NORTHERN LAND COUNCIL
Our Land, Our Sea, Our Life

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Exposure Draft
Native Title Legislation Amendment Bill 2018
Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

SUBMISSION

Background

The Northern Land Council (NLC) is the recognised Native Title Representative Body for the Top End of the Northern Territory (NT) pursuant to the *Native Title Act 1993* (NTA). This area includes the offshore seas of the NT, the Tiwi Islands and Groote Eylandt. The NLC has held this status continuously since the commencement of the NTA in 1994. The NLC is a member of the National Native Title Council.

The NLC has been at the forefront of the recognition of native title in Australia having conducted the first successful sea claim in *Commonwealth v Yarmirr* (2000) 168 ALR 426, the first successful native title compensation case in *Griffiths v Northern Territory* (2016) 337 ALR 362 which was recently heard on appeal by the High Court of Australia in September 2018. A judgement is pending in this leading test case in relation to native title compensation in Australia.

In addition, the NLC brought on behalf of native title holders the first successful claim to the native title right to take and use natural resources for any purpose including a commercial right to trade within a township and within the Northern Territory in *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 339 ALR 82.

Importantly to date the NLC has successfully negotiated or litigated the recognition of native title in 74 determinations within its region since the commencement of the NTA. The NLC has successfully negotiated the recognition of native title in two (2) native title determination applications during calendar year 2018 being *Wavehill (on behalf of the Wubalawun Group) v Northern Territory of Australia* [2018] FCA 1602 in relation to the township of Larrimah and *Margarula on behalf of the Mirarr People v Northern Territory of Australia* [2018] FCA 1670 (9 November 2018) in relation to the township of Jabiru.

Introduction

The Exposure Draft of the Native Title Legislation Amendment Bill 2018 (NTLAB 2018) and Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 (RNTBCLAR), whilst mostly technical and administrative in nature do include some beneficial proposals to native title holders.

The consultation or exposure drafts are not as wide-ranging or beneficial to native title holders as that proposed in the Native Title Amendment Bill 2012 and the Australian Law Reform Commission's Connection to Country: Review of the Native Title Act 1993 (Cth) Report released in April 2015.

That is unfortunate as some of those proposals would have facilitated the recognition of native title in a timelier manner. In this sense there is still much to be done.

There is also a compelling need to consider and adopt a broader and comprehensive approach to the settlement of native title. Importantly this includes at a policy and legislative level the recognition and implementation of Comprehensive Settlements, an alternative means to award compensation and an examination of the requirement for extinguishment of native title by some governments and developers.[1]

It is therefore to be commended that the Commonwealth Attorney General the Hon Christian Porter, MP and the Minister for Indigenous Affairs the Hon Senator Nigel Scullion agreed to form a Working Group with the National Native Title Council at a meeting on the 29 November 2018 at Parliament House in Canberra. This Working Group is to examine Comprehensive or Regional Settlements and an alternative administrative based approach to the assessment and payment of compensation.

The Commonwealth should also consider the re-instatement of the policy that it would pay 75% of compensation in relation to acts validated by the NTA. This would undoubtedly assist in the resolution of compensation claims and the acceptance of comprehensive settlements as a preferred approach to the resolution of native title claims.

Exposure Draft of the Native Title Legislation Amendment Bill 2018 and Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

The NLC supports the submission of the *National Native Title Council* (NNTC). Some comments have been made to certain proposed amendments and the position of the NNTC.

The NLC in particular welcomes:

- The additional flexibility proposed to be given to native title and compensation claim groups when deciding upon the authorisation of the applicant in relation to Indigenous Land Use Agreements (ILUAs); an application for a native title determination and compensation applications.

[1] NLC SUBMISSION No. 48 Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, pp 2,3.

- The opportunity to disregard by agreement between native title holders and government current and prior extinguishment of native title in National Parks or Park areas as defined in the Bill (new s47C);
- The clarification that after the recognition of native title in any determination utilising ss 47,47A, 47B and proposed new s47C that the future act regime will apply;
- The effective broadening of section 47 of the NTA (pastoral leases held by or for native title holders) to include Aboriginal Corporations and a Company Limited by guarantee which have members and not shareholders. This will ensure that this beneficial provision meets its original purpose as intended in 1993 by the Commonwealth Government and Indigenous negotiators at that time; and
- The broadening of the mandate of the National Native Title Tribunal to ensure it has a function in relation to dispute resolution with regard to Registered Native Title Bodies Corporate (PBCs).

