THE UNIVERSITY OF MELBOURNE

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ATNS SUBMISSION

NATIVE TITLE AMENDMENT BILL 2012

31 January, 2013

EXECUTIVE SUMMARY

This submission is made by Associate Professor Maureen Tehan in collaboration with Professor Marcia Langton, on behalf of the Agreements, Treaties and Negotiated Settlements (ATNS) Project.

Thank you for the opportunity to respond to the *Native Title Amendment Bill 2012* (the **Bill**). We generally support the proposed amendments which have the potential to expand the quantum of land that might be the subject of native title determinations and improve the operation and function of the future act regime.

We support the addition of s31(1)(c) which requires negotiations to include 'consideration of the effect of the doing of the act on the registered native title rights and interests of the native title parties'. We further support the addition of s31A(2) and in particular, s31A(2)(b), which addresses the concerns we raised in our submission on the Native Title Amendment Bill 2012 Exposure Draft (the **Exposure Draft**) regarding the possible codification of the 'good faith' requirements for the purposes of s31 negotiations.

We strongly support the proposed amendment to s36(2) and the proposed extension of time in s35(1)(a) from 6 to 8 months.

In principle we support the proposed s47C but maintain our view that it should operate in the same manner as ss47, 47A and 47B ie, not subject to agreement insofar as future native title determinations are concerned. Notice should only be required in transitional arrangements or revised determination applications. We suggest that it should be possible to agree to disregard extinguishment by Public works on s47, 47A and 47B land and that it should be possible to agree to disregard extinguishment on any Crown land.

We generally support the proposed amendments in relation to ILUAs but still have reservations about the new s251A(2) and its application.

ABOUT THE ATNS

The Agreements, Treaties and Negotiated Settlements (ATNS) project is a University of Melbourne based research project consisting of a series of ARC Linkage grants and a team of inter-disciplinary researchers from Melbourne, Griffith and the Australian National Universities. The ATNS database (www.atns.net.au) is an integral part of the project. The project began in 2002 with an ARC Linkage grant examining treaty and agreement-making with indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. In 2005 the research team secured a second grant to build on the project. The second phase examined the process of implementation and the wider factors that promote long term sustainability of agreement outcomes.

The current project, 'Poverty in the Midst of Plenty: Economic Empowerment, Wealth Creation and Institutional Reform for Sustainable Indigenous and Local Communities', started in 2010. It aims to study the institutional, legal and policy reforms required to reduce indigenous people's poverty and to promote economic development for sustainable indigenous communities. The interdisciplinary research draws on anthropology, geography, demography, law and public policy and uses comparative case studies. The project analyses the impacts of large-scale resources projects, and government policy and services, on local communities, including the role of agreement making. The object is to identify solutions for realising sustainable social and economic development for indigenous people based on social, policy, fiscal, procedural and legal models.

Chief Investigators

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Research Partners

- The Department of Families, Housing, Community Services and Indigenous Affairs
- Rio Tinto Ltd
- Woodside Energy Ltd
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This submission is made by Associate Professor Tehan and Professor Langton (Chief Investigators on the ATNS Project) and does not necessarily represent the views of all Chief Investigators or the industry research partners on the project.

Contact Details

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SUBMISSION

This submission is made by Associate Professor Maureen Tehan in collaboration with Professor Marcia Langton, on behalf of the Agreements, Treaties and Negotiated Settlements (ATNS) Project.

Thank you for the opportunity to respond to the Native Title Amendment Bill (the **Bill**), which will implement the proposals for change outlined by the Attorney-General on 6th June 2012. Subject to the comments below, we generally support the proposed amendments which have the potential to expand the quantum of land that might be the subject of native title determinations and improve the operation and function of the future act regime.

We also urge the Senate's Standing Committee on Legal and Constitutional Affairs Legislation to support the following areas of reform for the *Native Title Act 1993* (Cth) (the **NTA**) which accord with the overarching purpose of the amendment Bill. This includes strengthening the right to negotiate which our research of negotiation and agreement making in the native title context over many years has shown that the key to successful implementation and outcomes from agreement making is the building of relationships between the parties. The key time for this is during the negotiation phase. Our research also shows that while some parties operate beyond the strict legal requirements of the NTA, the provisions of the NTA in determining the extent of the rights and entitlements of the negotiating parties can be significant in shaping the equality of bargaining power and therefore the outcome of negotiations. Further, we consider that s223 of the NTA should be amended to reverse the current onus of proof and adopt a rebuttable presumption of continuity. Amendments to the NTA should also clarify that native title rights and interests may be of a commercial nature to support economic development and that more realistic definitions of traditional laws should be adopted.

