SUBMISSION OF ANNE ENGLISH

ATHERTON TABLELANDS LAW

TO REVIEW OF THE FUTURE ACTS REGIME

This submission is made by Anne English, Principal of Atherton Tablelands Law.

Anne has over 35 years experience in delivering legal services to the mining, maritime and native title sectors.

In 1992 she was the legal adviser for the First Nations party involved in negotiating a compensation agreement for mining on aboriginal land in Queensland that provided for the first private royalty to be paid by a miner to an aboriginal landholder for mining in Australia.

Since that time Anne has been involved in representing landowners, miners and First Nations parties in Land Court/Tribunal, Federal Court and even Supreme Court cases involving native title, mining lease applications, ILUAs, native title claims and s31 Agreements associated therewith.

Anne has been a maritime lawyer for as many years and this has also enabled her to have an appreciation of the failure of government and proponents to fully comprehend impacts on offshore native title rights and interests nor cumulative impacts of multiple co-located projects taking the same resource in a relatively small coastal area, on local First Nations communities.

More recent experience with negotiations on behalf of First Nations landholders and native title holders in the critical minerals sector have highlighted the failure of both government and proponents being prepared to take a strategic vision or be prepared to share economic opportunities that present themselves throughout all processes involved in those projects not just the RTN process. That lack of vision is disappointing and underscores the failure to understand or engage fully on FPIC principles and those espoused in both the Qld and Cth Critical Minerals Strategies regarding meaningful engagement with First Nations communities.

The above experience has allowed Anne to come to some considered conclusions about the matters addressed in the FAR ALRC's Issues Paper which may be summarized below:

1. Recent negotiations on behalf of RNTBC consent for mining lease applications in the critical minerals sector in Qld have been less than satisfactory for the RNTBC/common law native title holders and legal advisers.
2. The writer agrees with all the comments in the issues paper raised about First Nations people inability to properly resource response and engagement in RTN negotiations.
3. It has been the submitters experience that the proponent has always been required to provide the resources for First Nations to engage with the process.
4. However recent experience with poor proponent acknowledgement and recognition of the need to provide adequate resources in order to obtain FPIC over the past few years

has led to the conclusion that proponents are actually weaponizing control over resourcing to the great disadvantage of First Nations groups;

5. Examples are:

    a) Inappropriate attempts to contro, dictate and interfered with how resourcing funds should be used by First Nations groups.
    b) Seeking to vet terms of reference for experts providing advice to First Nations groups;
    c) Conditioning resource supply by requiring " agreed" budgets and refusing to agree, and/or causing First Nations lawyers to waste/money/resources in endless arguments over petty concerns in developing budgets;
    d) Inappropriately conditioning funding for experts by seeking access to reports and advice;
    e) Refusing to fund expert financial/cultural/socio/economic expert advice to First Nations groups engaged in trying to respond to EIS processes;
    f) Failure to appreciate the need for First Nations groups to have access to advice referred to in (e) in order to ensure due diligence on matters that should be addressed in ILUA/s31 Agreements and otherwise for FPIC.
    g) Ditto (f) particularly where there are EIS processes being undertaken at either State or Cth or both levels.
    h) The failure to provide resources and/or to ensure equitable participation in the EIS processes associated with RTN proposals disenfranchises First Nations people from being meaningfully involved in developing recommendations for and/or decision making in relation to matters affecting their own land contrary to Human Rights principles and those lofty ideals espoused in the Critical Minerals strategies.
    i) Having reluctantly provided resources to First Nations groups to engage independent expert technical or legal advice, proponents then don't like the results and are not above using the resource weaponizing tactics in a punitive way to send a message to "tow the line".

The writer could go on but the above should be enough to justify the writer's conclusion that she sees a trend in resource negotiations where control over resourcing is being weaponized as a negotiation tool to grind down First Nations involvement rather than to enhance it.

Solution – RTN Best Practice Standards

It is consistent with Human Rights and FPIC and self- determination principles that Frist Nations groups should have the control and management of funding resources to enable them to freely engage with the RTN process.

