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23

21 October 2012

Ms Kathleen Denley
Assistant Secretary, Native Title Unit
Attorney-General's Department
CA House, National Circuit
Barton ACT 2600

Via email: native.title@ag.gov.au

Dear Ms Denley,

Exposure Draft – Native Title Amendment Bill 2012

1. Australian Lawyers for Human Rights ("**ALHR**") thanks the Attorney-General's Department for the opportunity to comment on the exposure draft of the *Native Title Amendment Bill 2012*. We also thank you for the slight extension to provide our comments by 21 October 2012. It was the present writer's involvement in a long running case that has forced us to miss that deadline, as well. I apologise in that respect.

2. ALHR was established in 1993. ALHR is a network of Australian lawyers and law students active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2500 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

3. In summary, ALHR supports the substance of the proposed amendments to the *Native Title Act 1993* (Cth) ("**the NTA**") and sees them as positive steps towards remedying some concerning problems in the current native title legislation. Nevertheless, the proposed changes fall short of what is required to remedy significant shortcomings in Australia's treatment of the rights of Aboriginal and Torres Strait Islander peoples in relation to their traditional/ancestral lands. ALHR recommends that the amending legislation should:

   - Strengthen the proposed changes to the 'right to negotiate' procedure by:

- specifying that the National Native Title Tribunal ("**the Tribunal**") cannot consider an arbitration application until substantive negotiations have reached an unsuccessful conclusion;

- requiring the Tribunal to give greater weight to the legitimate wishes of native title parties (claimants and holders alike) in determining whether a future act may be done;

- allowing the Tribunal to impose financial conditions on proponents based on the profits, income or production derived from activities conducted on, or otherwise affecting, traditional lands; and

- Expand the provisions for disregarding historical extinguishment by:

  - removing the requirement of government agreement for national parks and conservation reserves;

  - removing the exclusion of marine areas; and

  - allowing disregard of extinguishment by consent for land areas not covered by the other provisions.

Good faith negotiations

4. The recognition of native title in Australia constitutes an important step in respecting and protecting the rights of Aboriginal and Torres Strait Islander peoples. It has the capacity to assist the cultural survival of Aboriginal and Torres Strait Islander cultures by allowing current and future generations to maintain their spiritual and material relationships to their lands and waters.[1] It is a direct consequence of the principle of non-discrimination, recognising the validity of non-European forms of property ownership.[2]

5. The United Nations Committee on the Elimination of Racial Discrimination ("**CERD Committee**") noted that Indigenous peoples worldwide:

   > *...have been and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.*[3]

   The CERD Committee called on State parties to:

   > *... recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and*

[1] Art 27, International Covenant on Civil and Political Rights ("**ICCPR**").
[2] Art 26, ICCPR; Art 5, International Convention on the Elimination of All Forms of Racial Discrimination "**CERD**").
[3] CERD Committee General Recommendation 23 Indigenous Peoples, 18/08/1997, UN Doc. A/52/18, annex V.

territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

6. The human rights principles mentioned above are distilled and applied to the context of Indigenous peoples in the United Nations Declaration on the Rights of Indigenous Peoples ("**the Declaration**"). Australia announced its commitment to the Declaration in 2009. Because of the special historical and cultural circumstances of Indigenous peoples worldwide, many provisions of the Declaration are concerned with issues of land and water.[4] Intersecting with these is the fundamental principle, grounded in the self-determination of all peoples, that the free, prior and informed consent of Indigenous peoples is a central consideration for any project affecting their traditional territories.[5]

7. The basic idea underlying the 'right to negotiate' procedure in Australia's system of native title is broadly aligned with these rights and commitments. However, the arbitration process, as it is currently structured, means that the 'right to negotiate' does not live up to this promise. There are three primary issues of concern with the current scheme.

8. Firstly, the 'right to negotiate' is predicated on the assumption that proponents will negotiate with a genuine desire to reach agreement with the native title parties but creates an incentive structure that makes such a desire unrealistic in the vast majority of cases. The Tribunal (once its power to arbitrate is enlivened) almost always allows future acts to be done, and any conditions that it imposes are unlikely to add significantly to existing regulatory requirements. Crucially, the Tribunal is not empowered to impose financial conditions of the kind that native title parties will often seek to negotiate prior to arbitration. Proponents are explicitly not required to act altruistically or depart from normal commercial principles,[6] and standard commercial negotiation would involve parties negotiating with explicit consideration of their best and worst alternatives to a negotiated settlement.[7] Yet, if proponents consider their position in these terms, negotiated settlement will rarely seem to be the best option. So 'good faith' in these circumstances amounts to negotiating as if proponents genuinely wanted to reach agreement, when the commercial reality is that they will probably be better off with the almost inevitable outcome of arbitration.

