Attachment 1:

AIATSIS Comments on Exposure Draft: Proposed amendments to the Native Title Act 1993

October 2012

AIATSIS Native Title Research Unit

Comments on Exposure Draft: Proposed amendments to the *Native Title Act 1993*

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Introduction

On 6 June 2012 the Attorney-General announced that the Australian Government will progress a number of amendments to the *Native Title Act 1993* (the Act), relating to 'good faith' and associated provisions under the 'right to negotiate' regime, the disregarding of historical extinguishment of native title in areas such as parks and reserves, and processes for Indigenous Land Use Agreements. The exposure draft of the proposed amendments was made available for public comment on 21 September 2012. In brief, the proposed amendments are designed to:

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

Our comments on each of these issues are provided separately below. In summary, we offer qualified support for the changes proposed related to 'good faith' negotiations and historical extinguishment, but argue that the reforms do not go far enough towards rectifying inequities inherent in the existing legislation. We make a number of recommendations to addressing these.

In relation to the streamlining of ILUA processes, we indicate our support of the proposed changes and recommend some refinements to the exposure draft as it currently stands. The most significant of these is a proposal to retain the three month period for objections or new claim applications, rather than reducing it to one month.

1. Disregarding historical extinguishment

1.1 Summary

The proposed s 47C is a welcome refinement of the operation of extinguishment rules under the Act. It represents a positive move to ameliorate the current law's arbitrary extinguishment of native title in circumstances that are unjustifiable in terms of both policy and jurisprudence. Allowing governments to agree to disregard the extinguishing effect of past grants and reservations in national parks and conservation reserves will enable the recognition of native title in these areas, whereas currently such recognition is impossible even with the agreement of all parties.

However, elements of the proposed s 47C—in particular the requirement of government agreement, its limitation to parks and reserves, and the exclusion of marine areas— will continue to unnecessarily constrain the recognition of Indigenous people's traditional rights and interests. We argue that a broader disregarding of historical extinguishment is warranted given the principles of justice outlined in the Preamble of the Native Title Act and Australia's various human rights international obligations. Such an extension would be workable and would not impose significant practical issues. Moreover, by potentially opening up more areas of land to the use and enjoyment of native title holders and their families, this approach potentially offers considerable benefits in other policy areas related Aboriginal and Torres Strait Islander peoples' health and wellbeing.

1.2 Issues in the current law

Native title is the Australian legal system's way of recognising the traditional ownership of land and water by Aboriginal and Torres Strait Islander peoples under their own laws and customs. The Australian legal system contains rules specifying the nature of the rights and interests that may be recognised, and the areas where they will be recognised. These have been called 'rules of recognition'.[1]

Extinguishment of native title is one of the primary rules of recognition. It is premised on the proposition that States, Territories and the Commonwealth have the legal power to deny recognition of Indigenous legal rights and interests, either by legislation or by the grant of inconsistent interests to other parties. A central rationale for this particular rule of recognition is that the landholders (and others, such as licensees) who have rights and interests under a grant from the Crown are entitled to retain those rights and interests; on this view, it would be unfair and economically disruptive to undermine private interests' security of title.

In cases where there are no other private landholders whose rights and interests are seen to require protection from the recognition of native title, a central rationale for excluding recognition falls away. Where the State, Territory or Commonwealth is the only party with any interest in an area of land or water, the recognition of the underlying Indigenous legal rights and interests is a matter between the government and the traditional owners. There are no other private interests to be taken into account. Furthermore, where there is no public or governmental use to which such an area is currently being put (or intended to be put), there is nothing to weigh against the claims of the traditional owners. In such cases there is no defensible reason to deny recognition of their traditional rights. (It is for this reason that so-called 'unallocated Crown land' is capable of being subject to exclusive possession native title.)

There is still no coherent reason to deny recognition in cases where land has once been subject to a grant or reservation that is inconsistent with native title but later becomes free of that encumbrance. In such cases there are again no competing public or private interests to militate against the full recognition of traditional rights. However, the rules of recognition under the current Native Title Act treat the land as if such competing interests still existed and deny recognition accordingly. In the *Fejo* case, the High Court held that once native title had been extinguished it could not be revived even after the relevant extinguishing act had come to an end.[2] Yet where these

[1] French, RS (2009) 'Native Title – a constitutional shift?', JD Lecture Series, University of Melbourne Law School, 24 March 2009.

[2] *Fejo v Northern Territory* [1998] HCA 58.

grants or reservations are 'historical' their extinguishing effect is merely residual or vestigial – it is not supported by relevant considerations of policy, fairness or jurisprudential logic. There is no reason to deny recognition of the rights traditional owners hold under their own laws, in situations where there are no competing land uses. That is equally so whether an area of land has never been subject to an inconsistent grant or whether it was so only for a limited period.

QSNTS' March 2010 submission *Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* provides a number of actual examples of this anomaly in action: townships that were gazetted but never actually built, land granted as freehold that has since been abandoned and surrendered back to the Crown; and leasehold interests expiring and not being renewed. In these cases there is literally nobody left to hold the kind of competing interest that would have otherwise justified the denial of recognition to the rights and interests of traditional owners under their own laws and customs. Similarly, where land has been reserved for a public purpose but never used for that purpose, or reserved for a purpose which is now redundant and inapplicable, there is no relevant public interest to compete against the recognition of the claims of traditional owners.

