South West Aboriginal
Land and Sea Council

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Kathleen Denley
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Native Title Unit
Attorney General's Department
CA House
National Circuit
BARTON ACT 2600

Dear Kathleen

NATIVE TITLE AMENDMENT BILL 2012 – EXPOSURE DRAFT – SOUTH WEST ABORIGINAL LAND AND SEA COUNCIL - SUBMISSION

Introduction

The South West Aboriginal Land and Sea Council (SWALSC) is the representative body for the native title claimants in the South West of Western Australia.

We welcome the opportunity to comment on the exposure draft of proposed amendments to the *Native Title Act 1993* (Cwlth) (NTA). Our comments relate to the native title rights and interests of all claimants in the South West of WA and the Noongar People.

SWALSC provides comments at a time when we are in active negotiation with the Western Australian State Government for an out of court negotiated native title settlement in relation to all six native title claims across the South West of WA. This approach is to obtain agreement on economic and culturally sustainable outcomes for Noongar People.

The exposure draft contains amendments to:

- Clarify the meaning of 'good faith' under the 'right to negotiate' provisions and make associated amendments to 'right to negotiate' provisions;
- Enable parties to agree to disregard historical extinguishment of native title in certain circumstances in areas such as parks and reserves; and
- Streamline Indigenous Land Use Agreement (ILUA) processes.

Questions to be considered in our response include:

- Whether the amendments are workable?
- Are there any risks we should be aware of?
- Are there any practical implications we should be aware of?
- What are the benefits of this approach?
- Will this package of amendments improve negotiation standards and agreement-making, flexibility for parties and improve the resolution of claims?

We endorse the overarching aim of the amendments to the NTA as a package of reforms which aligns with the Commonwealth's native title strategy with a particular focus on improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes.

Where the reforms have potentially the greatest impact in relation to improving standards in agreement-making and promoting sustainable outcomes is in the reforms to disregard historical extinguishment, in certain circumstances. If the amendments are clear and unambiguous in terms of the technical requirements associated with the potential implications of amending claim boundaries etc. and for the effective operation of section 47C without limiting existing rights and interests – the benefit for sustainable outcomes in native title over parks etc. is significant.

The amendments to the right to negotiate provisions of the NTA does not equate to reform but aims to 'clarify', 'encourage' and 'improve' the 'good faith' requirement. We support the requirement for the party seeking arbitral outcome to show they have negotiated in good faith and provide for the National Native Title Tribunal (NNTT) to make orders about the period of time before another determination can be sought if a finding that a party has not negotiated in good faith is made.

The aim to streamline the ILUAs is supported by SWALSC in terms of good practice and procedural efficiency.

'Good faith' and associated amendments under the 'right to negotiate' provisions

In the Preamble to the NTA it is stated:

> *It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done*[1]*.*

The approach to the reforms does make a reasonable effort to secure the agreement of the native title holders through the reforms to the special right to negotiate. It does not go far enough but we concede that good faith negotiation goes to the intent of the negotiation party and the difficulties of an assessment by an arbitral body on whether a party has behaved reasonably and fairly with a mind to reach an agreed outcome.

The exposure draft under *Schedule 2 – Negotiations*, pages 10 to 12 has an emphasis on the *good faith negotiation requirements.* This is comprehensive and evident in its admissions and omissions set out in the exposure draft:

- 1. Subsection 24MD(2) (Note 1) – "…if that Subdivision applies, negotiation parties are required to act in accordance with the good faith negotiations requirements (see section 31A)", (page 10);
- 2. Paragraph 31(1)(b) – omitted is "good faith" and substituted with "accordance with the good faith negotiation requirements (see section 31A)", (page 10).

[1] *Native Title Act*, 1993, page 2

- 4. Subsection 31(2) – "…, this does not mean that the negotiation party has not negotiated in accordance with the good faith negotiation requirements".
- 5. Paragraph 31(4)(b) – Omits "good faith" and substituted with: "accordance with the good faith negotiated requirements".
- 6. After section 31 - Inserted is the "31A The good faith negotiation requirements".
- 8. Subsection 36(2) – repealed and substituted with Determination not to be made where failure to negotiate in good faith and subsections (2) and (2A).

The *good faith negotiation requirements* codify that negotiation parties use all reasonable efforts to reach agreement and establish productive responsive and communicative relationships between the negotiation parties. In deciding if good faith negotiation requirements have been met, in relation to a proposed agreement of a kind mentioned in paragraph 31(1)(b), the emphasis has shifted to satisfying the *requirements* as set out in 31(A)(2).

The concern of SWALSC is that without discretionary provisions, similar to s. 39(1)(f) - *any other that the arbitral body considers relevant* - the arbitral body is constrained to consider the circumstances of each matter within a defined list of requirements. That, at least, could be the perception of the negotiation parties.

