National Native Title Tribunal

Native Title Amendment Bill 2012: comments on exposure draft

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Introduction

1) The National Native Title Tribunal (the Tribunal) welcomes the opportunity of commenting on the exposure draft of the *Native Title Amendment Bill 2012* (the Exposure Draft).

2) There is, as yet, no explanatory memorandum available. However, according to the cover sheet circulated with the Exposure Draft, in broad terms the Australian Government wishes to amend the *Native Title Act 1993 (*Cwlth*)* (NTA) to achieve the following outcomes:

   (a) clarify the meaning of 'negotiation in good faith' in s 31(1)(b) and make associated amendments to the right to negotiate provisions of the NTA

   (b) enable parties to agree to disregard historical extinguishment of native title in areas such as parks and reserves, and

   (c) streamline Indigenous Land Use Agreement (ILUA) processes.

3) The Tribunal previously provided comments in relation to some of these matters in its submissions on:

   (a) the exposure draft of proposed amendments to enable the historical extinguishment of native title to be disregarded in certain circumstances, dated 19 March 2010, and

   (b) the discussion paper called 'Leading practice agreements: maximising outcomes from native title benefits', dated 30 November 2010 (referred to later in these comments).

4) The commentary given below is organised to reflect the four schedules in the Exposure Draft and is directed at identifying possible unintended consequences or other technical, procedural or resourcing concerns that arise out of the Exposure Draft. It is not intended to constitute commentary on the policy underlying the proposed amendments except to the extent that it is relevant to the issue raised by the Tribunal.

Schedule 1 – Historical extinguishment

Items 1 and 2

5) Item 1 proposes an amendment to s 13(5) to add 'or (c) that the determination relates to an area in relation to which the agreement required by paragraph 47C(1)(c) has been given'. There is also a proposal to add an explanatory note.

6) The Tribunal is aware of a view that such a determination of native title could be 'revised' to include an area not previously subject to the determination. However, it seems there must first be an 'approved determination' (as defined in s 13) over the area concerned that is to be revised or revoked, i.e. a determination under s 225 either that native title does not exist in relation to the land or waters concerned or that it does exist. (If it is the latter, then other matters must also be addressed under s 225.) This is reflected in the new ground proposed in the Exposure Draft in that it refers to 'the determination' being one made in relation to an area to which the agreement required by s 47C(1)(c) 'has been given'.

7) If this is correct, it may assist if either the Explanatory Memorandum or the proposed note to s 47C makes it clear that, if the area concerned was excluded from the determination area in any particular case, rather than being made subject to the determination, then a new claimant application must be made, rather than a revised native title determination application (RNTDA), if the requisite agreement is reached.

8) If the area concerned was subject to an approved determination that native title does not exist, then a different issue may arise. The table in s 61(1) of the NTA limits the 'persons' who may make a RNTDA to the following:

   (a) the registered native title body corporate; or

   (b) the Commonwealth Minister; or

   (c) the State Minister or the Territory Minister, if the determination is sought in relation to an area within the jurisdictional limits of the State or Territory concerned; or

   (d) the Native Title Registrar.

9) The intention may be that there is the requisite nexus to allow a registered native title body corporate to make both the s 47C agreement(s) and the RNTDA over the area where native title has been determined not to exist, i.e. that it is 'the' registered native title body corporate 'concerned', to use the language of s 61(1) and proposed s 47C(1)(c)(i).

10) Alternatively, the intention may be that the agreement would be made with the relevant representative Aboriginal/Torres Strait Islander body (or a s 203FE funded body) and that the RNTDA would be made by the relevant government party to the agreement in the manner contemplated by the table in s 61(1).

11) However, if there is any doubt raised by the current drafting, it may be helpful to clarify the intention embodied in the relevant provisions, including s 61(1).

12) In Item 2, proposed s 47C(1)(a)(ii) requires that the area must be (among other things) 'in an onshore place'. It is noted that, from a geospatial perspective, it is usually difficult to determine with any degree of precision which places are, and which are not, 'onshore' as defined by s 253 of the NTA.

Items 3 to 8

13) No comment.

Items 9 and 10

14) For consistency, the proposed amendments to s 64 should include a requirement that an application that is amended to claim the benefit of s 47C(7) must be accompanied by a copy of the relevant agreement(s).

