding of what is or is not reasonable in a Future Act negotiation.

(e) The indicia as contained in the proposed s 31A(2) and (3) is already covered by the existing jurisprudence developed on the subject to date. In those circumstances, the proposed indicia take the debate nowhere.

(f) The practice of "Surface Bargaining" is not addressed in the proposed s 31A(2) and (3).

(g) The proposals do not require negotiations to be conducted in good faith in an ILUA negotiation;

(h) The role (or rather the lack thereof) of the State has not been addressed. Is it reasonable that the State should just sit there and contribute nothing?

(i) The indicia in the proposed s 31A(2) and (3) are based on s 228 of the *Fair Work Act 2009*.

But the *Fair Work Act 2009* is built on a foundation of amongst other things:

(i) A safety net of minimum employment conditions in the form of Awards,

(ii) The role of the Commissioner in checking Enterprise Agreements,

(iii) A strong arbitration and conciliation function manned by people who have real life experience in the day to day operation of labor laws,

(iv) The power of the union movement, which is itself one of the major bastions of the Labor Party,

(v) The right to take Industrial Action,

(vi) The Act itself.

Whereas the NTA has none of that.

(j) In the circumstances, s 228 of the *Fair Work Act 2009* cannot be simply "cherry picked" from the Fair Work Act 2009 and used in the NTA.

(k) The lack of fundamental consumer protection (that is available to every other person/consumer in Australia) in an RTN or ILUA Negotiation has not been addressed.

(l) The lack of funding and the resulting dependence upon Proponents to fund Future Act negotiations has not been addressed.

It may very well be that Government is happy for a "user pay" system to operate, such that it is the Proponent who wants the development; therefore it is the Proponent who must pay.

I have no fundamental objection to that notion, but how is it to operate.

What is reasonable for one Proponent is often purportedly objectionable to the next. What of the Proponent who cannot afford the cost of the process? Should that be used as an excuse for poor or non-existent agreement making as presently occurs?

(m) The proposals in the Bill contain no mechanism to protect Native Title Parties against Unfair or Unconscionable conditions within an agreement.

(n) The proposals in the Bill contain no minimum set of "safety net" provisions.

(o) The proposals in the Bill do not pick up a number of excellent reforms as contained in the Consultation Paper. Namely that:

(i) Extending the minimum negotiating period from 6 months to 8 months.

(ii) Giving the arbitral body the ability to intervene in negotiations if negotiations go off course, including the ability to:

a. issue negotiation orders specifying actions to be taken to ensure requirements for good faith negotiations are met (based on s 229 of the *Fair Work Act 2009)*

b. make a material breach declaration if a negotiation order is breached with appropriate consequences for the party responsible (based on s 235 of the *Fair Work Act 2009*), and

c. make non-binding recommendations about the process, which the negotiation parties should follow.

(iii) Ensuring that the expedited procedure can only be utilised where the grantee party requests that it apply (see *Cyril Gordon and Ors on behalf of the Kariyarra People/Western Australia/BHP Billiton Minerals Pty Ltd*, [2011] NNTTA 157)

8 Subsection 36(2)

Repeal the subsection, substitute:

Determination not to be made where failure to negotiate in good faith

(2) The arbitral body must not make the determination unless the negotiation party that made the application under section 35 for the determination satisfies the arbitral body that the negotiation party negotiated in accordance with the good faith negotiation requirements (see section 31A) until the application was made.

(2A) If the negotiation party does not satisfy the arbitral body as mentioned in subsection (2), the arbitral body may make an order providing that the negotiation party is not, despite any provision of this Act, entitled to apply for a determination under section 35 in relation to the act for the period specified in the order.

Comment: Agreed

4. IS THERE A WAY FORWARD

What in essence is being sought by Native Title Parties?

Native Title Parties want to be treated as real people with real and valuable interests who have a genuine interest in their country and who want to have some substantive input and control over the manner in which their country is exploited.

Most Native Title Parties do not necessarily oppose mining on their country per se. They might very well want a say in how their country is disturbed, but that is a far cry from opposing mining per se.

All Native Title Parties, with whom I have dealt, recognise the opportunities presented by such Projects.

What is sought by Native Title Parties is that a Proponent should obtain a social license to operate on the Native Title Parties country in circumstances where the Native Title Party has given their free and fully informed consent to the grant of the tenement or project approval as the case may be.

The challenge in seeking to obtain a social license to operate.

