National Native Title Council

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Dear Ms Denley

Exposure Draft – Native Title Amendment Bill 2012

Please find attached the submission of the National Native Title Council (NNTC) to the above Exposure Draft.

The NNTC is the peak body of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) from around Australia being formally incorporated in November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The NNTC would be happy to provide further information about its submission should this be required.

Yours sincerely

Brian Wyatt
Chairperson

National Native Title Council

spirit of Change

Submission

Exposure Draft: Proposed Amendments to the *Native Title Act 1993*

PURPOSE

This Submission is being provided in response to the Exposure Draft: *Native Title Amendment Bill 2012*.

SUBMISSION

The Native Title Amendment Bill 2012 (the "Amendment Bill") provides a range of amendments to the *Native Title Act* (the "Act"). The National Native Title Council (NNTC) welcomes the proposed amendments to the Act, and believes the Amendment Bill sets out certain provisions that the NNTC has been advocating for over several years illustrated through its numerous submissions to inquiries and consultation papers.

According to the Cover Sheet of the Amendment Bill, the proposed amendments align with the Commonwealth's native title strategy with a particular focus on improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes. The NNTC believes that the Amendment Bill will go some way towards achieving fundamental change in the system for the benefit of Traditional Owners.

Comments in relation to specific provisions of the Amendment Bill are set out below.

Schedule 1 – Historical Extinguishment

The NNTC broadly supports the proposed amendment to provide parties with more flexibility to agree to disregard historical extinguishment over parks and reserves.

The proposed amendment requires that prior extinguishment of native title is disregarded only when there is agreement in writing by both the relevant government and the applicant. However similar provisions in ss 47, 47A and 47B do not require agreement between the parties. The NNTC would query the necessity to obtain the consent of the relevant government in order for s 47C to apply, particularly when considering that other interests in the land would prevail over native title under s 47C(5).

Relying on the States and Territories to exercise goodwill by agreeing to disregard historical extinguishment may not result in the opportunities that the Federal Government may hope the amendment will produce such as more claims to be settled by negotiation rather than litigation. In some States or Territories the amendment may result in protracted negotiations or unavoidable litigation.

The NNTC would therefore strongly advocate that the legislation must also provide a presumption that the State agrees to disregard the extinguishment, and the onus would be on the State to rebut the presumption by providing reasons why it does not intend to disregard extinguishment. That is, there is a presumption that the State agrees to disregard historical extinguishment unless it indicates otherwise.

The NNTC would suggest that if the only other interest holder in that land is the Crown then extinguishment should automatically be disregarded.

The NNTC would also suggest that the limitation of the provision to parks and reserves should be expanded to include all Crown land.

The NNTC supports the proposal at ss 47C(3) and (4) whereby an agreement may include a statement by the Commonwealth, or the State or Territory concerned, that it agrees that the extinguishing effect of any relevant public works is to be disregarded. This provision is strengthened with the addition of s 47C(8)(a) that states the determination does not affect:

(ii) the validity of the creation of any other prior interest in relation to the agreement area; or
(iii) any interest of the Crown in any capacity, or of any statutory authority, or any other person, in any public works on the land or waters concerned, or access to such public works; or
(iv) any existing public access to the agreement area.

The NNTC suggests that these provisions should equally be extended to current provisions of the Act relating to the disregarding of prior extinguishment, i.e. ss 47, 47A and 47B.

The NNTC believes that the purpose of the notification/advertisement requirement at s 47C(5) is unclear, in particular that “interested persons” is not defined. The NNTC would consider that the notification process could complicate the operation of the provision leaving the door open to persons with insufficient interests causing unnecessary delays to the determination of applications.

It is not entirely clear what is contemplated by the term "condition" or in what circumstances the setting aside, granting or vesting of a park area would result from a "condition". By way of example, in the Northern Territory the Administrator may "by notice in the *Gazette*, declare an area of land to be a park or reserve": *Territory Parks and Wildlife Conservation Act*, s 12(1). Although such a declaration would be captured by the catch-all "otherwise" and, more doubtfully, by the term "proclamation", it is suggested that the term "condition" could perhaps be omitted and substituted by "declaration".[1]

It makes little sense to say that the "granting or vesting *resulted from* a dedication, reservation, proclamation, condition, vesting in trustees or otherwise". A park area is an area in which an interest is *created by* a grant or vesting for the purpose of, or purposes that include, preserving the natural environment of the area. A vesting in trustees is nothing more than an instance of vesting. It is also suggested that the words ‘vested or granted’ in s 47C(2)(b) be replaced with ‘created’ and the words ‘granting or vesting’ in s 47C(2) be replaced with ‘or creation of an interest’ or similar wording.[2]

