PRO FORMA NATIVE TITLE AGREEMENTS IN VICTORIA GETS THINGS MOVING*

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Several years ago, a growing backlog of mineral tenement applications and a stagnating mining and petroleum industry led the Victorian Government to review the Native Title Act 1993 (Cth) right to negotiate (RTN) process.[1] An outcome of this review and the concurrent discussions between the Victorian Minerals and Energy Council and the native title Representative Body for Victoria has been the drafting of a suite of pro forma native title agreements. This article describes the process of negotiating the agreements and outlines the content and options for each document.

1. INTRODUCTION

In 1998 there was a growing backlog of mineral tenement applications in Victoria. A significant cause of this backlog was the inability of the mining and petroleum sectors to successfully negotiate a way through claims made under the *Native Title Act 1993* (Cth).

A 1998 Victorian Government review of the *Native Title Act's* RTN process recognised that a new approach was needed. The Government wanted to avoid the difficulties being experienced in other jurisdictions with the *Native Title Act's* expedited procedure[2] (and later, alternative state-based regimes[3]). It decided not to implement the expedited procedure or an alternative state procedure, but instead encourage the minerals industry and native title claimants to use the RTN process, or the *Native Title Act's* Indigenous Land Use Agreement (ILUA) provisions.

To streamline the process of reaching native title (mineral and petroleum) agreements in Victoria, a range of *pro forma* agreements have been negotiated over four years as a partnership between the key stakeholders, being the Victorian Government, the Victorian Minerals and Energy Council (VMEC) and the Representative Body for Victoria. A cornerstone of this process was to establish and maintain a good working relationship between these parties.

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* An earlier version of this article was presented by co-author Peter Rush in November 2003 at the Mining Council of Australia's Sustainable Development Conference in Brisbane.

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1 S Rooney, "*Review of the right to negotiate process in Victoria*", Unpublished research paper for Native Title and Resources Law, Graduate Diploma Energy and Resources Law, Melbourne University (1998).

2 See section 32, *Native Title Act*.

3 Sections 43 and 43A of the *Native Title Act* deal with alternative State or Territory provisions. Queensland and (to a more limited extent) the Northern Territory ventured down this track unsuccessfully, eventually reverting back to the *Native Title Act's* right to negotiate process. Regarding the Northern Territory experience, see S Brownhill, "Native Title Act, Section 29 Notices for exploration licence and mining titles in the Northern Terrritory: Where to Now?" (2001) 5 *Native Title News* 38.

The willingness of the parties to the negotiation to compromise in terms of what was (or was not) included in the *pro forma* agreements was fundamental in moving the process forward, and finalising the agreements. Virtually all contracts and agreements require some degree of compromise by the parties involved. In relation to the *pro forma* project, each stakeholder represented a large number of constituents with (at times) similar and (at other times) different interests. Those using and/or analysing the *pro forma* agreements in the future need to bear in mind that concessions had to be made by all parties. However, the documents are template agreements only – they can be amended and extended to accommodate project specific considerations. These considerations are typically the details of any cultural heritage surveys and management of cultural heritage in relation to a company's work program, and the mutually acceptable work and compensation arrangements which the parties might agree to put in place.

The *pro forma* agreements minimise the variables to be negotiated when a native title agreement is required before a resource tenement application can be granted. They assist in creating an environment in which good working relationships can develop, permitting the parties to direct their often limited resources to more productive endeavours.

2. THE PROJECT

The Government's review of the operation of the *Native Title Act* in Victoria recommended that "to improve the preparation of those about to enter the negotiation process, a greater availability of information is needed … including … legal advice (rather than being advised to seek your own legal opinion), expected timeframes for the negotiation, relevant documentation …[and]… examples of other agreements and negotiations"[4].

In response to the Government's decision not to implement the expedited procedure or an alternative state-based regime, and the difficulties faced by industry and the Representative Body in getting agreements through the Government approval processes, representatives of Government, VMEC and the (then) Representative Body, Mirimbiak Nations Aboriginal Corporation[5] (from 2003 Native Title Services Victoria (NTSV)) met in 1999. They agreed to negotiate *pro forma* (or template) agreements which parties could use to streamline the RTN process, with the comfort of knowing that they had been prepared and endorsed by the major stakeholders/peak bodies.

After long and complex negotiations, a *pro forma* section 31 deed for exploration was finalised in December 2001 (the section 31 Deed being the "bare deed" containing the essential statutory requirements under s 31(1)(b) of the *Native Title Act*, and signed by all parties). The Government adopted the policy position that it would sign a section 31 deed without negotiation if the *pro forma* deed was adopted by parties without any significant amendments.

