National
Native Title
Tribunal

Submissions on the Native Title Amendment Bill 2012

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31 January 2013

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Introduction

1) The National Native Title Tribunal (the Tribunal) welcomes the opportunity to provide submissions on the *Native Title Amendment Bill 2012* (the Bill).

2) According to the Explanatory Memorandum to the Bill, the Australian Government wishes to amend the *Native Title Act 1993 (*Cwlth*)* (NTA) to introduce:

> ... targeted amendments ... which aim to improve the operation of the native title system, with a focus on improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes—at p 1.

3) In particular, if enacted, it is intended to achieve the following outcomes:

   (a) clarify the meaning of 'negotiation in good faith' in s 31(1)(b) and make associated amendments to the right to negotiate provisions of the NTA

   (b) enable the making of agreements that disregard historical extinguishment of native title in areas such as parks and some reserves

   (c) streamline Indigenous Land Use Agreement (ILUA) processes, and

   (d) ensure s 47 of the NTA applies to a body corporate holding a pastoral lease on behalf of, or for the benefit of, a native title group that has members, rather than shareholders.

4) The Tribunal had commented on some of these matters in its submissions on:

   (a) an exposure draft of proposed amendments to enable the historical extinguishment of native title to be disregarded in certain circumstances, dated 19 March 2010, available at http://www.ag.gov.au/LegalSystem/NativeTitle/Pages/Pastnativetitlereforms.aspx

   (b) a discussion paper called 'Leading practice agreements: maximising outcomes from native title benefits', dated 30 November 2010 (the Discussion Paper), available at http://www.ag.gov.au/LegalSystem/NativeTitle/Pages/Pastnativetitlereforms.aspx, and

   (c) an exposure draft of the Bill, dated 19 October 2012, available at http://www.ag.gov.au/Consultations/Pages/Currentnativetitlereforms.aspx.

5) It is noted with appreciation that many of the Tribunal's suggestions, and those of other stakeholders, have been taken up in the Bill.

6) The submissions made below are organised in response to the four schedules to the Bill. They are directed at identifying possible unintended consequences or other technical, procedural or resourcing issues that arise out of the Bill and are not intended as commentary on the policy underlying the proposed amendments, except to the extent that this is relevant to the issue raised by the Tribunal.

Schedule 1 – Historical extinguishment

Items 1 and 2

7) It is noted that the Explanatory Memorandum to the Bill indicates that:
   - if the area concerned was excluded from the determination area, rather than being made subject to the approved determination, then a new claimant application must be made, rather than a revised native title determination application (RNTDA), if the requisite agreement is reached,
   - there is the requisite nexus between an area where native title has been determined to be extinguished and the registered native title body corporate for those persons who would have held native title but for that extinguishment to allow it to make both the s 47C agreement and the RNTDA over the area concerned.

8) Both of these clarifications as to the intent behind the amendments are helpful but it might be preferable to make them part of the NTA, perhaps by including them as notes to the relevant provisions.

9) In Item 2, it is proposed to insert as s 47C(1)(b) a requirement that 'none of sections 47, 47A and 47B applies to the application'. It would be more consistent with these other provisions if it were to be redrafted to require that 'none of sections 47, 47A and 47B applies to the park area'.

Items 3 to 15

10) No comment.

Schedule 2 - Negotiations

General comments

11) The Tribunal has previously submitted (among other things) that if it was decided to codify the indicia going to show good faith, then the Tribunal's preference was that the indicia it had developed over the years (known as the *Njamal* indicia: see *Western Australia v Taylor* (1996) 134 FLR 211 at 224-5) be used: see p 28 of its commentary on the commentary on the Discussion Paper and the Tribunal's submission on the exposure draft of the Bill at p 4. The Tribunal makes the same general submission in relation to the Bill but makes the following comments on the proposed amendments in the Bill.

