

the high water mark of the sea, engaging in cultural activities, engaging in rituals and ceremonies, holding meetings and gatherings, teaching and learning about the physical, spiritual and cultural attributes of places and areas of importance. The native title rights and interests are subject to and exercisable in accordance with the traditional laws and customs of the native title holders and the laws of Victoria and the Commonwealth. Where there is an inconsistency between native title rights and interests and any other right or interest, the native title rights and interests continue to exist in their entirety but have no effect in relation to the other interests to the extent of the inconsistency during the currency of the other interests. There is no native title in minerals, petroleum or groundwater.

In determining whether the agreement was arrived at voluntarily and on a fully informed basis, the Court had heard and determined the Kurnai application and also heard evidence from expert anthropologists and historians as well as evidence from Indigenous witnesses. Justice North considered that the depth and richness of all the evidence confirmed the conclusion that it was appropriate for the Court to make orders which reflected the agreement of the parties. Being satisfied that the terms of the proposed determination were reflected in an agreement between the parties and that the meaning of the clauses was clear, North J made the native title determination.

The Gunai/Kurnai Land and Waters Aboriginal Corporation (GLaWAC) has been established as a prescribed body corporate and has been nominated to hold the native title on trust.

Although the majority of the negotiations in the present application were complete before the recent introduction of the *Traditional Owner Settlement Act 2010* (Vic), North J commented that there is hope that the introduction of this Settlement Framework will make it easier for Indigenous people to achieve land justice in Victoria in the future.

Summary of AIATSIS response to AGD/FaHCSIA Discussion Paper, ‘Leading practice agreements: Maximising outcomes from native title benefits’

By Joe Fardin, Research Fellow, AIATSIS

On 30 November AIATSIS released a submission (the Submission) in response to the discussion paper, *Leading practice agreements: Maximising outcomes from native title benefits* (the Discussion Paper) produced by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Attorney-General’s Department (AGD).

The Discussion Paper—and consequently AIATSIS’ submission in response—focussed on the following three areas:

1. Governance Measures

Several governance measures were proposed in the Discussion Paper:

- incorporation of entities that receive native title payments;
- independent directors on the Board of entities that receive native title payments;
- adopting enhanced ‘democratic controls’ to improve transparency and accountability to native title beneficiaries; and
- linking such measures to beneficial tax treatment.

AIATSIS submitted that there is no rationale for making additional measures compulsory for Indigenous entities in a racially discriminatory manner. Rather, the government should invest in existing organisations and mechanisms to allow them to improve their own practice.

In addition, AIATSIS put forward the view that culturally appropriate decision making and

governance arrangements may not accommodate independent directorships.

On the issue of communication and transparency, AIATSIS submitted that most RNTBCs and native title groups do not have the capacity to implement, monitor and enforce benefits contained in agreements, nor to communicate and work effectively with members and native title holders to arrive at sustainable outcomes. There is thus a strong argument for increased funding and resources for NTRBs and RNTBCs to provide a basic level of corporate capacity to undertake these functions.

Finally, the Discussion Paper's proposal to link governance measures to tax treatment was described in the Submission as ill-conceived. It would create greater complexity and diversity rather than certainty and simplicity and is thus anathema to good tax policy design.

2. Improving Governance and Native Title Agreements

The Discussion Paper proposed a new independent body to register, review and assess native title agreements. The rationale for the new body is to support parties to maximise positive outcomes. The Submission identified a number of concerns about the capacity of the proposal as presented in the Discussion Paper to address the issues identified. In summary AIATSIS highlighted the following points:

- Regulating the content of native title agreements may give rise to minimum compliance approach by causing a 'rush to the bottom', if generic standards are established. A precedent for this exists in the case of the Fair Work Australia Tribunal set up in 2009 to assess enterprise agreements against specified standards (*Fair Work Act 2009* (Cth) s.193).
- It is not clear how the proposed review body could cause parties to change the terms of an agreement, where the terms of the agreement are of a low standard, given

the review body has no direct or indirect powers of compulsion.

- The key term 'benefits' is insufficiently defined. 'Financial benefits' alone form a broad category including compensation, benefit sharing and commercial components. Incorporating non-financial benefits would extend the scope of the proposal dramatically. In either case a proportion of the 'benefits' the proposal seeks to regulate are not native title related.
- Analysis of the available empirical data suggests the number of agreements subject to registration by the proposed regulatory body is very low.

3. Future Acts Reforms

The Discussion Paper proposed two primary means to reform the 'future acts' process: streamlining of Indigenous Land Use Agreement (ILUA) processes, and clarifying good faith requirements contained in the future acts framework.

AIATSIS submitted that disputes amongst Indigenous people over the distribution of benefits, overlapping claims and group membership are a major issue in future act negotiations. In relation to this AIATSIS thus identified an urgent demand for a national Indigenous dispute resolution service.

Where disputes appear to be intractable, AIATSIS argued that there are various third party arbitration contingencies that might be negotiated at the outset of any agreement making process. Such contingencies might involve arbitration by a group of regional elders, the NNTT, or Land Councils, or a specifically dedicated Tribunal to deal with Indigenous land disputes.