The current Chief Justice of Australia, French CJ, has on a number of occasions queried the merit of the current law about historical extinguishment.[3] In a 2002 consent determination judgment he notes that traditional law and custom remains despite such extinguishment:

> There are certain areas that are excluded from the determination, in some cases because native title is thought to have been extinguished by operation of the Act or by operation of the common law. … This simply means that native title in such cases cannot be recognised by the Courts. There is a limitation on the recognition which can be granted under the Native Title Act. The relationship of the people to their country in those areas is not changed by the limits that the Act or the common law place on recognition. If it is their country under their traditional law and custom it remains so under their law and custom whatever the Act or the common law say about recognition.[4]

His Honour has expressed concern that the use of the term 'extinguish' as a metaphor for the non-recognition of Indigenous rights and interests carries a sense of finality that is inapt to describe the effect of a mutable rule of recognition or non-recognition. He suggests that the use of the 'extinguishment' metaphor has created conceptual confusion that has impeded the development of a coherent theory of extinguishment.[5] In relation to the *Fejo* decision, his Honour said that 'it is not clear why revival [of native title] is precluded' after an extinguishing tenure has been surrendered, since extinguishment relates only to common law native title and not the subject matter of recognition (ie the underlying rights and interests held under traditional law and custom).[6] In the context of this law reform submission, it is not necessary to argue about whether *Fejo* was wrongly

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[3] French, RS (2008) 'Lifting the burden of native title – some modest proposals for improvement', address to the Native Title User Group, Adelaide, 9 July 2008; French, RS (2010) 'The Role of the High Court and the Recognition of Native Title', in Strelein, L (ed) (2010)*Dialogue about land justice,* Aboriginal Studies Press, Canberra at pp97 and 111.

[4] *James on behalf of the Martu People v Western Australia* [2002] FCA 1208 at [12].

[5] French, RS (2010) 'The Role of the High Court and the Recognition of Native Title', in Strelein, L (ed) (2010)*Dialogue about land justice,* Aboriginal Studies Press, Canberra at p 97.

[6] French, RS (2010) 'The Role of the High Court and the Recognition of Native Title', in Strelein, L (ed) (2010) *Dialogue about land justice,* Aboriginal Studies Press, Canberra at p 111.

decided in strict legal terms. It is sufficient to make a case for legislative amendment to alter the legal situation post-*Fejo*.

The Native Title Act currently contains limited provisions to compensate for the anomaly of historical extinguishment. Sections 47, 47A and 47B require the extinguishing effect of certain past acts to be disregarded in limited circumstances. The common thread of ss47 and 47A is that the extinguishing grants are still in force but are held by or for the benefit of the traditional owners themselves. That is, ss47 and 47A exclude extinguishment where the traditional owners are the only current beneficiaries of the extinguishing grants. Section 47B is slightly different, in that it applies to land that is currently legally 'vacant' – empty of other grants or interests – but was once the subject of an extinguishing act.

1.3 Agreement should not be necessary for parks and reserves

The current historical extinguishment laws do not satisfy Australia's obligations and commitments under the *United Nations Declaration on the Rights of Indigenous Peoples* and other human rights instruments. The Commonwealth is not currently discharging its duties to give legal recognition to Indigenous rights in land and water,[7] to ensure that Indigenous people can maintain and strengthen their distinctive spiritual relationship with their traditionally owned territories,[8] and to prevent or provide redress for dispossession.[9] The rights in the Declaration represent well-established norms of human rights law, including rights to property and non-discrimination. While in some circumstances human rights must be balanced against each other, in the case of historical extinguishment there are no competing rights or interests to warrant the denial of recognition of native title.

The proposed s 47C does not rectify this unacceptable situation. By making the disregarding of historical extinguishment over parks and reserves dependent on the agreement of the relevant government, the amended Act would leave it open to States and Territories to deny recognition of native title at will – even where the act that originally extinguished the native title is no longer practically relevant. The Commonwealth has a duty to use its superior legislative power to ensure the rights of Aboriginal and Torres Strait Islander peoples are respected, and cannot simply leave the choice to the States and Territories.

It must be emphasised that disregarding the extinguishing effect of previous grants or legislation has no impact on the actual ongoing interests held by governments or others in the park or reserve area. To the extent that current grants or reserves are inconsistent with native title, they will prevail to the extent of the inconsistency. So much is clear from proposed s 47C(8). The only effect of the disregarding provisions is:

(a) To disregard the effect of other tenures that existed prior to the current park or reserve arrangements, such as a timber or pastoral lease in the area; and

(b) To preserve the native title rights and interests so that they may be 'revived' if the current park or reserve arrangements are altered in the future.

[7] Art 26.

[8] Art 25.

[9] Art 8(2)(b).

So in areas where the creation of currently existing national parks is held to be entirely inconsistent with native title, native title rights and interests would have to give way. The decision whether or not to withdraw the relevant grant or reservation would remain with the government.

Disregarding extinguishment has the capacity to *reduce* rather than increase the compensation liability of governments where it nullifies the extinguishing effect of any interest granted after 1975. Further, there are potentially significant efficiencies to be gained in relation to historical tenure searches and assessment. Tenure analysis constitutes an extremely costly and time-consuming part of settlement processes, and so avoiding the need to check grants of interests back to the assertion of sovereignty would deliver efficiencies to the system. There are cases in which governments negotiating native title consent determinations have resolved to search only current tenures, and not to conduct searches further back into history. This streamlined approach would become the norm for parks and reserves if the parties' agreement is not required (otherwise government parties might consider it necessary to perform the search before entering an agreement).