Items 11 and 12

15) It is suggested that Item 11 be included at the end of s 66A(1), rather than at the end of s 66A(1A), because:

   (a) The former deals with amendments that change the area covered by an application ('change of area' amendments), other than those that result from a combination of claimant applications - see s 66A(1)(c) and s 66A(2).

   (b) Subsection 66A(1A) then picks up 'change of area' amendments that result in the re-inclusion of an area that was covered by the original application – see s 66A(1A)(b).

   (c) The proposed amendment to the NTA relates to circumstances where a 'change of area' amendment results in the inclusion of an area that was <u>not</u> covered by the original application

   (d) It seems, therefore, that s 66A(1A) cannot apply, at least in its current form, because one of the preconditions – s 66A(1A)(b) - will not be met, and

   (e) If placed at the end of s 66A(1A), it seems the proposed amendment would result in an obligation to notify the same interest holders twice, i.e. 'each person whom the Registrar would, under subsections 66(3) and 66(5), be obliged to give notice if the application as amended were a new application, but to whom notice is not already required to be given under' the preceding two paragraphs.

16) If this suggestion is adopted, then Item 12 would need to be amended accordingly. Further, if it is intended that there should be an opportunity for other interest holders to join the proceedings, then it may be necessary to include similar entitlements as are found in s 66A(1C) in relation to amendments to re-include an area.

Item 13

17) While unrelated to the proposed amendment, it would be helpful if s 190A(6A) was amended to make it clear that amendments to Schedules D, H, HA, I, G, K and S of the prescribed form or an amendment to reflect an order made under s 66B(2) fall within the scope of s 190A(6A). However, in the case of the latter, it may be advisable to require that the Federal Court Registrar provide a copy of the s 66B(2) order to the Native Title Registrar when the amended application is given to the latter pursuant to s 64(4).

Item 14

18) In part, this item states: 'To avoid doubt, the application may be amended to state that section 47C applies to it'. It may be helpful to state that the application may be amended to state that section 47C applies to the whole or any part of the area covered by the application.

Item 15

19) No comment.

Schedule 2 - Negotiations

General comments

20) The Tribunal's experience is that proceedings in which one negotiation party asserts that another party did not negotiate in 'good faith' are resource intensive. The proceedings usually involve large volumes of evidentiary materials and (if held) relatively lengthy hearings. Overall, it does not appear that the proposed amendments will necessarily make them any less so. In fact, the current drafting of proposed s 31A(1)(b) has the potential to make them far more so, but without any concomitant improvement to the outcome of the 'right to negotiate' process overall that seems to be anticipated in the covering note accompanying the Exposure Draft.

21) At p 28 of its commentary on 'Leading practice agreements: maximising outcomes from native title benefits' (the Discussion Paper), the Tribunal submitted that:

   (a) codifying the indicia going to show good faith may serve little purpose

   (b) if it was decided to do so, using the indicia developed by the Tribunal over the years would be preferable, and

   (c) any 'code' should include a provision in terms similar to s 39(1)(f) of the NTA.

22) The Tribunal makes the same general submission in relation to the Exposure Draft. However, the following comments are made on the basis that the proposals made in the Exposure Draft are to be adopted.

Items 1 to 3 and 5

23) No specific comments but see discussion below.

Items 4, 6 and 8

24) As currently drafted, Item 6 of the Exposure Draft requires that the negotiation parties (as defined in s 30A) 'use all reasonable efforts to ... reach agreement'. Further, the negotiation parties must also 'use all reasonable efforts to ... establish productive, responsive and communicative relationships between the negotiation parties'. These are the 'good faith negotiation requirements' that must be satisfied by any party that makes a future act determination application (FADA) to the arbitral body. When deciding whether or not these requirements are satisfied, regard is to be had to whether the negotiation party has done the things set out in proposed s 31A(2): see Item 8.

25) There may be some difficulties in interpreting s 31A(1)(b), given it is a mandatory requirement that must be established by the party that makes a FADA under proposed amended s 36(2). For example, does the proposed paragraph refer to relationships to be established for the purpose of reaching an agreement, or for the purpose of giving effect to the agreement (see (27) below), or both?

