ATNS SUBMISSION

EXPOSURE DRAFT: NATIVE TITLE AMENDMENT BILL

19 October 2012

EXECUTIVE SUMMARY

This submission is made by Associate Professor Maureen Tehan in collaboration with Professor Marcia Langton, on behalf of the Agreements, Treaties and Negotiated Settlements (ATNS) Project.

Thank you for the opportunity to respond to the *Exposure Draft: Native Title Amendment Bill* (the **Exposure Draft**). We generally support the proposed amendments which have the potential to expand the quantum of land that might be the subject of native title determinations and improve the operation and function of the future act regime.

We support the addition of s31(1)(c) which requires negotiations to include 'consideration of the effect of the doing of the act on the registered native title rights and interests of the native title parties' but propose that it also be incorporated into the definition of 'good faith negotiation requirements'. We are concerned that the amendments, particularly s31A(2), will codify 'good faith' for the purposes of s31 negotiations with adverse and unintended consequences on the current body of good faith law in relation to s31 negotiations.

We strongly support the proposed amendment to s36(2) and the proposed extension of time in s35(1)(a) from 6 to 8 months.

In principle we support the proposed s47C but consider that it should operate in the same manner as ss47, 47A and 47B ie, not be subject to agreement. Notice should only be required in transitional arrangements. We suggest that it should be possible to agree to disregard extinguishment by Public works on s47, 47A and 47B land and that it should be possible to agree to disregard extinguishment on any Crown land.

We generally support the proposed amendments in relation to ILUAs but have reservations about the new s251A(2) and its application and to the Registrar's powers to disclose information to objectors.

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ABOUT THE ATNS

The Agreements, Treaties and Negotiated Settlements (ATNS) project is a University of Melbourne based research project consisting of a series of ARC Linkage grants and a team of inter-disciplinary researchers from Melbourne, Griffith and the Australian National Universities. The ATNS database (www.atns.net.au) is an integral part of the project. The project began in 2002 with an ARC Linkage grant examining treaty and agreement-making with indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. In 2005 the research team secured a second grant to build on the project. The second phase examined the process of implementation and the wider factors that promote long term sustainability of agreement outcomes.

The current project, 'Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities', started in 2010. It aims to study the institutional, legal and policy reforms required to reduce indigenous people's poverty and to promote economic development for sustainable indigenous communities. The interdisciplinary research draws on anthropology, geography, demography, law and public policy and uses comparative case studies. The project analyses the impacts of large-scale resources projects, and government policy and services, on local communities, including the role of agreement making. The object is to identify solutions for realising sustainable social and economic development for indigenous people based on social, policy, fiscal, procedural and legal models.

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- The Department of Families, Housing, Community Services and Indigenous Affairs
- Rio Tinto Ltd
- Woodside Energy Ltd
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This submission is made by the Chief Investigators on the ATNS Project and does not necessarily represent the views of the industry research partners on the project.

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SUBMISSION

This submission is made by Associate Professor Maureen Tehan in collaboration with Professor Marcia Langton, on behalf of the Agreements, Treaties and Negotiated Settlements (ATNS) Project.

Thank you for the opportunity to respond to the *Exposure Draft: Native Title Amendment Bill* (the **Exposure Draft**), which will implement the proposals for change outlined by the Attorney-General on 6th June 2012. Subject to the comments below, we generally support the proposed amendments which have the potential to expand the quantum of land that might be the subject of native title determinations and improve the operation and function of the future act regime in delivering long term and sustainable benefits to native title holders. Our research of negotiation and agreement making in the native title context over many years has shown that the key to successful implementation and outcomes from agreement making is the building of relationships between the parties and the key time for this is during the negotiation phase. Further, our research shows that while some parties operate beyond the strict legal requirements of the Native Title Act (the NTA), the provisions of the NTA in determining the extent of the rights and entitlements of the negotiating parties can be significant in determining the equality of bargaining power and therefore the outcome of negotiations. These are significant factors when considering how the NTA should be amended.

'Good faith' and associated amendments

The commentary on the Exposure Draft identifies the 'lack of clarity in what constitutes good faith' and the 'inequity in bargaining power between the parties' as the two key issues that these particular amendments seek to address. The following comments are directed to these issues.

Good faith amendments

The content of the 'good faith' obligation in general law is complex and ill-defined. This body of law has been drawn on to give meaning to the term 'good faith' in the NTA. This has produced varied results when applied in the context of negotiations under the provisions of the NTA (see for example *Risk v Williamson* (1998) 87 FCR 202; 155 ALR 393), but the National Native Title Tribunal ('NNTT'), endorsed by the Federal Court, have developed significant guidance on the content of the obligation in the context of s31 of the NTA (see for example *Western Australia v Taylor* (1996) 134 FLR 211 and *FMG Pilbara P/L v Cox* (2009) 175 FCR 141; 255 ALR 229). No doubt, the proposed amendments are partially in response to the decision in *FMG Pilbara P/L v Cox.* In that case, the Full Court of the Federal Court held that s31(1)(b) does not detail the subject matter of negotiations. Rather, it only prescribes that negottiations must be conducted in good faith. Therefore, the proposed amendments should be considered in the light of addressing this problem emerging from the decision as well as the identified need to ensure more equal bargaining power.