There is a growing body of literature that points to the potential social benefits in areas of health and welfare that accompany Indigenous Australian's ownership of, access to and use and enjoyment of their traditional lands.[10] The potential expansion to the Indigenous estate that will be facilitated by the proposed amendments, particularly in areas of high ecological and cultural value, will generate considerable returns in other areas of Indigenous social policy. The Commonwealth has the opportunity to extend this benefit by broadening even further the capacity to disregard prior extinguishment, through the removal of the need for government consent; the extension of the principle to include marine areas; allowing parties to agree to any disregarding of historical extinguishment, and removing the need to prove occupancy at the time of extinguishment.

- **Recommendation 1:**

  That the proposed s47C, dealing with parks and conservation reserves, be changed to remove the requirement for government agreement. The section would then operate in a way similar to ss47, 47A and 47B (subject to the further change to those sections proposed below).

1.4 Marine parks should not be excluded

The proposed s 47C would not apply to marine parks. There does not appear to be any legal or policy reason for this exclusion. In cases where the relevant connection under traditional law and custom can be shown, and the rights and interests claimed are otherwise consistent with the laws of Australia, there is no relevant difference between on-shore and off-shore places. To the extent that there is any concern about the ability of governments to regulate activities (including fishing for commercial purposes) off-shore, it must be remembered that the disregarding of extinguishment has no effect on the validity of the extinguishing act. The ability of governments to regulate

[10] See for example: Weir J (ed), *Country, native title and ecology* (Aboriginal History Monograph 24), ANU E-Press, Canberra, 2012; Altman J and S Kerins (eds), *People on Country: Vital landscapes Indigenous futures,* Federation Press, Melbourne 2012; Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Benefits Associated with Caring for Country*, AIATSIS 2011, www.environment.gov.au/indigenous/.../pubs/benefits-cfc.doc .

effectively is entirely unrestrained. Section 211 may allow non-commercial activities without a licence, but does not allow native title holders to escape regulation of commercial activities.

- **Recommendation 2:**

  That the proposed s47C be changed so that the section applies to marine areas as well as on-shore places.

1.5 Broader disregarding of historical extinguishment

Beyond the special case of national parks and conservation reserves, there is a range of other situations in which historical extinguishment ought to be disregarded. The arguments above in relation to s 47C are generally applicable to these other situations, and so it is submitted that the agreement of parties should not be necessary for extinguishment to be disregarded in a broad variety of cases. It is recognised, nevertheless, that the diversity of such circumstances may cause policymakers to be hesitant about the creation of a blanket rule of automatic application. There may be concerns about unforseen complications. It may be appropriate, in light of such concerns, to proceed more gradually in respect of broader disregarding provisions. Accordingly, a requirement for parties to agree to disregard extinguishment may be appropriate.

An additional section should therefore be introduced into the Native Title Act allowing extinguishment to be disregarded wherever the relevant government agrees. The drafting of the proposed s 47D in the *Native Title Amendment (Reform) Bill (No. 1) 2012* serves as a good model, subject to a clarification to ensure that the new section does not detract from the compulsory effect of ss 47-47B (and the s 47C proposed in these submissions). The drafting proposed is as follows:

> **47D Agreements to disregard prior extinguishment**
>
> *When section applies*
>
> (1) This section applies if:
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> (a) an application under section 61 is made in relation to an area; and
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> (b) before a determination on the application is made, there is an agreement in writing between the applicant and the Government party that the extinguishment of native title rights or interests by a prior act affecting native title in relation to the area, or any part of the area, covered by the application be disregarded.
>
> *Prior extinguishment to be disregarded*
>
> (2) For all purposes under this Act in relation to the application, any extinguishment of the native title rights and interests by any of the following acts must be disregarded:
>
> (a) the prior act itself;
>
> (b) the creation of any other interest in relation to the area as a result of the prior act;

(c) the doing of any act by virtue of holding the interest.

Effect of determination

(3) If the determination on the application is that the native title claim group holds the native title rights and interests claimed:

(a) the determination does not affect:

(i) the validity of the creation of any prior interest in relation to the area; or

(ii) any interest of the Crown in any capacity, or of any statutory authority, in any public works on the land or waters concerned; and

(b) the non-extinguishment principle applies to the creation of any prior interest in relation to the area.

Other provisions not affected

(4) Nothing in this section affects the operation of ss 47, 47A, 47B or 47C so as to make the disregarding of extinguishment under those sections conditional on the agreement of any party.

- **Recommendation 3:**

That a new s47D be drafted which allows for parties to agree to the disregarding of any historical extinguishment.

1.6 An unnecessary requirement to demonstrate occupation

Under the existing ss 47A and 47B, claimants are required to demonstrate that at least one group member 'occupied' the relevant area at the time the native title application was made.

The relevance of this limitation may be queried as it adds an additional requirement of proof without apparent justification. Given that claimants are still required to demonstrate their entitlement to the area under traditional law and custom, and given that ss 47A and 47B are premised on the absence of competing claims on the land, it is not clear what further policy purpose is served by insisting on this additional evidentiary burden. This requirement impedes the recognition of traditional rights and interests that would in any other circumstances be recognised. Accordingly this unnecessary requirement should be removed.