26) Determining whether or not a party has used 'all reasonable efforts to ... establish productive, responsive and communicative relationships between the negotiation parties' means making a subjective value judgment. Further, decisions in relation to provisions such as these may not be particularly susceptible to judicial review of the kind provided for by s 169(1) of the NTA.

27) It may also be that a 'one size fits all' requirement, such as that found in proposed s 31A(1)(b), is not always appropriate. This is because the proposed future act may be of such a kind that it may not be necessary for all of the negotiation parties to use all reasonable efforts to 'establish … relationships' of the kind mentioned there, e.g. where the act concerned is the issuing of a prospecting licence.

28) In addition, it is possible that a native title party could decide that, because of the nature of the area that would be affected if the proposed future act was done, it would not be appropriate to 'negotiate in accordance with the good faith negotiation requirements with a view to' agreeing to the doing of the future act, which is what the amended s 31(1)(b) would require. Rather, that party may wish to seek a determination from the arbitral body that the future act in question must not be done: see s 38(1)(c).

29) In such a case, the current drafting of the amendment to s 36(2) would appear to prevent the native title party from taking that course of action because the native title party would not be able to satisfy the arbitral body that it 'negotiated in accordance with the good faith negotiation requirements ... until the application was made': see Item 8. It would appear that this is an unintended consequence.[1]

30) There appear to be three other possibly unintended consequences arising as a result of the proposed amendment to s 36(2).

31) First, it seems that if (say) the government party satisfied the Tribunal that it had negotiated in accordance with the good faith negotiation requirements 'until the application was made', the Tribunal would be under a duty, pursuant to s 139(a), to conduct an inquiry into a FADA made by that party even where it was clear that (say) the grantee party had not negotiated in accordance with the good faith negotiation requirements. This contrasts with the current s 39(2) whereby the Tribunal has no power to conduct the inquiry if one of the negotiation parties convinces it that the government party and/or the grantee party did not negotiate in good faith during the prescribed six month period.

32) The second possible unintended consequence concerns the proposal to introduce a requirement that the negotiating party making the FADA must demonstrate that it negotiated in accordance with the s 31A requirements 'until the application was made'. Given the need to produce evidence to establish this in the terms required by s 31A in order to ensure the Tribunal is empowered to deal with the FADA, this requirement might prompt some parties

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[1] Any other negotiation party may be willing to make a FADA, but they would have to satisfy the arbitral body that the requirements were met and they would be seeking a determination that the future act be done, without or without conditions attaching.

to make a FADA earlier rather than continue negotiating beyond the new eight month period proposed to be included in s 35(1)(a) – see Item 5. If this does occur, it would be contrary to the intention set out at p 1 of the covering note to the Exposure Draft, i.e. to 'encourage parties to focus on negotiated rather than arbitrated outcomes'.

33) The third unintended consequence is that FADAs are often made in order to obtain a future act determination by consent: see *Foster v Copper Strike Ltd* (2006) 200 FLR 182; [2006] NNTTA 61. In cases such as these, it seems unduly onerous to require the party that makes the FADA to satisfy the Tribunal that the s 31A requirements were met. It could, perhaps, be assumed that this was the case given the determination is sought by consent.

34) If the overall intention is to make the negotiation parties more accountable for their behaviour, then it may be preferable to amend the NTA to provide that, after a FADA is made, if any negotiation party alleges that any other negotiation party did not fulfil the 'good faith negotiation requirements', the onus is on the party (or parties) against whom that allegation is made to establish that those requirements were met. If a failure by a native title party to negotiate in good faith is not intended to affect the arbitral body's duty to inquire in to the application (so as to avoid giving that party a de facto veto), then the amendment could say so: see the current s 36(2).

Item 9

35) No comment.

Schedule 3 – Indigenous Land Use Agreements

Item 1 and 2

36) No comment.

Item 3

37) The Tribunal supports the objective underpinning this proposed amendment as expressed in the covering note to the Exposure Draft at p 5.

38) However, the proposed amendment may not have as significant an impact as might be hoped because in many cases there is no determination of native title (as defined in s 225) made that native title does not exist. Rather, those areas are excluded from the determination area. There are a number of reasons for this, including:

    (a) Differing judicial views as to whether or not making such a determination is within jurisdiction, given most claimant applications exclude all areas where native title has been extinguished because of ss 61A(2), 190B(8) and 190B(9).[2]

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[2] See, for example, *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* [2004] FCA 472 at [205]-[207], [315], *Neowarra v Western Australia* [2003] FCA 1402 at [581], [592], [594], *Daniel v Western Australia* [2003] FCA 666 at [31]-[33].

