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19 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,

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

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide comment on the proposed changes to the operation of the *Native Title Act 1993* addressed in Exposure Draft released 21 September 2012. AIATSIS is one of Australia's publicly funded research agencies and is dedicated to research in Indigenous studies. AIATSIS includes the Native Title Research Unit, established following the *Mabo* decision, which conducts research and provide analysis on the law, policy and practice of native title.

AIATSIS has been integrally involved in debates over reform to the Native Title Act since its inception. Through events such as the annual National Native Title Conference, AIATSIS has promoted informed discussion and debate on the Act and its ability to fulfil the objectives set out in the preamble, to recognise and protect the rights of Indigenous peoples to their traditional lands. We remain fundamentally committed to improving legal process and policy in order to ensure better and more sustainable land justice outcomes for Aboriginal and Torres Strait Islander peoples.

In summary, it is our position that while the proposed amendments may help expedite some areas of native title law and practice, they still do not go far enough in addressing existing inequalities between native title groups and other parties. In particular, further measures should be taken to give greater weight to the free, prior and informed consent of native title parties negotiating in 'good faith' towards future act and other agreements.

I draw your attention to three previous AIATSIS submissions relevant to the Exposure Draft in which our arguments concerning the workability and fairness of the Native Title Act remain effectively unchanged (see attachments):

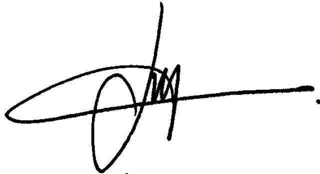
- *Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011* (August 2011);

- *Response to the joint Attorney-General and Minister for Families, Housing Community Services and Indigenous Affairs' Discussion Paper, 'Leading practice agreements: Maximising outcomes from native title benefit'* (July 2010); and
- *Submission on Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* (March 2010).

Attached also please find the March 2010 submission by Queensland South Native Title Services regarding *Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* which also supports our views.

Our comments regarding the Exposure Draft are based on over 15 years of research and practice by AIATSIS researchers in the native title sphere. We trust that they will assist you and your colleagues in further refining the operation of the NTA into the future.

Yours sincerely,



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

19 October 2012

Introduction

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

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

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

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

1. Disregarding historical extinguishment

1.1 Summary

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

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

1.2 Issues in the current law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3 Agreement should not be necessary for parks and reserves

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

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

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

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

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

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[7] Art 26.

[8] Art 25.

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

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

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

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

- **Recommendation 1:**

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

1.4 Marine parks should not be excluded

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

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

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

- **Recommendation 2:**

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

1.5 Broader disregarding of historical extinguishment

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

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

47D Agreements to disregard prior extinguishment

When section applies

(1) This section applies if:

(a) an application under section 61 is made in relation to an area; and

(b) before a determination on the application is made, there is an agreement in writing between the applicant and the Government party that the extinguishment of native title rights or interests by a prior act affecting native title in relation to the area, or any part of the area, covered by the application be disregarded.

Prior extinguishment to be disregarded

(2) For all purposes under this Act in relation to the application, any extinguishment of the native title rights and interests by any of the following acts must be disregarded:

(a) the prior act itself;

(b) the creation of any other interest in relation to the area as a result of the prior act;

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

Effect of determination

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

(a) the determination does not affect:

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

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

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

Other provisions not affected

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

- **Recommendation 3:**

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

1.6 An unnecessary requirement to demonstrate occupation

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

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

- **Recommendation 4:**

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

2. Negotiation in Good Faith

2.1 Summary

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

2.2 Benefits of proposed amendments

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

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

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

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

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

2.3 Issues in the current right to negotiate arrangements

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4 Tribunal powers and decision-making

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  Profit-sharing conditions may be determined

  (2) Without limiting the nature of conditions that may be imposed under paragraph (1)(c), they may, if relevant, include a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:

  (a) the amount of profits made; or
  (b) any income derived; or
  (c) any things produced;

  by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

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

2.5 Time limit before s 35 application can be determined

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Streamlining of ILUA Processes

3.1 Summary

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

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

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

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

3.2 Issue: unrealistic timeframes for notifications

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

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

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

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

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

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

3.3 Suggestions for improving proposed drafting of Bill

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

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

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

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

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

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

- **Recommendation 8: Drafting changes**

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

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

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

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

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

Prepared by:

Dr Lisa Strelein

Nick Duff

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Toni Bauman

Attachments

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

B) Australian Institute of Aboriginal and Torres Strait Islander Studies (2010) *Response to the joint Attorney-General and Minister for Families, Housing Community Services and Indigenous Affairs' Discussion Paper, 'Leading practice agreements: Maximising outcomes from native title benefit'*.

C) Australian Institute of Aboriginal and Torres Strait Islander Studies (2010) *Submission on Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances*.

D) Queensland South Native Title Services (2010) *Submission: Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances*.

<Attachment A>

Worldwide knowledge and understanding of Australian Indigenous cultures, past and present

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

10 August 2011

Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide submissions on the very important matters regarding the operation of the *Native Title Act 1993* (NTA) that are addressed in the Bill before the Parliament. AIATSIS is one of Australia's publicly funded research agencies and is dedicated to research in Indigenous studies. AIATSIS includes the Native Title Research Unit, established following the *Mabo* decision, which continues to conduct research and provide analysis on the law, policy and practice of native title.

