JUST [us] lawyers

238 Kelvin Grove Road, Kelvin Grove
P.O Box 120, Red Hill Brisbane QLD 4059
P. +61 7 3369 7145 | F. +61 7 3315 2727
E. reception@justuslaw.com
ABN 55 329 056 556
www.justuslaw.com

COMMENTS ON EXPOSURE DRAFT FOR NATIVE TITLE AMENDMENT BILL 2012

About our Firm

Just Us Lawyers is a legal firm located in Brisbane which specialises in native tile, aboriginal cultural heritage and resource law.

About 80 percent of the work of Just Us lawyers comes from Indigenous clients. The firm receives no public funding and all fees are paid directly by our Indigenous clients. With over thirty years combined experience, Colin Hardie, Ted Besley, Christopher Saines and Brittany Byrne, offer our clients extensive expertise in native tile, cultural heritage and commercial law.

Colin Hardie founded Just Us Lawyers in June 2001. Ted Besley became a partner of this firm in 2012. Both Colin and Ted have been engaged in senior roles by Native title Representative Bodies and Service Providers.

Many of our clients are dissatisfied with the representation provided by the publically funded Native Title system. Just Us lawyers provide an alternative, and in this submission, a different view to those provided by the Native Title Council.

The following comments on the exposure draft have been prepared by Colin Hardie and Ted Besley.

Schedule 1 – Historical extinguishment

1. The creation of most if not all national parks and other "Protected Areas" in Queensland does not extinguish native title due to the operation of s23B(9A) so the new provision would only benefit native title claimants by excluding extinguishment caused by public works in such areas. These are generally not specifically identified in determination orders in Queensland but are included in a broad category of acts which, if validly constructed on the determination area, extinguish native title. If the new provision were to be utilised, the State would need to undertake the laborious task of identifying all relevant public works in the "agreement area".

2. The provision is only enlivened where the relevant Government Party is willing to enter into an agreement with the RNTBC/applicant/Representative Body. The section 47 'suite' were enacted as beneficial provisions aimed at removing technical legal barriers to the full recognition of native title where no competing third party interests exist.

The existing provisions operate to benefit native title holders provided certain factual requirements are met – e.g. the claim area is unallocated state land at the time the claim is filed and one or more members of the claim group occupy the area.

3. Unlike the rest of the section 47 suite, the benefit of the new provision will not take effect unless the factual requirements of the proposed section are established and the agreement of the relevant Government Party is obtained. This introduces the possibility of inconsistency as Government Parties are free to exercise the discretion granted to them under the provision in a different manner from one "park area" to the next. A provision which is intended to benefit the native title party should not be made conditional upon the exercise of a discretion granted to the Government Party.

Recommendation

4. Like the other parts of the s47 suite, there should exist the presumption that past extinguishment within "park areas" be disregarded with such presumption being rebuttable if the relevant Government Party establishes:-
   - Public use and enjoyment of the park area will be prevented;
   - Existing third party commercial interests vitiated; or
   - The exercise of the claimed native title is inconsistent with the purposes of the park area or reserve.

Schedule 2 - Negotiations

1. The new s31A "good faith negotiation requirements" requires the parties to "use <u>all</u> reasonable" efforts to:-
   (a) reach agreement; and
   (b) establish <u>productive</u>, <u>responsive</u> and <u>communicative relationships</u> between the negotiation parties.

   No doubt the parties will have very different views as at what required to use <u>all</u> reasonable efforts to reach agreement. Secondly, the parties will also have very different views as to what is required to establish a productive, responsive and communicative relationship. These are also concepts that are not always complimentary. A relationship may be established that is responsive and communicative but unproductive – for example, where the parties regularly communicate in an unhelpful and antagonistic manner.

2. The inclusion of these new requirements does not address the current uncertainty over what is required to establish negotiations have/have not occurred in good faith. It may instead create a new arena of conflict centring on whether all reasonable efforts have been made and whether productive, responsive and communicative relationships have been established.

3. Some of the matters listed in subsection two for consideration in determining whether the good faith requirements have been met are inconsistent with the exceptions provided in subsection three. For example, sub-section two requires parties to make "reasonable offers

and counter offers" but subsection three states that parties are not required to "make concessions". How can an offer, much less a counter offer, be reasonable if the party is not required to make any concession? In addition, the use of subjective terms such as "genuine", "capricious" and "unfair" are likely to provide fertile ground for dispute rather than clarify what is required to demonstrate reasonable efforts to achieve a negotiated outcome

4. Many of the problems encountered with the operation of the right to negotiate provisions do not stem from the behaviour of the parties during negotiations but rather from the power imbalances that exist between the parties to the negotiation. In this respect many of the solutions that have been found useful in the in the area of consumer law are appropriate to this area of the law particularly in negotiations between large multinational resource companies and local community indigenous groups. In particular, the provisions relating to misleading or deceptive conduct, unconscionable conduct, unfair contractual terms and harassment and coercion in schedule 2, the Australian Consumer Law of Competition and Consumer Act 2010.

