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Legal and Constitutional Affairs Committee

Inquiry into Native Title Amendment Bill (No 2) 2009

Northern Land Council Supplementary Submission

9 February 2010

NORTHERN LAND COUNCIL SUPPLEMENTARY SUBMISSION: NATIVE TITLE AMENDMENT BILL (NO 2) 2009 – 9 FEBRUARY 2010

This supplementary submission responds in relation to matters raised during the Senate Committee hearing on 28 January 2010.

1. Application of non-extinguishment principle in relation to Aboriginal/Islander held land

The attached opinion dated 29 January 2010 from Mr Sturt Glacken SC, of the Melbourne Bar, identifies lack of uniformity and anomalous outcomes in relation to past and future acts on Aboriginal/Islander held land. He suggested that the approach indicated in the Bill of applying the non-extinguishment principle to certain future works on certain kinds of land held for the benefit of Aboriginal/Islander people can be given a wider application. The NLC supports that view.

As a matter of legislative policy both Labor and the Liberal/National Coalition, when in government, accepted the view that underlying native title should not be extinguished by past and future actions or developments in relation to Aboriginal/Islander held land (except in relation to minerals), and also that certain other acts (on any land) should not extinguish native title. In some cases the statute achieved this outcome directly by providing that the "non-extinguishment principle" would apply.[1] In other cases the statute provided a procedure whereby, at the time the Federal Court determines native title exists, prior extinguishment would be disregarded.

Examples of this policy in the *Native Title Act 1993* (NTA) in relation to Aboriginal/Islander held land (or vacant crown land) include:

- In 1993 s 47 provided (and still provides) that at the time of Federal Court determination prior extinguishment of native title would be disregarded in relation to pastoral leases which are held by or on behalf of native title holders.[2]
- In 1998 s 47A was inserted to provide that at the time of the Federal Court determination prior extinguishment of native title would be disregarded in relation to land held under statutory schemes for the benefit of Aboriginal/Islander people, or expressly held or reserved for their benefit.[3]
- In 1998 s 47B was inserted to provide that at the time of the Federal Court determination prior extinguishment of native title would be disregarded in relation to vacant crown land.[4]

Likewise, in the context of townships located on Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976*, both Labor and the Coalition have implemented provisions for township leasing whereby the underlying freehold title and rights of traditional owners are not extinguished.

Examples of the application of the non-extinguishment principle in the NTA in relation to past acts or future acts (on any land) include:

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[1] Section 238 of the *Native Title Act 1993*.

[2] The provision only applies if a pastoral lease was held by or on behalf of native title holders when the native title application was filed.

[3] The provision only applies if one or more native title holders occupied the land when the native title application was filed.

[4] The provision only applies if one or more native title holders occupied the land when the native title application was filed.

- In 1993 the statute provided (and still provides) that category C and D past acts attract the non-extinguishment principle (ie the past grant of mining leases and other interests other than freehold or leasehold).[5]
- In 1998 provisions were inserted in relation to intermediate period acts (ie acts which affected native title between 1 January 1994 and the date of the High Court's *Wik* decision on 23 December 1996) which applied the non-extinguishment principle in the same fashion as for past acts (see above).
- In 1998 provisions were inserted whereby the non-extinguishment principle applies to certain future acts: primary production activity on pastoral or other non-exclusive leases (s 24GB(4)), management of water and air space (s 24HA(4)), the provision of facilities for services to the public (s 24KA(4)), low impact future acts (s 24LA(4)), and acts affecting offshore places other than compulsory acquisition (s 24NA(4)).

The purpose of the *Native Title Amendment Bill (No 2) 2009* is beneficial. It is intended to ensure that native title is not extinguished in relation to the provision of public housing and related matters on Aboriginal/Islander held land, and thus promote timely and consensual outcomes.