In Victoria the substantive matters between the native title party and the company are negotiated as a Project Consent Deed (PCD). This is negotiated separately from the section 31 Deed thus allowing details to remain confidential between the parties. The *pro forma* project then began

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4 S Rooney, "*Review of the right to negotiate process in Victoria",* Unpublished research paper for Native Title and Resources Law, Graduate Diploma, Energy and Resources Law, The University of Melbourne (1998).

5 Mirimbiak Nations Aboriginal Corporation, the former Representative Body for Victoria, was involved in the *pro forma* project from 1999-2003. In mid-2003, Native Title Services Victoria Ltd took over this role. NTSV is the body performing functions of a Representative Body under section 203FE of the *Native Title Act 1993* (Cth). For ease of reference, the authors have referred to NTSV.

work on a *pro forma* PCD for exploration to provide the framework for these separate negotiations. This was later expanded to cover mining and petroleum licence activities.

To facilitate the existing option of participating in the RTN process or negotiating an ILUA to permit the grant of a tenement, the working group also negotiated and produced a *pro forma* ILUA for exploration and/or mining. The *pro forma* ILUA provides for the grant of conjunctive exploration and/or mining tenements to allow parties to negotiate an agreement on a "once-only" basis. While each ILUA which is negotiated will need to be considered for registration by the National Native Title Tribunal "on its merits", the negotiating parties (in consultation with the Tribunal) have tried to ensure that, as far as possible, the *pro forma* ILUA meets the registration requirements of the *Native Title Act* and the relevant regulations (see point 3.10 below).

The following documents have been negotiated and finalised in the project so far.

***Pro forma* Document**	**Legislation**	**Status**
Section 31 Deed for exploration	*Mineral Resources Development Act* 1990	Version 1 in use since December 2001, Version 2 finalised and awaiting Ministerial endorsement. Being used informally.
Project Consent Deed for exploration	*Mineral Resources Development Act* 1990	Finalised and awaiting Ministerial endorsement. Being used informally.
Section 31 Deed for mining	*Mineral Resources Development Act* 1990	Version 1 in use since December 2001, Version 2 finalised and awaiting Ministerial endorsement. Being used informally.
Project Consent Deed for mining	*Mineral Resources Development Act* 1990	Version 1 finalised and awaiting Ministerial endorsement. Being used informally.
Section 31 Deed for Petroleum Exploration Permits	*Petroleum Act* 1998	Version 1 in use since December 2001, Version 2 finalised and awaiting Ministerial endorsement. Being used informally.
Project Consent Deed for Petroleum Exploration Permits	*Petroleum Act* 1998	Version 1 finalised and awaiting Ministerial endorsement. Being used informally.
Section 31 Deed for Petroleum Production Licences	*Petroleum Act* 1998	Version 1 finalised and awaiting Ministerial endorsement. Being used informally.
Project Consent Deed for Petroleum Production Licences	*Petroleum Act* 1998	Version 1 finalised and awaiting Ministerial endorsement. Being used informally.
ILUA for exploration and/or mining (conjunctive agreement)	*Mineral Resources Development Act* 1990	Version 1 finalised and awaiting Ministerial endorsement. Being used informally.

2.1 The Process

As with any major venture involving parties with diverse interests, the project's success largely depended on the relationship between the participating representatives of Government, VMEC and NTSV. While these parties often have different, and sometimes conflicting, objectives, the *pro forma* project was founded on the parties' common interest of streamlining the RTN process to reduce time, cost and uncertainty, and provide equitable outcomes for all parties.

The Government took the view that it had a crucial role to play in establishing the correct framework for successful native title outcomes. In recognition of the more limited resources of VMEC and (in particular) NTSV, the Government took the lead role in hosting the meetings and drafting the *pro forma* agreements after each meeting.

The process was a learning experience for all participants, as each came to understand the other's needs and expectations. It was readily apparent that the time and resources being expended by all parties on the RTN process was a major issue. In particular, the Government and NTSV were duplicating the same processes, and consequently the reliability of each organisations' data was questionable.

As part of building trust with NTSV the Government began to provide it, and the National Native Title Tribunal, with publicly available electronic data of Victorian mining tenements. This information-sharing initiative created an open and transparent environment for all RTN parties, and enabled them to determine and analyse data particular to their needs. This in turn streamlined native title processes and eliminated errors, through minimising the need for data interpretation and external verification from a range of sources. Providing the Tribunal with electronic mining tenement data also eliminated the cost to industry of undertaking manual searches of the Register of Native Title Claims. The data quality available to all parties also improved greatly as a result.