5. It is noted that the exposure draft only applies to the right to negotiate provisions. However many of the evils it seeks to ameliorate are also evident in the negotiation of the Indigenous Land Use Agreements ("ILUA's") where in practise the consent of the Native Title party to participating in negotiations and signing off is illusionary due to ever present threat the proponent (especially in relation to large resource projects) may illicit the support of the relevant Government to compulsorily acquire Native Title Rights and Interests.

Recommendation

6. The general provision requiring good faith negotiations and a power to delay arbitration where there have not been good faith negotiations should be retained. However, the Native Title Act should be amended to prevent certain types of behaviour (with a right to damages where it has occurred) and to include a power to have unfair contractual terms set aside. These provisions should apply both to S31 agreements and ILUA's.

Schedule 3- Indigenous Land Use Agreements

A. General comments

7. Most of the recent litigation involving ILUA's have resulted from the attempts of individuals and minorities to prevent registration of ILUA's that have been approved by the majority of persons who hold or may hold native title rights and interests in the area affected. The potential is very great for the ILUA provisions to be rendered unworkable unless the correct balance is struck between the interests native title holders as a whole and individuals and small groups who insist on having a veto. We enclose an article contributed by Colin Hardie to Native Title News dealing with this issue.

8. In our view, the provisions of the exposure draft will render the ILUA provisions unworkable by swinging the balance back in favour of individuals as opposed to the collect native interests. In effect, the changes will allow individuals and small groups who are able to portray themselves in some way as different from the majority to prevent the registration of ILUA's no

matter how widely they are supported by native title holders. In addition, some of the provisions will add to uncertainty and give greater rights to potential objectors than to the Applicants for Registration of ILUA's.

B. The basis of objections to the registration of ILUA's

9. The requirements of registration of an area ILUA are set out in S24CG (3) which were considered by Justice Reeves in QGC Pty Ltd V Bygrave (2011) 199FCR 1019 ("Bygrave No3"). His Honour held that only claim group members of Registered Native Title Claims had a right to insist on independently authorising an ILUA - in effect, exercising a right of veto over the approval of an ILUA.

10. It is submitted that this is wholly appropriate because claimant group members of a registered native title claim have had to pass the relatively stringent requirements of the registration test as set out in S190A, 190B and 190C.

11. However s24CG (3) also imposes an obligation upon the registrar to consider whether persons *who hold or may hold native title* have been identified and entitle such persons to authorise the making of an agreement. This permits such persons to participate in the negotiation and the decision making process for an ILUA but does not allow them to exercise a right of veto (as they are not members of registered Native Title claim). This would seem to be the only reasonable interpretation of the section in the light of the decision of Justice Reeves in Bygrave No 3 particularly in instances where there are no registered native title claimants but where potential native title holders have been identified. Any other interpretation would, in the light of Bygrave No3, mean that ILUA's could not be authorised in such circumstances because there were no registered native title claimants.

Recommendation

12. It is submitted that s24 CG (3) (ii) should be amended to put the position beyond doubt and to this end the following wording is suggested:

> "(ii) the persons so identified have been provided with a reasonable opportunity to participate jointly with others so identified in authorising the making of the agreement and claim group members of registered native title claims have separately authorised the making of the agreement.

13. Another problem with s24 CG (3) is that in the absence of a Registered Native Title Claim it provides no guidance to the Registrar of what must be shown by those asserting that they *may hold* native title and therefore potentially have a right to object to the registration of an ILUA. This is in contrast to provisions which set out what a native title claimant must establish to obtain registration of a native title claim. It is submitted those asserting that they hold native title should not be placed in a better position than those who submit to the rigorous process of registering a native title claim otherwise there is a disincentive to seek to register native claims. In short, before a person has a right to object to the registration of an ILUA they should be required (as per S190B) to:

(a) Clearly identify the Native Title group to which they belong;

(b) Sufficiently identify the Native Title rights claimed; and

(c) Provide a factual basis for claiming native title by showing that they and their predecessors have an association with the ILUA area, there exists traditional laws observed by them that give rise to the claimed native title rights and interests and they continue to hold native title rights and interest in accordance with those traditional laws and customs.