Another concern of SWALSC is the good faith negotiation requirements adopt the criteria of the *Fair Work Act 2009* (Cwlth) (FWA), Part 2 – 4, Division 8, Subdivision A, section 228. The context of the FWA is to achieve fairness and productivity through an emphasis on enterprise level collective bargaining by simple good faith bargaining obligations and clear rules governing industrial action[2]. The FWA in this respect sets out what the good faith requirements are to achieve within the context of collective bargaining. What will the good faith negotiation requirements aim to achieve in the context of native title and native title outcomes?

The exposure draft aims to clarify the meaning of good faith and the conduct and effort expected of the negotiation parties in seeking to reach agreement. The statement in the explanatory notes to the exposure draft in relation to "'Good faith' and associated amendments under the 'right to negotiate' provisions" refers to the amendments as intended to encourage parties to focus on negotiated, rather than arbitrated, outcomes. This does not mean that parties are unaware of what constitutes good faith; it means they may prefer a particular outcome, which is arbitral.

The good faith negotiation requirements will not deter that particular outcome which parties may seek.

In deciding if a party has negotiated in accordance with the *good faith negotiation requirements* under 31A(1), 'regard', without limiting 31A(1), is to be had to 31A(2)(a)-(h). Under s. 36(2), to be repealed and substituted the arbitral body needs to be satisfied a negotiation party negotiated in accordance with the *good faith negotiation requirements* 'until the application is made'. Effectively, a negotiation party would need to negotiate in accordance with the good faith negotiation requirements for more than the 8 month period.

Concerns were raised during the teleconference convened by the Attorney General's Department on Monday 15 October 2012 that the amendment to s. 36(2) may encourage a party to exit negotiations after 8 months and one day rather then risk the prolonged requirement to have regard to the *good faith negotiation requirements*. The

[2] *Fair Work Act* 2009 (Cwth), Division 2, Section 3(f)

concerns are related to the decision in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 which led to this proposed amendment.

SWALSC submits that the concerns may not be relevant. Under the current NTA and obligation to negotiate in good faith (s 31) the arbitral body in making a determination that good faith obligations have been met, on the evidence submitted, will examine evidence over the period of negotiations between the parties. This may be over a considerable period of time. We refer to a recent NNTT matter *Backreef Oil Pty Ltd and Oil Basins Ltd/John Watson and Ors on behalf of Nyikina and Mangala/Western Australia*, [2012] NNTTA 98 (6 September 2012) where the Member examined a chronology of evidence of negotiations between 20 January 2008 and 4 May 2012. Unless a party elects to exit negotiations good faith negotiations usually occur for a longer than 6 month negotiation period.

We believe the amendments reflect the current circumstances and requirement for parties to negotiate in good faith up until an application is made for a section 35 future act determination application. The amendments merely extend the period from 6 to 8 months before an application can be made. This encourages parties to delay an application for an arbitral outcome and hence remain in the negotiation period longer. Whether it is a 6 month or 8 month period before an application can be made, or longer if parties stay in negotiation, a party will need to negotiate in good faith or negotiate in accordance with the *good faith negotiation requirements.*

Where the FWA aims to achieve 'fairness', what appears to underpin the amendments to the NTA and exposure draft is to provide *clarity* on the meaning of good faith and *improve* the balance of power between the negotiating parties. The good faith negotiation requirements provides guidance as such and in this respects *encourages* parties to negotiate by providing a general understanding of what will constitute negotiation in good faith in terms of the right to negotiate provisions of the NTA.

Where the balance of power may shift is with the requirement of the negotiating party that makes an application under section 35 of the NTA for a future act determination is to satisfy the arbitral body that the negotiation party has negotiated in accordance with the *good faith negotiation requirements*.

The shift, in the view of SWALSC, will more likely be towards a greater awareness or mindfulness by the negotiation party on how they will need to satisfy the arbitral body and not necessarily shift their focus ultimately from an arbitral outcome towards an agreed outcome.

It does not follow that providing clarity in terms of what is negotiation in good faith will encourage parties to focus on negotiation or promote positive relationship-building agreement-making. Parties with this intent look to establish these outcomes anyway and to also comply with the legal requirements and obligations.

In terms of the *good faith negotiation requirements*, as codified, SWALSC is of a similar view as was expressed by the NNTT in its submission on the "Discussion Paper 'Leading practice agreements: maximising outcomes from native title benefits,' July 2010" made on 30 November 2010 that codifying the requirement to show good faith "may serve little purpose".

Furthermore, in relation to the *good faith negotiation requirements* drafted along the lines of s. 228 of the FWA, the NNTT stated that "most of the relevant matters addressed by the provision are covered by the indicia the NNTT applies when determining whether or not negotiation in good faith has taken place".