Item 1

12) In order to be consistent with s 31(1)(b), and for the sake of clarity, 'the' could be inserted before 'negotiation parties'. Further, in the Explanatory Memorandum at [58], it is said that this amendment is intended to ensure that 'all parties must adhere' to the good faith negotiation requirement. Therefore, perhaps the proposed note to s 24MD(2) should read 'all of the negotiation parties'.

Item 2

13) No comment other than to see the discussion below in relation to Items 3, 6 and 8.

Item 3

14) One issue that has arisen in past 'good faith' hearings before the Tribunal is whether or not the grantee party should be required to pay the costs of organising meetings with the native title parties or other matters relating to the native title parties' costs. For a recent example, see *Xstrata Coal Queensland Pty Ltd/ Albury (Karingbal #2); Wyman & Ors (Bidjara People)/Queensland* [2012] NNTTA 93.

15) This has occasionally proven to be such a stumbling block that no substantive negotiations are possible. In some cases, this eventually leads to an application for a future act determination.

16) Deputy President Sumner raised this issue in *Magnesium Resources Pty Ltd/Puutu Kunti Kurrama and Pinikura People/Western Australia* [2010] NNTTA 211 at [74] to [75]:

> Where a native title party (after advice of their solicitors who may be employed by a native title representative body) takes a stance that they will not engage in negotiations unless funding for them is provided by a grantee the potential exists for an outcome which is not in their interests. It is possible to envisage a scenario where a grantee refuses to fund negotiations to the extent requested by a native title party or at all; a native title party declines to engage in good faith negotiations; the grantee party makes a future act determination application; the Tribunal finds that the grantee party has negotiated in good faith potentially taking into account that the native title party has not done so; and the Tribunal determines that the future act may be done on terms considerably less beneficial to a native title party than could have been negotiated. This outcome is quite possible as the Tribunal cannot make a determination for payments in the nature of royalties (s 33(1) NTA).

> The dilemma raised by this scenario ... comes about because the scope of the obligation to negotiate in good faith and in particular s 31(1) and (2) of the NTA does not encompass negotiating about a Government or grantee party providing funds to the native title party for the purposes of the negotiations. On the other hand, there are limitations on the funding provided by FaHCSIA for future act negotiations (as demonstrated by the evidence in *Austmin Platinum Mines Pty Ltd and Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji ...* [2010] NNTTA 212 ...) . If a native title party is not funded for the negotiations from their own resources (in many cases they will not have this capacity), by Governments or by approaches to mining companies then they are potentially placed at a disadvantage in the negotiations.

17) It is not clear to the Tribunal whether or how this situation is to be dealt with under proposed s 31(1)(c), which presumes that substantive negotiations will occur, and under proposed s 31A. It may be helpful to amend those proposed provisions to address this situation.

18) There is also the very common circumstance where the issue is not whether the grantee party agrees to fund the native title party but whether the funding proposed by the grantee party is thought to be sufficient by the native title party. There are two distinct situations which need to be addressed. First, where the grantee party refuses to provide any resources (sometimes because of its own financial circumstances) and, second, where an offer to provide financial resources is rejected as inadequate, sometimes because the native title party says that the 'sitting fee' component is inadequate. In either case, substantive negotiations are stymied.

19) The Tribunal may be able to address these issues in the context of assessing the reasonableness of the behaviour of the various parties, but that may be of little assistance to the non-native title parties if the occurrence of substantive negotiations is a necessary component of meeting the new good faith requirement.

20) Accordingly, it would be helpful, in the light of the apparently mandatory nature of proposed s 31(1)(c), to address what the other negotiation parties are required to do if the native title party is not negotiating in good faith, i.e. are they then relieved of this obligation? As currently drafted, s 31(1)(c) might have the unintended consequence of creating a possible veto for native title parties.