(b) The fact that, while areas where native title is extinguished at the time of a determination under s 225 may later become claimable under ss 47A or 47B, those provisions only apply to claimant applications.[3] Therefore, those seeking recognition of native title over such an area may be required to make a RNTDA to revoke the determination and, assuming that application succeeds, a claimant application claiming the benefit of ss 47A or 47B.

(c) Section 24FD applies s 24FA protection to any area that 'at a particular time' is covered by an entry on the National Native Title Register under ss 193(1)(a) or (b) 'specifying that no native title exists in relation to the area'. Any future act subject to s 24FA protection is valid, even if native title is later found to have existed at the time it was done and even if the effect of that future act is total extinguishment.

39) Putting these matters to one side, the current requirement under s 24BC is that there is a Registered Native Title Body Corporate (RNTBC) '*in relation to all* of the area' (emphasis added) if the agreement is to be a Body Corporate Agreement (BCA). Conversely, s 24CC requires that this must not be the case if the agreement is to be an Area Agreement. Sections 24BC and 24CC are mutually exclusive and so a mistake as to which applies may deprive the agreement of one of the fundamental requirements for being either one or the other kind of Indigenous Land Use Agreement: see ss 24BA and 24CA.

40) Section 24BB requires the agreement to 'be about *one or more* of the following matters *in relation to an area*' (emphasis added) in order to be a BCA. Those matters include 'compensation for any past act, intermediate period act or future act'. So it seems that the current s 24BC contemplates there being an RNTBC 'in relation to' an area subject to an act of that kind, even one that has wholly extinguished native title.

41) However, whether or not that is the case, it may be possible to amend s 24BC so that it allows for a BCA to be made both:

(a) where there has been a s 225 determination that native title does not exist in relation to a particular area, and

(b) where the area concerned was excluded from a s 225 determination in which native title was recognised but would have been included were it not for an extinguishing act. For example, where native title has been extinguished over areas upon which there are pastoral improvements or public works (as defined in s 251D) but these areas have been specifically excluded from the determination area.

42) While this may provide more flexibility for BCAs, it would need to be carefully drafted so that it only applied where (among other things):

(a) it was clear that 'connection' had been established sufficient to support recognition of native title rights and interests in the area(s) concerned, and

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[3] See ss 47A(1) and 47A(1)(a)

(b) native title would have been held by the relevant common law holders but for the extinguishment.

43) It would not be helpful if any such amendment were to:

(a) create uncertainty as to whether a BCA were available, or

(b) give rise to attempts to make a BCA over areas where there was uncertainty as who would have held native title to the area concerned but for extinguishment.

Item 4

44) No comment.

Item 5

45) If this amendment is made, would the *Native Title (Indigenous Land Use Agreement) Regulations 1999* be amended to require material to support compliance with proposed s 24CD(4A)(b), such as a certificate from the relevant representative body or s 203FE funded body?

46) While not directly on point, this proposed amendment seems to be linked to findings in *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412; [2010] FCA 1019. The Tribunal has a related concern which arises from what is said at [97] to [99], which appears to amount to a finding that there is no privity of contract between the 'native title group', as defined in s 24CD(2), and the other parties to the agreement. If so, this has implications for s 24EA(1)(b) which, it is submitted, should also be addressed by an amendment to the relevant provisions.

Item 6 and 7

47) No comment.

Items 8 and 12

48) There may be some confusion as to what is intended by proposed s 24CH(6) when it is read with the proposed amendment to s 24CL(2). Is the intention behind proposed s 24CH(6)(a) that the notice include a statement about a claimant application in response directed at s 199C(1)(b), rather than at getting the claim registered within the one month notice period? However, it is acknowledged that any confusion as to the intended effect of the amendment might be resolved once the explanatory memorandum is available.

Item 9

49) It is not clear who would make the assessments required under proposed s 24CI(1C). It would seem to be more appropriate that it be the Registrar, rather than the Tribunal. This is because it is the Registrar who is provided with the materials mentioned in s 24IC(1C)(a), not the Tribunal, and the objection is made to the Registrar: see s 24CI(1). In this context, please refer also to ss 96A and 98 of the NTA.

