Good faith and associated amendments under the right to negotiate provisions

1. *The provisions in the exposure draft establish good faith criteria that parties must follow.*

   The amendments in the exposure draft set out good faith criteria to be used in deciding whether or not a party has negotiated in accordance with good faith negotiation requirements. The criteria provide for clarity in relation to what constitutes 'good faith' negotiations. Whilst this is a positive step, it should be considered whether the criteria go far enough in terms of requiring negotiation parties to actively participate in 'good faith' negotiation.

   The biggest issue facing native title parties in relation to negotiation is the funding of their attendance and fully-informed participation. The proposed amendments do not make any allowances for this consideration. This comment also relates to the adequate resourcing of those assisting native title parties in these negotiations.

   Similarly, proposed s31A(2) does not, but should, allow for consideration of the location of negotiation meetings, given the often remote location of members of the native title party.

   Additionally, proposed s31A(2)(d) would be improved by the addition of a requirement for a reasonable outline of the reasons for the responses provided. The simple provision of a response to proposals will not meaningfully progress negotiation if there is no requirement to provide sufficient information to allow other negotiation parties to provide further proposals addressing any issues noted with the agreement.

   Given s31A(3), it would be desirable that s31A(2)(e) contain a requirement that parties be required to give "demonstrable" genuine consideration to the proposals and that participation as required by s31A(2)(a) be "active" participation. This would ensure that, whilst concession or agreement on proposals is not required for 'good faith' negotiation, parties are not simply "going through the motions" of complying with the good faith criteria.

   Additionally, although the list in s31A(2) is inclusive, an "and anything else that should be considered" would also allow for the negotiation parties to provide comment on any other matters that should be considered by the NNTT.

2. *The reforms also extend the time before a party may seek a determination from the NNTT from 6 to 8 months. Additionally, the requirement to negotiate in good faith will apply until an application for a determination is made*.

   The extension of time during which parties must negotiate in accordance with the good faith criteria provides additional time for parties to meaningfully progress the negotiations. This extension is particularly relevant given the remoteness of members of the native title party and the broad range of issues to be negotiated between parties.

   It should be noted that the requirement to negotiate in 'good faith' should apply until a determination is made, rather than the date of an application

for determination (ie. Removing deleting the words “until the application is made” from the proposed s36(2)). Although there is arguably reason to believe that, once an application for determination is made, parties would no longer be desirous of negotiating in good faith, if the NNTT determines that a party has not acted in good faith and orders a period of time, before which another determination cannot be sought, it would be practical if good faith negotiation had continued through that time.

3. *The reforms also require the party seeking the arbitration to show they have negotiated in good faith.*

   Requiring a party to demonstrate they have negotiated in good faith, in order for a determination to be made, provides additional encouragement to negotiation parties to actively negotiate in good faith, rather than waiting out the 6 month time period.

   Additionally, see the comments above (at 1. and 2.) in relation to further requirements for a party to demonstrate that they have negotiated in good faith and the duration of the application of the good faith criteria.

4. *The reforms allow the NNTT to make orders about the period of time before another determination can be sought if there is a finding that a party has not negotiated in good faith.*

   Allowing, but not obliging, the NNTT to make orders in relation to a further period of ‘good faith’ negotiation provides for further meaningful negotiation to occur prior to the application of a new determination. It should be noted that, depending on the parties involved and the content of any initial application for determination under s35, forcing negotiation parties to negotiate in good faith for a further time period may be inappropriate and, without adherence to the explicit criteria in s31A(1), may lead to negotiation parties simply doing enough to comply with the letter of s31A(1), but not the intention behind the section.

Historical extinguishment

1. *The proposed amendment would only allow extinguishment of areas such as parks and reserves to be disregarded where there is agreement between the government party and the applicants. Any current interests over the land would continue to exist, and, to the extent of inconsistency with NT rights, prevail.*

   Unlike the current section 47, 47A and 47B, the exposure draft provides for extinguishment to be disregarded over areas such as parks and reserves (and public works within those parks and reserves) only when the government party and the applicants have reached an agreement as to the disregarding of that extinguishment. The more preferable option would be as outlined in the proposed Green's bill, allowing for prior extinguishment over parks and reserves to be disregarded as of right, without any requirement for agreement with government parties. Similarly, the proposed Green's bill does not restrict agreement about extinguishment to parks and reserves, but opens it to any agreement between parties about extinguishment.

   The proposed amendments provide no guidance as to the contents of the agreement to be reached between the applicant and the government party and place no restriction as to what a government party may require in order to reach agreement.

   Noting the two month notification requirement and the possible comments provided by interested persons, raises the issue of the involvement of these third parties in the agreement process. Depending on the interest and the comment, it is likely that agreement would not be reached by a government party unless third party interests were dealt with prior to the application being lodged. See comments below (at 3.) regarding the right of interested persons to comment.