The term "company" is not defined in the *Native Title Act*. It's usage in the Act suggests that it is limited to companies incorporated under the *Corporations Act 2001* and does not include, for example, bodies corporate registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*: see ss 201B(1), 203EA. In the Northern Territory for example there are pastoral leases held by bodies corporate registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006.* While "the persons who made the application" will in almost all cases be members of such a body corporate and thus, arguably, picked up by s 47(1)(b)(i) this is by no means clear. Section 47

[1] Central Land Council, Personal Communication with J. Dalziel, 9 October 2012
[2] ibid

will not otherwise apply as such persons do not hold the pastoral lease in their own right and are not covered by paragraphs (1)(b)(ii) and (iii). The proposed amendment should make clear that s 47 may also apply in relation to bodies corporate registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* or State and Territory associations incorporation legislation.[3]

The NNTC seeks clarification on the operation of 47C within the process of making a claimant application for a determination of native title. Under section 62(1)(d), a copy of the agreement for the disregarding of historical extinguishment is to accompany the claimant application. The NNTC supports the submission of the South West Aboriginal Land and Sea Council in that 'this may infer that the operation of the section 47C applies to a current claimant application only if accompanied by an agreement, or it may infer that subsequent agreements made after a new claim application is made are to accompany the application'.[4] There appears to be some uncertainty what needs to be in existence first in order to bring about the effect and operation of section 47C. The NNTC submits that this uncertainty needs to rectified in order for the provision to be fully effective.

Schedule 2 - Negotiations

The NNTC strongly supports amendments to the Act that will provide guidance on the requirements for negotiating in good faith. The proposed amendment is timely, particularly given the recent resources boom which is driving a higher demand for land access, both for exploration as well as mining operations. This is heightened further due to the lifting of bans on uranium mining in Western Australia and more recently in Queensland.

The NNTC believes that the suite of amendments under Schedule 2 of the Exposure Draft will go some way to shifting the balance of power, which currently sits firmly in favour of industry.

The NNTC raised concerns about the current provisions of the *Native Title Act 1993* following the Full Court judgment in *FMG Pilbara Pty Ltd v Cox*[5]. The judgment of the Full Federal Court overturned a decision by the National Native Title Tribunal in relation to good faith negotiations. The Tribunal had determined that FMG had not fulfilled its obligations to negotiate in relation to a future act in good faith as required by s 31(1)(b) of the *Native Title Act 1993*. The Full Court however, held that:

(1) The NNTT erred in concluding that there could not be negotiation for the purpose of s 31(1)(b) if the negotiations were only embryonic. Further, there is no requirement for negotiations to have reached any particular stage by the end of the negotiation period[6];

(2) The NTA did not dictate the content and manner of negotiations by compelling parties to negotiate in a particular way or over specified matters. Providing what was discussed and proposed was conducted in good faith and was with a view to obtaining agreement about the doing of a future act, then the requirement under s 31(1)(b) would be satisfied[7].

The NNTC raised concerns with the judgment believing that it would affect all Native Title Representative Bodies and Service Providers, particularly those with mining activity occurring within their jurisdiction. It is the view of the NNTC that the finding in FMG and Cox would allow the NNTT to make a future act determination as soon as the prescribed six month period expires, regardless of

[3] Ibid

[4] South West Aboriginal Land and Sea Council, Native Title Amendment Bill 2012 – Exposure Draft – South West Aboriginal Land and Sea Council - Submission, 19 October 2012, p 6.

[5] (2009) 175 FCR 141

[6] Ibid., at [23], [29]

[7] Ibid., at [38]

the stage negotiations have reached, provided negotiations were conducted in good faith during that period with a view to reaching agreement with the native title parties.[8]

It is clear that most future act determinations have found in favour of the grantee party in that the future act may be done, and the majority of determinations have been made by consent between the parties. The reality, however is that arbitration through the NNTT is often used by the grantee as a threat to encourage the native title party to settle. There is therefore reasonable incentive for the native title party to reach agreement, however unfavourable the terms of that agreement, in order to avoid the NNTT's arbitration process, which the native title party knows is unlikely to result in a favourable outcome. In many cases, native title parties will accept heavy compromises and accept proposals put to them by the grantee party, for fear of the NNTT granting the tenement with no agreement in place or with no meaningful compensation agreed between the parties.[9] The NNTC considers that the proposed amendments would go some way towards addressing these issues.

The proposed amendments introduce a new provision that sets out good faith negotiation requirements that outlines what reasonable efforts parties should take to come to an agreement about the doing of an act. The NNTC, however submits that further consideration should be given to expanding section 31A(2) to:

(a) include a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith;
(b) insert a 'reasonable person' test which may be used in assessing the conduct of a proponent seeking an arbitral determination when negotiations are at a very early stage; and
(c) supplement the legislative criteria pertaining to good faith with a code or framework to guide the parties as to their duty to act in good faith

The NNTC also submits that s 31A(2)(a) be altered to require parties to "actively" participate in meetings as well as meetings be held "at a location where most of the members of the native title parties reside, if so requested by them" where reasonably practicable. Also s 31A(2)(d) could also require parties to respond to proposals "in detail".