This protection of underlying title is already the case regarding Aboriginal freehold, and underlying or coexisting native title, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). As Mr Glacken SC explained, this is because acts affecting Aboriginal freehold are excluded from the future act regime under the NTA.[6] Since late 2008 the NLC has facilitated seven housing leases in communities located on Aboriginal land (with two further leases pending). These positive outcomes were underpinned by confidence that Aboriginal rights in relation to land would not be extinguished. Obtaining these positive outcomes would have been very difficult, if not impossible, if the legal position had been otherwise.

Drafting anomalies and related technical outcomes in the Federal Court mean that the same beneficial legal position does not apply in relation to Aboriginal/Islander held land outside of the Northern Territory. It is evident that the legislative intention in favour of non-extinguishment of native title regarding such land, which informed the statute including as amended in 1998, has not been fulfilled.

This legal position jeopardises consensual outcomes, since native title holders or claimants will be reluctant to participate in a process (whether under the new subdivision 24JAA process, or through their participation in entities responsible for granting leases) whereby leases are granted which extinguish or render extinguishment of native title (including where, legally, extinguishment occurs as a result of an anterior "past act"). The Bill is intended to remedy this situation but, as Mr Glacken SC explained, does not achieve that outcome.

One option to remedy this deficiency may be to expand the class of Aboriginal/Islander held land which is exempted from the future act regime. Underlying native title would then be protected in the same manner as is the case under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Further, the beneficial regime under ss 47, 47A and 47B should be amended to ensure a uniform outcome in relation to disregarding past extinguishment. Specifically these provisions should expressly apply to extinguishment from previous exclusive possession acts, and the drafting in s 47(2)(c) should be utilised in ss 47A and 47B so as to remove uncertainty. Section 47(2)(c) expressly states that any extinguishment of native title from "the doing of any act under the

[5] Sections 15, 231 and 232 of the NTA.
[6] Mr Sturt Glacken SC, opinion dated 29 January 2010, par 4.

[pastoral] lease or by virtue of holding the interest" must be disregarded. As Mr Glacken SC explained, it "is unclear why s 47A, added in 1998, does not adopt the same drafting."[7] Adopting that drafting in s 47A will ensure that public housing and other facilities do not extinguish native title on Aboriginal/Islander held land. The Bill should be redrafted to achieve this outcome.

This course would resolve evident incongruent reasoning in judgements of Full Courts of the Federal Court in *De Rose v South Australia (No 2)* 2005 145 FCR 290 and *Erubam Le v Queensland* 2003 134 FCR 155, in favour of the former such that an aspect of the judgement in the latter is reversed. As Mr Glacken SC explained, the reasoning in *Erubam Le* does not "sit well" with the reasoning in *De Rose*; the latter, if applied to the facts of the former, would have engaged the non-extinguishment principle such that native title was not extinguished.[8]

It should also be noted that the judgement in *Erubam Le* resulted in differential outcomes regarding extinguishment. Depending on timing some past public facilities on deed of grant in trust land in the Torres Strait extinguished native title, others did not.[9] As a matter of legislative policy, this differential or "patchwork" outcome is not appropriate.

Likewise the NLC's submission dated 28 January 2010 referred to a similar anomalous situation, whereby there is presently a differential outcome or "patchwork quilt" in relation to the extinguishment or non-extinguishment of underlying native title by "previous exclusive possession acts" in communities on Aboriginal land in the Northern Territory. Amendments (including to s 47A) to resolve this anomalous situation, as well as the differential outcomes in *Erubam Le*, would be appropriate.

2. Bill should only apply to land which was reserved for or held by Aboriginal/Islander people as of 2009

As stated in the NLC's submission dated 28 January 2010, to avoid doubt the Bill should be amended to clarify that the new consultative process therein applies only to land which was held or reserved for the benefit of Aboriginal/Islander people at the time it was foreshadowed in the discussion paper in 2009, but not to land held or reserved after that date.