AIATSIS has been integrally involved in debates over reform to the NTA, in particular the problems associated with the requirements and burden of proof. Through events such as the annual National Native Title Conference, AIATSIS has promoted informed discussion and debate on the NTA and its ability to fulfill the objectives set out in the preamble, to recognise and protect the rights of Indigenous peoples to their traditional lands.

This submission will address the proposed amendments according to their item numbers in the Bill and Explanatory Memorandum. The submissions are based on over 15 years of research and practice by AIATSIS researchers in the native title sphere.

Yours sincerely,

Dr Lisa Strelein
Director of Research -
Indigenous Country and Governance

<Attachment A>

AIATSIS Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011

Introduction

> The Attorney-General stated in his first speech on native title that the centrality of negotiation in the native title regime as created by the *Native Title Act 1993* (Cth) (the Act) has been 'strangled in litigation and arguments over technical provisions of a complex Act'. The Attorney-General acknowledged the need to reinforce the importance of negotiation in native title and stated that real reform and not tinkering around the edges was necessary to achieve that end. The Minister for Indigenous Affairs agreed that reform was essential to ensure that the native title system was working in the best interests of Indigenous peoples and the nation at large. The National Native Title Council, the umbrella body for many national Indigenous representative bodies and on behalf of applicants, welcomed the government's attitude to reform. The Minerals Council of Australia welcomed any approach that would shift focus from the courts to negotiation.[1]

And the development of the Joint Working Group on Indigenous Land Settlements revealed a commitment by State and Commonwealth governments to find solutions. The Bill introduced by Green's Senator Seiwart seeks to address the key legal impediments in the NTA.

AIATSIS commends the aims of this Bill in seeking to address the widely recognised imbalance in the NTA against the interests of Indigenous peoples. There may be different views on the appropriate drafting to achieve these aims, but the Parliament should not be hasty in dismissing the Bill.

Item 1: New s 3A

AIATSIS supports the reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as an object of the NTA. By endorsing UNDRIP in 2009, the Australian government accepted an obligation to pursue these principles, including introducing legislative mechanisms to give effect to the rights under the Declaration. Australia has similar obligations in relation to human rights covenants from which the UNDRIP is derived. This Bill is an opportunity for the Commonwealth to make good on its statements to the world and to our own Indigenous peoples on its commitment to recognise and protect the rights of Indigenous peoples over whom they have asserted sovereignty.

The extracted principles of UNDRIP are consistent with the first Main Object of the NTA.[2] Proposed sub-section 3A(2) is particularly useful, in directing the courts and the executive to take into account these principles in the future interpretation of substantive rights provisions of the NTA. Incorporation of such principles to inform interpretation and implementation of legislation has

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[1] Justice A M North and Tim Goodwin, 'Disconnection—The Gap Between Law and Justice in Native Title: A Proposal for Reform' in Lisa Strelein, Maureen Tehan and Marcia Langton (eds.), *The Problem with Section 223 of the Native Title Act 1993: Issues and Possibilities*, AIATSIS, Canberra, (forthcoming).

[2] Section 3, NTA.

proved effective in Aotearoa/New Zealand where the Treaty of Waitangi principles are regularly incorporated into legislation. This sub-section could have a substantive impact on the enjoyment of rights in Australia because, unlike in other jurisdictions, the Australian courts have not, of their own accord, followed a principle of beneficial interpretation in relation to the NTA.[3]

The statutory incorporation of principles for interpretation is practically important in the context of the NTA because of the many discriminatory aspects of the legislation (and common law native title on which it is based) that are not addressed in this suite of proposed amendments.[4] Many of the substantive rights recognised in the UNDRIP are not fully recognised or protected by native title and many compromises have been made in the legislation in favour of non-indigenous interests.[5] Utilising the UNDRIP as a touchstone for interpretation would, in the case of any ambiguity, ensure a beneficial interpretation that would not unnecessarily undermine the recognition and protection of native title. It would not affect the clear and plain intentions of the Parliament.

For example, the principle of free, prior and informed consent could be used to interpret provisions under the future acts regime, which requires proponents to engage with Indigenous groups in order to validly do an act that may affect native title rights. However, it would not change the clearly expressed content of the provisions, regardless of whether they may be inconsistent with international law. Contrary to some views put to the inquiry, in the context of the NTA as a whole, the proposed amendment would not, of itself or in combination with other proposed amendments, provide the native title holders or registered claimants with a right of veto.

That being said, the Parliament should continue to look for opportunities to enhance the enjoyment of rights under the UNDRIP, including further beneficial amendments to the NTA in order to continue to fulfill Australia's international obligations.