The preparedness of Proponents and State Governments to obtain that social license to operate is at the core of how negotiations should be conducted under the Future Act regime under the NTA.

Aside from self-interested and vested interests, there is little argument that the NTA does not of itself provide a pathway to a Proponent obtaining a social license to operate.

Although much has changed in Australian society since the enactment of the NTA in 1993, the reality is that the rate of change within the Future Act context has been glacial.

To date, negotiating parties have effectively been left to themselves. The results have been mixed.

Whilst I am not suggesting they are perfect, there are a minority of resource companies who value, are acutely aware of and actively develop their corporate social responsibilities values in undertaking industry best practice in business dealings with Native Title Parties.

However the reality is that largest proportion of resource companies and their advisors have a lot of work to do and I would strongly argue they are well out of step with accepted community values in Australian society in 2013.

Suggestions on a way forward

1 Legislative Reform

(a) Consideration should be given whether the "good faith" standard should be replaced with a "genuine efforts" standard as occurs under the Family Law Act.

(b) The NNTT should be given a role in Future Act matters in a similar way that Fair Work Australia operates. See the discussion below as to suggestions about how that might occur.

(c) In addition to the statutory conduct obligations already proposed, further statutory obligations should be developed which directly deal with abuse of the inherent power imbalance that exists in all negotiations,

(d) There is an inescapable "social justice element" in any reform of the "good faith" requirement.

That needs to be recognised and openly discussed.

A subjective test should be introduced into the "good faith" requirement to ascertain whether a Proponent is acting in a disingenuous manner for example by engaging in surface bargaining.

(e) The incremental approach to reform flagged by the Attorney General in her speech at the annual AIATSIS Conference in Townsville titled Echoes of Mabo will not deal with the range of issues confronting equitable agreement making under the NTA which are already known to government, nor will it deal with the range of issues as described in this paper.

(f) Government needs to revisit the restraint imposed upon the NNTT by s 38(2) NTA whereby the NNTT must not determine a condition under s31(1)(c) that

has the effect that the native title parties are to be entitled to payment worked out by reference to:

(i) the amount of profits made; or

(ii) any income derived; or

(iii) any things produced;

Royalty agreements have been shown to work in all resource sectors in Australia and are the fairest, simplest and most transparent way of compensating Native Title Parties for the impact the proposed mining operation will have upon their native title rights and interests.

When forced to do so as occurs in the Northern Territory, Proponents have demonstrated they are capable of reaching workable and long lasting royalty agreements with Native Title Parties. In Western Australia, royalty agreements are a common feature of agreement making.

Despite the scare mongering from the resource sector in the past, no proponent has (to the best of my knowledge and belief) ever gone out of business as a result of an agreement with the Native Title Party.

The combination of s 38(1) and (2) NTA makes it more attractive and cheaper for Proponents to seek a determination rather than engage in proper and equitable agreement making.

(f) Legislation should be introduced to make it cheaper and easier for Native Title Parties to enforce existing RTN or ILUA agreements,

(g) Legislation should be introduced to require minimum safety net standards and eradication of Unfair and/or Unconscionable conditions within agreements. Some examples of safety net type standards might include provisions relating to employment, training, and contracting opportunities.

(h) Government should make it clear (whether by way of policy or by legislation) that Federal Environmental or Export Approvals may be withheld in the event that a Proponent does not reach agreement with Native Title Parties.

In other words a holistic approach to the approvals process should be encouraged, such that a Proponent cannot cherry pick those approvals that it needs (and will thereby treat seriously) and those it can do without.

(i) Legislation needs to be introduced to embed good faith obligations into ILUA negotiations.

2 NNTT

The NNTT (if not the NNTT, then some other independent body) should be reformed to strengthen its Future Act mediation role in much the same way as occurs with Fair Work Australia.

Ways in which that can occur would be to have:

(a) Nationally accredited mediators, trained in interest based negotiation, mediation practices and procedures and Corporate Social Responsibility.

(b) Minimum safety net conditions developed which are open and transparent,

(c) Agreements subjected to scrutiny to ensure they at least meet the minimum safety net standard,

(d) Agreements scrutinized to detect Unfair or Unconscionable clauses,

(e) Reports from the mediator are tabled in any FADA or other judicial review proceedings where "good faith" is in dispute,

(f) Mediations are recorded both visually and by audio. Such recordings are kept confidential save and except for the purposes of a FADA where good faith is in issue or upon any appeal of a FADA concerning good faith.

(g) The present policy of FADA hearings being conducted on the papers be immediately dispensed with.