3. Indigenous Land Use Agreements: removal of registration test

In their evidence to the Committee on 28 January 2010 Commonwealth representatives referred to potential unacceptable delay in the negotiation and registration of Indigenous Land Use Agreements (ILUAs) for housing in Aboriginal/Islander communities:[10]

> *It might be fair to say that even in a best case scenario ILUAs include a necessary statutory registration test period etc. In a best case scenario ILUAs take a minimum of 12 months.*

Delay arises because, after completion of the consultation process with native title holders or claimants and execution of an ILUA, it is still necessary to engage in an inherently lengthy

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[7] Mr Sturt Glacken SC, opinion dated 29 January 2010, par 9.

[8] Mr Sturt Glacken SC, opinion dated 29 January 2010, pars 8 and 9.

[9] Public works constructed between 1977 and 23 December 1996, being a windmill-driven pump, a windmill, and earth dam storage, a fibreglass reservoir and reticulation pipes, extinguished native title due to being previous exclusive possession acts. Public works constructed after 23 December 1996 up to 2002, being a house, a reticulated sewage scheme, and a sport and recreation stadium, did not extinguish native title. In both cases the deed of grant in trust owning entity retained full power to administer and manage those assets.

[10] Evidence of Mr John Litchfield, FaHCSIA p 38. See also the evidence of Ms Amanda Cattermole, FaHCSIA, at p 39.

registration process conducted by the Native Title Registrar. This is the case even when, as is ordinarily the case, an ILUA has been certified as properly authorised by the responsible native title representative body pursuant to s 203BE of the NTA.

In 2001 the Parliamentary Joint Committee on Native Title inquired in relation to Indigenous Land Use Agreements, including as to the effectiveness of the Native Title Registrar's registration function. The NLC submitted that the registration test gives rise to considerable and unjustifiable delay, and that the process involves duplication of functions by native title representative bodies and subsequently by the Registrar which, in its allocation of public funds, is necessarily inefficient.[11]

The NLC repeated its concerns in 2003 in submissions to the Parliamentary Joint Committee regarding its inquiry into the Effectiveness of the National Native Title Tribunal, and in 2006 in a detailed submission to the Attorney-General's department in response to a discussion paper dated 8 November 2005.[12] That submission, by reference to examples (see below), advised as to the significant resources and time which are inevitably required to comply with the registration test process. The NLC submitted that the inherent delay in the registration test was detrimental to the interests of all parties, and either should not apply (as for mining agreements under s 31(1)(b) of the NTA) or alternatively should not apply where an ILUA has been certified by the responsible native title representative body (which must comply with administrative law requirements). Aggrieved persons would retain rights under general law to challenge decisions including in the Federal Court or by complaint to the Ombudsman.

The NLC repeats that submission. The ILUA registration test (particularly regarding native title applications, as distinct from where native title has been determined to exist) is necessarily slow and resource intensive (commencing with a minimum notification period of three months),[13] considerably delays the implementation of agreements, and inappropriately provides an opportunity for a small number of aggrieved members of a native title group (or other persons) to frustrate and hinder the position of the group.

In relation to determined native title applications, there is only a limited right of objection which is vested in a native title representative body and cannot be exercised by an individual member of a native title group (s 24BD(4)(a)). Nonetheless the registration process still engenders significant delay, being in the order of six months. Determined native title applications are presently the exception, and this will likely remain the case for some years given the volume of applications before the Court.

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[11] In relation to its functions of facilitating and certifying ILUAs, a native title representative body must identify native title groups and their decision making processes, and investigate and resolve any disputes. This consultative process requires anthropological and legal advice, with significant expenditure for that purpose. In relation to the registration test a representative body will then be required to satisfy the Native Title Registrar that it has properly certified the ILUA. The Registrar, in turn, needs to be resourced so that it can employ professional staff to assess whether the professional staff or consultants engaged by the representative body have properly performed their functions. In other words the registration process requires that the Registrar duplicate the statutory functions which have already been performed by the representative body, and contemplates that both entities expend significant resources - at the taxpayers' expense - to achieve that duplication. The process, in its allocation of public funds, is necessarily inefficient.