Item 2: Substitution of s 24MD(1)(c)

AIATSIS supports the amendment to allow for decision-makers and courts to consider the effectiveness of laws protecting Aboriginal and Torres Strait Islander heritage on a case by case basis. It allows circumstances to be considered in relation to the actual affect that a future act is likely to have, and reduces the risk of ineffective or inappropriate legislation allowing the validation of an act that would otherwise not pass the Freehold Test under the NTA.[6]

Item 3: Substitution of s 24MD(2)(c)

AIATSIS supports the amendment to this section to provide that compulsory acquisition does not itself extinguish native title. This proposed amendment would align the impacts of compulsory acquisition with the ILUA and future act regimes in terms of preserving native title where possible.

The provision would have no effect on the ability of the Crown to acquire property or any impact on the right of any party who acquires a interest as a result. To this extent we reject any accusation that such a provision would undermine certainty of non-indigenous rights and interests. However, should the land ever return to the Crown estate, the native title in the land would revive. Importantly, the extinguishment will not occur if the act for which the land is acquired is not ultimately done.

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[3] See L Strelein, 'A Captive of Statute', *Reform* 2010.
[4] This includes for example, no compensation for extinguishment prior to 1975, no right to minerals, etc.
[5] see *Griffiths v Minister for Lands, Planning and the Environment* [2008] HCA 20. Generally see L Strelein, *Compromised Jurisprudence* (2nd edn) ASP 2009.
[6] Contained in subdivision M – Acts passing the freehold test, within Division 3 – Future Acts, NTA.

The Committee should note that the effect of this proposed amendment would be to reduce the Crown's exposure to compensation for permanent extinguishment.

Item 4: Repeal of s 26(3)

AIATSIS supports this proposal to afford the equivalent right to negotiate to inter-tidal coastal country and sea country as to onshore country. As far as native title is concerned, *Yarmirr* suggests that apart from the threshold non-recognition matters (international rights of free passage and fishing) there should be no difference in the treatment of native title in relation to land or sea country, as the burden on the Crown's sovereignty is the same.[7]

Items 5 and 6: Good faith

AIATSIS supports the substitution of sub-section 31(1)(b) and the addition of a new sub-section 31(1A) to restore the intention of the Act that the negotiating parties engage in negotiations *in good faith*. The Preamble of the Act states:

> In future, acts that affect native title should only be able to be validly done if… wherever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

Justice French, as he then was, in *Sampi v State of Western Australia* described the Preamble as 'a continuing declaration of the moral foundation of the Act [which] informs its construction'.[8]

It is crucial to note the significant restrictions that have been placed on section 31 by judicial interpretation. The Full Federal Court decision in *FMG v Cox* effectively reduced the meaning of 'good faith' to the mere absence of outright bad faith or intention to mislead.[9] The effect of this precedent is that both parties to negotiations are aware of the strong likelihood that a future act will be allowed by the Tribunal if no agreement is reached, as long as some steps have been taken by the proponent to appear to be engaging in negotiations. Notwithstanding examples of good industry practice in Australia, this expectation bolsters the bargaining position of proponent parties at the expense of the native title group, placing inequitable pressure on the Indigenous party and, consequently, could influence negotiated outcomes to the detriment of the native title party.[10] When coupled with the fact that native title parties have no right to walk away from negotiations the agreement-making environment can be more oppressive than empowering.

Section 35 provides that an application for arbitration of a future act application cannot be made less than 6 months from the date of notification. However, the passage of 6 months does not always indicate a reasonable period to reach agreement – even where appropriate effort is being made.[11] Particularly where native title groups have little or no experience in negotiating agreements, the establishment of fundamental conditions for entering into negotiations may take

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[7] *Commonwealth v Yarmirr* (2001) 208 CLR 1.
[8] *Sampi v State of Western Australia* [2005] FCA 777 at [942].
[9] *FMG Pilbara Pty Ltd x Cox* [2009] FCAFC 49.
[10] In a frank example, recently made prominent in ABC television program 4 Corners, an FMG negotiator told a Yindjibarndi community meeting: "Fortescue will always use legal avenues to get our mining leases and roads and whatever else. I'm not going to hide that. We will do that every time, because we are in a hurry, in a rush." ABC Televsion, "Iron and Dust", 18 July 2011, Program transcript accessed at http://www.abc.net.au/4corners/content/2011/s3272125.htm .
[11] See examples, consideration by the Tribunal and analysis in S. Burnside, *Negotiation in good faith under the Native Title Act: A critical analysis*, NTRU Issues Paper no.3 of 2009, AIATSIS, 2009.

much of this period. The proposal to adjust the time reference to *at least 6 months* recognises that the real test for good faith negotiations would require the expiry of a *reasonable period* of negotiations in the circumstances. In tandem with the proposal to insert the words '*use all reasonable efforts...'* the amendment would convert the inquiry of the arbitrator into a more fact-specific and less literal one.

Item 6: New s 31(1A)

The proposed guiding provisions in paragraphs 31(1A)(a) to (f) do not create onerous new obligations on proponents, but rather describe some basic elements of a good faith negotiation. These elements are crucial to instilling fairness in future act negotiations. The right to negotiate regime is not like commercial negotiations in which two or more parties come together freely for mutual benefit: the native title party has no choice but to engage with the proponent, whose activities will affect their native title interests. The parties know that the future act will almost always go ahead, despite any opposition by native title holders or registered claimants. In the absence of such express elements in the legislation, the good faith standard is vulnerable to narrow interpretation.[12]

The NTA did not create a compulsory negotiation processes with a requirement of 'good faith' merely to create an optional scheme of alternative dispute resolution and a delayed path to arbitration. The benefit of these proposed provisions would be to guarantee that a series of minimum steps are taken, potentially leading to both fairer processes and fairer agreements.