- **Recommendation 4:**

That the requirement for claimants to prove occupancy be removed from ss 47A and 47B, and that it not be reproduced in the proposed ss 47C and 47D.

2. Negotiation in Good Faith

2.1 Summary

The proposed amendments contain a number of valuable changes that have been sought for many years. Nevertheless, they do not address serious flaws and contradictions in the existing legislation. The effectiveness of the proposed s 31A(2) will be minimal unless the incentive structure in which negotiations take place is altered. Addressing this requires further changes to the powers and decision-making processes of the National Native Title Tribunal (NNTT), and a requirement for negotiations to run their course before a s 35 application can be made. Further, the indicia of good faith should be more detailed and substantive, and should be mandatory minimum criteria rather than indicative factors.

2.2 Benefits of proposed amendments

The amendments proposed to the 'right to negotiate' provisions within the Native Title Act constitute a very positive development. The following aspects of the exposure draft are particularly commendable:

- *Requiring the use of 'all reasonable efforts' to reach agreement*: Whereas previous decisions have held that parties do not need to demonstrate that they have taken every reasonable effort to reach agreement,[11] the proposed s 31A(1) brings the law into line with the sentiment expressed in the Preamble of the Native Title Act. The concept of 'all reasonable efforts' is by no means a rare or unusual element of statutory and contractual schemes, and Tribunals and Courts will not face any particular difficulties in interpreting it in the native title context. The fact that some test cases may be required to refine the factual detail of the test is no reason to avoid what is otherwise a valuable legislative change. Such cases are unlikely to be an ongoing source of delay or uncertainty, once the principles are settled.
- *Emphasising the establishment of good relationships between parties*: The requirement imposed by the proposed s 31A(1)(b) provides an additional safeguard for the negotiation process, ideally incorporating an additional emphasis on active engagement with the process.
- *Explicitly allowing the Tribunal to consider the reasonableness of offers*: Although the cases already establish that the reasonableness of offers may be considered in the assessment of good faith,[12] it is useful to specify this in the legislation.
- *Increasing the minimum time before a s 35 application may be made*: Increasing the period in s 35(1)(a) from 6 months to 8 months brings two important benefits. Firstly, this increases the likelihood that well-designed and culturally-appropriate decision-making processes can be established and implemented. Secondly, it increases the incentive for parties to reach agreement by making it less attractive simply to 'wait out' the minimum period before applying for arbitration.

[11] For example, *Walley v Western Australia* [1999] FCA 3 at [16].

[12] *Brownley v Western Australia* [1999] FCA 1139 at [35]-[36]; *Walley v Western Australia* [1999] FCA 3 at [15]).

- *Putting the evidentiary burden on the party asserting their own good faith*: Currently native title parties face significant evidentiary difficulties when attempting to establish the lack of good faith on the part of proponent parties. In part, these difficulties result from the inherent difficulty in proving a negative. Placing the onus on proponent parties to demonstrate their own good faith ameliorates this problem.
- *Allowing the Tribunal to impose a further period of negotiation if it finds a lack of good faith*: This proposed reform provides useful guidance about what should happen in a case where arbitration cannot be made because of a lack of good faith negotiation.

2.3 Issues in the current right to negotiate arrangements

The 'right to negotiate' regime has long been criticised for its narrow operation and the difficulty of its enforcement.[13] It has frequently been interpreted in ways that fall short of its description in the Native Title Act's preamble, and far short of recognising the right of traditional owners to make decisions about their land and waters. It is likely that its interpretation has also been narrower than may have been intended by its drafters. The existing 'right to negotiate' framework contains serious logical contradictions that limit its effectiveness.

These contradictions are not resolved by the proposed amendments, and so the proposed s 31A is likely to have a merely negligible effect on the substance of negotiations. There is a fundamental contradiction in the NTA between:

a) The requirement that proponents have a genuine intention to reach agreement with native title parties; and,

b) The reality that a Tribunal determination will almost certainly be in the proponent's favour.

Over 95% of future act determinations made by the Tribunal have allowed the proposed act to be done; in 50% of those the Tribunal did not impose any conditions.[14] In the remaining 32 decisions where conditions were imposed, the conditions have generally been very limited. The Native Title Act has in effect resulted in a system where proponents are required to hold a sincere and honest intention to reach agreement, and yet arbitration is a viable option for achieving their ultimate commercial goals.[15] In reality, the best that a proponent can do is behave *as if* they genuinely want to secure agreement, when the system does not give them any incentive for doing so.

The problematic result of this contradiction is *not* that agreement is not reached in most cases, but rather that agreement is frequently reached in circumstances that render the native title party's consent far from meaningful. Tribunal statistics are likely to show that a large proportion of future acts are resolved by agreement, but those statistics do not disclose the number of native title parties

[13] See for example: Burnside S, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis', *Land, Rights, Laws: Issues of Native Title,* vol.4, no.3, October 2010; De Soyza, A, 'Engineering Unworkability: The Western Australian State Government and the Right to Negotiate', *Land, Rights, Laws: Issues of Native Title,* No.26, October 1998.