[12] The Attorney-General department's discussion paper focused on prescribed bodies corporate, however in light of departmental discussions the NLC broadened its response to include the ILUA registration process. Subsequently the department proposed technical and workability amendments which were contained in the *Native Title Amendment Bill 2006* which was considered by the Senate Legal and Constitutional Affairs Committee in 2007. That Bill did not deal with the ILUA registration test concerns raised by the NLC.

[13] Section 24CH(2)(d) of the NTA.

The issue does not arise in relation to mining agreements under s 31(1)(b) of the NTA, since the registration test does not apply. A $1 billion uranium mine on a pastoral lease will be valid and enforceable at the time of execution of an agreement under s 31(1)(b), whereas an ILUA on the same lease regarding a minor tourism development in practice will not be enforceable until after the completion of the (lengthy) registration process. Likewise, where a mining development involves both an agreement regarding a minerals tenement under s 31(1)(b) and also an agreement regarding a mining company's associated use of land under an ILUA, the former will be valid and enforceable at the time of execution but the latter will be subject to a lengthy registration process.

Likewise, in relation to Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), an agreement once executed is legally binding. It is not subject to a registration process.

This procedural dichotomy between mining and non-mining native title agreements did not apply prior to the 1998 amendments. Relevantly the parties to the Alice Springs to Darwin railway agreement (which concerned both Aboriginal land and land subject to native title claim), when signing the agreement in February 1999, ensured that it was backdated prior to 1 October 1998 to ensure that the new ILUA registration provisions would not be applicable. This meant that the agreement was valid and enforceable immediately upon execution, rather than likely to be frustrated for a year or more due to the registration process.

The NLC's experience of inordinate delay in the registration process confirms these concerns. Where there is no objection, the registration process ordinarily takes around six months and requires significant resources.[14] Where objections are lodged, the process is considerably longer and requires significant resources - as summarised in the following table regarding objections to ILUAs in the NLC's region.

Matter	**Delay between execution and registration of ILUA**[15]	**NLC resources used to comply with process**
Bradshaw defence ILUA	9 months (registered 6 April 2004)	senior solicitor - 9 days senior anthropologist - 5 days
Cox Peninsula water easement ILUA	11 months (registered 12 January 2006)	senior solicitor - 3 days senior anthropologist - 3 days
A National Park ILUA	2 years 7 months (registered 10 October 2007)	senior solicitor - 15 days senior anthropologist - 7 days
A Community Living Area ILUA	11 months (registered 17 November 2009)	senior solicitor - 12 days senior anthropologist - 5 days

All matters concerned pre-existing disputes which were known to, and considered by, the NLC at the time of certification. Each objection was rejected, and the ILUA registered.

[14] As stated above, there is a minimum notification period of three months under s 24CH(2)(d) of the NTA.

[15] In each matter an application for registration was formally filed with the Registrar shortly after execution of the ILUA.

By way of illustration the Bradshaw defence ILUA was executed by all parties at a public ceremony held in Timber Creek in the Northern Territory on 16 July 2003 (it was preceded by an in principle agreement which was executed on 13 May 2001). The NLC certified the agreement on 23 July 2003, and it was lodged with the Registrar for registration who commenced a notification and advertising process.

The agreement was made on behalf of approximately 800 traditional owners from five language groups. On 3 December 2003 three persons lodged an objection to the ILUA. The objection concerned a pre-existing dispute which was known to the NLC, and was the subject of anthropological and legal advice at the time of certification. All three persons were signatories to the in principle agreement of 13 May 2001 (which was not an ILUA) which concerned the withdrawal of a land claim regarding adjacent land under the *Aboriginal Land Rights (Northern Territory) Act 1976*, and which also contractually bound the parties to enter the ILUA. None of the three persons, under Aboriginal tradition, were senior or authoritative, and they had only a limited connection with Bradshaw due to residence elsewhere. One of the persons was not a traditional owner of Bradshaw at all.