Item 4

21) The Tribunal welcomes this proposed amendment but repeats the submission it made in relation to s 31(2) in its commentary on the Discussion Paper at pp 29-32:

> The Tribunal has found that s. 31(2) limits the scope of the negotiations that must be conducted as a precondition to the making of an application to the Tribunal pursuant to s. 35 in relation to the effect of the future act on the native title parties' registered native title rights and interests. However, the Tribunal takes the view that this includes the matters related to those rights and interest found in s. 39(1)(a). This is because construing s. 31(2) narrowly might lead to finding that the obligation to negotiate in good faith was only related to s. 39(1)(a)(i), which specifically refers to the effect of the act on the enjoyment of registered native title rights and interests: see *The Griffin Coal Mining Co Pty Ltd v Western Australia* (2005) 196 FLR 319; [2005] NNTTA 100 ... at [31], [34] and *Western Australia/West Australian Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/Hayes on behalf of the Thalanyji People* [2001] NNTTA 18 at [18] to [19].

22) As was also noted in the Tribunal's commentary on the Discussion Paper, at pp 28-32, a related issue arises as to whether s 31(1)(b) encompasses negotiations about compensation and other benefits as per s 33(1). This issue has only been the subject of judicial scrutiny once, in *Brownley v Western Australia* (1999) 95 FCR 152; [1999] FCA 1139, (*Brownley*) but s 31(2) did not apply in that case because it was introduced when the NTA was amended by the *Native Title Amendment Act 1998* (Cwlth). The issues determined in *Brownley* turned on a construction of the NTA as it stood before those amendments took effect.

23) On this issue, see also Deputy President Sumner in *South Blackwater Coal Ltd v Queensland* (2001) 165 FLR 232; [2001] NNTTA 23 at [30]–[38], *Griffin Coal v Nyungar People* (2005) 196 FLR 319; [2005] NNTTA 100 at [44], [46] and President Neate in *Xstrata Coal Queensland Pty Ltd/Albury (Karingbal #2); Wyman & Ors (Bidjara People)/Queensland* [2012] NNTTA 93 at [208].

24) If the matters referred to in s 33(1), and some of the matters mentioned in s 39, are not related to the effect of the future act on the registered native title rights and interests of the native title party, then s 31(2) provides that a reasonable refusal to negotiate about those matters does not constitute a failure to negotiate as required, even after the amendments proposed by the Bill are made.

25) Accordingly, an amendment to s 31(2) which stated that a negotiation party could only reasonably refuse or fail to negotiate about matters that were unrelated to at least some of the matters noted in paragraphs 39(1), and must at least consider and respond to s 33(1) proposals, would both provide clarification for the arbitral body and further encourage the parties to take an interest-based approach to the negotiations.

Item 5

26) No comment

Item 6

27) As currently drafted, proposed s 31A(1) in Item 6 of the Bill states that 'the ***good faith negotiation requirements*** ... are that negotiation parties use all reasonable efforts to reach agreement'. It may be more grammatically correct to say that ''the ***good faith negotiation requirement*** ... is that negotiation parties use all reasonable efforts to reach agreement' given there is now only a single requirement. Consequential amendments would need to be made to all of the other items in the Bill that use this phrase. It may also be preferable to insert 'the' before 'negotiation parties' in order to be consistent with s 31(1)(b).

28) If the Bill is passed in its current form, s 31A(1) will be one of the requirements that must be satisfied before the Tribunal is empowered to make a future act determination. The Tribunal is concerned that there may be very different views among the negotiation parties as to what this new provision means. The requirement that the negotiation parties use 'all reasonable efforts to reach agreement' is helpfully contextualised in the Explanatory Memorandum to the Bill at [66] as follows:

> Reasonableness may depend, for example, on the size of the project, the amount of land involved, the extent and nature of the native title rights and interests and the length of time that the tenement is sought for. This provision supports the Government's aspiration that native title negotiating parties will establish productive, responsive and communicative relationships.

29) However, the 'reasonableness' of a party taking a stance to limit the negotiations to the effect on registered native title rights and interests, in accordance with s 31(2), will no doubt be raised in relation to an assessment of reasonableness under s 31A(1). This supports the Tribunal's submission above that s 31(2) should be amended to clarify the minimum scope of the negotiations.

30) This, along with the amendment to s 31(1) proposed in Item 3, would significantly enhance the development of a shared understanding between the negotiation parties and the arbitral body as to what the negotiations must encompass.

