AIATSIS
Australian Institute of Aboriginal and Torres Strait Islander Studies

Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded in Certain Circumstances

Submission: Attorney General's Department

Introduction

The doctrine of extinguishment is a particularly concerning area of native title law that is unquestionably deserving of more critical attention. Extinguishment is one of the key racially discriminatory aspects of native title. Specifically, the circumstances prescribed by the *Native Title Act 1993* (Cth) ('the Act') in which the extinguishment of native title may be disregarded are among the few attempts to develop a more just legal framework for the recognition and protection of native title; though they remain far too limited in scope.

In addition to the significant research that is required by native title parties to prove connection with and rights to land and water, State government parties must undertake costly and time-consuming searches of historical tenure over land in order to resolve native title claims.[1] An intricate evaluation of this information is required in order to establish whether each particular act affecting land has occasioned any extinguishment and to what extent. Effectively, a potential dispute arises over each individual tenure granted over past 230 years. Regardless of whether these disputes take the form of negotiation or litigation, the time and cost associated with this aspect of the claims is significant.

Building on the exceptions found in ss 47, 47A and 47B; the proposed s 47C is a beneficial provision that will extend the important exceptions to historical extinguishment. It will help to reduce the cost and delay associated with native title claims and may facilitate the return of land to traditional owners. However AIATSIS makes the following two submissions.

Firstly, despite the benefit that would be derived from the inclusion of this provision in the Act, a significant impediment still exists in s 47C(1)(c)(ii), which makes the operation of the provision optional. The provision should apply to all claims over areas of the relevant class. Secondly, this reform should be extended to all Crown land.

The problems relating to the doctrine of extinguishment are such that, in general, this area needs to be scrutinised and ongoing reform should be considered to ensure non-discrimination becomes the touchstone for any change to native title law and practice.

[1] The 1994 consultation on the Parliamentary Joint Committee on Native Title Parliamentary Joint Committee on Native Title, Parliament of the Commonwealth of Australia, *First Report of the Parliamentary Joint Committee on Native Title: Consultation During August 1994* (1994) 9.

The current proposal creates an unjust power relationship

While the proposed s 47C is, on the whole, a constructive amendment to the Act, subsection (1)(c)(ii), which requires agreement of the parties before the provision can operate, remains problematic. In requiring that the relevant Commonwealth, State or Territory governments also agree to disregard extinguishment of the relevant area of land, power is taken from the native title holders and placed back in the hands of the State.

While all state governments adopt policies that support negotiated outcomes over litigated outcomes, it remains in the State's interest to argue for extinguishment so that the land may remain under its control, free from encumbrances. Where the only other competing interest holder in the land over which native title exists is the Crown', offering the State the option *not* to agree to disregard extinguishment places the State in a position of undue power in negotiating the settlement of the claim. This could have a significant impact in terms of both the nature and extent of rights and interests that the Crown will recognise, and how those rights and interests will be exercised in relation to the Crown's interests.

The section should provide that where native title exists over a national park and the only other interest holder in that land is the Crown, then extinguishment should automatically be disregarded.

Extinguishment is racially discriminatory

At the time of colonisation, land was forcibly taken from Indigenous people to whom it previously belonged. Today, it is recognised that these colonial acts of dispossession were wrongful, though under the doctrine of native title, they are not seen as illegal or compensable, founded as they were, in an era of racial discrimination. Through the legal doctrine of native title, it is now accepted that Indigenous peoples have a rightful claim to their traditional lands. If we are to suggest that we now live in an era of non-discrimination, it should be the aim of the Crown to return lands to traditional owners where possible.

While the recognition of native title in the *Mabo* case displaced the discriminatory concept of *terra nullius*,[2] it is still premised on a discriminatory conception of Indigenous society as a 'relic of prior sovereignty'[3] and therefore fails to recognise Indigenous society as an equal source of rights and interests'.[4] This is highlighted by the discriminatory approach of the doctrine of extinguishment.