The NNTC supports the extension of the timeframe from 6 to 8 months under Item 7, believing that the extended timeframe would better meet practical realities of organising native title group meetings and ensuring free, prior and informed advice. The NNTC concurs with the views provided in the submission by Yamatji Marlpa Aboriginal Corporation (YMAC) that such a minor extension of time would not necessarily have an impact on the more complex future act agreements as 'these negotiations can go on for many years' and the view of the extractive industry is that the 'making of native title agreements as a factor contributing to their social licence to operate in other parts of the world and they do not seek to rely upon a legal process which is heavily weighted in their favour'.[10]

Whilst this is not considered in the Amendment Bill, an issue that has been raised by Native Title Representative Bodies and Service Providers in recent times has been the difference between agreements being conjunctive (i.e. it governs both exploration and mining, if it eventuates – favoured by the extractive industry) or disjunctive (i.e. it governs only exploration ***or*** mining – favoured by native title groups).

The NNTC considers this matter to be an impediment to agreements being reached within an appropriate time frame. Should extractive industry companies prefer and/or insist on negotiating conjunctive agreements the 6 month time frame would clearly be inadequate. Whether this can be

[8] Yamatji Marlpa Aboriginal Corporation, *Native Title Amendment Bill 2012 – Comments on Exposure Draft*, 19 October 2012, p 2.
[9] Ibid, pp 2-3
[10] Ibid, p6

addressed within an 8 month time frame would also be questionable. The NNTC would argue that negotiating disjunctive agreements would also be a fairer option for native title parties, particularly as any mining activity that does eventuate and any potential benefits would not be clearly defined before exploration occurs.

Native Title Representative Bodies and Service Providers would consider that there should also be a statutory requirement to negotiate for a period of less than eight months where circumstances support a shorter negotiation period.

The NNTC supports the proposed amendments to section 36(2) to require the party seeking arbitration to show that they have negotiated in good faith. Currently, the provisions require the objecting party (in almost all cases native title parties) to demonstrate that negotiations have not been conducted in good faith. The NNTC considers this to be extremely difficult, particularly given the lack of guidance under the Act as to what constitutes 'good faith'. The NNTC therefore considers that the proposed amendment would improve the fairness of the right to negotiate procedures as the burden of proving the negotiations have been conducted in 'good faith' will fall to the party seeking to do the act, generally being the better resourced party of the negotiations.[11] The NNTC also believes this would have a positive effect in altering the behaviour of negotiating parties by discouraging the premature termination of negotiations and leading to more beneficial agreements.

The NNTC would also suggest that the words "until the application was made" be deleted under the proposed s 36(2). These words are likely to have the effect that many miners will rush to bring an application as soon as the eight month period has expired. It would appear to have the result that the bulk of the negotiations were conducted under a set of rules (the good faith negotiation requirements) with the balance to be conducted without such rules. This could be an unintended outcome of the proposed amendment and possibly be open to abuse. I can see no reason why the good faith negotiation requirements should not continue to apply until the making of any determination by the arbitral body.

Schedule 3 – Indigenous Land Use Agreements

The NNTC supports the proposed amendments to section 24BC.

The NNTC has some concerns about the addition of the following categories:

s 24BB(ac) – 'the making or not making of applications, including applications under Division 1 of Part 3 in relation to the area'; and

s 24CB(ad) – 'the operation of s 211 in relation to the area'

Applications under Division 1 of Part 3 of the NTA include both native title determination applications and compensation applications. Similar amendments also apply to Subdivision D ILUAs (s 24DB(ab) and (ac)).

As far as s 24BB(ac) is concerned, it is not clear what kind of applications other than native title determination applications and compensation applications are intended to be covered. Under the Act as it currently stands, it is clear that ILUAs can deal with withdrawal, amendment, variation or other things in relation to extant applications (ss 24BB(b) and 24CB(b)). Further, they can deal with the surrender of native title rights (ss 24BB(e) and 24CB(e)). The amendment makes explicit that the native title party can agree, for example, not to bring any further claims over an area.