31) The Tribunal also notes that, where the future act concerned is the grant of a mining or petroleum tenement, and there is a 'dual deed' system in operation, the government parties can take a fairly passive role: see *Xstrata Coal Queensland Pty Ltd/Albury (Karingbal #2); Wyman (Bidjara People)/Queensland* [2012] NNTTA 93 at [103] to [110] and [124] to [126].

32) It is not clear from either the Bill or the Explanatory Memorandum as to whether or not the amendments are aimed at having Government parties take a more active role. Therefore, some clarification on this issue would be helpful. For example, does a state or territory have a lesser, equal or greater obligation to resource the negotiations where the future act is primarily for the benefit of a grantee party? Is the Government party obliged to make offers in the same way as the grantee has been found to be? Can a Government party continue to play the same a passive, or supervisory, role, largely with the consent of the other parties? If not, and these requirements must be met by a Government party, that might result in a dramatic change in behaviour so that a Government party could rebut an assertion of a failure to meet the good faith requirement.

33) It would be very helpful to the Tribunal, as the arbitral body, and all of the negotiation parties, if these issues were expressly addressed in the Bill rather than left to the Tribunal, and the courts, to resolve in what may well be extended, expensive and adversarial proceedings.

34) Proposed s 31A(2) provides as follows:

> Without limiting subsection (1), in deciding whether or not a negotiation party has negotiated in accordance with the good faith negotiation requirements, regard is to be had, where relevant, to:
> (a) whether the negotiation party has done the following:
> (i) attended, and participated in, meetings at reasonable times;
> (ii) disclosed relevant information (other than confidential or commercially sensitive information) in a timely manner;
> (iii) made reasonable proposals and counter proposals;
> (iv) responded to proposals made by other negotiation parties for the agreement in a timely manner;
> (v) given genuine consideration to the proposals of other negotiation parties;

(vi) refrained from capricious or unfair conduct that undermined negotiation;
(vii) recognised and negotiated with the other negotiation parties or their representatives;
(viii) refrained from acting for an improper purpose in relation to the negotiations; and

(b) any other matter the arbitral body considers relevant.

35) According to the Explanatory Memorandum at [67]:

> Subsection 31A(2) specifies the criteria that the arbitral body will have regard to in considering whether a party has satisfied the good faith negotiation requirements. Under the new provisions, the emphasis is on interest based negotiation rather than positional or adversarial bargaining.

36) The Tribunal's experience is that most negotiation parties do take an interest based approach to negotiations at present. Further, with respect, the proposed criteria do not appear to affect that one way or the other. In addition, while s 31(2) continues to allow negotiation parties to limit themselves to discussing the effect of the act on the relevant registered native title rights and interests, a more legalistic approach remains available, provided it is reasonable in the circumstances.

37) The Tribunal is also concerned about how to interpret specific criterion, particularly proposed s 31A(2)(a)(vi) and (viii). It is difficult to see how the Tribunal could have regard to whether the negotiation party has 'done' the following things:
    - refrained from capricious or unfair conduct that undermined negotiation;
    - refrained from acting for an improper purpose in relation to the negotiations.

38) How could the Tribunal know whether a party has 'done' something by refraining from doing it? What evidence could the party who bears the onus of proof bring to show that it refrained from acting in a particular way? Therefore, the Tribunal suggests that it would be preferable to recast these paragraphs to require the arbitral body to have regard to whether the relevant negotiation party has 'done' something that can be more easily proven by, such as:
    - engaged in capricious or unfair conduct that undermined the negotiations;
    - acted for an improper purpose in relation to the negotiations.

39) The criteria do not have to be confined to those going to demonstrate good faith, as illustrated by the indicia developed by the Tribunal over the years. This approach would require an assertion that there had been behaviour of this kind in order to make these matters relevant but it is submitted that this would not affect the shift in onus that the Bill seeks to achieve in s 36(2).