2. *The proposed amendment allows flexibility for parties to agree which area (the whole or part of the park or reserve area) is the subject of the agreement to disregard extinguishment*.

   See comments above.

3. *The proposed amendment includes a two month notification requirement before the agreement is made. The relevant government party must arrange for reasonable notification of the proposed agreement in the state or territory in which the park is located, and must give interested persons an opportunity to comment on the proposed agreement.*

   The proposed amendment allows for comment from interested persons, during a minimum two month notification period. The amendments are not specific about what use may be made of these comments. Theoretically the government party would use these comments in determining whether they want to agree to disregard extinguishment in a particular park or reserve, or part of a park or reserve. This appears to be the only use to be made of any comments provided under 47C(5)(b). No agreement may be made until after the completion of the period for comment.

Once an application is made, any person whose interest in relation to the area may be affected by the determination has the right to become a party to the determination proceedings (s84(3)(a)(iii)). This would be the appropriate forum in which any submissions could be made. Both the current 66A(1) and the proposed additions to s66(1) would allow for interested parties to be notified at that stage of the proceedings.[1] Allowing all potential interested persons to comment prior to the agreement being made and the application lodged will unnecessarily complicate the matter of agreement between the government party and the applicant in relation to extinguishment.

Given that any determination made under s47C does not affect the validity of the park or reserve, nor the validity of the creation of any prior interest, nor the interest of the Crown, nor any existing public access right (proposed s47C(8)(a)), the effect of the determination on any interested persons could readily be addressed as part of the management of the determination application, as any interest is dealt with in relation to s47, 47A and 47B areas under the current Act.

It should also be noted that the two month period is a minimum; government parties could choose to delay the making of any agreement (and therefore any application for native title) by extending the period of comment to any period it chooses. This could unnecessarily delay the process of reaching agreement.

4. *The amendment also allows for the extinguishing effect of public works which occur within the park to be disregarded by agreement with the relevant govt party.*

   Although the inclusion of the extinguishing effect of public works in this section is positive, see above for comments in relation to the process for disregarding that extinguishment.

[1] The exposure draft refers to s66A rather than s66A(1) in paragraph 11 of Schedule 1.

ILUAs

The purpose of the following amendments is to streamline identified processes to ensure greater flexibility and also provide greater certainty for all parties.

1. *The reforms establish a threshold which will determine whether or not a new registration process is required. If the amendments do not affect matters which the Registrar was obliged to consider in deciding whether to register the agreement, then the parties need not re-apply to have the amended agreement re-registered*.

   No comment.

2. *The new provision will ensure that parties that have an ILUA which includes areas where native title has been extinguished, are not prevented from using the Subdivision B ILUAs, which have a simpler registration process*.

   No comment.

3. *The reforms clarify that ILUAs can be used to cover a broad range of issues, including, restrictions on native title rights, and the final settlement of any compensation liability.*

   Although it is desirable that ILUAs be able to provide for agreement about as broad a range of issues as possible, several points in relation to the scope of possible agreements need to be clarified. In relation to the "making or not making of applications" (which are noted to include applications under Division 1 of Part 3 of the Act), questions are raised as to what other types of applications are intended to be brought within this subsection. The diversity of matters already referred to in section 24BB, 24CB and 24DB indicates that a broad range of applications are intended to be included.

   Similarly, the proposed s24BB(ad), 24CB(ad) and 24DB(ad) seems to leave open a future argument that it would be possible to contract out of s211 of the NTA. A statement in the Explanatory Memorandum noting that this was not intended as an effect of the proposed legislations would avoid any confusion in the future. This is especially important given the protective effects of s211 for our constituents.

4. *These amendments are designed to streamline registration of Subdivision C ILUAs, including by:*

   a. *Reducing the mandatory three-month notice period to one month*

   b. *Modifying the process for opposing registration of agreements to capture all those who should be involved in the authorisation process – where a party does not have a registered native title claim but can establish a prima facie case that they may hold native title*

   c. *Enabling the Australian government Minister to determine requirements for opposing registration*

   d. *Providing guidance for the Registrar in considering objection material*

e. *Clarifying what rights persons making objections have to view material supporting application for registration*

No comment on the technical amendments to streamlining registration, except in relation to the requirements for provision of material supporting the application for registration. It is noted that confidential or commercially sensitive information is excluded, and suggested that the provision of culturally sensitive information also be excluded. Parties to the ILUA could be afforded the opportunity to provide consent (or comment) on the provision of specific documents to objectors.

Minor technical amendment to s47

1. *The amendment would ensure that where an Indigenous corporation has members rather than shareholders, section 47 could still apply to disregard extinguishment over the area.*

   No comment.