[14] Of the 67 determinations listed on the Tribunal website, only three did not allow the future act to be done: *Weld Range Metals Limited/ State of Western Australia/Ike Simpson and Others on behalf of WajarriYamatji* [2011] NNTTA 172; Seven Star Investments Group Pty Ltd/State of Western Australia/Wilma Freddie and Others on behalf of Wiluna [2011] NNTTA 53; *Holocene Pty Ltd/State of Western Australia /Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu)* [2009] NNTTA 49.

[15] *Strickland &Anor v Western Australia* [1998] 868 FCA.

who feel as though they were forced into agreement by the implicit threat of an arbitral decision. In such cases, the idea that consent was 'freely' given must be rejected.

Further, statistics that show a relatively low number of cases in which proponent parties are found not to have negotiated in good faith do not constitute an effective defence of the current system.

As long as the framework of risks, costs and incentives associated with the right to negotiate remains unchanged, these contradictions will continue to create confusion and frustration for all parties. Legislative amendments may provide greater guidance about the processes to be followed, but proponents will still be asked to negotiate as if they genuinely sought the agreement of the native title parties, knowing all the time that they can achieve their objectives without such agreement.

The following Recommendations 5 and 6 propose ways in which these contradictions may be addressed. Recommendation 7 addresses the content of the proposed s 31A and discusses some ways in which that section could be made more effective.

2.4 Tribunal powers and decision-making

The most direct way of remedying the incoherence in the current framework is to expand the types of conditions the Tribunal can impose when allowing future acts to be done, and to provide more specific guidance to the Tribunal about how it should weigh up different factors in s 39. There is currently also an enforced disjuncture between the content of future act negotiations and the content of future act arbitrations. Section 38(2) prohibits the Tribunal from considering the economic issues that are likely to play a strong role in the negotiations between parties. In reality, the Tribunal is not arbitrating the same matter as has been the subject of negotiations. In 2011 AIATSIS supported a proposed amendment to allow the Tribunal to impose conditions requiring proponents to pay money to native title parties calculated by reference to profits, income or production. The AIATSIS submission noted:

> The three methods are commonly employed by parties in negotiated future act agreements, and the arbitrator will be capable of taking submissions from the parties and considering a variety of evidence in support of or against such a condition.[16] Currently, if the Tribunal is asked to determine a future act application where negotiations under section 31 have not produced an agreement, it cannot arbitrate between the parties on the central matter of financial compensation for the effect on the native title interest, but is restricted to allowing the future act or not, with or without other conditions. As a result, matters before the arbitrator may be misdirected to issues unrelated to the source of the dispute.[17]

The Minister for Indigenous Affairs has expressed the importance of harnessing the potential for Indigenous economic development through native title agreement making in her often cited Mabo Lecture of 2008.[18] There is no doubt amongst native title negotiators and representative bodies that future act agreement-making process often fails to provide sustainable economic opportunities for native title parties. The amendments proposed in this submission can go some way to improving that failure by providing a sound commercial basis for proponents to make agreements that

[16] For example, a mining company proponent is already obliged to make detailed statements to mining ministries and to the stock exchange about the expected worth of a project, and the three proposed methods enable the Tribunal to utilise the one it finds to be appropriate for the facts of the matter, including appropriate flexibilities inherent in the formulae.

[17] AIATSIS, 'Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011', Canberra, 2011, p.5.

[18] Jenny Macklin, 2008 Mabo Lecture, "Beyond *Mabo*: Native title and closing the gap", James Cook University, Townsville, 21 May 2008.

genuinely contribute to the economic and social wellbeing of native title parties. Adjusting the law to lessen the negotiation handicap on native title parties is likely to result in agreements that more accurately reflect the property and resource values of projects.

In addition, s 39 should be amended to include more detailed guidance to the Tribunal in weighing up the various factors listed in that section. In particular, the Tribunal should be directed to give particular consideration to s 39(1)(b) 'the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or water …'. It would be possible to specify a greater weight for this factor without recognising fully the right of native title parties to prevent the doing of the act without their consent.[19] Making this change would bring the Native Title Act more into line with international human rights standards.[20]Although the arbitration process exists to bring an end to negotiations which have not led to agreement, the commencement of arbitration does not absolve the Commonwealth government of its obligation to seek the free, prior and informed consent of the native title party before allowing a future act to be done. Arbitral decisions should be squarely focused on determining the conditions on which the native title parties *would* agree to the doing of the relevant act, and should attempt so far as possible to put those conditions into effect. Where the native title party maintains its lack of consent, this should seriously raise the prospect of a determination that the act should not be done at all.

If these two changes were made they would dramatically improve the prospect of proponent parties negotiating with the genuine intention of obtaining the agreement of native title parties. Making agreement genuinely preferable to arbitration, or at least not clearly inferior, would constitute an important improvement to the native title system.

In its submission in relation to the *Native Title Amendment (Reform) Bill 2011,* the Attorney-General's Department stated that 'The Government will only undertake significant amendments to the *Native Title Act 1993* (the Act) after careful consideration and full consultation with affected parties to ensure that amendments do not unduly or substantially affect the balance of rights under the Act.'[21] It would be concerning if the Government's starting point is literally to ensure that no substantial change to the balance of rights is made. A better approach would be to see the law reform process as an opportunity to ask whether the balance of rights struck in 1993 and 1998 is appropriate, and to change that balance if it is found wanting. Further, it should not necessarily be assumed that the judicial interpretation of the future act provisions accords with the actual legislative intention — it is possible (as perhaps was the case in *QGC v Bygrave*[22]) that the drafting of the Act did not capture the spirit of what the Parliament intended. In such a case, the question should be left open as to whether reforms should substantially alter the balance of rights under the Act.