We support the addition of s31(1)(c) which requires negotiations to include 'consideration of the effect of the doing of the act on the registered native title rights and interests of the native title parties'. The effect of this is to establish a minimum benchmark for the content of negotiations. This amendment directly addresses one of the issues in *FMG* and is likely to have a positive impact on the negotiation process, especially when read together with the proposed s31A(1). This amendment defines 'good faith negotiation requirements' and effectively imposes a positive duty to use all reasonable efforts to reach agreement and establish relationships. The 'good faith negotiation requirements' are given further substance with the proposed s31A(2) which details certain matters that might be relevant in deciding whether the parties have negotiated in accordance with the 'good faith negotiation requirements'.

We have two reservations about the scheme and content of these amendments.

First, the new s31(1)(c) does not form part of the 'good faith negotiation requirements'. We consider that there should be express reference to this requirement as part of the 'good faith negotiation requirements', perhaps by incorporation in s31A(1).

Second, the new scheme, but particularly s31A(2), effectively imposes a code for good faith negotiations but necessarily includes only some of the matters that the NNTT and Federal Court have identified as criteria for determining 'good faith', in the context of particular fact matrices. These new provisions will require a revisiting of these criteria and there is a danger that a strict interpretation of the section will exclude some matters previously identified as criteria for 'good faith' negotiations. Consequently there is an argument that s31A(2) be excluded. If s31A(2) is retained, in our view it is too limiting and either further criteria should be included (as reflected in the case law to date) or the first part of the section should be redrafted to ensure that the matters listed form only part of the matters that might be indicators of 'good faith negotiation requirements'. The phrase 'Without limiting subsection (1)' is necessary but insufficient to address the problem noted here. The use of these words add weight to the view that this is intended to be a codification of the 'good faith' requirements. As referred to above, we do not consider codification desirable.

Additional amendments

We strongly support the proposed amendment to s36(2). This provision essentially reverses the onus of establishing good faith by requiring the party seeking arbitration to establish that they have negotiated in accordance with the good faith requirements. It will therefore be less likely that a party can manipulate the negotiation process with a view to having the matter arbitrated rather than engage in serious negotiations.

We strongly support the proposed extension of time in s35(1)(a) from 6 to 8 months. This together with the proposed s31(1)(c), S31A(1) and the new s36(2) should encourage serious negotiations with prospects of reaching agreement without recourse to s35 arbitration.

Historical Extinguishment

There is an artificiality associated with historical extinguishment that has long been the subject of judicial and academic comment. As a result, the extension of beneficial measures under the NTA through this proposed amendment is welcome.

The form of the amendment requires some comment.

Requirement for consent:

The proposed amendment requires consent of both native title claimants and the relevant government before extinguishment can be disregarded. There are already provisions allowing for the disregard of historical extinguishment in certain circumstances in the NTA. These can be found in ss47, 47A and 47B. These provisions do not require State or Commonwealth consent for specific historical extinguishment to be ignored. No rationale is given for the different treatment of disregard of historical extinguishment in these amendments.

The proposed s47C provides that where extinguishment is to be disregarded, the non-extinguishment principle applies and all current interests in the land will prevail over native title. These are beneficial provisions and there seems no reason why the current structure of the "disregard of extinguishment" provisions of the legislation in ss47, 47A and 47B should not be followed.

The Commonwealth has power to provide for disregard, as it has done in ss47, 47A and 47B and there seems no reason not to provide for disregard of extinguishment in the proposed s47C as it does in these sections. Given that the non-extinguishment principle applies and Public works and other interests are protected, there is little justification for requiring agreement (or consent).

To require consent opens up the disregard issue to manipulation as part of broader negotiations and litigation. This appears to confuse the entitlement to have historical extinguishment disregarded with procedural measures designed to achieve negotiated outcomes. While the latter may be an admiral goal, it should not be confused with the entitlement to have historical extinguishment disregarded as it has been in ss47, 47A and 47B.

The requirement for consent should be removed and the proposed section 47C should mirror ss47, 47A and 47B.

Notice requirement

The requirement for notice that flows from the consent requirement may also give rise to the use of the consent requirement as a negotiating carrot, confusing what should be an entitlement with procedural matters.

Given that prior interests (and presumably permitted renewals) are protected, the purpose of both the consent and notice provisions is unclear.

Further, it seems that notice is required even if an application for a determination is made after the provision comes into force. There is no clear policy reason given for adding this procedural step effectively giving 'interested parties' the opportunity to be given notice of and oppose the original application and to be given further notice of and the opportunity to comment on this disregard of extinguishment. The negative aspect of this second opportunity is the danger of reopening areas of dispute and controversy that may have already been resolved with difficulty.

The requirement for notice and the opportunity for comment on a revised native title determination application or, transitional provisions relating to variation of unresolved native title determination applications are appropriate and in line with the general approach of the Act. These provisions would also be required if the disregard occurred as of right.