Once the *pro forma* section 31 Deed was finalised in 2001, negotiations moved to the *pro forma* PCD for exploration. The PCD contains the commercial aspects of any deal and is negotiated, sighted and signed by the company and the native title party only. It was a therefore a major policy shift for NTSV and VMEC to invite the State to participate in drafting and negotiating the *pro forma* PCD, and indicative of the strength and success of the relationship which had been built between the parties during the project's initial stage.

The relationship established in the early years of the project endures to this day. One of the keys to its success was that the same people have (largely) been involved throughout the entire project. The Government's policy and legal representatives represented the Government from 2000.[6] VMEC's Executive Director and Chairman of the Native Title Working Group has been involved in the entire project to date, along with VMEC's legal adviser from early 2002. NTSV maintained the participation of its future act lawyer from early 2000. Over four years and countless meetings, these people developed a solid relationship based on trust, goodwill, and shared goals.

Another important aspect of the project was that each party came to the negotiating table with the authority to negotiate on behalf of their constituents. While all the *pro forma* agreements required final endorsement by (variously) relevant Ministers (the Government), a Board (NTSV) or the Executive Council (VMEC), the authority that each party's representatives brought to the negotiating table built confidence in the relationship and the process.

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6 Co-authors Sean Rooney (senior policy officer 2000–2002) and Georgia Denisenko (legal).

The benefits flowing from these relationships can be measured beyond the success of the *pro forma* project, and have extended to other negotiations and projects. It has also allowed the *pro forma* project to extend beyond the scope initially envisaged by the parties. For example, negotiations have already commenced on a regional ILUA for exploration with one of the claimant groups. The solid foundation existing between the Minerals and Petroleum Division, of the Department of Primary Industries, VMEC, and NTSV will also be important when the *pro forma* agreements are reviewed periodically.

3. KEY FEATURES OF THE *PRO FORMA* AGREEMENTS

While the *pro forma* agreements all differ slightly in content (particularly the ILUA which is governed by a different statutory process within the *Native Title Act* than the section 31 Deed), they share common features, which are outlined below. Wherever possible, clauses are identical both in content and order across the suite of documents (for example, the dispute resolution clause).

All agreements other than the *pro forma* ILUA are intended to meet the RTN future act requirements of the *Native Title Act*. The *pro forma* ILUA is a template "area" agreement designed to meet the requirements of sections 24CB to 24CE of the Act (as area agreements are most commonly used) but it could be adapted to a body corporate agreement under section 24BA if this became necessary in the future. There are no native title body corporates in Victoria at present.

3.1 Foreword, Notes and Variables

All the *pro forma* agreements have a "Foreword" cover page for removal during project specific negotiations, which is designed to provide background to the document, and explain its purpose, the intended parties, and provide for a formal review process every 12 months.

The *pro formas* also provide extensive "notes" and "variables" throughout the documents, to guide users through their negotiations and drafting. The notes are highlighted in coloured text, often raising issues for users to consider in project specific negotiations. These notes are designed to be deleted before negotiations are finalised.

Any variables within the agreements (eg., parties, native title claim reference details, tenement specifics, benefits) are also highlighted in coloured text so that the user can simply fill in the blanks.

3.2 Consent to Future Acts / RTN Not to Apply

As a cornerstone of the agreement, all the *pro formas* provide for the native title party's consent to the grant of the relevant tenement by the Government. In addition, the ILUA incorporates a statement that the RTN is not intended to apply.[7]

3.3 Native Title

The *pro formas* also confirm that the entering into of the deed or ILUA does not mean that the parties agree to the existence of native title. However, the deed or ILUA will not be affected by a determination or decision in relation to native title rights and interests (including a determination that native title does not exist). Effectively, this means that if the native title claim is discontinued, or native title is determined by the Federal or High Court not to exist, the deed or ILUA (including the provision of benefits) stands.

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7 See section 24EB(1)(c) of the *Native Title Act*.

3.4 Non-extinguishment Principle

The *pro formas* provide that the non-extinguishment principle in s 238 of the *Native Title Act* applies to all the future act(s) consented to in the deed or ILUA.[8]

3.5 Benefits

The successful use of the *pro forma* agreements depends on mutually acceptable compensation arrangements being settled in project specific negotiations.

The PCD and ILUA provide for the company to pay benefits to the native title party on a "once-only" basis, and confirm that there is no liability to pay any further compensation beyond what is provided for in the deed or ILUA. Benefits are contained in Schedule B, with extensive user notes to remind parties to consider issues such as whether GST is applicable, and importantly, how the benefits will be distributed to the native title claimants.