Interpretation of the requirements of good faith, informed by the principle of free, prior and informed consent, should take into account evidence from AIATSIS research carried out for the Indigenous Facilitation and Mediation Project (2003-2006) and the Indigenous Dispute Resolution and Conflict Management Case Study Project conducted with the Federal Court of Australia and the National Alternative Dispute Resolution Advisory Council.[13]

These projects found that typically, over many years, Indigenous communities have experienced pressure to accept proposals, often suggested by non-Indigenous agencies, without having the opportunity to understand the details or implications of their decisions, or to consider other solutions. In many meetings, closed questions are put to the floor, such as 'Do you understand?' and 'Everyone agrees?', resulting in Indigenous people leaving the meeting unable to explain what they have agreed to. Inappropriate process can also result in increasing tensions and hostilities between and amongst Indigenous families and individuals.

Both reports highlight the importance of parties' ownership of processes, of careful preparation, and of working with the parties to design processes that can meet their procedural, substantive and emotional needs. As has been identified in at least six other significant reports to governments, they suggest that this ideally would be done by third party community engagement facilitators (or positions with similar functions) with highly specialised communication skills.

AIATSIS recommends that proposed subsection 31(1A) include additional requirements to establish good faith:

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[12] *FMG Pilbara Pty Ltd x Cox* as discussed above.

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

- that native title parties having capacity or being prepared for negotiation; and
- that native title parties have access to process expertise.

Item 7: New s 31(2A) – Onus to show good faith

Currently, the respondent party to an application for arbitration of a future act application (invariably the native title party) bears the onus to prove that the other party (the proponent) failed to engage in negotiations in good faith. The substitution proposed in the Bill would provide that that the party seeking an arbitrated decision bears the burden of proving that it has satisfied its obligations and is entitled to the determination it seeks. This will *not* amount to a right of veto. The arbitrator (the Tribunal) would retain the ability to determine that the future act can be done where good faith negotiations have been conducted.

Items 8 and 9

These items work with and clarify the relationships between these subsections. AIATSIS supports them.

Item 10: Substitute s 38(2) – Profit sharing conditions may be determined

AIATSIS supports the proposed amendment to allow the Tribunal to use its power to impose conditions that entitle the native title party to payments by reference to one of the three stated methods of calculation. The three methods are commonly employed by parties in negotiated future act agreements, and the arbitrator will be capable of taking submissions from the parties and considering a variety of evidence in support of or against such a condition.[14] Currently, if the Tribunal is asked to determine a future act application where negotiations under section 31 have not produced an agreement, it cannot arbitrate between the parties on the central matter of financial compensation for the effect on the native title interest, but is restricted to allowing the future act or not, with or without other conditions. As a result, matters before the arbitrator may be misdirected to issues unrelated to the source of the dispute.

The Minister for Indigenous Affairs has expressed the importance of harnessing the potential for Indigenous economic development through native title agreement making in her often cited Mabo Lecture of 2008.[15] There is no doubt amongst native title negotiators and representative bodies that future act agreement making process often fails to provide sustainable economic opportunities for the native title party. These proposals can go some way to improving this. Although there may be some reluctance to altering the existing body of precedent applying to the arbitration and litigation of the right to negotiate, the proposed adjustment will lessen the handicap that native title parties carry in future act negotiations and motivate proponents to reach agreements. This amendment could support agreement making that more accurately reflects the property and resource values of projects, potentially supporting more constructive agreements that can better promote economic development.

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

[15] Jenny Macklin, 2008 Mabo Lecture, "Beyond *Mabo*: Native title and closing the gap", James Cook University, Townsville, 21 May 2008 <http://www.jennymacklin.fahcsia.gov.au/speeches/2008/Pages/beyond_mabo_21may08.aspx> at 5 August 2011.

Item 11: New s 47C – Disregarding prior extinguishment

AIATSIS strongly supports the extension of provisions that disregard historical extinguishment, where native title rights and interests would continue to exist, but for those prior acts. Currently, historical tenure that has expired, for example where a pastoral lease has reverted to the Crown, will still have an extinguishing effect to the extent of any inconsistency. In practice, where there are no other present interests in land that would extinguish native title, there is no reason why that land should not be open to a determination of exclusive possession native title. Similarly, where present interest holders are agreeable, this proposed amendment would allow historical tenures to be disregarded and only current interests could be considered to determine the extent of any extinguishment.

This new section would increase the flexibility available to parties in negotiating consent determinations. Again, the amendment would not dramatically change the obligations of the parties, but removes a restriction on potential terms of settlement. In addition, it would save significant costs and time in determining the impacts of historical tenures.