The ALRC should consider:

a) Development of minimum/ best practice resource standards for the benefit of First Nations groups involved in RTN processes, to be complied with by proponents as a condition of and being able to demonstrate "good faith" negotiations. (compare for instance 11 minimum National Employment Standards for workplace agreements under the Fair Work Act.)

Often the rules of negotiations are set out in Negotiation Protocols or similar between the parties but these are voluntary documents and negotiated in a vacuum. It would be preferable to have some enforceable basic standards that will guide the process.

Standards should include:

(i) Acknowledgement by proponent that First Nations group will control and manage the resources required to participate in an RTN process;

(ii) Acknowledgement by proponent that it will fund and provide the necessary resources required by First Nations for FPIC participation

(iii) An upfront negotiation fee payable to the RNTBC/First Nations group that includes coverage for meeting costs/legal and technical expert fee estimates that is automatically topped up by reference to an agreed set of terms). For instance this could be a monthly consultation fee, annual payment or lump sum but it must be flexible enough to cover extraordinary as well as routine items that may require to be addressed as negotiations proceed);

(iv) In projects involving and EIS (Environmental Impact Statement) the recognition by the proponent and agreement that First Nations group are not just a consultant stakeholder but they are a primary stakeholder who should be sitting at the table with the regulator and proponent in the development and design of EIS TOR (Terms of Reference) from the outset. First Nations people should not be regarded just as a stakeholder to be consulted but rather be a co-partner in the EIS process. Proponents need to understand that resources also need to be provided to First Nations for meaningful participation in the EIS development and assessment process. The reason for this is because the matters to be addressed in the EIS particularly the Socio/Economic component are likely to identify and produce information that will be extremely valuable to the First Nations party to RTN negotiations. Furthermore EIS studies are about the impact of the project on the First Nations land. In cases where First Nations are also the landholder (eg Aboriginal Deeds of Grant in Trust land QLD) or in areas where there are exclusive native title rights and interests determined, respect and recognition of First Nations rights as landholder should be a given.

(v) Where there is no regulatory requirement for an EIS the standards should include a requirement for a Socio-Economic impact assessment directed to the impact on FN rights and interests so that a base line can be determined informing negotiations.

(vi) **Information Disclosure** -Proponent to provide First Nations group with a data/report list for all technical reports prepared for the project. Too often First Nations groups are grappling in the dark. First Nations groups should not have to seek out and repeatedly ask for project information. One of the RTN standards should require proponents to prepare and provide to First Nations a list of all technical reports prepared n connection with the project from which First Nations can determine what Information they wish to see. The list is to be kept up to date as the project proceeds and copies provided to First Nations groups in a timely manner as and when requested. Too often proponents selectively provide material in a time frame that does not match legislative negotiation timeframes.

(vii) **A principle acknowledging FN right to engage its own expert technical and legal advisers**

The above are just some of the matters that should be included in a mandatory list of Standards against which good faith negotiations can be tested.

As to the questions raised in the issues paper, the following are brief comments:

Question 1.

Amending time frames for RTN negotiations. 6 months is unrealistic and impractical.

Developing best practice standards against which good faith negotiations can be judged.

Question 2

Yes – the issues Paper does not identify the EIS processes as an integral component that should involve FN. There needs to be a much greater appreciation of the importance of FN exposure to and involvement with regulatory EIS processes and where an EIS is not mandated by the regulator – a Socio- Economic impact on FN should be required.

Due to work commitments I have run out of time to further respond but would be happy to be involved in developing further the ideas suggested in this submission.

The bottom line is that in my experience, First Nations people are still being treated as second class citizens in RTN negotiations due to lack of resources and information and just plain disrespect.

The opportunity to treat FN people as true partners in a project, be innovative in ways to engage with and maximise opportunities for capacity building and benefits derived from all aspects of RTN projects is being missed in many cases. And much time and energy is devoted to educating proponents to treat FN as equals which detracts from the energy that could be being put into crafting and negotiating agreements that align with the cultural values of the FN peoples and maximise the benefits of projects for them.

Respect and recognition of the equal status of FN peoples is still sadly lacking in RTN negotiations. Developing and mandating a set of standards by which “good faith” can be judged in negotiations will help to address many of the issues raised in the paper.

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