We submit that these substantive reforms will address some of the limitations and inequities in the NTA and deliver more equitable measure of justice for Aboriginal and Torres Strait Islanders while allowing the efficient operation of the native title scheme generally.

<u>Schedule 1: Historical Extinguishment</u>

There is an artificiality associated with historical extinguishment that has long been the subject of judicial and academic comment. As a result, the extension of beneficial measures under the NTA through this proposed amendment is welcome.

Requirement for consent s47C(1)

The proposed amendment requires consent of both native title claimants and the relevant government before extinguishment can be disregarded. We maintain the concerns raised in our submission to the Exposure Draft in relation to the consent requirement.

There are already provisions allowing for the disregard of historical extinguishment in certain circumstances in the NTA. These can be found in ss47, 47A and 47B. These provisions do not require State or Commonwealth consent for specific historical extinguishment to be disregarded. The proposed s47C provides that where extinguishment is to be disregarded, the non-extinguishment principle applies and all current interests in the land will prevail over native title. As these provisions are beneficial, there seems no reason why the current structure of the "disregard of extinguishment" provisions of the legislation in ss47, 47A and 47B should not be followed.

We support the retrospectivity aspect of the provision and understand that the notice requirements are appropriate in that context. However, in so far as any future determinations are concerned, the requirement for consent should be removed to ensure consistency with the other sections.

Given that the non-extinguishment principle applies and public works and other interests are protected, there is little justification for requiring agreement (or consent).

To require consent opens up the disregard issue to manipulation as part of broader negotiations and litigation. This appears to confuse the entitlement to have historical extinguishment disregarded with procedural measures designed to achieve negotiated outcomes. While the latter may be an admiral goal, it should not be confused with the entitlement to have historical extinguishment disregarded as it has been in ss47, 47A and 47B.

The requirement for consent should be removed and the proposed section 47C should mirror ss47, 47A and 47B subject to agreement and notice in respect of revised determination applications to include disregard of prior extinguishment.

Notice requirement s47C(5)

We maintain the concerns that we raised in response to the Exposure Draft. The requirement for notice that flows from the consent requirement may also give rise to the use of the consent requirement as a negotiating enticement, confusing what should be an entitlement with procedural matters.

Given that prior interests (and presumably permitted renewals) are protected, the purpose of both the consent and notice provisions is unclear. Further, it seems that notice is required even if an application for a determination is made after the provision comes into force. There is no clear policy reason given for adding this procedural step which effectively gives 'interested parties' the opportunity to be given notice of and to comment on this disregard of extinguishment. The negative aspect of this second opportunity is the danger of reopening areas of dispute and controversy that may have already been resolved after extensive negotiation between the major parties.

The requirement for notice and the opportunity for comment on a revised native title determination application or, transitional provisions relating to variation of unresolved native title determination applications are appropriate and in line with the general approach of the NTA. We support these provisions if the disregard occurred as of right.

Land subject to proposed s47C

As explained in the Explanatory Memorandum, the proposed s47C envisions that all forms of land designated for preservation of the natural environment, either wholly or in part, by whatever method, are captured by the definition of *park area.* Given the strict statutory nature of this provision it is important that it is sufficiently broad to ensure that unintended exclusions do not occur. The proposed definition is significantly broader than the exception in s23B(9A) for example and is likely to capture the full range of Crown actions that create areas of land wholly or partially for the preservation of the natural environment.

Providing for disregard of extinguishment of part of a 'park area' by agreement provides welcome additional flexibility for the parties.

Public works ss47C(3) and (4)

We support the provision allowing extinguishment of native title by public works to be disregarded by agreement. As a matter of consistency and principle, we consider that this provision should be extended to ss47, 47A and 47B.

Allow for extinguishment to be disregarded by agreement generally

As raised in our submission in response to the Exposure Draft, we submit that if the consent requirement is retained, then consideration should be given to a provision that would allow *any* historical extinguishment to be disregarded on any Crown land if the claimants and the government party agree. Much Crown land could appropriately be the subject of disregard of extinguishment such as forest reserves and other Crown Reserves and unallocated Crown land. Especially where the non-extinguishment principle applies and existing interests are protected, as a matter of consistency and principle, there appears to be no reason not to permit parties to agree to disregard extinguishment in all areas of Crown land. A provision of this nature would address the purpose of the amendment in 'providing greater flexibility in reaching agreements and may provide more opportunities for native title to be recognized and claims to be settled by negotiation'.[1]

Although this extension raises the issue of co-existence of native title and other interests, these circumstances are not new. For example, pastoral lessees' rights co-exist with native title rights and there seems no reason in principle why other rights holders, such as the public or those licensed to use Crown lands in particular ways, should not similarly co-exist with native title. As all existing rights are protected there is no diminution of currently held rights and entitlements.