40) The addition of s 31A(2)(b) is welcomed by the Tribunal but, with respect, the drafting is infelicitous, i.e. 'regard is to be had, where relevant, to ... any other matter the arbitral body considers relevant'. It might be preferable to insert 'where relevant,' before 'whether the negotiation party has done the following'.

Item 7

41) No comment.

Item 8

42) Item 8 proposes replacing the current s 36(2) with the following:

> (2) If a negotiation party asserts that another negotiation party (the second negotiation party) did not negotiate in accordance with the good faith negotiation requirements, the arbitral body must not make the determination unless the second negotiation party satisfies the arbitral body that the second negotiation party negotiated in accordance with the good faith negotiation requirements (see section 31A).
>
> (2A) If the second negotiation party does not satisfy the arbitral body as mentioned in subsection (2), the arbitral body may make an order providing that the second negotiation party is not, despite any provision of this Act, entitled to apply for a determination under section 35 in relation to the act for the period specified in the order.

43) The drafting of proposed 36(2) may have the unintended consequence of creating a veto for native title parties. This is because, if the grantee or the government party submits (i.e. 'asserts') that the native title party did not negotiate in accordance with the good faith requirement as justification for doing less than might be otherwise expected, and it is clear that this was the case, then it seems the arbitral body will be barred from exercising its power to make a future act determination.

44) If the Government does not intend to confer on native title parties a potential right of veto, it would be preferable to remove all doubt by specifying, consistently with current s 36(2), that a failure by the native title party to negotiate in accordance with the good faith requirement does not affect the arbitral body's power to make a determination.

45) Further, in the interests of procedural fairness and efficiency, it would be of great assistance to the arbitral body and the 'second negotiation party' if the first negotiation party was required to provide some particulars in support of the assertion made in relation to the second negotiation party.

Items 9 and 10

46) No comment.

Item 11

47) The proposal is that the amendments in Schedule 2 will 'apply to negotiations that commence on or after 1 January 2013 and are still on foot on the day this Act receives the Royal Assent'. The Tribunal notes that, if there is a dispute, it might be called upon to determine whether or not 'negotiations' had 'commenced' on or after that date.

Resourcing issues

48) If the proposed amendments are made, native title parties may be more likely to assert that one or both of the other negotiation parties have not negotiated in accordance with the good faith requirement. As noted in the Tribunal's comments in on the Exposure Draft of the Bill:

> The Tribunal's experience is that proceedings in which one negotiation party asserts that another party did not negotiate in 'good faith' are resource intensive. The proceedings usually involve large volumes of evidentiary materials and (if held) relatively lengthy hearings—at [20].

49) If there is an increase in the number of challenges made, then experience indicates that it may have a significant impact on the Tribunal's financial and human resources, and on its capacity to deliver timely determinations within the period specified in s 36 of the NTA. Therefore, it might be appropriate to extent the period specified in s 36 in circumstances where the Tribunal is required to deal with an assertion under proposed s 36(2).

Schedule 3 – Indigenous Land Use Agreements

Item 1

50) No comment.

Item 2

51) The proposed broadening of the areas in relation to which a Body Corporate Agreement (BCA) can be made is welcomed, but the Tribunal has some concerns with the drafting. As the Tribunal noted in its comments on the exposure draft to the Bill, in providing more flexibility for BCAs, care needs to be taken to ensure that (among other things):

    (a) it is clear that 'connection' has been established sufficient to support recognition of native title rights and interests in the area(s) concerned, and

    (b) native title would have been held by the relevant common law holders but for the extinguishment.

52) At first blush, it seems possible to make a BCA where native title has been extinguished either over the whole of the agreement area or only a part of it. A BCA may, for example, be a used as a vehicle for a s 47C agreement over an area where native title is wholly extinguished, provided the area is subject to an approved determination of native title.