[19] See *Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of WajarriYamatji* [2011] NNTTA 172

[20] Art 32(2), United Nations Declaration on the Rights of Indigenous Peoples.

[21] Commonwealth of Australia (2011) *Submission: Senate Legal and Constitutional Affairs Legislation Committee – Inquiry into the Native Title Amendment (Reform) Bill 2011*, at p 2.

[22] *QGC Pty Limited v Bygrave* [2011] FCA 1457.

- **Recommendation 5: Tribunal powers and decision-making**

That s 38(2) be amended in the way proposed by the Native Title Amendment (Reform) Bill 2011, replacing the current sub-section with the following:

> **Profit-sharing conditions may be determined**
>
> (2) Without limiting the nature of conditions that may be imposed under paragraph (1)(c), they may, if relevant, include a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
> (b) any income derived; or
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

Such an amendment should also include guidance about how the Tribunal ought to exercise its power to impose profit-sharing conditions.

2.5 Time limit before s 35 application can be determined

The current rules governing the timing of applications for Tribunal arbitration do not support genuine and effective negotiations. They allow parties to seek arbitration before all avenues for negotiation have been exhausted, thus undermining the rationale of the 'right to negotiate' and departing from the focus on free prior and informed consent contained in the Declaration of the Rights of Indigenous Peoples.

The Full Court of the Federal Court stated in *FMG Pilbara Pty Ltd v Cox* that:

> We do not agree that there is a requirement for negotiations to have reached a certain stage. The Act makes no reference to the parties reaching any particular stage in their negotiations. The interpretation adopted by the Tribunal and contended for by [the native title party] is an additional requirement which is not to be found in the Act. It puts a gloss on the statutory provisions and places a fetter on a negotiation party's entitlement to make an application under s 35 in order to obtain an arbitral determination.[23]

Arguably, the introduction of the requirement to use 'all reasonable efforts' to reach agreement (proposed s 31A(1)(a)) would implicitly require parties to exhaust all avenues towards a negotiated settlement before approaching the Tribunal for an arbitration. It would therefore not be a large step to make that explicit in the legislation. Certainly, the introduction of s 31A(1)(a) without more would introduce uncertainty in the system and the matter would very likely be litigated. It seems preferable for the Commonwealth to make its policy intentions clear on this point.

There are good policy reasons for requiring negotiations to run their course before the Tribunal intervenes. Increasingly, parties are employing best practice processes of agreement-making including developing negotiation protocols. If proponents are able to access arbitration after a mere

[23] *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 at [23].

six (or eight) months of such preliminary negotiations, without allowing a proper opportunity for substantive negotiations about the future act, then the Tribunal may be deciding on matters that are still capable of agreement between the parties. This may result in pressure on parties to negotiate without clear negotiation protocols, which is clearly a departure from the Commonwealth government's emphasis on best-practice agreement making.

The following is a suggestion for how such a requirement could be drafted:

> (2A) The arbitral body must not make the determination unless the negotiation party that made the application under section 35 for the determination satisfies the arbitral body that negotiations between the parties have reached the point where no further progress towards agreement is likely.

In this way, the 8 months in the amended s 35(1)(a) would serve as a minimum period for negotiations rather than (effectively) a maximum after which an arbitration application could occur at any time. It must be emphasised that the parties are free to conclude an agreement at any time before the 8 month period ends; it is only the recourse to arbitration that must wait.

- **Recommendation 6: Time limit before s 35 application can be determined**

  That s 36 be amended so that the Tribunal cannot make an arbitral decision until negotiations have reached the point where it is clear that the parties are unable to agree.[24] *This relatively minor and simple amendment to timing requirements for arbitration applications would achieve a large improvement in the working of the 'right to negotiate' system.*

2.6 Re-casting the s 31A(2) factors

The eight factors proposed for s 31A(2) do not appear to add significantly to the existing case law. The wording of the exposure draft does not indicate how each of these factors should be weighed, and none of the criteria are expressed to be absolutely necessary for good faith. Without restructuring the role of these factors they are unlikely to improve agreement making processes.

All of the factors mentioned in proposed s 31A(2) have been raised to some degree in previous cases on negotiation in good faith. The clear trend in the cases has been to regard isolated 'lapses' as not fatal to a claim to have negotiated in good faith, with all of the circumstances of the case considered in their entirety. A problem with this approach is that, reading down the list of factors in s 31(A)(2), it is difficult to see how a party could have made all reasonable efforts to reach agreement unless they fulfilled each one of those requirements. Accordingly, it is appropriate for the test of good faith to treat each of paras (2)(a)-(h) as cumulative mandatory criteria, rather than mere indicia to be weighed.

For example, existing case law states that good faith does not *require* parties to make reasonable substantive offers, but that the Tribunal may consider the reasonableness of offers as part of a

[24] See Ms Carolyn Tan's evidence to the 2011 inquiry: Australia, Senate (2011) Legal and Constitutional Affairs Legislation Committee, Native Title Amendment (Reform) Bill 2011, 16 September 2011, Canberra, pp 6-9.

broader assessment of the pattern of conduct of the parties.[25] The amendments as they currently stand do not alter this situation. But one might ask how a party who has not made reasonable offers or counter-offers can claim to have taken all reasonable efforts to reach agreement. Accordingly, treating s 31A(2)(c) as a mandatory requirement would support the general intention of s 31A(1).

