



# Native Title Services Victoria Ltd

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## Comments on exposure draft: Native Title Amendment Bill 2012

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### A. Introduction

1. Native Title Services Victoria (NTSV) is funded to provide the services of a Native Title Representative Body under the *Native Title Act 1993* (Cth). NTSV exists to deliver sustainable Native Title outcomes to Aboriginal people in Victoria that will respect, protect and transmit Aboriginal culture and identity for present and future generations.
2. NTSV welcomes the opportunity to comment on the proposed changes to the *Native Title Act 1993* (Cth) (NTA) in the Native Title Amendment Bill 2012 (**Amendment Bill**) which are currently being considered by the Attorney-General's Department. This submission comments on a number of aspects of the proposed NTA Amendment Bill.

### B. 'Good Faith' and associated amendments under the 'right to negotiate' provisions

3. Where section 31(1)(b) NTA applies to a Future Act, parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act. This good faith negotiation requirement is an important legal safeguard afforded to native title parties under the Future Acts regime.

### *The meaning of good faith*

4. The current drafting of section 31(1)(b) NTA provides little guidance as to the meaning of the ‘good faith’. Further, the National Native Title Tribunal and Federal Court of Australia have offered restrictive interpretations of the meaning of the term. This has meant that it is very difficult, under the current law, for native title claimants or native title holders to establish that a proponent has failed to act in good faith. This makes section 31(b) difficult to enforce and diminishes the significance of the safeguard for native title parties.
5. NTSV supports the Amendment Bill’s inclusion of explicit criteria as to what constitutes ‘good faith.’ The proposed criterion requires the Court or Tribunal to look beyond the mere surface of negotiations to determine whether there has been a lack of good faith.
6. NTSV submits that further consideration should also be given to the following:
  - (a) including 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;<sup>1</sup>
  - (b) inserting 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;<sup>2</sup> and
  - (c) supplementing 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.<sup>3</sup>

### *Timeframes for right to negotiate*

7. NTSV submits that the right to negotiate, as currently drafted, is limited insofar as the proponent is able to apply for a determination by an arbitral body under section 35 after only six months. In certain circumstances this timeframe will be insufficient to allow for adequate negotiation. NTSV therefore welcomes the Amendment Bill’s extending the time before a party may seek a determination from the National Native

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<sup>1</sup> See Australian Human Rights Commission, *Submission to Senate Legal and Constitutional Affairs Committee on Native Title Amendment (Reform) Bill 2011* (2011): 9.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

Title Tribunal to eight months. However, NTSV considers 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.

*Onus of proof in relation to good faith negotiations*

8. NTSV supports the Amendment Bill's proposed amendments to section 36(2) NTA, which will require the party seeking arbitration to show that they have negotiated in good faith. NTSV believes that this is an important measure in improving the fairness of the right to negotiate procedure. It is hoped that this amendment will have a positive effect in terms of altering the behaviour of negotiating parties, for instance by discouraging the premature termination of negotiations and leading to more beneficial negotiated agreements.

### **C. Historical Extinguishment**

9. The NTA currently includes provisions that require historical extinguishment of native title to be disregarded in certain circumstances. The Amendment Bill seeks to provide parties with more flexibility to agree to disregard historical extinguishment over parks and reserves. NTSV supports the expanding of the range of circumstances in which extinguishment can be disregarded and NTSV broadly supports the proposed amendment. However NTSV makes the following observations and submissions on the form of the proposed amendment.

*Public Works*

10. The Attorney-General's Department *Exposure Draft: Proposed amendments to the Native Title Act 1993 (Exposure Draft)* states that the model for the proposed amendment is based on sections 47 to 47B NTA. NTSV notes that there are problems with the drafting of sections 47 to 47B NTA, insofar as the provisions refer only to disregarding prior extinguishment by the grant of previous *interests*. The prevailing view seems to be that this would not extend to allowing the disregarding of extinguishment by previous public works (that is, works constructed by the Crown without any grant of an "interest" as such). In *Erubam Le (Darnley Islanders) (No 1)*

*v Queensland*<sup>4</sup> it was held that creating or establishing a public work could not be characterised as the ‘creation of any other prior interest’ and accordingly the extinguishment created by such works could not be disregarded.

11. In light of these issues, NTSV welcomes the drafting of the proposed section 47C(4) insofar as it allows for the extinguishing effect of the construction or establishment of public works to be disregarded.