<u>Schedule 2: Negotiations - 'Good faith' and associated amendments</u>

The commentary on the Exposure Draft identified the 'lack of clarity in what constitutes good faith' and the 'inequity in bargaining power between the parties' as the two key issues that the schedule 2 negotiation amendments seek to address. The amending provisions regarding good faith requirements have been amended to define and clarify the nature of good faith in the context of the right to negotiate to encourage parties across the whole sector to focus on negotiated, rather than arbitrated, outcomes and to promote positive relationship-building through agreement-making.

Good faith amendments

The content of the 'good faith' obligation in general law is complex and ill-defined. This body of law has been drawn on to give meaning to the term 'good faith' in the NTA. This has produced varied results when applied in the context of negotiations under the provisions of the NTA (see for example *Risk v Williamson* (1998) 87 FCR 202; 155 ALR 393), but the National Native Title Tribunal ('NNTT'), endorsed by the Federal Court, has developed significant guidance on the content of the obligation in the context of s31 of the NTA (see for example *Western Australia v Taylor* (1996) 134 FLR 211 and *FMG Pilbara P/L v Cox* (2009) 175 FCR 141; 255 ALR 229). As noted in the Explanatory Memorandum to the Bill,[2] the proposed amendments are partially in response to the decision in

[1] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 3.

[2] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 16-17.

FMG Pilbara P/L v Cox. In that case, the Full Court of the Federal Court held that s31(1)(b) does not detail the subject matter of negotiations. Rather, it only prescribes that negotiations must be conducted in good faith. Therefore, the proposed amendments should be considered in the light of addressing this problem emerging from the decision as well as the identified need to ensure more equal bargaining power.

As noted in our response to the Exposure Draft, we support the addition of s31(1)(c) which requires negotiations to include 'consideration of the effect of the doing of the act on the registered native title rights and interests of the native title parties'. The effect of this is to establish a minimum benchmark for the content of negotiations. This amendment directly addresses one of the issues in *FMG* and is likely to have a positive impact on the negotiation process, especially when read together with the proposed s31A(1). This amendment defines 'good faith negotiation requirements' and effectively imposes a positive duty to use all reasonable efforts to reach agreement and establish relationships. The 'good faith negotiation requirements' are given further substance with the proposed s31A(2) which details certain matters that might be relevant in deciding whether the parties have negotiated in accordance with the 'good faith negotiation requirements'. While s31(1)(c) does not form part of the 'good faith negotiation requirements' under s31A(1), we consider that it does so implicitly as it seeks to ensure parties negotiate in a productive manner and discuss the substantive matters at issue.[3]

We welcome the addition of s31A(2)(b) to the Bill which allows for the arbitral body in deciding whether or not a negotiation party has negotiated in accordance with the good faith requirements to have regard to 'any other matter the arbitral body considers relevant'. We consider that the amendment addresses the concerns raised by the ATNS project in response to the Exposure Draft with regard to the possible codification of good faith requirements contained in the Exposure Draft. As noted by the Explanatory Memorandum to the Bill '31A(2)(b) gives the arbitral body an additional capacity to consider matters that may be relevant to the consideration of the conduct of the parties during negotiation. This will include an examination of the conduct of parties, beyond the minimum eight month negotiation period.'[4]

We note that the Explanatory Memorandum to the Bill suggests that the good faith negotiation provisions do not preclude a native title party seeking a future act determination that an act cannot be done or can only be done with conditions (eg *Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49). We consider this should be explicitly stated, particularly in light of the proposed amendments to s36(2).[5]

Amendment s36(2)

We support the changes made to the proposed amendment of s36(2). We consider that the changes will encourage genuine negotiation and help to ensure that parties will be less likely to manipulate the negotiation process with a view to having the matter arbitrated.[6]

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[3] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 16-17.

[4] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 18.

[5] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 18.

[6] Agreements Treaties and Negotiated Settlements, Submission to the Exposure Draft Native title Amendment Bill (19 October 2012) 4.

