National Native Title Tribunal

Comments on exposure draft:

Native Title Legislation Amendment Bill 2018

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

Public Consultation Paper - October 2018

The Hon John Dowsett AM, President
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12 December 2018

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Introduction

A. The National Native Title Tribunal (the Tribunal) welcomes the opportunity to provide comment on the proposed amendments in the exposure drafts:
   - *Native Title Legislation Amendment Bill 2018*; and
   - *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*.

B. The proposed amendments are informed by feedback from stakeholders on an options paper – Proposed reforms to the *Native Title Act 1993* (Cth), released on 29 November 2017.

C. The Tribunal made a submission in response to the options paper, which submission drew on earlier submissions made regarding:
   - *Native Title Amendment Bill 2012*;
   - Inquiry into the *Native Title Amendment Bill 2012*; and
   - ALRC, Connection to Country: Review of the *Native Title Act 1993* (Cth), Report No 126 (2015).

D. There is as yet no explanatory memorandum available. However, according to the Public Consultation Paper accompanying the exposure drafts, the objective of the proposed reforms is to deliver improvements to native title claims resolution, agreement-making, and dispute resolution processes prescribed by the *Native Title Act 1993* (Cth) (the Native Title Act) and other legislation, including to:
   - ensure the validity of existing s 31 agreements after the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10;
   - give greater flexibility to native title claimants in designing their internal processes, including by:
     - allowing the claim group to place conditions on the applicant's authority; and
     - allowing the applicant to act pursuant to a majority decision of those comprising it;
   - streamline and improve native title claims resolution and agreement-making, in particular by allowing historical extinguishment over areas of national and state parks to be disregarded, where the parties agree;
   - increase the transparency and accountability of prescribed bodies corporate, and
   - create new pathways to address native title-related disputes, arising after a native title determination.

E. The Public Consultation Paper seeks stakeholders' views on the approach to amending the law. The Tribunal's submissions are organised so as to correspond to the schedules in each of the exposure drafts. These submissions are made in the context of the functions and operations of the Tribunal and the Native Title Registrar (NT Registrar), and are directed at identifying possibly unintended consequences or other technical, procedural or resourcing concerns arising out of the exposure drafts.

F. The Tribunal notes that the Australian Government is continuing to work with the Western Australian Government and other affected stakeholders on the potential native title implications arising from Western Australia's proposal to validate mining leases affected by the decision in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30.

NATIVE TITLE LEGISLATION AMENDMENT BILL 2018

SCHEDULE 1 – Role of the Applicant

Part 1: Authorisation

General Comments

1) The Tribunal has previously indicated its support for proposals which will allow the claim group to define the authority of the applicant, and for the applicant to act by majority as authorised by the claim group.

2) Throughout Part 1, the drafting refers to 'conditions on authorisation' (Item 1, Item 5, Item 7, Item 10, Item 12, Item 13, Item 17 and Item 21).

3) According to the Public Consultation Paper at page 3, the proposed new s 251BA (Item 21) 'would allow conditions to be imposed on the applicant as part of the authorisation process under sections 251A and 251B'. The Tribunal understands the reference to 'conditions' to mean conditions (or limitations) on the applicant's **authority**.

4) We are concerned that the expression 'conditions on the authorisation' may invite a focus upon the validity of the authorisation, rather than its effect upon the authority conferred on the applicant. Such a focus may invite repeated challenges to the validity of the authorisation by disaffected groups. On the other hand, a focus on the authority of the applicant, having regard to the terms of the authorisation, will hopefully lead disaffected persons to focus on the effect of the conditions, rather than the validity of the process by which they were imposed.

5) We are also concerned that a claim group may impose limitations upon an applicant's powers, which limitation may be inconsistent with the efficient conduct of proceedings in the Federal Court and in the Tribunal. Perhaps there should be a limitation upon the extent to which such conditions may impact upon the fair and efficient conduct of proceedings.

Item 2-4

6) We refer to the discussion below in relation to Items 17-20.

Item 5

7) We understand the proposed amendments to address the question of compliance with the relevant decision-making process adopted in imposing conditions upon the applicant's authority. Could not the existing paras 62(1)(a)(iv) and (v) be amended to include the content of proposed paras 62(1)(a)(vi) and (vii)?