In his reasoning in *Fejo*, Kirby J emphasised the inherent 'vulnerability' of native title.[5] Arguably, this conception of native title can also be read into prior native title jurisprudence.[6] In line with this characterisation, Kirby J suggested that 'the inconsistency lies not in the facts or the way in which the land is actually used. It lies in a comparison between the inherently

[2] *Mabo v Queensland* [No. 2] (1992) 175 CLR 1.
[3] Michael Dodson and Lisa Strelein, 'Australia's Nation Building: Renegotiating the Relationship between Indigenous People and the State' (2001) 24(3) *The University of New South Wales Law Journal* 826, 835
[4] ibid.
[5] *Fejo v Northern Territory* (1998) 195 CLR 96, 151 [105] (Kirby J).
[6] For example, see Brennan J's judgment in *Mabo* in which he stated that 'rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power' in *Mabo v Queensland* [No. 2] (1992) 175 CLR 1, 63 (Brennan J).

fragile native title right, susceptible to extinguishment or defeasance and the legal rights which fee simple confers'.[7]

This characterisation of native title rights as 'fragile' and 'susceptible to extinguishment' creates a hierarchy of rights in which Indigenous interests are consistently placed beneath non-indigenous interests. The way non-indigenous interests are privileged through this characterisation has the effect of reinforcing colonial power relations and undermining the rights of Indigenous people.

Native title law does not privilege the fact that Indigenous people were the first owners of the land (as common law property traditions would normally do), nor does it protect Indigenous property from arbitrary deprivation by the Crown (as the common law would normally do). Indeed the Court's have used a derivative of this latter common law tradition, that the Crown cannot derogate from a grant once made, to underpin the privileging of non-native title interests.[8]

The common law makes no attempt to redress the wrongs of the past. Thus, legislative intervention is required to ameliorate the position the courts have taken at common law. The *Racial Discrimination Act 1975* (Cth) provides some protection for native title and the Act provides additional procedural protections. However, provisions like s 47C also aid in lessening the discriminatory nature of the doctrine of extinguishment.

The Crown should not benefit from unjust acts of colonial dispossession

The doctrine of extinguishment has the effect of protecting the property rights of parties other than the State, who, since colonisation, have gained an interest in land which is recognised by law. Therefore, where native title rights and interests conflict with the rights and interests held by those non-state parties, native title will be extinguished and the subsequent interest will be protected. This is recognised by many as a realistic compromise. Having recognised native title so late in the development of the Australian nation, it was necessary to accommodate over 200 years of dealings in land without consideration of the rights of Indigenous peoples.

However, the situation should be different where the only other possible land owner is the Crown. While it is acknowledged that non-State parties did not commit any wrong acts, the Crown cannot claim any such moral high ground. The Crown was responsible for dispossessing Indigenous people of their land, whether by force or by legal accretion. The profits of this colonial enterprise could be considered as akin to unjust enrichment, by which the Crown obtained a benefit at the expense of the traditional owners of the land.[9] To remedy this unjust enrichment, an obligation should rest with the Crown to make fair and just restitution;[10] preferably in the form of land.[11]

[7] *Fejo v Northern Territory* (1998) 195 CLR 96, 151 [105] (Kirby J).
[8] see Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia*, Native law Centre, Saskatchewan, 2001, pp. 357-408.
[9] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.
[10] ibid.
[11] See United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc *A/RES/61/295* (13 September 2007).

Justice North of the Federal Court of Australia has taken this approach somewhat further, to apply not only to questions of extinguishment, but also of proof of connection. In his view the Crown should not be permitted to rely on its prior, unjust conduct to continue to deny Indigenous people native title rights.[12] Justice North has noted that as the law currently stands, the more white settlement has harmed Indigenous people, the harder it is to establish native title.[13] He has suggested that the onus of proof should be on the state to prove a lack of continuity, but also, that any interruption to connection that resulted from the impact of actions of settlers should be disregarded.[14] In his view, this 'disgraceful state of the law' must be addressed for the 'moral wellbeing' of Australia.[15]

State and Commonwealth governments rely too readily on the current legal framework of native title. They must take responsibility for identifying ways to redress the discriminatory and unjust aspects of native title, most particularly in relation to benefits to the Crown from non-recognition. The Commonwealth should take the opportunity and precedent established by the current reforms to s 47ff to broaden the circumstances in which extinguishment can be disregarded to include all Crown land.