An initial submission in response to the objection was filed on 15 December 2003, with comprehensive written material filed on 11 March 2004. The material was in the same form as would be filed in Federal Court proceedings, and considerable time and resources were necessary bearing in mind that reducing anthropological and legal concepts to writing is time consuming, and also the existence of substantial documentary material deriving from previous proceedings which required perusal. The ILUA was registered on 6 April 2004, nine months after it was executed.

The other three matters also concerned pre-existing disputes which were known to, and considered by, the NLC at the time of certification. The Cox Peninsula water easement ILUA involved an objection by one member of a 1,500 person Aboriginal group, and the Community Living Area ILUA involved an objection by two members of the Aboriginal association which was to receive freehold title to the land - despite the fact that all members of the association were in favour of receiving that title (the dispute concerned the NLC's acceptance of anthropological advice that the objectors were not native title holders).

Ordinarily Australian citizens and institutions are protected from inappropriate or vexatious litigation by the procedures and practices, including cost considerations, that apply regarding review in the Federal Court or other courts. No such protection exists in relation to the lodgement of objections to the registration of an ILUA. The outcome is that scarce resources must be allocated in relation to objections by aggrieved persons, notwithstanding that their concerns were expressly considered in the certification process - and notwithstanding that, if not, review could readily be sought in the Federal Court. Further, property owners - in this case native title holders - are subject to considerable delay before they can benefit from agreements regarding their land, a position which does not apply to other property owners.

The Commonwealth's evidence and the concerns of State Governments are confirmatory of the NLC's longstanding position and concerns regarding the ILUA registration process. Legislative reform to remove the ILUA registration requirement - at least where certified by a representative body - would greatly improve the capacity of governments to timeously deliver urgent public housing in Aboriginal/Islander communities by agreement. The certification process provides a sufficient safeguard to ensure confidence that decisions are properly made by native title groups. An additional administrative safeguard, being an assessment of the representative body's certification by the Native Title Registrar, cannot be justified.

Information in the National Native Title Tribunal's 2008/09 annual report is confirmatory of the NLC's position. In 2008/09 the Registrar applied the registration test to 52 ILUAs, this being the same as the average number of ILUAs registered over the previous four years. Four matters were the subject of objections or legal concerns, with 90% of the remaining 48 ILUAs being registered within six months. The total cost of processing the 52 matters was $1,737,907, at an average cost of $33,421 per matter.[16] (Similar additional costs would likely have been incurred by representative bodies and other parties in relation to the process.) The Tribunal does not report in relation to the time and resources required to process objections, or as to the quality of its performance regarding that processing.[17] The Tribunal's previous annual reports are in similar terms.

It appears that the vast majority of ILUAs are registered without objection, however the parties are precluded from benefiting from their executed agreements for six months. As explained above, it is difficult to justify this delay from a policy perspective.

Removing the ILUA registration requirement, at least where certified by a representative body, is an overdue reform which would likely be of greater effect in achieving the Bill's purpose of facilitating urgent public housing in Aboriginal/Islander communities than the process contained in the Bill. The reform would also promote the objectives expressed in various submissions by Aboriginal/Islander groups to the Committee, and shared by the NLC, of promoting resolution of native title matters by agreement, rather than other processes.

It is submitted that it would be appropriate for the Committee to consider this issue in this inquiry, and to that end to seek a response from the Commonwealth and other governments.

[16] National Native Title Tribunal Annual Report 2008/09 pp 76 to 78.

[17] The National Native Title Tribunal Annual Report 2007/08 stated at p 73: “As a matter of policy, ILUAs in relation to which objections are received are not included in performance figures.”