Item 9-10

8) Section 62A confers authority on an applicant to commence, conduct and ultimately seek resolution of an application referred to in that section, subject to any limiting conditions. The default position should be that the efficacy of any condition depends upon its being noted on the relevant register, save possibly as between the claim group and the applicant. It is critical that other parties, the Court and the Tribunal be able to deal with the applicant with knowledge of any limits on its authority.

Item 13

9) The Tribunal notes that this amendment is relevant to the NT Registrar's registration test function. Perhaps there should be a requirement that the NT Registrar be satisfied that the adoption of the condition will not have adverse effects upon any party, including any member of the claim group. The proposed amendment makes no provision for scrutiny of any purported imposition, revocation or variation of conditions.

Items 14-16

10) The Tribunal notes that the amendment is relevant to the NT Registrar's registration test function, and introduces an additional requirement into s 190C. The NT Registrar must be satisfied that any conditions placed on the applicant's authority have been satisfied.

11) There is some incongruity, between this proposed amendment and that proposed in Item 13, in that a new application will be tested against s 190C but the same material provided in an amended application will be dealt with under Item 13, without such testing.

Item 21

12) The proposed s 251BA is a key amendment. We have already suggested that the amended legislation should focus on the limitations upon the applicant's authority, rather than on the authorisation.

RESOURCING

13) The Tribunal anticipates that the adoption of the above amendments will create an increased workload in registration testing.

Part 2: Applicant decision making

General comments

Item 32

14) The Tribunal notes that this amendment creates a general rule that the applicant may act by majority. This extends the operation of the principle underlying the *McGlade* amendments to all things which the applicant, can or must do under the Native Title Act. The claim group may change such default position if it so chooses.

Item 36

15) This amendment inserts a note concerning conditions on the authority of the authorised persons. We have doubts as to the efficacy or value of legislative notes but accept that they have become a feature of legislative drafting.

Part 3: Replacement of applicant

General comments

16) The Tribunal has previously submitted that it supports proposals to cover situations where an applicant dies or is unable or unwilling to act.

SCHEDULE 2 – Indigenous land use agreements

Part 1: Body corporate and area agreements

Item 3

17) The Tribunal supports this amendment. It removes the obligation for the NT Registrar to notify an area agreement even if he/she is not satisfied that the agreement meets the requirements of ss 24CB-24CE (see Bygrave No 2[1]).

18) A further benefit is that it provides an opportunity to resolve an issue, if one should arise, after submitting an application for registration, and before going into notification. This avoids having to defer dealing with the issue until the end of notification.

Part 2: Deregistration and amendment

General comments

19) The Tribunal refers to its previous comments made in relation to the *Native Title Amendment Bill 2012*, and its submission in response to the options paper. In summary, the Tribunal supports proposals that give the NT Registrar further powers to ensure that the ILUA Register remains accurate and reliable.

Item 7

20) The Tribunal welcomes the proposed inclusion of the new s 24ED, which allows for the parties to make minor amendments to registered ILUAs. We wonder whether the rights of third parties should be prejudiced by any, as yet unregistered amendments. There should be a specific power to enter such amendments on to the Register.

SCHEDULE 3 – Historical extinguishment

Part 1: Park areas

Items 1-16

21) The amendments in the exposure draft regarding 'Park areas' are consistent with those in the *Native Title Amendment Bill 2012*. The Tribunal refers to previous comments made in its submission concerning that bill.

22) The Tribunal notes that the proposed amendment clarifies the application of the future act provisions in areas where the Act requires prior extinguishment to be disregarded.

[1] *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412

SCHEDULE 6 – Other procedural changes

Part 2: s 31 Agreements

Division 1 - Amendments commencing day after Royal Assent

Item 4

23) The Tribunal notes that s 31 agreements are usually provided to it by the Government party, which may not be privy to the existence, or at least the details, of any ancillary agreements that relate to the future act. Consideration should be given to introducing a mechanism whereby the negotiation parties are required to advise the existence of such agreements. We discuss this matter further below.

24) The Public Consultation Paper at pages 22 and 23 proposes that the NT Registrar[2] be notified of the existence of ancillary agreements to ILUAs, so that she may note such existence on the ILUA Register. However the exposure draft does not appear to include an amendment to that effect.