(h) A Code of Conduct in Corporate Social Responsibility be developed for Proponents – possibly with the assistance of bodies like the Australian Centre for Corporate Social Responsibility or the Centre for Social Responsibility in Mining – which set out substantial standards of conduct and outcomes in keeping with International Standards of best practice and modern Australian values.

Compliance with that code of conduct would be requirement of meeting the "good faith" standard.

(i) The NNTT would keep track of the progress of negotiations by way of regular status conferences.

(j) At the request of any negotiating party, the NNTT can intervene in the negotiation in order to:

a. issue negotiation orders specifying actions to be taken to ensure requirements for good faith negotiations are met (based on s 229 of the *Fair Work Act 2009)*

b. make a material breach declaration if a negotiation order is breached with appropriate consequences for the party responsible (based on s 235 of the *Fair Work Act 2009*), and

c. make non-binding recommendations about the process, which the negotiation parties should follow.

(k) A public register of all negotiated agreements (both past and future) should be developed and maintained, so that a level of consistency is developed in negotiation outcomes across Australia.

Such an initiative would be advantageous to all negotiation parties including (perhaps most critically) the Courts and NNTT who must assess whether

offers made by Proponents are reasonable and made in good faith or whether they are nothing more than disingenuous surface bargaining.

At the moment, Courts and the NNTT operate in a vacuum, as they do not have that knowledge. The only party that benefits from that - is the unscrupulous Proponent.

There are many examples of leading practice Proponents voluntarily making Future Act Agreements publicly available.

(l) In FADA's where good faith is in issue, the NNTT should have the ability to call independent expert evidence about the amount, value and worth of offers made by Proponents in negotiations in order to objectively ascertain whether such offers are reasonable and the Proponent has met its obligation to negotiate in good faith.

3 Lawyers, negotiators and advisors

(a) Before being able to participate (either directly or indirectly - including by giving legal advice) in any Future Act Negotiations - all lawyers, negotiators and advisors must hold national accreditation in Interest based Negotiation, Mediation and Corporate Social Responsibility.

These courses are readily available at most Universities around Australia.

The accreditation would have to be renewed every 3 years.

The system of accreditation would be supervised by the NNTT.

All such courses should have a strong element of cross-cultural and anti discrimination/racial discrimination training and education.

(b) A code of conduct be developed which all lawyers, negotiators and advisors must sign and be bound by.

That code should be enforceable in the case of lawyers by the Federal Court, the NNTT and State Law Societies or Legal Service Commissions. In the case of non-lawyers the code can be enforced by the NNTT.

A complaints system (that meets Industry Standard based Customer Dispute Resolution Standards) be developed to report alleged breach of the Code of Conduct.

In the event of breach and aside from any formal censure by Law Societies (in the case of lawyers) the offender would lose accreditation and so be barred from again participating in any Future Act Negotiations until such time as that person has again completed further retraining and reached a satisfactory standard.

In the event of multiple breach, the person would permanently lose accreditation to be involved (either directly or indirectly) in any Future Act processes.

(c) Prior to commencement of any negotiations under the Future Act regime, there be an agreed negotiating protocol approved by the NNTT as to the manner in which the negotiation would proceed.

Although some aspects of the protocol would inevitably be template in nature, its prime purpose would be to ensure (so far as the NNTT is able) that there is more equality in bargaining position as between the parties.

4 Proponents

(a) As previously acknowledged there is a small minority of Proponents exhibiting best practice behaviour in Future Act negotiations.

(b) Generally speaking however, the majority of corporate Australia has been slow to voluntarily implement international best practice corporate social responsible values into their corporate culture and businesses.

(c) Clearly better training and education is needed, but is almost impossible to control.

(d) Corporate Australia and the Resource Industry generally has historically resisted reform of its own accord, requiring Government at both State and Federal level to legislate in many sectors including Company law, Trade Practices, Antidiscrimination, Environmental and Work Place Health and Safety to name but a few.

Disappointingly, it was only when governments get serious and legislate to provide disincentives to particular forms of behaviour, that real change and reform has come about.

(e) That level of change and reform that ordinary Australians would expect in 2013 has not occurred in many sectors of Future Act negotiations under the NTA. Where it has occurred, its pace has been incremental, hard fought and glacial like.

The NTA was enacted in 1993.

Yet the behaviour as depicted in this paper remains prevalent almost 20 years on.

(f) Clearly further substantial legislative reform of the sector is required.

[redacted]

Michael Owens
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4 February 2013