3.6 Warranties

Specific warranties confirming the authorisation of the parties to enter into the deed or ILUA are provided in each agreement.

3.7 Dispute Resolution

The *pro formas* all provide for a three step dispute resolution process, being initial good faith discussions, mediation and then arbitration. The process is fairly detailed and may not be as speedy as other forms of dispute resolution. However, the parties were committed to seeking alternative dispute resolution methods wherever possible. In particular, the Government's policy of "native title litigation as a last resort" meant that it was heavily committed to mediation-based solutions.

3.8 Public Relations

The ILUA and section 31 deeds contain a clause regarding publicising the fact that an agreement has been entered into by the parties. The clause requires that that the content of any media release made by any of the parties must have the prior agreement of all parties.

3.9 Other Clauses

All of the *pro formas* contain standard "boilerplate" clauses including interpretation, definition, acknowledgements, confidentiality, covenants, assignment, variation, severance, entire agreement, governing law, counterparts, liability, waiver, independent legal advice, relationship, further co-operation, costs, and notices.

3.10 Attachments

The Attachments in the *pro forma* agreements are all designed to be used where applicable, and then deleted from the project specific document.

Attachment 1 in the *pro formas* contains various optional execution or "sealing" clauses for selection by parties in project specific negotiations. More often than not, the Government had to return section 31 Deeds for re-execution by the company as their sealing clauses did not comply with section 127 of the *Corporations Act 2001*. This was causing delay for all parties, and particular inconvenience for NTSV and the native title claimants; in having to re-schedule large and costly meetings. Attachment 1 has cured this problem and offers the tenement applicant (whether a company or individual) a choice of optional sealing clauses. The *pro forma* ILUA also contains an optional sealing clause if the Government is a party.

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[8] See section 24EB(3) of the *Native Title Act* in relation to the *pro forma* ILUA.

Attachment 2 (to the PCDs and ILUA in particular) contains clauses for optional negotiation and insertion by the parties during project specific negotiations. Some are clauses which may or may not be applicable to the negotiations – eg. a GST clause. Others are clauses which the Government, NTSV and VMEC could not agree to insert in the body of the *pro formas*, but agreed that parties should consider their inclusion during negotiations. For example, an optional clause dealing with termination of the agreement, and optional provisions for large and/or long-term projects which would benefit from the establishment of a "Liaison Committee".

Attachment 3 to the *pro forma* ILUA contains the requisite documentation for making an application to the National Native Title Tribunal to have the ILUA registered. The Tribunal's ILUA registration application requirements are detailed and precise, with numerous attachments (including the executed ILUA) having to be completed to meet legislative and regulatory requirements. Significant delays in registering the ILUA will be caused, for example, by the initial application failing to correctly provide a "complete description of the ILUA area".[9]

In an effort to avoid delays in the ILUA registration process (and therefore the grant of the tenement), Attachment 3 to the *pro forma* ILUA contains the Tribunal's registration application form, along with detailed user notes explaining in what circumstances a particular attachment will be required. Attachment 3 is designed to be removed, completed, and submitted to the Tribunal (together with the ILUA) for registration.

3.11 Schedule A – Cultural Heritage

An integral feature of the *pro forma* PCDs and ILUA is a Cultural Heritage Management Procedure included as Schedule A. The Cultural Heritage Management Procedure was developed in close consultation with Aboriginal Affairs Victoria and is designed to meet their legislative and procedural requirements.

The Cultural Heritage Management Procedure has the following general principles, subject to applicable legislation[10] and the role of Aboriginal organisations and officers under such legislation:

- the protection and management of the cultural heritage of the native title party;
- the requirement that such cultural heritage be treated with sensitivity and in co-operation with the native title party.

The Procedure also includes:

- a Work Plan[11] not necessarily having to be provided to the native title party in circumstances where an exploration licence has been granted which only allows low impact exploration that amounts to non-ground disturbing activity;
- the appointment by the native title party of a representative to liaise with the proponent regarding cultural heritage matters;
- access to the tenement area, subject to safety and health concerns;

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9 Rule 5 and 7(2)(d) of the *Native Title (Indigenous Land Use Agreement) Regulations* 1999 (Cth) Regulation 5 defines a "complete description", and further guidelines regarding the content of that requirement are posted on the Tribunal's website at www.nntt.gov.au.

10 In particular, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic).

11 Work Plans are provided by proponents to the State under section 40 of the *Mineral Resources Development Act 1990* (Vic).

