

National Native Title Conference 2011

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Dialogue forum – What is a native title benefit and who should benefit?

The NT Conference Question for discussion is:

What is a native title benefit and who should benefit?

The term “native title benefits” features in policy debates, yet is rarely defined. There has been little discussion around the broader social, cultural, environmental, economic and other values which the notion of a benefit gives rise to. This dialogue is not restricted by the legal technical framings, and instead embraces the broader agenda of the benefits of native title.

Observations

The following is a compilation of speaking notes, to attempt to say something meaningful in the 5 minutes allotted to speak.

A native title benefit can strictly be anything that a native title group want it to be, so long as that thing is lawful.

As a lawyer, I usually narrow down where benefits come from as being from:

1. Native title claims; and
2. Agreements that are negotiated **in response** to a third party development, for example, mining. That is, the negotiations are usually reactive, from a native title group’s perspective.

Preparation for negotiations

I find it very frustrating that in preparation for mining negotiations, very little time and resources are usually given to the question of what the native title group and community as a whole might get out of the negotiations. The context is usually a reaction to pressure from a third party.

With the best will in the world, and with the best negotiators on your side, you will not get the best outcome without a clear idea of:

1. What is possible; and

2. What a native title group and, to the extent relevant, what the community in which the group is based, want.

For that, time and planning are required.

Examples

For the Argyle Diamond Mine, there was a two decade long history of distrust and anger. About a year was taken within the native title group, in drawing out complaints, concerns and then more positively, aspirations and ideas. A considerable healing process was a beneficial by-product, which made settling the financial and other parts of an agreement between the native title parties, surprisingly efficient. Settling money issues with the company, a subsidiary of Rio Tinto was, as usual, slow and hard work. The preparation phase for the Argyle agreement is usually not highlighted.

With Jawoyn People in 1993 with the first post Mabo mining agreement, Jawoyn had already won back part of their land under the NT land rights act. They had a good idea what they wanted, because they did a lot of internal planning. They had a long wish list, with obvious things at the top, and more esoteric things as well. They did surprisingly well, effectively settling the outstanding claim, entering two large joint ventures and using the mining negotiations as a step to be a major commercial entity in their region. They were ready for negotiations.

With Hopevale, the last decade has been spent trying to persuade the State Government and the community as a whole that the Hopevale Congress, representing clan groups, should hold the freehold title as well as native title. Because arrangements have not been finalised, I will not go into them in detail, but would be pleased to report back next year on how well things are going.

Importantly, Congress developed a series of principles to be considered in dealing with financial benefits.

Principles

1. **Fairness** between groups

Congress listened to the clan groups most affected by the mining: three clans who together call themselves Yuuru. The Yuuru clans wanted to make sure that those who are most affected by the mine get the most benefits, while others don't miss out.

2. Benefits to assist **current and future generations**.
3. Make sure money is not wasted – **accountability and transparency**.
4. **Getting real benefits** – setting up structures that encourage benefits to go to old people who have received no benefits from a large mine on their land for the last 20 plus years, then also to adults and youngsters. We lawyers can get tied up in the things set out in the 3 principles above. They are of no use if there is no real benefit to the NT group. That requires good planning, decision making, monitoring and reviewing.

Trusts

The proposed trust structures aim to:

1. recognise the clan groups most affected by mining by dedicating a proportion of funding each year to them;
2. dedicate a proportion of funding each year for community development purposes;
3. establish reliable and transparent administration while keeping costs down; and
4. obtain the benefits of scale by combining contributions of various sets of income.

While the trust for community development purposes can be relatively easily categorised as a trust for a charitable purpose, the Yuuru trust arrangements are intended to offer but not compel the use of charitable trusts. It is proposed that each year, the Yuuru clans decide how much of their proportion of the income would be paid in to a charitable trust, and how much distributed outside the trust.

Some of the arrangements for income going into the trusts are confidential. That will particularly apply to any agreement between the mine and the land trust. One aim of the trusts is for their processes to be open and transparent.

The transfer of the DOGIT will trigger the use of the trusts.

A presentation in 5 minutes cannot be complete, but can describe an overview of the trusts. See diagram. More detail can then be provided if sought.

Financial Benefits – Mining Agreements

I started negotiating mining agreements in 1987. I am yet to get my perfect mix of financial benefits.

They are:

1. Payment on giving consent

Put crudely, the only thing that a mining company needs that native title holders have, is consent. Once given, it is rare for it to be retrieved. It is unique and valuable. It is also usually given at a time when there is no production so it is expensive to a mining company.

Similar payments are payments on grant of mining leases and (more attractive to a mining company) the commencement of production.

2. Small annual payment for locking up the land

A mining lease restricts other activities on the land even if the mining project is not proceeding. A form of compensation should be paid to address that restriction. It is usually relatively small.

3. Minimum annual payment while there is production

A floor. The floor should be slightly less than the amount expected and discussed during negotiations as the annual payment tied to production. It should be a cash payment tied to CPI and sometimes also tied to the rise and fall in metal prices using a neutral body such as the LME.

4. An annual payment tied to size and value of production –ad valorem royalty or similar.

Payment should be proportional to the amount of disturbance. See s.33 NTA.

The guiding criteria for compensation is set out at s51(1) NTA: "... an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment ... on their native title ...".

On the basis that each individual member of the native title group (up to several thousand) may be entitled to compensation (and noting that since 1992, there has been no Federal Court precedent for calculating compensation) it is arguable that when personal and

corporate compensation are totalled for possibly several thousand people who are the native title holders affected, the compensation could have greater value than the entire mining project.

The idea is to deliver a fair result for the native title group and the developer.

5. Share of profit

On the argument in 4. above, all of the above categories result in an inadequate attempt to compensate native title holders. If a project is more profitable than expected, that is, the internal rate of return substantially exceeds the company's expectations, then that profit should be shared.

The trick is to balance each of the above components. I am pleased to say that over the past few decades, there are more agreements with more appropriately sophisticated financial models. Unfortunately, they remain in the minority and most native title groups are not aware of them.

Problems

While there are many more problems, two serious concerns are:

1. transparency, and
2. the default position if agreement cannot be reached: the ugly prospect of participation in what appears to usually be unfunded or at least under-funded arbitration before the NNTT, where the Arbitrator's hands are very tightly bound: see s.38(2) NTA.

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Attachments:

1. Diagram setting out overview of trusts