Land subject to proposed s47C

The proposed s47C appears to try to ensure that all forms of land that have been designated for preservation of the natural environment, either wholly or in part, by whatever method, are captured by the definition of *park area.* Given the strict statutory nature of this provision it is important that it is sufficiently broad to ensure that unintended exclusions do not occur. The proposed definition is significantly broader than the exception in s23B(9A) for example and is likely to capture the full range of Crown actions that create areas of land wholly or partially for the preservation of the natural environment.

If the schema proposed in the Exposure Draft is retained, then providing for disregard of extinguishment of part of a 'park area' by agreement provides welcome additional flexibility for the parties.

Public works

We support the provision allowing extinguishment of native title by public works to be disregarded by agreement. As a matter of consistency and principle, we consider that this provision should be extended to ss47, 47A and 47B.

Allow for extinguishment to be disregarded by agreement generally

If the consent requirement is retained, then consideration should be given to a provision that would allow *any* historical extinguishment to be disregarded on any Crown land if the claimants and the government party agree. There is much Crown land could appropriately be the subject of disregard of extinguishment such as forest reserves and other Crown Reserves and unallocated Crown land. Especially where the non-extinguishment principle applies and existing interests are protected, as a matter of consistency and principle, there appears to be no reason not to permit parties to agree to disregard extinguishment in all areas of Crown land. Such a provision would address the point made in the Exposure Draft commentary that "(s)takeholders have raised on-going concerns about a lack of flexibility in the Act as parties are not permitted to reach agreement about disregarding extinguishment".

Although this extension raises the issue of co-existence of native title and other interests, these circumstances are not new. For example, pastoral leasees' rights co-exist with native title rights and there seems no reason in principle why other rights holders, such as the public or those licensed to use Crown lands in particular ways should not similarly co-exist with native title. As all existing rights are protected there is no diminution of currently held rights and entitlements.

Minor technical amendments to section 47

We support this amendment which rectifies problems created by narrow drafting of the original section.

Simplifying process for amendments to Indigenous Land Use Agreements (ILUAs)

While there is merit in permitting purely technical or process amendments to ILUAs without requiring re-registration, the mechanism in the proposed s24ED essentially leaves consideration of the matter in the hands of the Registrar of the NNTT. Consideration should be given to itemising specific amendments/variations that might be permitted rather than creating such an open ended and discretionary scheme.

Consideration might also be given to adding provisions that deal specifically with assignment by non-native title parties.

Broaden the scope of body corporate ILUAs

We support this proposed amendment to s24BC. It is a sensible response to an anomalous situation and removes a complexity in negotiating and drafting body corporate ILUAs.

Clarify the coverage and scope of ILUAs

The amendments to s24BB, 24CB and 24DB clarify a potential inconsistency with the *Traditional Owners Settlement Act 2010* (Vic) and add certainty to the matters that might properly be included in an ILUA. However, it also permits the regulation or diminution of a specific statutory protection of a benefit for native title holders provided by s211 of the NTA. Given that ILUAs, once registered, bind all native title holders and their successors, there needs to be a balance struck with any of the provisions for authorisation, registration and objection processes as well as any process for amending ILUAs.

Improve authorisation and registration process for Area ILUAs

We note that there have been difficulties in relation to authorisation of area ILUAs and that the general effect of the proposed changes is to move the area ILUA process to one that is more an objection process rather than a competing claims process. While this has benefits of efficiency, we

have some concerns that the changes will permit registration of an ILUA notwithstanding that there are relevant parties who have not been adequately consulted or have not consented to the ILUA. Our concern here arises from the effect of registration of an ILUA and therefore it is necessary to ensure that the appropriate balance between efficiency and native title holder rights is struck.

Notice period

We note that the reduction of the notice period to one month will improve efficiency and prevent delay in registration. We have some concerns that the amendments to s251A impose a new test on objectors – establishing a prima facie case that they may hold native title. This will be very difficult for some potential objectors and effectively requires material similar to that required for an application. For many this will be impossible to establish within the one month notice period.

Authorisation

In relation to authorisation of area ILUAs, we consider that if parties have reached agreement in relation to an ILUA, there should be no requirement for establishing a prima facie case that they may hold native title which is the effect of the proposed s251A(2).

Disclosure of material by Registrar

The proposed s24CI(1C) allows the Registrar of the NNTT to release material to an objector if it is likely to lead the withdrawal of the objection. We support the goal of encouraging resolution of objections, particularly given that the process is now one of objection rather than competing claims. However, we have some concerns with the proposal, particularly that the responsibility and control of documents is transferred to the NNTT and that release of some information may have an adverse impact on on-going proceedings or relationships. Further, the prospect of loss of control of information may result in a reluctance to hand material to the Registrar.

While the ILUA itself is under the control of the NNTT, the release of additional supporting material should not be solely in the discretion of the Registrar of the NNTT, even where there is provision for the Registrar to withhold confidential or commercially sensitive information. We recommend that at the least, no material be released without consultation with the parties to the ILUA in relation to the content and redaction of sensitive material. A stronger approach would require consent to release. We do not consider this necessary provided that consultation includes an opportunity to withdraw and re-file material in support of an application for registration in these circumstances.