However, it is unclear why there is a need for agreement from the Crown for extinguishment to be disregarded where the Crown is the only other potential interest holder. A further amendment should be introduced that clarifies that any unencumbered Crown land should be treated the same as land under sections 47A and 47B with automatic disregard of historical tenures.

Items 12-13: Presumption of continuity and changes to requirements of proof (s 223)

The proposed presumption of continuity through changes to sections 61 and 223 responds to concerns across the native title sector about the onerous requirements of proof that have grown around the definition of native title under section 223. AIATSIS has fostered debate on this issue, including in partnership with the Federal Court and academic colleagues. Beginning with the national Native Title Conference in Perth in 2008, in the wake of the appeal in the *Bennell* case,[16] former judges Wilcox and Merkel discussed the limitations of the current interpretation of the law. That decision saw the Court impose a requirement that, where contested, the claimants must demonstrate continued vitality of a system of laws and customs, and connection to the land and waters by those laws and customs, *for each generation.*[17]

Over the ensuing years there has been intense discussion about the increasingly onerous and intricate tests associated with the proof of native title. Every word in section 223 has its own, or even multiple tests associated with it. This has given rise to a painful statutory interpretation exercise that filters down to the processes of negotiating connection for the purposes of entering into consent determinations. While claimant groups continue to meet the weight of materials required by state governments to establish those requirements, the process is expensive and time consuming.

One option promoted by Noel Pearson was to delete s223 altogether, to re-enliven the common law definition and development of the requirements of proof for native title. The risk in this approach is that the Courts may continue along the lines they have taken in interpretation of section 223. Justice Tony North noted in response that in order to ensure that the Courts took notice of the change, more direction was required from the legislature. In this vein, Chief Justice Robert French's 'modest proposal for reform', included a presumption in favour of continuity, which would

[16] *Bodney v Bennell* (2008) 167 FCR 84.
[17] *Bodney v Bennell* (2008) 167 FCR 84, [70].

effectively 'lift the burden of proof'.[18] The risk of this approach was immediately obvious, in that the state could actively seek to disprove the claim. The proposal is largely dependent on the state's willingness to reach a consent determination. To this Justice North added an additional proposal, that the state in rebutting a presumption in favour of the claimants, could not use evidence of their own wrong doings.[19] The proposed amendments respond to these proposals: first, through a rebuttable presumption in favour of applicants on the registration of their claim; and second, through guidance in the interpretation of section 223.

Item 12: New s 61AA – Presumption relating to applications

The Bill proposes a presumption in favour of the claimants, which takes effect on registration of the application. In theory it should provide support for claimant groups and state governments (and other respondent parties) in reaching consent determinations. The proposed provision relies on traditional common law concepts for establishing custom, in particular the reliance on reasonable beleifs. AIATSIS commends the intention of the provision but we make some observations on its practical implementation.

The proposed amendments allow for the presumption of continuity to be set aside by evidence of substantial interruption in the acknowledgement of the traditional laws or observation of the traditional customs. In this instance, the onus of proof is effectively reversed, and the state will be required to bring evidence.

The first observation is that the amendment would not necessarily make a substantial change to the amount of anthropological and historical research conducted on the applicants' behalf. At present normal practice is that NTRB/NTSPs prepare connection materials on behalf of claimants for consent and litigated determinations. A number of State and Territory governments also carry out significant research for native title claims before entering into negotiations for consent determinations. Under the amendments, NTRB/NTSPs would still carry the primary responsibility for compiling evidence of connection for presentation to respondent parties. While the proposed amendments may take away the need for claimants to demonstrate continuity in minute detail back to sovereignty, it is likely that they would still need to conduct thorough research to establish the right people to claim country as well as to anticipate, or respond to, a rebuttal of continuity. For example, in the state of Queensland, the government prepares a timeline of possible discontinuities that claimants must address. It is not clear whether, in the context of collaborative processes of reaching a consent determinaton, the States would require a lesser level of information in the face of a relaxed standard of proof.

The second observation is that careful consideration must be given to how any increase in the research burden on states would be resourced. In light of the previous observation, it would be imperative to ensure that resources were not redirected to the States and Territories away from NTRBs.

The third observation relates to practical, ethical and social concerns over the conduct of anthropological research by State-commissioned researchers directed towards establishing

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[18] French CJ suggested three key changes to the NTA:

1. Allow an agreed statement of facts (between state and native title applicants) to be relied upon by the Court in making a consent determination (in particularly this could lift the burden of proof of continuity)
2. provide for a presumption in favour of the existence of native title
3. provide for historical extinguishment to be disregarded over classes of land where agreed by the Sate and Applicants.

Suggestion 1 was contained in the 2009 Amendment Bill. Suggestions 2 and 3 are contained in this Bill.

[19] Justice A M North and T Goodwin 'Disconnection – The Gap Between Law and Justice in Native Title: A Proposal for Reform, Native Title Conference 2009, 3-5 June, Melbourne.

discontinuity. It would be a poor outcome from the amendments if claimants were required to respond to two researchers with different purposes, the one aiming to assist them in preparing their claim and the other aimed at proving disruption. There are questions around whether and how State researchers could access claim groups in a way that would not undermine cohesion within Indigenous communities. In particular, researchers would need to be very careful, in obtaining the free, prior and informed consent of informants, about ensuring that informants had a full understanding of the intended use of the information they might provide.