- an option given to the native title party to inspect proposed work areas and negotiate management of heritage sites prior to work commencing, with payment being made for these services;
- procedures if an object or site of cultural heritage significance or human remains is discovered;
- cultural heritage instruction by the native title party; and
- a series of flow-charts at the end of the Schedule to guide users through the steps required in the procedures.
- Completing negotiations for Schedule A was a landmark step in the *pro forma* project, as cultural heritage recognition and protection is typically expressed by native title claimants in Victoria as a core aspiration and responsibility.

3.12 Other Schedules

The other Schedules in the *pro forma* agreements make provision for maps of the tenement area, benefits to be paid by the company to the native title party, notices, and Liaison Committees. The *pro forma* ILUA also contains additional Schedules providing for:

- clear definition of the area to which the ILUA relates; and
- a list of the future acts to which the ILUA applies.

4. OUTCOMES

The *pro forma* agreements have streamlined the RTN process for industry in Victoria, with the (then) Minister for Energy and Resources signing agreements for the grant of 11 mining and petroleum tenements[12] in 2002, compared to just nine between 1994 and 2001.

A central objective of the *pro forma* project was to reduce the time and cost associated with the negotiation of individual agreements. Informal use of the *pro forma* agreements has already reduced the time taken to reach an agreement in the RTN process in Victoria. Prior to the availability of the *pro forma* agreements, the average time taken to complete the RTN process for nine section 31 agreements was 24 months. Following introduction and use of *pro forma*, this figure has dropped to 19 months. The *pro forma* PCD and ILUA were not completed until the end of 2003 and it is anticipated that they too will have a positive effect on timeframes.

The average time taken to reach an outcome by way of a *Native Title Act* section 35 arbitration determination, from the time the section 29 notice is issued by the State, is currently 18 months. The use of ILUAs to reach agreement for the grant of mining tenements currently takes an average of 25 months.

When the full suite of *pro forma* agreements are endorsed, publicly launched and a familiar feature of the native title landscape, it is anticipated that they will be widely used and extremely effective in reducing the time taken to achieve a successful agreements in Victoria.

4.1 Related Policy Considerations

Victoria has a comprehensive policy framework to deal with native title requirements for mineral and petroleum tenements. Guidelines have been produced on how to process mineral and petroleum tenements under the *Native Title Act.* These are publicly available.

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[12] Note: only one RTN process has been completed for petroleum tenements. Pipelines are not included in this analysis.

Procedural delays caused by native title processes have created the opportunity for some explorers to tie up ground without the need to meet expenditure obligations required under the *Mineral Resources Development Act 1990* (Vic). To address this problem, the Government now has a policy requiring tenement applicants to demonstrate that they are either negotiating in good faith within the RTN process, or progressing ILUA negotiations. Failure to demonstrate satisfactory progress in native title negotiations places the company at risk of forfeiting its tenement application, for failing to show a "genuine intention to work" as required by section 15(6)(ba) of the *Mineral Resources Development Act*.

5. THE FUTURE

Although (at March 2004) the *pro forma* agreements are awaiting Ministerial endorsement and public launch, most documents are nevertheless being informally used by proponents, native title claimants and the Government. However, there is still work to be done informing all potential users about the documents and the benefits they offer, especially the *pro forma* PCD and ILUA. This will involve particularly VMEC and NTSV, meeting separately and together with their members and constituents to provide information and an opportunity to discuss them. Through this process there should be an improved understanding leading to their increased acceptance and adoption.

Further work is also required to improve the native title process in Victoria and provide for sustainable relationships between the industry and indigenous communities. There is a need to identify Crown land in Victoria where native title has been extinguished to save proponents and claimants expending resources on native title processes for no reason. Additionally, the pursuit of framework ILUAs covering the entire area of native title claims would further streamline processes. In particular, the negotiation of framework or regional ILUAs over entire claim areas, providing standing consents to small mining and exploration in exchange for standard benefits and cultural heritage protection, would enable small mining and exploration to occur without the need for project specific negotiations. These regional agreements could easily be applied to other areas of the mineral and petroleum sectors.

6. CONCLUSION

There have been some unavoidable delays in the launch and public release of the documents. VMEC's Executive Council endorsed the documents in 2003, followed by the new NTSV Board on 24 February 2004. State Ministerial endorsement is now being sought, and parties hope to launch the documents shortly. Following the public release of the documents, they will be published on the Government's and VMEC's web-sites, and made available to all Victorian mineral and petroleum licence applicants.

Government and the peak bodies take the view that they have a crucial role to play in establishing the correct framework for successful native title outcomes. This framework, once established, gives industry the platform to innovate, and to get on with its business in partnership with indigenous communities. It is expected that the *pro forma* native title agreements, once endorsed, launched and fully operational, will provide this framework for all parties.