*Requirement for Agreement/Consent*

12. NTSV notes that the proposed amendment would only allow extinguishment to be disregarded where there is agreement between the government party and the native title parties. NTSV submits that the proposed amendment should be strengthened by removing the requirement that there be an agreement before extinguishment can be disregarded. A number of reasons are offered for this.
13. Firstly, NTSV notes that there is an inconsistency in drafting between the proposed section 47C and other NTA provisions which already allow for historical extinguishment to be ignored. Sections 47 to 47B of the NTA already allow for the disregard of historical extinguishment in prescribed circumstances; however, these provisions do not require State or Commonwealth consent for historical extinguishment to be disregarded and there is no clear rationale as to why the proposed section 47C should be drafted any differently. NTSV notes that the interests of stakeholders other than native title claimants would still be protected without a consent requirement. For instance, all current interests in the land will prevail over native title in circumstances where extinguishment is to be disregarded.
14. Secondly, the beneficial operation of the amendment will depend on the willingness of Government to disregard extinguishment. Entrenched interests on the part of Government may limit any such willingness. Accordingly, the reform may not be successful in promoting agreement-making with respect to prior extinguishment.

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<sup>4</sup> (2003) 134 FCR 155.

15. Should the Attorney-General's Department insist on retaining a consent requirement, NTSV submits that the proposed amendment should be strengthened by providing that, where native title exists over a national park or reserve and the only other interest holder in that land is the Crown, extinguishment should automatically be disregarded.<sup>5</sup>

### *Advertising Requirement*

16. The proposed amendment includes notification requirements. It provides that, before making an agreement under the proposed section, the relevant government party must arrange for reasonable notification of the proposed agreement in the State or Territory in which the park is located, and must provide "interested persons" an opportunity to comment on the proposed agreement.
17. NTSV submits that the purpose of this notification/advertisement requirement is unclear. This is because, as noted above, prior interests in the land will prevail over native title in circumstances where extinguishment is to be disregarded.
18. NTSV is concerned that the notification process will complicate the operation of the beneficial provision. This is especially the case given that "interested persons" is not defined in the proposed amendments. Any uncertainty surrounding the definition of this term may cause persons with insufficient interests causing unnecessary delays to the determination of applications. The notification process may also provide Government with an additional leverage in negotiations, which may jeopardise the beneficial operation of the provision.

### *Limitation to Parks and Reserves*

19. NTSV submits that further reform is necessary to expand the circumstances in which historical extinguishment can be disregarded so as to include all Crown land and not

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<sup>5</sup> See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission to Attorney General's Department on Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* (2010): 2 <<http://www.ag.gov.au/Documents/SUBMISSION%20-%20AIATSIS%20-%20historical%20extinguishment%20-%2022%20March%202010.PDF>>

simply parks and reserves within the meaning of “park area” as defined in proposed section 47C.

#### **D. Processes for amendments to ILUAs**

20. Currently the NTA does not provide a clear process of enabling minor amendments to be made to ILUAs. NTSV broadly supports a simplified registration process for minor ILUA amendments, as provided for in the proposed section 24ED. This can enhance the flexibility of ILUAs and minimise costs and resources involved in requiring an amended ILUA to be re-registered.

#### **E. Authorisation and Registration processes for ILUAs**

##### *Registration of certified ILUAs*

21. NTSV takes this opportunity to comment on the *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* Discussion Paper proposal leading 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).<sup>6</sup>

22. NTSV is disappointed that the Amendment Bill does not address this overdue proposal. NTSV 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 authorisation process, this should be determinative for the Registrar and there should be no provision for anyone to object to the Registration. NTSV 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).

23. NTSV believes that such an amendment would lead to a reduction in the duplication of registration requirements. Further, NTSV believes that the amendment would also

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<sup>6</sup> Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits Discussion Paper* (July 2010): 12.

reduce delays associated with ILUA registration in circumstances where the certification of the representative body or service provider provides a safeguard of probity.

24. If this proposal is seen as too broad, NTSV 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 probity. NTSV believes that such an approach would assist in expediting settlements under Victoria's *Traditional Owner Settlement Act*.

## **F. Scope of Body Corporate ILUAs**

25. NTSV supports the proposed amendments to section 24BC, to ensure that Subdivision B ILUAs are available to parties that have an ILUA which includes areas where native title has been extinguished.

## **G. Minor Technical amendment to section 47**

26. NTSV supports the proposed amendments to section 47, which will allow an Indigenous corporation that has *members* rather than *shareholders* to take the benefit of section 47.

## **H. Conclusion**

27. NTSV would be pleased to discuss any of the issues raised in this submission. NTSV looks forward to working with the Commonwealth Government in developing future legislative reforms targeted at improving the native title system.