Similarly, research directed towards rebutting the presumption is likely to have socially disruptive effects. Currently NTRBs/NTSPs have a legislative duty to represent the interests of claimants and native title holders, including dispute resolution assistance functions. By contrast, information-gathering on behalf of respondent parties would tend, intentionally or unintentionally, to pit groups against one another without their understanding the implications of their actions for the success of their own claims. States and other respondents have neither the responsibility nor the capacity to resolve such disputes, or to understand their location within the broader dynamics of a claimant group or its neighbours.

Finally, the retention of the word ‘tradition’ imports the contested notions of ‘continuity’ and ‘change’ that have been so problematic. The interpretation of such terms in native title jurisprudence does not reflect anthropological thought, nor claimant realities – particularly those in southern and coastal areas of Australia. Changing thinking around the meaning of native title is not only a matter of goodwill; it also requires informed understandings of culture and change in identifying the nature of contemporary Indigenous societies relevant to native title. We say more on this in relation to proposed changes to section 233 below.

Item 12: New s 61AB – Continuing Connection

Section 61AB partially responds to Justice North’s observations, and addresses comments in *Bennell* that the reasons for change are irrelevant.[20] Sub-section 61AB(2) requires the Court to take in to account whether any interruption or significant change was the result of the acts of a State or Territory or person who is not an Aboriginal person or Torres Strait Islander. It does not, however, suggest that such interruptions or changes be disregarded. Therefore the problem identified by North J is only partially addressed.

Further, these qualifications themselves may also become a matter for contestation. It may not always be possible to prove a direct correlation between a demonstrated interruption or change and the effect of government policies and individual behaviour on the movements of individuals or families.[21] Indigenous agency in responding to such forces is not always easily articulated and reasons for certain actions may form part of the implicit rather than explicit knowledge of claimants. In these circumstances, respondent rebuttal might argue that a particular move was voluntary as the subtleties and long terms effects of policies remain invisible. There are also many other factors, such as cataclysmic events, drought, flood, war and the like, which could, prima facie, indicate a substantial period of dislocation, but which might fall outside the protection of s 61AB(2).

These difficulties are evidence of the problematic nature of the NTA’s focus on continuity and failure to deal adequately with the realities of change.

Item 13: New s 223(1A) and (1B) – Traditional laws and customs

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[20] *Bodney v Bennell* (2008) 167 FCR 84, at [81], reiterated at [97]

[21] In the context of establishing fiduciary duties owed to individuals removed from their families, see Kruger

Taking into account our comments above regarding the problematic nature of the interpretation of tradition, change and continuity in the NTA, the proposed subsections 223(1A) and (1B) would be valuable in clarifying the somewhat contradictory and ambiguous case law on the definition of 'traditional'.

In the High Court's *Yorta Yorta* decision, there were at least two senses of 'traditional' employed: [22]

- One meaning of 'traditional' referred to laws and customs which are *rooted* in the laws and customs existing at sovereignty, but not necessarily the same as them;[23]
- The other meaning of 'traditional' referred to laws and customs which are *the same laws and customs* as were acknowledged and observed at the time of the assertion of the Crown's sovereignty.[24]

In *Neowarra*, any ambiguity was resolved in favour of that the former sense: The Court simply satisfied itself that 'the *origins* of the content of the laws and customs relied on by the claimants are to be found in the normative rules of the societies that existed in the claim area before 1829'.[25] This latter view places less emphasis on a direct comparison of the content of the present-day law and custom against the pre-colonial law and custom.

There has been a clear line of case law in the Federal Court (both at trial and appellate levels) in which alterations and adaptations to law and custom have been found not to break the connection with the past which marks those laws and customs out as 'traditional'.[26] Despite this, there have been judges as well as parties who continue to treat 'traditional' as requiring a process of matching present-day laws and customs with laws and customs from the 18th century. Or, to the extent that change and adaptation is seen as 'acceptable', this is determined by a comparison between 'now' and 'then', rather than an inquiry into the historical processes of transmission that link contemporary law and custom with pre-colonial law and custom.[27]

AIATSIS Research Fellow, Toni Bauman, has recently written that rather than a presumption of continuity, as proposed in s61AA, the assumption should be one of 'transformation'. That is, the law must embrace the fact that societies 'change in form, appearance, nature, or character'.[28] Continuity might be better viewed in terms of continuous processes of socio-cultural transformation that includes processes of fission and fusion in group formation and processes of succession. Some judgements of the Federal Court have dealt better with societal change than others.[29] But misinterpreted and de-contextualised accounts of continuity can 'include the implication that change is bad'. The process of determining whether native title exists must move away from contestations of what is 'acceptable' and 'unacceptable' change[30] to a non-controversial acceptance of change as a constant. It is the descent of title and the descent of rights which should provide the focus for any discussion of continuity and succession.

