Government of South Australia
Attorney-General's Department

If calling please ask for
Jenny Hart/Elizabeth Wilson

Telephone
8207 1759 8207 1765

Reference
107797

Crown Solicitor's Office

Native Title Section

Level 6
45 Pirie Street
Adelaide SA 5000

GPO Box 464
Adelaide SA 5001
DX 336

Tel 08 8207 1691
Fax 08 8204 9576

19 October 2012

BY EMAIL native.title@ag.gov.au

Mr Kym Duggan
First Assistant Secretary
Social Inclusion Division
Attorney-General's Department
CA House
National Circuit
Barton ACT 2600

Dear Sir

Re Native Title Amendment Bill 2012

Thank you for the opportunity to comment on the exposure draft of the Native Title Amendment Bill 2012.

Right to Negotiate

We have been provided with a copy of the Western Australian government's submission and note the concerns raised by that State in relation to the proposed changes to the Right to Negotiate (RTN).

While we do not have direct experience of some of the issues relating to processing high volumes of mining applications which attract the RTN such as have been raised by WA, we make the observation that in prescribing processes that must interact with State and Territory legislation, the Commonwealth must ensure that the Native Title Act (NTA) processes are workable for all jurisdictions and situations, including those where there is high mineral prospectivity and a high demand for mining tenements.

In the event that South Australia was ever fortunate enough to have the same level of activity in relation to exploration and mining as Western Australia has, we would not want to find it stymied by time consuming and unworkable RTN processes.

1. Good faith criteria

The proposed amendments are intended to clarify what is meant by good faith negotiations under the RTN provisions in Subdivision P of the NTA. They provide that in determining whether a party has negotiated in good faith, regard must be had to certain criteria listed in the amendments.

The meaning of good faith negotiation in the context of the right to negotiate provisions has been the subject of judicial interpretation and is, to a large extent, understood by negotiating parties. Thus far no litigation has emerged from the corresponding good faith requirement contained in section 63 Q(5) of the South Australian *Mining Act 1971* which operates as an alternative to Sub-division P in respect of mineral exploration and production in South Australia.

The establishment of a set of codified criteria adds a layer of complexity to the scheme and is likely to result in negotiating parties engaging in further litigation to determine how the criteria are to interpreted and applied.

Proposed s 31A(1) provides that the good faith negotiation requirement requires parties to use all reasonable efforts to reach agreement and establish productive, responsive and communicative relationships between the negotiations parties. In deciding whether these criteria have been met, regard will be had to whether a negotiations party has done the following:

(a) attended, and participated in, meetings at reasonable times;
(b) disclosed relevant information (other than confidential or commercially sensitive information) in a timely manner;
(c) made reasonable offers and counter offers;
(d) responded to proposals made by other negotiation parties for the agreement in a timely manner;
(e) given genuine consideration to the proposals of other negotiation parties;
(f) refrained from capricious or unfair conduct that undermined negotiation;
(g) recognised and negotiated with the other negotiation parties or their representatives;
(h) refrained from acting for an improper purpose in relation to the negotiations.

Many of these criteria are themselves ambiguous and rely on the concept of "reasonableness" which is likely to vary in any given case and be perceived differently be different parties. We are particularly concerned about sub-paragraph (h) as, in effect, it will require parties to prove a negative. At the very least, this criteria, which, unlike the other criteria, has no parallel in the Fair Work Act, should be deleted.

Overall, the State submits that the introduction of these criteria is unlikely to achieve the intended clarity about what constitutes good faith negotiations nor add any real benefit to the existing process. Conversely, they will lead to further litigation and uncertainty that is unwarranted and counter-productive.

2. Requirement to demonstrate negotiation in good faith

The proposed amendments require that a party seeking a determination from the NNTT must show that they have negotiated in good faith in accordance with the specified good faith criteria before the NNTT may make a determination. If there is a finding that the party has not negotiated in good faith, the NNTT can make an order barring the party from seeking a determination for a specified period.

Unless there is an issue regarding the conduct of the parties, this requirement would seem to impose an unnecessary additional requirement on the parties which could result in extra cost and delay. For example, having to establish that good faith requirements were met as a prerequisite to obtaining a determination where parties are otherwise in agreement seems to be an unnecessary imposition on the time and resources of parties and the NNTT.

3. Increasing minimum period for negotiation

The State does not support the proposed amendment to increase the minimum negotiation period from 6 to 8 months. There is no discernable benefit to the parties nor will it necessarily ensure a greater focus on good faith negotiations.

We understand that the proposed increase in time is based on a concern that, in practice, six months is not sufficient time for parties to reach an agreement, particularly where native title parties need to first register a claim.

However, parties are able to (and regularly do) negotiate for longer than the mandated period. In addition, they are able to continue negotiations after an application for a determination has been made. There seems little benefit in requiring parties to continue with negotiations which have clearly broken down.

A longer mandatory negotiation period will likely result in higher negotiation costs to the parties. It will also require parties who are otherwise in agreement but require a determination for procedural reasons to wait an additional two months before being able to obtain a determination. This latter issue could be readily rectified by allowing parties to agree upon an earlier referral.

Historical Extinguishment - Parks and Reserves

The proposed amendments provide that extinguishment over areas of parks and reserves must be disregarded for the purposes of an application under the Act if there is agreement between the relevant Government body and native title party that section 47C will apply.

Unlike sections 47, 47A and 47B of the NTA, the new section 47C provides for extinguishment to be disregarded by agreement. It mandates that where there is an agreement that section 47C applies, the Court must disregard prior extinguishment in making a native title determination.

Although we support the flexibility of the proposal, we note that other parties may challenge the validity of section 47C on the basis that it undermines the integrity and independence of the judiciary. This is because it obliges the Court in making a native title determination to give effect to a decision by the State and the native title party to disregard prior extinguishment.

The existence of such a provision will also create an expectation among native title parties that the State will agree to apply the provisions. However, applying section 47C to a park will result in additional cost and complexities for the State if it results in the “revival” of native title. Some potential issues include managing renewals of existing interests in the park (e.g. tourism and infrastructure interests), facilitating mining activities where these are permitted and the process for validly adding or removing land from a park. These sorts of issues may act as a disincentive for Government parties to make an agreement under section 47C.

The amendment also allows for applications to be made to vary approved determinations of native title where an agreement is reached under section 47C. This is likely to result on native title parties putting pressure on the State to enter into such agreements over areas where there is already a finalised determination. This will place an additional burden on the resources of the State.

While we can see the benefit of additional flexibility in this area, we are concerned about the precedent effect of changing the Act in a way that leads to the revisiting of existing determinations. This is certainly not something that we would want to see happening on a wider scale.

Finally, if extinguishment is disregarded by operation of section 47C, the State will have to bear an additional compensation liability in respect of any future acts done in the area. The Commonwealth has not provided for any financial assistance to the State in this regard. Again, this may impact on the willingness of the State to enter into an agreement to apply section 47C.

Scope and Coverage of ILUAs

The proposed amendments allow for ILUAs to include provisions modifying the operation of section 211 of the NTA. We consider that section 211 should itself be amended so that its application is limited or modified where so provided in an ILUA. Otherwise there may be uncertainty about whether an ILUA (which has effect as a contract, except as specifically provided under the NTA) can override the operation of a statutory provision.

Other Amendments

The State has no comments on the other proposed amendments.

Please contact Jenny Hart on (08) 8207 1759 or Elizabeth Wilson on (08) 8207 1765 should you wish to discuss this submission further.

Yours faithfully

Jenny Hart
Assistant Crown Solicitor,
Native Title Section
Crown Solicitor's Office