As far as s 24CB(ad) is concerned, again it is not clear what kinds of agreements these provisions are intended to authorise. The Explanatory Statement is obscure on this point (p.5). Section 211 of the Native Title Act is an important provision that confers considerable benefit on native title groups in

[11] Ibid, p3

terms of making lawful what would otherwise be unlawful under State or Territory legislation. In short, it permits native title groups to do certain things by way of hunting, fishing, gathering and the like without having to obtain a licence, permit or other instrument to do so[12].
It is possible that these new provisions may be used to support an argument that it is open to contract out of s 211 of the NTA. Such a scenario may not be the intended consequence of the Amendment Bill however, it would clearly not be in the interests of native title groups for this to occur.

The NNTC therefore seeks clarification from the Attorney-General's Department about the kinds of agreements these provisions are intended to authorise. The NNTC also seeks confirmation that there is no intention to permit any contracting out of the operation of s 211 and suggests that a statement to this effect could be included in the Explanatory Memorandum.

Section 24CH has been redrafted to include provisions that would improve the authorisation and registration processes for ILUAs. Whilst the NNTC broadly supports this objective, we would however, be keen to maintain the mandatory three-month notice period for Subdivision C ILUAs. Notification is a critical component in the process of registration and a reasonable time for comment is required for an effective process which better meets the requirements for procedural fairness. In this regard, the NNTC supports the proposal set out in the submission of the South West Aboriginal Land and Sea Council.[13]

The NNTC also broadly supports a simplified registration process for minor ILUA amendments, as provided for in the proposed section 24ED. The NNTC believes that this provision would facilitate the minimization of costs and resources and enhance flexibility.

The NNTC would also strongly support the proposals put forward by Native Title Services Victoria (NTSV) in relation to the registration of certified ILUAs, proposals first discussed in the Government's *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* Discussion Paper. The NNTC considers that those proposals would lead to 'a reduction in the duplication of registration requirements by creating an alternative registration process when an ILUA has been certified by a Native Title Representative Body" (and also a Native title Service Provider with ILUA certification functions).

As set out in the submission prepared by NTSV, there is disappointment that the Amendment Bill does not address this overdue proposal. The NNTC submits that the NTA should be amended so that, where a Native Title Representative Body or Service Provider has certified an application for registration of an ILUA on the basis of its research and knowledge of the authorization process, this should be determinative for the Registrar and there should be no provision for anyone to object to the Registration. The NNTC submits that such an amendment entailing automatic registration should be subject only to the possibility of a party seeking Judicial Review of the certification (as opposed to registration).

The NNTC believes that such an amendment would lead to a reduction in the duplication of registration requirements. Further, the NNTC believes that the amendment would also reduce delays associated with ILUA registration in circumstances where the certification of the representative body or service provider provides a safeguard of probity.

If this proposal is seen as too broad, the NNTC submits that a similar approach could nonetheless be used, but only in circumstances where the State, Territory, or Commonwealth is a party to a certified ILUA. In this context, the fact of government concurrence could again be seen as a safeguard of

[12] See, for example, *Yanner v Eaton* (1999) 201 CLR 351
[13] Op Cit., p 7.

probity. The NNTC believes that such an approach would assist in expediting settlements under Victoria's *Traditional Owner Settlement Act*.[14]

ADDITIONAL COMMENTS

The NNTC would like to take this opportunity to advocate for additional provisions to be included in the Amendment Bill. In particular the NNTC would strongly recommend the following proposals.

Rebuttable Presumption of Continuity

This is a significant amendment that will reset the negotiation table between Traditional Owners and respondent parties. The NNTC has advocated for this amendment over several years and through many submissions.

Given that in many instances (particularly in remote locations) there is little foundation for significant dispute over continuity,[15] the NNTC believes that the adoption of a rebuttable presumption would help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims. Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonized or asserted its sovereignty over a claim area. This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.[16]

Importantly, the burden placed on the State by virtue of such a presumption may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g., genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a paradigm shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.[17]

The Australian Government has previously been criticised by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for its approach to native title since the 1998 amendments. The Committee raised concerns about the high standard of proof required for the Courts to demonstrate continuous observance and acknowledgement of the laws and customs of Indigenous people, resulting in Traditional Owners not being able to obtain recognition of their relationship with their traditional lands.

These concerns have been consistently raised by the Committee since the 1998 amendments to the Native Title Act, concerns that are shared by Native Title Representative Bodies and Service Providers around Australia. The NNTC believes that the current Amendment Bill would be greatly improved with the addition of a rebuttable presumption provision and would provide a significant opportunity to address the criticisms of CERD.

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[14] Native Title Services Victoria, Comments on exposure draft: Native Title Amendment Bill 2012, 17 October 2012, pp 6-7

[15] Justice Mansfield. 'Re-Thinking the Procedural Framework'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) p 2.

[16] Smith, K., *Minefields, Minor Amendments and Modest Changes: an outline of the inherent dangers in native title negotiations and the opportunities to sweep them away,* Negotiating Native Title Forum, Melbourne, 19 February 2009

[17] ibid