The submission of the NNTT goes on to explain that:

> *These indicia emerged initially from the Tribunal's reasons for decisions in Western Australia v Taylor (1996) 134 FLR 211. They are commonly referred to as the Njamal indicia.*
>
> *….As Member O'Dea noted in FMG Pilbara/Cheedy/Western Australia [2009] NNTTA 38 at [71], determining whether or not parties have negotiated in good faith during the prescribed six month period 'is not a formulaic exercise'. In any particular case, the arbitral body must assess 'whether the parties have behaved reasonably and fairly to put their mind to reach an accord over the doing of the act'.*
>
> *Further, the indicia applied by the Tribunal is not closed. They may be developed in an appropriate case. Any such developments could be informed by developments in other areas of law such as workplace relations but would be made in a native title context.*

During the first teleconference discussion on native title legislative reforms held on 18 July 2012 and convened by the Attorney General's Department it was the view of SWALSC and other Land Councils present that good faith requirements need to be applied within a native title context. The circumstances and environment of native title negotiations and outcomes to be achieved differ from outcomes to be achieved from work place relations negotiations.

Regarding the reforms to extend the period of time from 6 months to 8 months before an application can be made to the NNTT for an arbitral determination, this is a nominal difference and does not represent an adequate period of time in which to reach an agreed outcome. This negates the purpose of the reforms by the Commonwealth to focus on improving agreement-making in any real sense; however it is an improvement. Refer to our comments above on the impact of extending the time period.

SWALSC considers that the amendments would be workable as drafted in relation to the "'Good faith' and associated amendments under the 'right to negotiate' provisions".

In terms of the benefits of this approach, reforms that go towards agreement-making are welcomed. In particular, SWALSC perceives a real benefit in relation to parties no longer required to prove a lack of good faith, which often is the position of the native title party as respondents to s. 35 future act determination applications.

On that point, and related to any perceived risks associated with the exposure draft, it is not clear whether there is an opportunity for the respondent to challenge the application on whether the good faith negotiation requirements have been met. Do we assume that that is met under procedural requirements?

Historical Extinguishment

The inconsistency across States and Territories as a result of the High Court's decision in *Ward* in relation to vesting of Crown reserves and extinguishment of native title despite the exclusion provision in s. 23B(9A) of the NTA requires reform and this is welcomed by SWALSC. We agree that the reforms in this context could also go towards ameliorating the effect of the High Court's decision in *Ward*.

We also support the reference made by Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner to the *Native Title Report 2002* that native title

has become ‘an archaeological site of extinguishment’. Reform to disregard historical extinguishment in certain circumstances over parks and reserves improves the native title system, gives it some flexibility, encourages negotiation and commences to overcome some of the entrenched and systematic dispossession of Aboriginal and Torres Strait Islander peoples.

Whilst we support the reform for disregarding historical extinguishment it is important to ensure that the technical and complex requirements do not defeat the effectiveness of those reforms.

SWALSC supports the concerns in the submission made by the NNTT on the “Proposed amendments to the Native Title Act 1993 relating to national parks etc.” (19 March 2010), which makes a number of technical observations which may hinder or prevent the NTA accommodating the reforms.

In terms of whether there are any risks to be aware off we have examined the exposure draft and *Schedule 1 – Historical extinguishment* on pages 3 to 8 and make the following general observations.

Schedule 1:

- There may be practical implications regarding the impact on current negotiations in relation to a park which encompasses an undetermined native title claim area, partially determined land and unclaimed land. National parks may encompass large areas of land and large numbers of parties.

- The term ‘revised’ in relation to a native title determination application is unclear and may relate to a variation as per subsection 13(5)(c). The term is used within the new section 47C and applies to a claimant application or a revised native title determination application which is made in relation to an area set out in 47C(1)(a)(i).

- For section 62 and revised native title determination applications it is unclear if an application is to be revised first before section 47C is operational.

- For section 62(1)(d) a copy of the agreement is to accompany the claimant application. 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. What needs to be in existence first is unclear to bring about the effect and operation of section 47C. This difficulty to be avoided for the full effect of the section.

- For 47C(5) Notice and time for comment, invites comment but not third parties to the agreement. Legalities need to be ensured for the effect of the amendment.

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

SWALSC supports the reforms to establish a threshold which will determine whether or not a new registration process is required. The threshold, for minor amendments to an ILUA and examples given has set the bar low and includes general administrative descriptions which do not impede the rights and interests of the parties. We agree the Registrar is informed of those minor amendments.

Broaden scope of body corporate ILUAs

SWALSC supports these reforms and does not perceive any risks or practical implications.

Improve authorisation and registration processes for ILUAs

SWALSC sees merit in retaining the mandatory three month notice period for Subdivision C ILUAs. Notification is a critical component in the process of registration and commences the requirements for an effective process and better meets the requirements for procedural fairness. Greater efficiency in timeframes should be met in the negotiation phase.

Minor technical amendment to section 47

SWALSC supports the minor technical amendment to s. 47(1)(b)(iii) to ensure where an Indigenous corporation has members rather than shareholders, s. 47 could still apply to disregard extinguishment over the area.

We hope the comments above will be of assistance in relation to the Exposure Draft and Amendments to the NTA.

SWALSC has no objection regarding publication of this submission on the Attorney General's Department web site.

Yours sincerely

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Sent via email