Time Limits

As we stated in our response to the Exposure Draft, we strongly support the proposed extension of time in s35(1)(a) from 6 to 8 months. This together with the proposed s31(1)(c), s31A(1) and the new s36(2) should encourage serious negotiations with prospects of reaching agreement without recourse to s35 arbitration.

Schedule 3: Indigenous Land Use Agreements

Broaden the scope of body corporate ILUAs s24BC

We support the amendment to s24BC and the additional subsection 3. It is a sensible response to an anomalous situation and removes a complexity in negotiating and drafting body corporate ILUAs.

Removal of the additions to ss 24BB(ab), 24CB(ab) and 24DB (aa)

The amendments to ss 24BB and 24CB of the additional subsections of (ac) and (ad) in the Exposure Draft have not been included in the Bill. In our previous submission in response to the Exposure Draft we noted that while the amendments clarified a potential inconsistency with the *Traditional Owners Settlement Act 2010* (Vic) they also permitted the regulation or diminution of specific statutory protection of a benefit for native title holders under s 211 of the NTA.[7] On balance we support the status quo.

Improve authorisation and registration process for Area ILUAs

We note that there have been difficulties in relation to authorisation of area ILUAs and that the general effect of the proposed changes is to move the area ILUA process to one that is more an objection process rather than a competing claims process. While this has benefits of efficiency, we have some concerns that the changes will permit registration of an ILUA notwithstanding that there are relevant parties who have not been adequately consulted or have not consented to the ILUA. Our concern here arises from the effect of registration of an ILUA and therefore it is necessary to ensure that the appropriate balance between efficiency and native title holder rights is struck.

Notice period 24CH

We note that the reduction of the notice period to one month will improve efficiency and prevent delay in registration. However we have some concerns that the amendments to s251A impose a new test on objectors – establishing a prima facie case that they may hold native title. This will be very difficult for some potential objectors as the amendment effectively requires material similar to that required for an application. For many objectors this will be impossible to establish within the one month notice period. We therefore consider the requirement of establishing a prima facie case under s251A should be removed or the time period extended.

Authorisation s 251A (2)

As raised in our submission on the Exposure Draft, we consider that in relation to authorisation of area ILUAs, if parties have reached agreement in relation to an ILUA, there should be no

[7] Agreements Treaties and Negotiated Settlements, Submission to the Exposure Draft Native title Amendment Bill (19 October 2012) 6.

requirement for establishing a prima facie case that they may hold native title which is the effect of the proposed s251A(2).

Disclosure of material by Registrar s 24CI(1)

We welcome the changes that have been made to the proposed s24CI(1C) which seeks to repeal s24CI and streamline the registration of Subdivision C ILUAs.[8] The amendment allows for objections to be lodged against the registration of an agreement. We support the goal of encouraging resolution of objections, particularly given that the process is now one of objection rather than competing claims. Our concern with the Exposure Draft amendment of s24CI and the transfer of responsibility and control of documents to the NNTT - that the release of some information may have an adverse impact on on-going proceedings or relationships - have been addressed in the revised proposed amendment.

Registration of area agreements certified by representative bodies 24CK

The changes to the amendment 24CK from the Exposure Draft have simplified the conditions required for the registration of area agreements with subsection (2) being the only condition to be determined. An application will no longer be required to meet the condition of there being no valid objections made under 24CI and the Registrar is no longer obliged to take matters into account regarding information given to the Registrar by persons making objections, representative Aboriginal/Torres Strait Islander bodies that certified the application and any account of any other matter or thing it may choose. While this amendment has been designed to streamline the authorisation and registration process, we are concerned that the efficiencies have been gained at the expense of potential objectors. We do note however that the Explanatory Memorandum to the Bill notes that a person wishing to make an objection against an ILUA certified by a NTRB has recourse to judicial review.[9]

Registration of area agreements not certified by representative Aboriginal/Torres Strait Islander bodies s 24CL

We support the addition of s24CL(4)(c), which states that in deciding whether the requirements of the section have been met, the Registrar must take into account any objections that have been made in relation to the application under s24CI.

Amended Agreements 24ED

We welcome the changes that have been made to the proposed amended agreement provisions under s24ED and the conditions that have been placed upon what amendments that may be made to ILUAs.

<u>Schedule 4</u>

Minor technical amendments to section 47

As indicated in our response to the Exposure Draft, we support this amendment which rectifies problems created by narrow drafting of the original section.

[8] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 22.
[9] The Parliament of the Commonwealth of Australia, Native Title Amendment Bill 2012, Explanatory Memorandum, 22.