Park Areas (new s47C)

In relation to the proposed amendments in Schedule 3 Part 1 (NTLAB 2018) concerning Park areas without diminishing the importance of the provision it is noted that it is by agreement. This is unlike the existing provisions in Part 2 Division 4 of the NTA which disregard extinguishment of native title as of right without requiring the consent of government. In this sense it is a quite modest reform. This proposal in relation to Park areas will ensure that Justice Brennan's views in relation to the common law and National Parks in *Mabo v Queensland (No 2)* will come to pass in terms of recognition under the NTA.[2] To quote:

> Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (e.g., land set aside as a national park).

Section 31 Agreements

The proposed amendments at Schedule 6 Part 2 item 6 seek to retrospectively validate section 31 agreements concerning the grant of exploration and mining tenements and the compulsory acquisition of native title in certain circumstances. As is acknowledged by the Commonwealth Attorney Generals Department concerns have been raised that the result in *McGlade v Native Title Registrar*[3] (*McGlade*) in relation to Area ILUAs is likely to also apply to section 31 Agreements.[4]

Section 31 Agreements are not subject to the protections applicable to an ILUA. Section 31 Agreements are not subject to the registration process including rights of objection by persons who may hold native title, a function performed by the Registrar of the NNTT.

It is generally not good public policy to enact legal provisions that have retrospective application. It is not possible in the circumstances to understand the full implications of this proposal as it is not known how many s31 Agreements have been executed by less than all the persons that comprise the applicant.[5] There is no register that comprehensively list all these agreements. The

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[2] [1992] 175 CLR 1 [83].
[3] [2017] FCAFC 10
[4] Native Title Reforms Fact Sheet # 1 Overview of Reforms, 2.
[5] In response to the *McGlade* decision it was ascertained that some 126 ILUAs were affected. See NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENTS) BILL 2017 SUPPLEMENTARY EXPLANATORY MEMORANDUM, [6].

dimension of the potential problem wherein less than all members of the applicant may have signed the agreement is unknown.

It is of concern that compensation and benefits that have been negotiated and passed to native title holders may be at risk because of the potential impact of the *McGlade* decision applying to s31 Agreements. There is no reasonable doubt that it may do so in some instances.

The proposed new provision at item 6(1)(d) states that 'at least one of the persons who comprised that registered native title claimant was a party to the agreement'. This is consistent with the practice of some parties to Area ILUAs following the decision in *QGC Pty Ltd v Bygrave (No 2).*[6]

It is noted that a late amendment which resulted in a situation where there was no requirement for any members of the registered native title claimant to be a party to the Area agreement was the cause of some contention during discussions that led to the passage of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* in relation to the *McGlade* decision. Presumably government has chosen the requirement that there be at least one of the persons whom comprised the applicant to maintain consistency with the original response to the *McGlade* decision and that is welcome.

The retrospective validation of agreements in the circumstance where the extent of the problem is not known is less than ideal. It would though appear that there is little choice but to support such an amendment in order to secure benefits to native title holders.

Deregistration and amendment of ILUAs - fraud, undue influence or duress

The NLC adopts the submission of the NNTC opposing that part of Schedule 2 Part 2 (NTLAB 2018) concerning the deregistration and amendment of ILUAs in relation to instances where an ILUA was procured by fraud, undue influence or duress (proposed new s24EB (2) and s24EBA). It is not a just outcome that any granted future act authorised by such an ILUA should remain valid. It is noted that the Torrens system which creates an indefeasible title by registration in Australia is subject to an exception for fraud.[7]

The NLC also supports the NNTC in its opposition to the following proposed amendments for the reasons given in its submission. These are:

- Schedule 5 Part 1 (NTLAB 2018) concerning the Commonwealth's intervention in proceedings thereby requiring its consent to the recognition of native title when it is otherwise not a party.

Registered Native Title Bodies Corporate Part 1 Registrar oversight

Schedule 8 proposed amendments (Clauses 1-3) to section 487-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* are opposed for the reasons given in the NNTC submission.

It is quite inappropriate to give the CATSI Registrar such a highly discretionary and interventionist power to intervene in the independent affairs of a PBC by providing that a

[6] [2010] 189 FCR 412.
[7] For example, see *Land Titles Act* (NT) ss 188,191.

Commonwealth officer may determine what is contrary to the interests of the native title holders. No such power resides with the regulatory authority pursuant to the *Corporations Act, 2001*(Cth).

Rick Fletcher
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Northern Land Council

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