First Nations Legal & Research Services

28 August 2020

Ms. Lisa Gropp
Presiding Commissioner
Resources Sector Regulation review

By Email: Resources@pc.gov.au

Dear Ms Gropp,

I refer to our meeting with yourself and relevant Commission staff on the 25 August 2010 and thank you for the opportunity to express our views.

First Nations Legal and Research Services (FNLRS) is a company limited by guarantee, owned by Victorian Traditional Owners (through the Federation of Victorian Traditional Owner Corporations) and is funded by the Commonwealth to perform the functions of a native title representative body pursuant to the *Native title Act, 1993* (Cth) (NTA).

I would like to briefly confirm in writing some of the points made to the Commission during our meeting and raise some additional issues.

The use of the terminology 'benefit sharing' when discussing payments received by native title holders pursuant to an Indigenous Land Use Agreement (ILUA), a s31 Agreement or associated agreements is problematic. This is because generally in the resource industry context the payment of money and other consideration is a form of compensation for the impact and affect upon property rights– the native title rights and interests. It is not a gift or benefit. It is not compensation for the general benefit of local and regional Aboriginal communities. Although some native title corporations (PBCs) do make payments for infrastructure and goods and services to benefit the broader Aboriginal community in their area and that is clearly a decision for them. It is noted that often the compensation is used to provide services that should be provided by government.

This is not to downplay the serious issues that sometimes arise in terms of the governance and decision making in relation to the investment and utilisation of this form of compensation. In this regard FNLRS supports the National Native Title Council PBC Economic Vehicle Status proposal referred to in its submission to the Commission.

Furthermore, it should be noted that the financial situation of many PBCs is dire. In the absence of substantive income from negotiating future act or native title settlement agreements the far majority of PBCs have minimal income and are not funded to adequately perform their important functions. This has been a major issue since the commencement of the Native Title Act in 1994. Unfortunately, there is no sign of resolution in terms of any substantive financial support from the Federal Government.

Fortunately, a higher level of financial support is provided to Victorian Traditional Owner groups where a settlement is agreed pursuant to the *Traditional Owner Settlement Act 2010* (Vic).

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In relation to the discussion concerning the right of free, prior and informed consent (FPIC) it strikes us that to describe it in terms of not being a veto appears to conflate the fact that it is not fully recognised in Australian native title law with its full recognition as a human right. It should properly be understood as a principle protected by international human rights standards including the right to self-determination recognised in a number of international instruments including of course the United Nations Declaration on the Rights of Indigenous Peoples.

In our opinion the fact that the Right to Negotiate provisions of the NTA do not include a veto is at the heart of the unequal bargaining position of native title parties in any commercial negotiation with mineral resource and energy companies.

It is important to note that there are precedents in Australian law that do fully recognise FPIC to include a legal requirement of consent for the grant of title as well as determining the terms and conditions. This includes Part IV of the *Aboriginal Land Rights (Northern Territory) Act, 1976* (Cth). In addition, the Western Australian Government announced in 2019 it would amend its Petroleum and Geothermal legislation to provide for a right of veto for native title holders in certain circumstances in relation to hydraulic fracturing.[1] More recently the Queensland Government has determined that it will provide a legal requirement of consent for native title holders in relation to the Forest Wind Farm Development.[2]

In our opinion the unequal bargaining position for native title holders inherent in the future act provisions in the NTA should be remedied. This would have the twin benefits of ensuring that ILUAs are not merely negotiated at the goodwill of the resource industry and that native title holders have an enhanced legal right to protect their sacred and significant areas.

I also take the opportunity to endorse recommendation 10.1.

I also note the following corrections to the section of the draft report entitled 'Victoria's traditional owner settlements' (defined terms below are as per the draft report):

- The suite of agreements under the *Traditional Owner Settlement Act 2010* (Vic) are the subject of ongoing review the Victorian Government and Victorian Traditional Owners.
- To date, two LUAAs have been established with the Dja Dja Wurrung and Taungurung people.
- It is not the case that the native title future act and LUAA regimes must both be complied with simultaneously in Victoria and so settlement benefits are not offset by additional regulatory requirements, as suggested by the draft report.

I hope this submission is of assistance in the consideration of the Commission's terms of reference as those relate to Indigenous peoples.

[1] https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/09/Hydraulic-fracturing-remains-banned-on-98-per-cent-of-WA.aspx

[2] https://www.legislation.qld.gov.au/view/pdf/bill.first.hrc/bill-2019-006

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Yours sincerely

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