The harsh doctrine of permanent extinguishment

The *Fejo* decision confirmed that a grant of a freehold estate extinguishes native title.[16] It determined that such extinguishment is absolute and forever, regardless of whether rights and interests in land still exist under the Indigenous law from which native title derives its content. The majority stated that while the existence of Indigenous law is *necessary* to establish native title, it is not *sufficient* to do so.

Justice Kirby came to the same conclusion but for slightly different reasons. He justified his decision by arguing that for 'a number of reasons of legal authority, principle and policy' extinguishment effected by a grant of fee simple is irreversible.[17] He suggested that to recognise a revival would be to recognise a new right and that therefore, the outcome was incompatible with the idea that native title has its origin in Indigenous laws.

The Court in *Ward* emphasised that the Act is at the core of native title litigation and that the operation of the Act mandates permanent extinguishment.[18] It highlighted the fact that Division 2B of the Act provides for both 'complete' and 'partial' extinguishment. The Court also confirmed that this can take place despite native title rights continuing to exist under indigenous law. In his *Ward* judgment, McHugh J was critical of the way the law operates in these circumstances to extinguish native title regardless of the merits of the case[19] and both McHugh J and Callinan J called for a new process that would lead to more just outcomes for Indigenous people.[20]

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[12] See Justice A M North and T Goodwin, 'Disconnection- The Gap Between Law and Justice in Native Title: A Proposal for Reform' (Speech delivered at the National Native Title Conference, Melbourne, 4 June 2009).
[13] ibid.
[14] ibid.
[15] ibid.
[16] *Fejo v Northern Territory* [1998] 195 CLR 96.
[17] ibid, 112 (Kirby J).
[18] *Western Australia v Ward* (2002) 213 CLR 1, 63 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[19] ibid, 240 [561] (McHugh J).
[20] ibid, 240 [561] (McHugh J); 398 [970] (Callinan J).

Significant academic and extra-curial criticism followed these decisions. Justice Basten has commented that 'there is little explanation in the jurisprudence as to why a grant that has never been taken up and has later been relinquished should extinguish— rather than suspend—the pre-existing native title which depended for its recognition as a factual matter on evidence of continued use and enjoyment of the land under traditional law and custom.'[21] Similarly, Chief Justice French has suggested that if it is accepted that extinguishment is related to native title itself rather than the subject matter of recognition, it isn't clear why native title cannot revive.[22] Certainly, the preamble of the Act seems to support revival, stating that 'where appropriate, native title should not be extinguished but revive after a validated act ceases to have effect'.[23]

The justification provided in the *Fejo* and *Ward* judgments for the permanent extinguishment of native title is wrong headed; conceptualising the revival of native title as a new right does not reflect the continued existence of the laws and customs that underpin native title. Extinguishment must be understood as something that only occurs in the non-Indigenous legal mind, not the Indigenous legal system. As a result, where a connection to land continues at Indigenous law, native title should not be able to be permanently extinguished.

More specifically, native title is a burden on the Sovereignty of the Crown;[24] and should remain so until it is no longer able to be established by reference to Indigenous law. If the common law is unable to achieve this, then legislative reform should be made. If previous grants over land no longer exist and the only other interest in the land is that of the Crown, there should be no barrier to returning the land to its traditional owners. The s 47ff schema to disregard prior extinguishing acts should be extended to all 'Crown' land.