In addition to the criteria or factors currently proposed for s 31A(2), there are some further criteria that would be useful in ensuring that good faith negotiations truly represent a genuine attempt to gain the native title party's consent to the future act.

First, requiring parties to provide reasons for their responses to proposals by other parties would provide important procedural support for negotiations. It would ensure that parties are speaking to each other about the real issues that may be preventing them from reaching agreement. It would also make it easier to identify a lack of good faith on the part of a party who refuses to make concessions but does not explain the reason why. The wording drafted for proposed s 31(1A)(e) of the *Native Title Amendment (Reform) Bill (No. 1) 2012* is well suited to this purpose:

> (e) responding to proposals made by other negotiation parties in a timely and detailed manner, including providing reasons for the relevant response;

Secondly, the capacity of native title parties to negotiate effectively, including their access to the assistance of experts in negotiation processes, is an important determinant of whether they are capable of giving their free, prior, and informed consent to a project. In the AIATSIS submission to the proposed amendments to the Native Title Act in 2011, this concern was expressed as follows:

> 'Interpretation of the requirements of good faith, informed by the principle of free, prior and informed consent, should take into account evidence from AIATSIS research carried out for the Indigenous Facilitation and Mediation Project (2003-2006) and the Indigenous Dispute Resolution and Conflict Management Case Study Project conducted with the Federal Court of Australia and the National Alternative Dispute Resolution Advisory Council.[26] These projects found that typically, over many years, Indigenous communities have experienced pressure to accept proposals, often suggested by non-Indigenous agencies, without having the opportunity to understand the details or implications of their decisions, or to consider other solutions. In many meetings, closed questions are put to the floor, such as 'Do you understand?' and 'Everyone agrees?', resulting in Indigenous people leaving the meeting unable to explain what they have agreed to. Inappropriate process can also result in increasing tensions and hostilities between and amongst Indigenous families and individuals. Both reports highlight the importance of parties' ownership of processes, of careful preparation, and of working with the parties to design processes that can meet their

[25] *Marjorie May Strickland&Ors v Minister for Lands & Anor*[1998] FCA 868; *Walley v Western Australia* [1999] FCA 3; Brownley v Western Australia [1999] FCA 1139.

[26] T. Bauman and J. Pope (Eds). 2008.'*Solid Work you Mob are Doing': Case studies in Indigenous dispute resolution and conflict management*. Federal Court of Australia, Melbourne; T. Bauman. 2006. *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation.* IFaMP Report No. 6. AIATSIS, Canberra: The research findings, recommendations and implementation of the IFaMP project were based on consultations with a wide range of stakeholders including via a number of workshops and case studies. The *Solid Work You Mob are Doing* findings were based on three detailed case studies and a series of snapshot case studies.

procedural, substantive and emotional needs. As has been identified in at least six other significant reports to governments, they suggest that this ideally would be done by third party community engagement facilitators (or positions with similar functions) with highly specialised communication skills.'[27]

In light of these issues, and considering the Commonwealth's commitment to consult and cooperate in order to obtain the free, prior and informed consent of Indigenous peoples to any developments on their land,[28] it is submitted that a Tribunal decision to allow a future act ought not be made unless the Tribunal is satisfied that the native title party has:

(a) capacity for effective negotiation;
(b) access to assistance by experts in negotiation processes, where appropriate.

These requirements could be included in the definition of good faith, or could be included as separate conditions on the Tribunal's' exercise of arbitral power.

- **Recommendation 7: Re-casting the s 31A(2) factors**

  That the factors listed in proposed s 31A(2) should be reframed as cumulative mandatory criteria rather than as factors to be weighed. They should define a bare minimum of conduct, such that the Tribunal may find an absence of good faith even where all of those requirements are satisfied.

  That the criteria in s 31A(2) include a requirement for a party to give reasons for their response to a proposal by another party.

  That amendments be introduced to ensure that Tribunal decisions not be made unless the Tribunal is satisfied that the native title party had capacity for effective negotiation and had access to assistance by experts in negotiation processes, where appropriate.

3. Streamlining of ILUA Processes

3.1 Summary

The proposed amendments to ILUA authorisation procedures usefully clarify the ambiguities that led to the decision in *QGC Pty Ltd v Bygrave* [2011] FCA 1457. In that decision the judge's application of statutory interpretation rules to the text of the existing Native Title Act led to an outcome that differed from most people's expectations and assumptions, and created new uncertainties. The resulting interpretation of the Act also posed potential policy problems, whereby people without registered claims could be effectively locked out of ILUA negotiations despite having a sound case for native title.

[27] Australian Institute of Aboriginal and Torres Strait Islander Studies (2011) *Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011.*

[28] Art 32(2), *United Nations Declaration on the Rights of Indigenous Peoples.*

The proposed amendments provide for a process whereby the consent of unregistered claimants with a prima facie case is required for the registration of an ILUA. We are of the opinion that this is an appropriate way of protecting the rights of traditional owners before a determination of native title has been made. It ensures that the processes for resolving disagreements about traditional ownership are not overtaken by the more commercial urgency of the ILUA process. We have some concerns, however, about the timeframes for notifications proposed in the exposure draft. These concerns are outlined below.