To this end, there is some undesirable looseness in the language 'identifiable through time'. This may generate more apparent uncertainty than is necessary, and could be remedied by more clearly articulating the relevant characterisation of present-day law and custom. We would recommend the

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[22] See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [31].
[23] Ibid at [44], [46], [53], [79].
[24] Ibid at [86], [186].
[25] *Neowarra v Western Australia* [2003] FCA 1402, at [335] (emphasis added).
[26] Eg *Neowarra v Western Australia* [2003] FCA 1402; *De Rose v State of South Australia* [2003] FCAFC 286; *Griffiths v Northern Territory of Australia* [2007] FCAFC 178.
[27] Eg *Jango v Northern Territory of Australia* [2006] FCA 318 at [460]-[507].
[28] Anthropologist David Trigger also referred to this suggestion, in his presentation to the Federal Court Judicial Education Forum in Sydney in April 2011.
[29] *Western Australia v Ward* (2002) 213 CLR 1; *Sampi v Western Australia* [2005] FCA 777.
[30] *Bodney v Bennell* (2008) 167 FCR 84 [74].

use of language emphasising the *linkage* rather than the *similarity* between contemporary and historic law and custom; focusing on the means of transmission and the idea of inherited law and custom. The language from the case law is instructive, for example speaking of a requirement for contemporary law and custom to be 'rooted in' or 'having its source in' pre-colonial law and custom.[31]

It would also be beneficial for the legislation to clarify that an application should not fail simply because there has been an internal reorganisation or redistribution of rights within a claimant group, if the group as a whole has continued to hold rights and interests in relation to the land as against outsiders.

Item 13: New s 223(1C) – Connection

This proposed amendment has little legal effect, since it amounts to a re-statement or clarification of current law, but potentially it may have a significant practical benefit for the conduct of consent determination negotiations.

As observed in *Yorta Yorta,* the questions presented by s 223(1) are about *present* possession of rights or interests and *present* connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection are irrelevant.[32] It has been clearly established in the case law that physical connection is not required by s223(1)(b). [33] Nevertheless some negotiating parties proceed on the opposite basis.

Legislation to this effect would help to overcome this divergence of law and practice.

Further, there is ongoing uncertainty around the meaning of the words 'by those laws and customs…have a connection.' On one view, 'connection' is seen as a *condition* for the existence of native title rights and interests – a further fact that must be proved in addition to establishing the content of the rights and interests under traditional law and custom.[34] On another view, "connection" is descriptive of the *effect* of the laws and customs. That is, Courts must first identify the content of traditional laws and customs, and secondly characterise the effect of those laws and customs as constituting a 'connection' between the Aboriginal or Torres Strait Islander people and the land and water.[35]

Underlying this uncertainty is the absence of a clear articulation of the function or rationale of the current sub-section 223(1)(b). Is its purpose to capture what was said by Brennan J in *Mabo (No 2)*?[36]

> Native title to particular land …, its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, *by those laws and customs, have a connection* with the land. It is *immaterial that the laws and customs have undergone*

[31] *Eg Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [44], [46], [53], [79]; *Neowarra v Western Australia* [2003] FCA 1402; *De Rose v State of South Australia* [2003] FCAFC 286; *Griffiths v Northern Territory of Australia* [2007] FCAFC 178.

[32] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [85].

[33] *Neowarra v Western Australia* [2003] FCA 1402 at [347]-[358]; *De Rose v State of South Australia* [2003] FCAFC 286 at [303]-[328]; *Sampi v State of Western Australia* [2005] FCA 777 at [1079]; *Northern Territory of Australia v Alyawarr , Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92].

[34] *Northern Territory of Australia v Alyawarr , Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93].

[35] *Western Australia v Ward* (2002) 213 CLR 1 at [64]; *De Rose v State of South Australia* [2003] FCAFC 286 at [303]-[313].

[36] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at [83] (emphasis added).

> *some change* since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.

If so, it would appear that the meaning of the word 'connection' in that context was intended to be equivalent to the phrase 'in relation to' in the chapeau;[37] that is, it is merely descriptive of the effect of the laws and customs. Therefore, it would appear to be an error to treat 'connection' as some additional element of proof about the occupancy or particular activities of the claimant group.

If 'connection' is seen to require some additional facts to be established, beyond the content and effect of the relevant laws and customs, careful consideration must be given to the *rationale* for this added requirement. What is the mischief to which the extra provision is directed? Why ought an otherwise successful claim fail because of a failure to establish 'connection', if it be established that the claimants possess rights and interests in relation to the land under their traditional laws and customs?

An additional amendment to clarify this position would be useful.

Item 13: New s 223(1D) - Continuity

The proposed s223(1D)(c) would not involve any fundamental departure from the existing conceptual basis for native title. Irrespective of whether the law currently requires substantially uninterrupted acknowledgement and observance of traditional law and custom, it is clear that no such requirement applies to 'connection'. Nevertheless, as part of clarifying the purpose and meaning of sub-section 223(1)(b), it may be useful to specify that no 'continuity' requirement applies to it.

Read in conjunction with proposed ss 66AA and 66AB, the proposed s 223(1D)(b) and (c) would seem to reinforce the current position that s 223(1) does not require the establishment of *absolute* continuity, requiring only that there be no substantial interruption. This is to be welcomed.