14. There should also be a prohibition against individuals and sub groups asserting that they may hold native title independently from the traditional owner group to which they belong. This will prevent individuals and sub groups from asserting they hold native title beyond the traditional country of their particular landing holding group.

15. The Registrar must be required to be satisfied that *prima facie* at least some of those rights identified by the objector can be established and they have or had a traditional physical connection to the lands covered by the ILUA.

C. The ILUA Registration Process

16. While the proposed reduction in the period during which objections must lodged and considered is welcomed, it appears from the exposure draft that the Registrar will have an unfettered discretion on how to decide objections. There are no provisions equivalent to 190E and 190F providing a right to require a reconsideration nor is there a provision allowing for consideration by a Court of the merits of the Registrar's decision. The option for judicial review under the ADJR Act does not provide for judicial consideration of the merits of a Registrar's decision.

17. The task to be undertaken by the Registrar involves, amongst other things, the weighing of facts about whether an objector has established on a prima facie basis that they hold native title in the ILUA area. This is a judicial function and should ultimately be determined by a court.

18. Quite often ILUA's contain provisions requiring the payment of substantial benefits to aboriginal people over long periods of time. A decision by the Registrar not to register an ILUA not only has the potential to delay development projects but also to result in substantial economic loss to indigenous persons. These issues are important enough to require judicial supervision of the merits of a Registrar's decision not to registrar an ILUA.

19. Lastly, the objection process outlined in the exposure draft has the potential to allow individuals to frustrate and delay the registration of an ILUA simply because they do not agree with the decision of the majority to authorise it. To militate against the potential for lengthy court proceedings which ultimately prove to be unmeritorious, there should be a provision included for a Court to award costs against the unsuccessful party.

D. Amended agreements

20. Many ILUA s contain a provision that allows the parties to review an ILUA to take into account changed circumstances relating to a project. This usually occurs where, at the time that the ILUA is negotiated, the precise scope of the project and the potential effects on Native Title is not foreseeable. Where such a provision exists within agreements, and the parties are agreed, there should be scope to vary the ILUA without having to re-navigate the registration process.

E. Amendment to S251A

21. The exposure draft envisages amendments to S251A, presumably to overcome the effect of the decision in Bygrave No3. In our view, such amendments are unnecessary and in any event are better dealt with by amendment to S24CG (3).

22. It is noted that the exposure draft proposes to delete the words "common or group rights" from section 251A (a) and (b). As well as removing the basis upon which Reeves J found that claim groups of Registered Native Title claims groups have the right to independently authorise ILUA's, such an amendment may require that individuals and sub groups independently and separately authorise ILUAs. The result being that where more than one person asserts an interest on a different basis to others, the ILUA's will no longer be able to be authorised by a majority of those who hold Native Title in the ILUA area but will require unanimity or, at the very least, agreement to a common authorisation process. This is likely to render the ILUA provisions unworkable.

23. The proposed amendment also has the potential to allow individuals or subgroups to object to the authorisation of ILUA's even though the landholding or traditional owner group to which they belong does not assert that they hold common or group rights in the area of the ILUA. This gives individuals and subgroups a greater say in authorising ILUA's than they have in authorising Native Title claims under S251B. The court has held that authorisation of native title claims by individuals or subgroups are invalid (see for example, Risk V National Native Title Tribunal [2000] FCA 1589 at [36] to [38] and most recently Laing v South Australia (No 2) [2012] FCA 980

24. The exposure draft also proposes the addition of two new subclauses to s251A. The proposed s251A (2) provides a definition of persons who may hold native title. However, this definition refers to process i.e. the requirement to establish a prima facie case, rather than the substance of what must be established. As mentioned above, unlike the registration test for native title claims, the legislation provides no guidance as to what must be established on a prima facie basis before the Registrar. However, the inclusion of the word "may" in the phrase "who can establish a prima facie case that they may hold native title" may have the unintended consequence of introducing a standard which is inferior to that suggested by the phrase "who can establish on a prima facie case that they hold native title". It is therefore recommended that the word "may" be deleted from the last line of this subsection.

25. The proposed S251A (3) suggests by inference that where there is a registered native title claim, persons who may hold native title have no right to participate in the authorisation of the ILUA. This would appear to contradict the intended consequence of deleting the words "common or group rights" from the proposed S251A (1) (a) and (b).

Conclusion

26. We do not support the exposure draft in its current form and suggest that it is amended to address the issues we have identified in this submission before being put to the Parliament for consideration.

Colin Hardie
Ted Besley

Just Us Lawyers