3.2 Issue: unrealistic timeframes for notifications

We are concerned that the one month 'notice period' set out in s 24CH(5) and (6) for the filing of claims or lodging of objections to notifications of ILUAs is grossly insufficient to enable people who claim to have native title interests in the area to gain the benefit of the proposed changes.

The proposed shortened notice period poses a problem for the procedural route specified in s 24CH(6)(a). Although claimants may file an application at any time, the intention of the statement in s 24CH(6)(a) is to inform potentially affected people that they can file an application in response to the ILUA notification. Again, realistically the time required to prepare, authorise and file an application is almost certain to exceed one month.

We also draw your attention to how the nominated timeframe will interact with the proposed s 24CL(2), which requires the Registrar to consider only *registered* applications before proceeding to register an ILUA. This means that an application that has been prepared in response to a s 24CH(6) notice must be filed not only within one month of the publication of that notice, but early enough in that month to allow sufficient time for the Registrar to consider the application. That seems so unlikely as to make the provision nugatory. Processing of new native title applications, once submitted to the Registrar, currently takes more than one month in many cases. In a recent example, applicants who lodged their claim in September 2012 were advised that the Registrar's decision would be expected in March 2013.

We do not believe that it is reasonable to expect Indigenous parties who may wish to object to an ILUA will be able to seek legal advice, collate anthropological and historical evidence of their rights and interests, conduct consultations with members, hold an authorisation meeting, lodge a claim and have it registered within a period of only four weeks. While we understand the need to balance the interests of the parties to the ILUA on one hand, with the interests of the unregistered claimants on the other, it is proposed that a three month notice period represents a more appropriate timeframe.

- **Recommendation 7: Extension of timeframe for notification of objections**

  That the one month 'notice period' set out in s 24CH(5) and (6) for the filing of claims or lodging of objections to notifications of ILUAs be extended to at least three months.

3.3 Suggestions for improving proposed drafting of Bill

In addition to the above recommendation, we would like to draw attention to some issues of drafting that could usefully be addressed before the Bill is finalised. These are outlined below.

First, there was some discussion in the *QGC* decision about whether, in circumstances where there are disagreements about who holds native title in an area, authorisation of an ILUA must be done by all purported native title holders at once, or in separate groups. In the event, Reeves J did not need to address that question, since he decided that the Kamilaroi/Gomeroi People were not entitled to participate in the authorisation process. Some additional drafting would be very useful to clarify the situation where both a registered claim group and unregistered claimants assert rights in an area. For example, it would be important to clarify that members of a native title claim group are bound by an authorisation decision of the claim group as a whole, even if they assert that they constitute a distinct group.

Second, notices under the proposed s 24CH(6)(b) inform recipients that they may object to the registration of an ILUA. Under the current legislation, objections are only explicitly mentioned in relation to NTRB-certified ILUAs; s 24CK(2) prevents the registration of a NTRB-certified ILUAs where there are outstanding objections. Under the proposed s 24CH(6)(b), objections would also be available for non-NTRB-certified ILUAs, but the proposed amendments do not appear to include an provision equivalent to s 24CK(2). Now, the Registrar would still be required to satisfy themselves that the s 24CG(3)(b) authorisation requirements are fulfilled (s 24CL(3)), but there is no explicit legal function given to objections. It is therefore questionable whether the addition of the new objection process has any legal effect without an equivalent of s 24CK(2).

Third, proposed s 24CH(6)(b) speaks of 'the requirements of paragraph 24CG(3)(b)'. This is ambiguous because s 24CG(3)(b) is dealing literally with the mandatory contents of an application: the only requirement that s24CG(3)(b) imposes is that an application must contain certain statements. It would be more accurate, and less ambiguous to refer to the requirements in s 24CG(3)(b)(i) and (ii). (This same problem afflicts s 24CL(3): that subsection is ambiguous as to whether the Registrar must be satisfied that the application contains the relevant statements, or that the statements are in fact true and accurate.)

Fourth, proposed s 251A(3) refers to 'paragraph (a) or (b)''. Given that s 251A as amended would contain more than one sub-section, this ought to refer to 'paragraph (1)(a) or (1)(b)'.

Finally, proposed s 251A(2) clarifies that persons who 'may hold' native title are persons who can establish a prima facie case. In its own terms, this definition applies only to s 251A. There is scope for ambiguity in interpreting s 24CG(3)(b), which speaks of persons who may hold native title in the context of identifying them rather than their authorisation of an ILUA. One solution could be to reproduce the s 251A(2) definition in s 24CG.

- **Recommendation 8: Drafting changes**

  That s 251A or s 24CG be amended to specify the authorisation requirements for objecting claimants who are members of an overlapping registered native title application.

  That s 24CL be amended to include a condition equivalent to that in s 24CK(2).

  That s 24CH(6)(b) refer to 'the requirements of sub-paragraphs 24CG(3)(b)(i) and (ii)', rather than simply s 24CG(3)(b).

  That s 251A(3) refer to 'paragraph (1)(a) or (1)(b)'.

That the clarification of the definition of persons who 'may hold' native title in proposed s 251A be reproduced in s 24CG or otherwise stated to apply to that section.

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