53) As there would be no native title in relation to the extinguishment area, the only available mandatory subject matter for such a BCA in relation to an 'extinguishment area' would appear to be:
    - paragraph 24BB(ab) - changing the effect of a wholly extinguishing intermediate period act
    - paragraph 24BB(b) - doing something to a compensation application
    - paragraph 24BB(ea) - compensation for any past, intermediate period or future act that wholly extinguished native title, with the possibility that disregarding of extinguishment is compensation in kind,
    - 24BB(f) - perhaps, for a s 47C agreement BCA, i.e. assuming the disregarding of extinguishment is 'any other matter concerning native title rights and interests in relation to the area'.

54) However, even if the proposed amendment is made, there would be no registered native title body corporate in relation to the area concerned and so s 24BD(1) would not apply. Of course, such a body could be a party pursuant to s 24BD(3).

55) Paragraph 24EA(1)(b) binds 'all persons *holding native title* to *any* of the land or water covered by the agreement ... in the same way as the registered native title bodies corporate' (emphasis added). Therefore, provided the relevant registered native title body corporate is a party to the agreement, any native title holder for any part of the agreement area appears to be bound by the BCA's terms 'in the same way as' the registered native title body corporate is bound,

even in relation to the areas where native title has been extinguished and where that extinguishment is not to be disregarded, it seems.

56) The difficulty the Tribunal has identified is that, as currently drafted, the amendment does not provide that the registered native title bodies corporate have any relationship with those areas. This issue impacts on a number of the BCA provisions.

57) Therefore, to avoid uncertainty and complexity, it may be preferable to insert a statement in the last paragraph of proposed ss 24BC(2) and (3) which provides that, if the conditions specified in paragraphs (a) and (b) are met, the extinguished area is deemed to be area in relation to which there is a registered native title body corporate for the purposes of Part 2, Div 3, Subdivision B. It should also be clear that the 'deemed' registered native title body corporate is the one nominated by the common law holders that would have held the native to the extinguished area but for the extinguishment.

58) However, there may also need to be an amendment to proposed s 24BC(3) to make it clear that it only applies where the area concerned was excluded from an approved determination of native title because it was excluded from the area claimed in the application that was the subject of that determination (on the basis of extinguishment) or the area was the subject of a negative determination due to extinguishment (i.e. the right people for country have been identified).

59) These proposed changes should provide more certainly in determining which of the two mutually exclusive provisions (i.e. s 24BC or s 24CC) applies in any particular case.

60) Lastly, it is not clear why ', or part of the area,' has not been included after 'in relation to the area' in proposed s 24BC(3)(b).

Item 4

61) The Tribunal welcomes this amendment, which the Explanatory Memorandum states 'makes clear that there is no need to give notice of an [area agreement] ILUA unless the mandatory requirements [in ss24CB to 24CE] are satisfied'.

62) However, experience shows that it would also be helpful if it was clear as to whether or not the application must be progressed if there is a failure to comply with s 24BG(2), s 24CG(2) or 24DH(2).

63) Of greater importance, however, is the issue of when compliance with s 24CD is required. At present, the law is unclear on the point. It seems logical to imply that the legislature intended that those who seek to make an area agreement ILUA would be able to determine which of ss 24CD(2) or (3) applies at the point in time at which they make the agreement in order to ensure they have complied with s. 24CD(1).

64) Subsection 24CD(3) states that: 'If subsection (2) does not apply', then the 'native title group' consists of 'one or more of the following', which provides some support for that view because of the use of the present tense.

65) Further, only an agreement that is 'made' can be the subject of an application to the Registrar because s 24CG(2) states that a copy of the agreement must accompany the application for registration. So it seems logical that Parliament intended to enable the parties to satisfy themselves that the requirements of ss 24CB to 24CE were met before seeking to have the agreement registered.

66) Subsection 24CL(2), amended as proposed in the Bill, would then require that, at the end of the proposed one-month notice period, any registered native title claimant or registered native title body corporate in relation to any of agreement area that was not already a party to the agreement would need to become a party to it if it was to be registered.

67) However, in *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412; [2010] FCA 1019 at [61], Justice Reeves appears to say that this is not the case, i.e. that the agreement must meet these pre-requisites *after* the notice period mentioned in s 24CH ends.