9. Empowering the Tribunal to make realistic orders that relate to the same subject matter as the parties' actual negotiations would be an appropriate way to redress this incoherent scheme.

10. The second issue of concern with the current legislation is that it has been interpreted not to require parties to exhaust the avenues for negotiation before approaching the Tribunal for arbitration. So long as the six month time limit has passed, proponents can effectively

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[4] See arts 8(2)(b), 25, 26, 27, 28, 29, 32, the Declaration.

[5] Art 32(2), the Declaration.

[6] *Angelina Cox &Ors on behalf of the PuutuKuntiKurrama&Pinikura People/ WintawariGuruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* [2008] NNTTA 90 at [29]; *Mr Kevin Cosmos &Ors (YaburaraMardudhunera People)/Mr Jack Alexander &Ors (KurumaMarthudunera People)/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35 at [23].

[7] Ury and Fisher (1991) *Getting to Yes: Negotiating Agreement Without Giving In,* Penguin Books.

discontinue negotiations that may otherwise seem fruitful and productive.[8] Native title parties may spend much or all of the six months negotiating a negotiation protocol or otherwise engaging in preliminary steps and then find that they have missed their opportunity to negotiate about the substantive project. While welcome, the extension of this limit to eight months will not address the underlying problem.

11. The most obvious solution is to require the Tribunal to assess whether the substantive negotiations have in fact stalled before considering an arbitral determination (perhaps assessed through a mediation process that could become a mandatory step prior to arbitration being considered). Such an assessment would not fall outside the expertise and knowledge of the Tribunal, and would not impose an onerous burden on the negotiation parties (i.e., the State, proponent and native title parties). It may be that the proposed s 31A(1) would require such an assessment to be undertaken in any case, but it would give clarity and certainty to parties to specify a requirement for negotiations to have run their course before the Tribunal can be asked to arbitrate. An additional safeguard would be to require the State to take a more active role in negotiations, rather than effectively delegating their responsibility to project proponents (particularly as it relates to compensation). This issue was recently highlighted in *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2);Brendan Wyman & Ors (Bidjara People)/Queensland,* [2012] NNTTA 93 (23 August 2012).

12. The third issue of concern, and an important consideration for the Commonwealth Government, is that the Tribunal's current decision-making process treats the wishes of native title parties as merely one of a number of considerations. Tribunal decisions have repeatedly emphasised that native title parties are not given a 'veto' in decisions about developments on their country, but the prevailing interpretation of s 39 goes further than this. It does not give any special weight to the native title party's lack of consent (or consent with conditions) and the Tribunal determines for itself whether the reasons for the native title party's lack of consent are significant enough to justify refusing the future act. The problem with this approach is that the Tribunal treats the task of consulting and negotiating with the native title party as having been discharged by the proponents, and then goes on to make a decision that does not treat free, prior and informed consent as its central consideration. However, when the Tribunal makes an arbitral decision, the Commonwealth executive is effectively the decision-maker. In making the decision whether or not a project may go ahead, the Tribunal is therefore under a duty to constructively engage with the native title party, to determine the conditions on which the native title party might consent to the future act. If no set of conditions is capable of securing the native title party's agreement, then the Tribunal's default position should be that the act must not be done. Substantial and persuasive reasons should be required to depart from that presumption. As James Anaya, the current UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, has noted:

> *[w]here property rights are indirectly but still significantly affected, for example, in the extraction of subsoil resources that are deemed to be under state ownership, the state's consultation with Indigenous peoples must at least have the objective of*

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[8] *Angelina Cox &Ors on behalf of the PuutuKuntiKurrama&Pinikura People/ WintawariGuruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* [2008] NNTTA 90 at [29]; *Mr Kevin Cosmos &Ors (YaburaraMardudhunera People)/Mr Jack Alexander &Ors (KurumaMarthudunera People)/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35

achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward. If it proceeds, the state bears the heavy burden of justification to ensure the indigenous peoples share in the benefits of the project, and must take measures to mitigate its negative effects.[9]

13. Accordingly, ALHR recommends that s 39 be amended to require the Tribunal to give greater weight to the wishes and views of the native title party. Ideally, this should be achieved by creating a rebuttable presumption that the act should not be done without the native title party's free, prior and informed consent. The Commonwealth executive, through the Tribunal, should actively attempt to identify the terms on which the native title parties might consent, and to tailor conditions to match these terms.

Historical extinguishment

14. The human rights principles outlined in paragraphs 4–6 above apply equally to the extinguishment rules in the NTA. In cases where traditional owners can establish their native title connection, by proving rights and interests held under traditional law and custom, it is incumbent on the Commonwealth to recognise and protect these rights and interests.

15. Human rights must involve a balancing process. The historical settlement reached in 1993 with the passage of the NTA included the broad view that where private individuals and corporations have acquired rights and interests in land, these should not be taken away by the recognition of native title. It was further recognised that governments have the power to impinge on native title rights through legislation or through the use of Crown land for public purposes. Therefore considerations of private fairness and public policy led to our main rules of extinguishment.