The practical problems that emerge from of partial extinguishment

While the issues of justice are compelling, there is also an efficiency argument for extending the s47ff scheme. The *Ward* decision, supported by the *Wilson* case[25] confirmed that the operation of the Act allowed for partial extinguishment of native title.[26] The Court outlined the 'inconsistency of incidents' test, which would determine the extent of extinguishment and co-existence between native title rights and those rights conferred by a Crown grant. The Court affirmed that what is required is a comparison of the particular rights and interests conferred by native title on the one hand and by the statutory grant or interest on the other.[27] Where the legal incidents of the two sets of rights are inconsistent, the rights under the Crown grant will prevail and the particular inconsistent native title rights and interests will be extinguished. This means that the extent of extinguishment can only be determined once the legal content of both sets of rights has been established.[28] This also applies to circumstances

[21] Justice John Basten , 'A Curious History of the Mabo Litigation' (Speech delivered at the National Native Title Conference, Darwin, 26 May 2006).
[22] Chief Justice Robert French, 'The Role of the High Court and the Recognition of Native Title: Address in Honour of Ron Casten QC AM' (Speech delivered at the National Native Title Conference, 28 August 2001).
[23] *Native Title Act 1993* (Cth), Preamble.
[24] *Commonwealth v Yarmirr* (2001) 208 CLR 1.
[25] *Wilson v Anderson* (2002) 213 CLR 401.
[26] *Western Australia v Ward* (2002) 213 CLR 1.
[27] ibid, 89 [79] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[28] ibid, 114 [149] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

where the Crown has reserved land to itself for particular purposes or used land for public purposes.[29]

In practice, the combination of permanent and partial extinguishment under the Act creates an intricate scheme in which prior grants and interests can extinguish native title in a piecemeal fashion, and particular rights and particular areas can be extracted from native title one by one. This creates a 'patchwork' of tenures and acts that leave a permanent imprint on native title. The determination of the impact of extinguishment on an area under claim can take as long, if not longer than the determination of connection.

The problem of inconsistency across jurisdictions

As illustrated by the variety of outcomes for national parks in *Ward*, native title outcomes are unduly affected by idiosyncrasies of tenure and statute in each state or territory. The *Ward* decision[30] found that the declaration under s 12(1) of the *Territory Parks and Wildlife Conservation Act 2000* (NT) that created the Keep River National Park was void. This decision brought into question the validity of the park and thereby, the validity of national parks across the Northern Territory. In contrast the national parks on the other side of the border in Western Australia were found to extinguish native title if the instrument used to create the reserve effectively constituted a grant of exclusive possession to the Crown. However, some reserves created under the same legislation, simply by placing them under the control of a board of management, was found not to extinguish native title. In the result, there were differing approaches across State/Territory boundaries as well as within Western Australia. The approach under proposed s 47C brings further clarity and consistency to native title outcomes and could be usefully extended to other Crown interests.

Conclusion

Overall, the proposed s 47C appears to be a beneficial amendment to the *Native Title Act.* Section 47C could eliminate unnecessary delay and cost currently attached to native title claims over national parks by eliminating tenure assessments and may facilitate the return of national park lands over which Indigenous peoples continue to hold rights and interests under Indigenous law. However, a considerable problem with this reform is that it requires claimants and the State governments to agree to the operation of s 47C. This further erodes the negotiating power of native title parties and unduly places the power of the hands of the State.

Further, reform in this area should be more extensive. The problems that exist in relation to the doctrine of extinguishment have been outlined in this submission. These include the discriminatory nature of the doctrine of extinguishment, the unjust enrichment of the Crown, the inadequate justification for permanent extinguishment, the confusing and impractical piecemeal erosion caused by partial extinguishment, and the problem of the inconsistent approaches across jurisdictions.

[29] See *Erubam Le (Darnley Islanders) (No 1) v State of Queensland* [2003] 134 FCR 155.
[30] *Western Australia v Ward* (2002) 213 CLR 1.

The problems with the current law of extinguishment could be ameliorated by further reform to expand the circumstances in which historical extinguishment can be disregarded to include all Crown land.