68) It is submitted therefore that, for certainty and clarity, s 24CD(1) should be amended to make it clear that compliance with it is required either when the agreement is made or, which seems preferable, when the making of the agreement is authorised by the native title contracting group.

69) Finally, as was noted in the Tribunal's comments on the exposure draft of the Bill at [46], the findings in *QGC Pty Ltd v Bygrave (No 2)* at [97] to [99] amount to a finding that there is no privity of contract between the 'native title group', as defined in s 24CD, and the other parties to the agreement. This appears to be contrary to s 24CD(7) which, when read with s 251A, indicates the 'native title group' would be authorised to make the agreement on behalf of the relevant contracting group and would enter into the agreement on that group's behalf. Further, it has implications for s 24EA(1)(b) which, it is again submitted, should be addressed by an amendment to the relevant provisions.

Items 5 and 6

70) It is not clear what purpose would be served by continuing to give notice of an application to register a certified area agreement if there is no opportunity for an objection to be made (as proposed by Item 9), other than to provide an opportunity to those who may be adversely affected by a decision to register the agreement to take steps to protect or preserve their interests.

71) That may, of course, be sufficient to justify the resources required to continue to give full notification of applications to register certified area agreements but it is recommended that some consideration be given to whether or not that is the case.

Item 7, 10 and 11

72) The proposal here is, in short, to provide a one-month period in which any person claiming to hold native title in relation to the agreement area can object against the registration of an uncertified area agreement on the sole ground that it was not duly authorised.

73) In that case, it may be appropriate to amend s 24CL(4) so that it is in the same form as the current s 24CK(4), rather than as proposed in Item 11, in order to focus consideration on the relevant matters.

Item 9

74) In the Tribunal's experience, objections to certified agreements are relatively uncommon and, due to the onus placed in the objector, only likely to succeed in limited cases. Further, the objection process is relatively timely and very informal. It is likely that judicial review will be beyond the means of most of those who have, in the past, objected against registration of a certified area agreement.

75) In any case, there are two different circumstances relevant to this proposed amendment: those where the relevant representative body or body funded under s 203FE is at arm's length from the process; and those in which it is not.

76) In the former case, it performs a role that is on all fours with the Registrar's role and it may well be that nothing further should be required, other than to ensure the agreement still meets the pre-requisites of an area agreement ILUA. In the latter case, things may be more complicated.

77) For example, the Tribunal is aware of several recent instances where certification was given in circumstances where the relevant body later acknowledged it should not have been and so withdrew the applications for registration. This error was as a result of the body getting too close to the matter, rather than any impropriety. However, it does illustrate why an independent eye can be helpful in ensuring compliance with such a critical statutory requirement.

78) Finally, as noted above, if s 24CK is amended as proposed, consideration should be given to whether or not full notice of the application for registration should continue to be required.

Item 12

79) In relation to proposed s 24ED, the intention appears to be to allow for the specified amendments to be made and have effect in relation to a registered ILUA without any requirement that the Register of Indigenous Land Use Agreements (the Register) be updated to reflect those amendments.

80) If that is the case, then (subject to what is said below), it may be preferable to amend s 199B to include a power to update the Register accordingly, along the lines of the current s 199B(4).

81) Changes to the parties may be best confined to changes to the non-mandatory parties, given their presence as a party to the agreement goes to the 'ILUA-ness' of the agreement. Of course, if the intention is to leave the party details unchanged on the Register, but allow the agreement to be amended effectively in this regard, then this may not be an issue but other issues will arise. Therefore, the Tribunal would appreciate further guidance on what is intended here.

82) Some of the other issues noted are that:
- it is not clear what might be embraced by 'administrative processes' in proposed s 24ED(1)(e) and so it would be helpful if some examples were given, and
- it may be preferable to amend proposed s 24ED(1)(c) so that the area covered by the agreement cannot be changed, e.g. if the area was reduced so as to exclude one of the groups that authorised the agreement, it would seem preferable to require that change to be authorised and the agreement re-registered.