16. Those private and public considerations do not apply in the case of historical extinguishment and, accordingly, there is no justifiable basis for denying recognition to native title where the original extinguishing act is no longer relevant. The human rights of traditional owners must not be disregarded for the sake of historical legal anomalies. The disregarding of extinguishment under the NTA should therefore be extended to cure these unjustified and unjust quirks.

17. The proposed s 47C should be changed to remove the requirement of governmental agreement. The disregard of extinguishment under that section will have no effect on the content of the reservation, granting or vesting. The governments' rights are not diminished by the operation of the section, and the native title rights must necessarily give way to them. The only effects of the section are that (a) the native title rights will be capable of re-animating later, if the reservation is altered or removed; and (b) defunct tenures granted previously to the establishment of the park or reserve are disregarded. Accordingly the governments' interests, and the public's interests, are not diminished by the recognition of native title. Under those circumstances, disregard of extinguishment should be automatic rather than conditional on agreement.

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[9]Anaya, J. (2005). Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: The more fundamental issue of what rights indigenous peoples have in lands and resources. *Arizona Journal of International and Comparative Law*, 22(1), p.17

18. Further, there is no explanation for why marine parks are excluded from the scope of s 47C. Assuming that the claimed native title rights are otherwise compatible with the common law of Australia and Australia's international obligations, the issue of whether or not the creation of parks and reserves has extinguished native title would not appear to be affected by the on-shore or off-shore location of the claimed area. This appears to be an exclusion without a rationale.

19. Finally, in addition to the disregard of historical extinguishment in parks and reserves, it is appropriate to create legislation enabling parties to disregard historical extinguishment in any situation. In distinction to the argument made above at paragraph 17, ALHR recognises that there may be situations outside the context of conservation reserves in which the tenure history of an area justifies a negotiated approach. There may be complexities arising from past, present or future interests that warrant more tailored solutions than can be achieved by a blanket rule. This does not detract from the previous submission that, in the case of parks and conservation reserves, agreement should not be a requirement.[10]

Indigenous Land Use Agreements

20. While we acknowledge the need to ensure that Indigenous Land Use Agreements (**ILUAs**) are registered in an efficient and timely way, we do not think this should be at the expense of due process. The proposed reduction in the 'notice period' in which objections to registration of ILUAs can be lodged (from the current three months down to one month) severely and unnecessarily limits the window of time in which affected third party Indigenous persons can lodge an objection. We do not think that a three month notification period causes undue delay for proponents given average project timelines and other compliance requirements (such as the need to obtain environmental authorities at the State level), but a one month notification period for Indigenous persons wishing to lodge an objection is particularly disadvantageous. This is because of the time it may take for resource deprived Aboriginal and Torres Strait Islander peoples to effectively mobilise and lodge an objection, particularly, given the asymmetries in information that they often experience.

21. While we commend the introduction of a formal objection process under s 24CH for an un-certified ILUA, the problems we have highlighted above are amplified in these cases. At the very least, certification of an ILUA by a representative Aboriginal and Torres Strait Islander body (as an objective third party) gives an additional layer of comfort to the Tribunal that the requirements of s 203BE(5)(a) and (b) have, in fact, been satisfied. Absent the overlay of certification, we think it is even more imprudent to reduce the notification period to one month. While we think it unnecessary to reduce the three month notification period in either case, perhaps a realistic compromise position is a six week notification period for certified ILUAs and three months for un-certified ILUAs.

Conclusion

22. The recommendations made in this submission are not radical, onerous or novel. They have been under consideration for some years, and are directed towards remedying serious deficiencies in Australia's human rights record in relation to its Indigenous

[10]See Aboriginal and Torres Strait Islander Social Justice Commissioner (2009) *Native Title Report 2009,* Human Rights and Equal Opportunity Commission, Canberra, at p 110.

peoples. By making these additional and relatively minor adjustments to the NTA, the Government would be taking significant steps towards delivering a fairer deal for Aboriginal and Torres Strait Islander peoples. A better future acts process would create economic opportunities and social benefits that governments are still struggling to provide. More sensible rules about extinguishment in parks and reserves would also increase opportunities for traditional owners to care for country and engage in environmentally sustainable activities including, for example, carbon abatement and sequestration initiatives. Additionally, Australia would be in a better position to demonstrate on the international stage that it is making genuine progress towards improving the protection and promotion of the human rights of Aboriginal and Torres Strait Islander peoples, particularly, in relation to the interface between those rights and the extractive industries which are the backbone of the Australian economy.

23. If you would like to discuss any aspect of this submission, please contact me on mobile: 0433 846 518 or email: s.keim@higginschambers.com.au

Best regards,

Stephen Keim SC
President
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