Item 6

25) The Tribunal supports this amendment. It ensures the validity of existing s 31 agreements, having regard to the possible application to s 31 agreements of the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

Division 2 - Amendments commencing 6 months after Royal Assent

Items 7-8

26) The amendments in Item 8 would allow a Government party to limit its participation in s 31 negotiations, if the other negotiation parties consent.

27) Where there are multiple native title parties, separate negotiations typically take place with each native title party. The proposed amendment appears to have the effect that, if one of the native title parties does not give its written consent, the Government party would be required to participate fully in negotiations with all parties, even if some of them had agreed to limit the Government party's participation. This may limit the practical effect of the proposed amendment. It may also be desirable to address the possibility that a consent may be withdrawn and the likely consequences of any such withdrawal.

28) The Native Title Act, in ss 28-41, seems to contemplate there being one agreement as to whether the proposed future act should be permitted. The proposed s 31(1B) reflects that position. We are informed that where there are two or more native title parties, there are often two or more 'agreements'. It may be as well to clarify the statutory intention in this regard. Whilst there may be difficulties in negotiating one agreement with multiple native title parties, difficulties may also arise out of the existence of multiple agreements.

[2] While the Public Consultation Paper refers to 'the Tribunal' in this context, it is presumed that this proposal was meant to concern the functions of the NT Registrar.

29) Section 28(1)(f) suggests that there should be 'an agreement of the kind mentioned in s 31(1)(b)'. However that section refers only to negotiations 'with a view to obtaining agreement with each of the native title parties to the doing of the future act, or the doing of such act subject to conditions. Section 31(1) does not necessarily exclude the existence of multiple agreements. Of course, if the matter goes to determination, there can be only one determination. The insertion of the proposed s 31(1B) may have unexpected consequences.

Proposed public record of s 31 agreements

30) The Tribunal notes that the exposure draft does not contain any proposed amendments giving effect to the proposal to establish a public record of s 31 agreements, which matter is discussed at page 23 of the Public Consultation Paper.

31) The above discussion concerning multiple agreements may affect the nature of any such record. In the event that there are multiple agreements, there would be a question as to whether all should be registered. The alternative might be to record the fact of agreement by all native title parties that the future act be done, or done on conditions.

32) If the Tribunal is to maintain such a record, its responsibility should be identified. In particular, would the Tribunal be required to ensure that an agreement provided to it under s 41A(1)(a) meets the statutory requirements for such an agreement?

33) The Tribunal also notes that there is currently no mechanism for enforcing compliance with s 41A(1)(a). No apparent consequences attach to non-compliance. The Tribunal has no means of verifying the extent to which negotiation parties are currently complying with the requirement. This may affect the integrity of any public record of s 31 agreements and undermine the aims of the proposal.

34) The Tribunal continues to support the position outlined in its earlier submission that any requirement to maintain such a record should apply prospectively rather than retrospectively.

SCHEDULE 7 – National Native Title Tribunal

General comments

35) The Tribunal generally supports the proposed amendments in this schedule. We have previously commented on the role which the Tribunal could play in post-determination dispute management.

Item 1

36) The Tribunal notes that the new s 60AAA(3) states that the Tribunal 'may' enter into an agreement with the RNTBC or common law holder concerning 'liability to pay the Commonwealth for assistance'. However there is no proposed amendment to 203BK(3) which provides that the Tribunal may only assist a representative body **if those parties have entered into an agreement under which the representative body is liable to pay the Commonwealth for such assistance**. There is arguably tension between the two provisions.

Item 3

37) The Tribunal notes the policy of providing consistency in the treatment of such arrangements in Commonwealth legislation and has no objection to the proposal. However it should not be understood as requiring that where a statutory officeholder is absent from Australia or unable to perform his/her duties, there should be such an appointment. Modern technology permits the continued performance of most duties, wherever the relevant officeholder is located, even if he/she is out of Australia. Further, the President's powers of delegation and direction are sufficient to deal with most issues, even if he/she is out of the country, or even if he/she is ill, at least if he/she is not seriously ill. In particular where the absence or incapacity is likely to be relatively short, there will be no need for such appointment.

Item 4

38) The Tribunal assumes that the intention is to remove any limitation upon the President's power to identify persons who are to provide assistance under the Act, and not to exclude from such power, the giving of directions as to the persons who are to provide assistance in making or negotiating agreements. The general power to assist is somewhat amorphous. Perhaps it should be defined.