50) The Tribunal's current role is to assist under s 24CI(2). If it does so, it is under a duty not to use or disclose any information accessed only because it provided that assistance without the

prior consent of the parties: s 24CI(3). If the proposal is that the Tribunal make the assessments required by proposed s 24CI(1C), then it is not clear how this would interact with s 24CI(3).

51) However, the main concern is that the introduction of proposed s 24CI(1C) may result in substantial delays in the processing of applications to register Area Agreements where an objection has been received because:

(a) the matters that will have to be determined (i.e. 'that it is reasonably likely that the objection would be withdrawn' and 'to the extent that the ... [Registrar] is satisfied that the information is confidential or commercially sensitive') are likely to be contentious and, in practical terms, potentially difficult to assess,

(b) it seems procedural fairness will have to be afforded to both the parties to the agreement and the objector in determining these matters, and

(c) if decisions under s 24CI(1C) are reviewable, there may be litigation.

Items 10, 11 and 13

52) No comment.

Item 14

53) In relation to proposed s 24ED(1)(a), should the word 'all' be inserted between 'the' and 'parties as is the case in s 199C(1)(c)(ii)?

54) In relation to proposed s 24ED(1)(b), should the notice of the amendment be given by all parties to the agreement?

55) The proposed s 24ED(1)(c) contains the phrase 'the conditions that were required to be satisfied in order for the Registrar to register the agreement'. There may be some uncertainty about the conditions that were required to be satisfied. For example, a registered Area Agreement may be amended to increase the area it covers. However, there is no specific 'condition' required to be satisfied when an ILUA is registered in relation to such an amendment. Yet this would seem to be an amendment that should require the amended agreement be retested to ensure (for example) the affected native title holders/claimants have authorised the extension of the terms of the agreement to that area. Therefore, it may be preferable if proposed s 24ED(1)(c) were recast so that it were to be similar to the current s 190A(6A), i.e. by identifying the specific conditions in the NTA that are intended to be relevant and any other relevant matters, for example, by including the examples given at p 4 of the covering note to the Exposure Draft.

56) In relation to proposed s 24ED(2), it is suggested it might be better directed at providing an express power to amend the Register of Indigenous Land Use Agreements to include the amendments covered by s 24ED(1).

Item 15 to 17

57) No comment.

Item 18

58) In relation to proposed s 251A(2), it is not clear how, when and by whom the identity of 'persons who can establish a prima facie case that they may hold native title' to be established. Therefore, it may be helpful to make it clear that it is a matter for those seeking to make the ILUA. The Registrar must assess whether or not the requirements of s 24CG(3)(b) are met. On this point, please see *Murray v The Registrar of the National Native Title Tribunal* [2002] FCA 1598 at [74]-[75].

59) In addition, it may be helpful if the requirements for making 'all reasonable efforts', as required by s 24CG(3)(b), were spelt out in cases where s 251A(b) is relied upon. This may then focus the parties on that part of the process. It may also avoid the Registrar becoming involved in the kind of contest that arose in *Murray v The Registrar of the National Native Title Tribunal* [2002] FCA 1598.

60) It would also be helpful if the intention behind proposed s 251A(3) was clarified to indicate who must authorise the making of an Area Agreement. For example, is it intended that, where there is a registered native title claim, only the native title claim group for that claim would be able to participate in the authorisation process? There may be cases where, for example, there is an unregistered claim that failed the registration test on a 'non-merit' condition, such as s 190C(3). Or there may be a group that has not put in a claim but does have a legitimate claim to the area concerned. Is the intention that those people will not have to be identified and their authority obtained?

Schedule 4 – Minor technical amendment

Item 1

61) No comment.

Conclusion

62) The Tribunal appreciates the opportunity to comment upon the proposed amendments. However, to ensure the policy outcomes sought are achieved and, to the extent possible, any unintended consequences are avoided, the Tribunal submits (in summary) that further consideration be given to the amendments, particularly those found in Schedule 2 and Schedule 3 of the Exposure Draft, taking into account the matters raised above.

63) If you have any questions in relation to these submissions, please contact Lisa Wright on (08) 9425 1046 or at Lisa.Wright@nntt.gov.au.