Items 13 and 14

83) No comment.

Item 15

84) In *QGC Pty Ltd v Bygrave* (2011) 199 FCR 94; [2011] FCA 1457 at [104] to [121], Justice Reeves found that the expression 'hold or may hold native title' as used in s 24CG(3)(b) has 'an expansive and inclusive meaning' and that the phrase 'hold or may hold the common or group rights comprising the native title' as used in s 251A(a) and (b) have 'a confined and exclusive meaning'. This led his Honour to conclude that only those with a registered native title claim could 'insist on being involved in the authorisation process under s 251A'.

85) The amendment proposed in Item 15 appears to be aimed at ensuring that paragraphs 251A(a) and (b) have an 'expansive and inclusive meaning', presumably with the effect that all of those who are identified in compliance with s 24CG(3)(b)(i) must also authorise the making of the agreement under s 24CG(b)(ii). If that is the case, then it is a welcome amendment. If not, then some further assistance as to what is intended would be helpful.

Item 16

86) In relation to proposed s 251A(2), as was noted at [58] of the Tribunal's comments on the exposure draft of the Bill, it is not clear how, when and by whom the identity of persons who can establish a *prima facie* case that they hold native title is to be made. It would be preferable if it was made clear that it is those seeking to make the ILUA who must be satisfied that a person who claims that they may hold native title can, *prima facie*, support that claim. The Registrar must assess whether or not the requirements of s 24CG(3)(b) are met.

87) It is the Tribunal's submission that the Registrar's focus should be on the adequacy of the identification and authorisation processes at the time they were conducted, not on the strength or weakness of any claim to hold native title to the ILUA area made after the event direct to the Registrar.

88) This approach is supported by *Murray v The Registrar of the National Native Title Tribunal* [2002] FCA 1598 at [74]-[76], where Justice Marshall endorsed the delegate's finding that those who are required to make 'all reasonable efforts' under s 24CG(3)(b)(i) were entitled to reject a claim that a person was someone who may hold native title in relation to the agreement area, provided they first conducted an appropriate inquiry and formed a reasonably held view that such a claim was, *prima facie*, without substance or merit.

89) Further, experience indicates that any other approach leads to the Registrar's delegates being drawn into considering either something done after authorisation or complex anthropological and legal arguments that unnecessarily delay the registration decision.

90) One of the aims of the Bill is to streamline ILUA registration processes. Therefore, the Tribunal again respectfully suggests it should be clear that what the Registrar is required to address is the adequacy of the processes undertaken to have the making of the agreement authorised and not the merit, or otherwise, of claims to hold native title to the area concerned. As such, it would be helpful if a note to that effect was inserted under proposed s 251A(2) and to s 24CG(3)(b).

91) In relation to s 251A(3), if the submission made above in relation to s 24CD(1) is accepted, it would be helpful if it were clear that the relevant time is either when the agreement is made or, preferably, at the time the making of the agreement is authorised. Further, in the light of the amendment proposed by Item 15, should the phrase 'the common or group rights comprising' be deleted from proposed s 251A(3)? If not, then it is not clear what is intended by including it and so further guidance would be appreciated.

92) Finally, the Explanatory Memorandum states that the intention behind proposed s 251A(3) is to 'address current uncertainty as to the law about who may authorise an [area agreement] ILUA'. However, with respect, it is not entirely clear how it has been resolved. Is it that, for areas where there neither a registered native title body corporate nor a registered native title claim, all of those identified for the purposes of s 24CG(3)(b)(i) must authorise the making of the agreement? If so, it accords with the approach the Registrar's delegates have taken to date. If not, then further clarification would be appreciated.

Item 17

93) No comment.

Schedule 4 – Minor technical amendment

Item 1

94) No comment.

Conclusion

95) The Tribunal appreciates the opportunity to comment upon the proposed amendments and hopes that these submissions will assist to ensure the Bill achieves its aims and, to the extent possible, avoids any unintended consequences.