Further legislative guidance would also be welcome in relation to what this revised notion of 'continuity' realistically and appropriately means, having regard to the objects of the Act and the context of contemporary Aboriginal and Torres Strait Islander communities. In addition, an amendment could usefully specify the nature of the evidence which would be required to establish a substantial interruption in the acknowledgement and observance of law and custom.

Item 14: Substituted s 223(2) – Commercial interests

AIATSIS has argued elsewhere that a provision of this kind is required to ensure that native title facilitates rather than impedes Indigenous economic engagement.[38] The emphasis on 'traditional' in relation to native title has proved a limiting factor on the rights enjoyed as a result of the recognition of native title.

The Crown has advocated against the recognition of commercial rights in litigated determinations, denying Indigenous peoples the right to utilise their property in the same way as any other property owners. Due to the nature of the process, many Indigenous groups have conceded these terms in consent determinations. The classic formulation of a determination of native title rights and interests to include use of resources for personal, communal, ceremonial and non-commercial

[37] The 'chapeau' is the opening stanza of the section – the umbrella or overarching part of the provision.
[38] HORSCATSIA. 2008. *Open for Business: Developing Indigenous Enterprises in Australia.*

purposes is antithetical to the notions of a proprietary interest. It could result in the perverse situation that while other parties can enter into an agreement to undertake commercial activities on native title land, native title holders themselves cannot.

Minister Macklin has said to the United Nations that:

> We support Indigenous peoples' aspiration to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity.[39]

The Liberal Party members of this Committee, in considering the Wild Rivers Bill, pointed to the absurdity of native title holders being unable to make economic decisions about the use of their native title lands. We would suggest that this view supports the proposed Item 14. It is imperative that the Parliament give legislative intent to the stated objective of all parties that native title should be the basis for economic development for Aboriginal and Torres Strait Islander peoples.

There is a need for a provision that specifically states that exclusive possession native title carries with it the full beneficial title to the land and that the rights and interests exercised by native title holders remain a matter internal to the groups, subject to laws of general application.

In Summary

AIATSIS supports particularly the changes proposed to the objects of the NTA (item 1), the removal of the automatic extinguishment provision in compulsory acquisitions (item 3), the removal of the distinction between rights over land and sea country (item 4), the right to negotiate and good faith provisions (items 2, 5-7), the ability for parties to a determination application to disregard historical extinguishment (item 11), and the recognition of native title rights to trade and other commercial rights (item 14).

AIATSIS strongly supports the review of the matters addressed by items 12 and 13, but notes that these matters may require further consultations and more thorough consideration of the drafting and complementary measures required.

Overall we commend the Senator for introducing this important Bill and the Government for referring these important matters to Committee. If some of these proposals are not enacted as a result of the current Parliamentary processes, we encourage the Parliament and the Attorney-General to continue reviewing the Act in light of its most often cited failings and frustrations. AIATSIS urges legislators to consider in particular the experiences of native title holders and claimants, who in many instances feel that the legislation as it currently stands and operates responds to the interests of other parties better than to the foundational rights of Indigenous Australians.

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[39] Minister Macklin's Statement on the United Nations Declaration on the Rights of Indigenous Peoples, 3/04/2009: http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx.

<Attachment B>

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) response to:

The joint Attorney-General and Minister for Families, Housing Community Services and Indigenous Affairs' Discussion Paper, 'Leading practice agreements: Maximising outcomes from native title benefit', July 2010.

Introduction

This submission is made by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) in response to the discussion paper, *Leading practice agreements: Maximising outcomes from native title benefits* (the Discussion Paper) produced by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Attorney-General's Department (AGD).

Underlying Principles
AIATSIS welcomes the Government's commitment to improving the mechanisms of the native title process to improve outcomes for Aboriginal and Torres Strait Islander peoples. The Government's deliberations on reform should be underpinned by principles that empower Aboriginal and Torres Strait Islander peoples, and native title holders/claimants specifically, to exercise greater control over their own lives and to determine their economic and cultural development. Native title reform should be consistent with and improve compliance with Australia's international obligations under the *Declaration on the Rights of Indigenous Peoples.*

Evidence based policy
The Discussion Paper is wide ranging with some specific and some general proposals and is presented in the context of a number of consultation processes, which again cover a broad array of issues with some specific and broad issues being canvassed. It will not be possible to comment substantially on all of the complex issues touched on by the Discussion Paper. However, AIATSIS research and activities are directly relevant to a number of aspects of the Discussion Paper. In particular we have conducted research over many years on native title agreement making and taxation and corporate design, as well as communication and decision-making processes within native title groups and corporations.

The Discussion Paper does not clearly articulate evidence of systemic mismanagement of native title benefits and payments. Rather there appears to be a perceived need for greater support for native title groups in making good agreements and decisions, which, wherever possible, provide intergenerational benefit. The majority of ILUAs are small scale and involve only small amounts of money, though it is recognised that they are highly significant to local signatories. The Native Title Payments Working Group convened by the Government identified only a handful of agreements that provided substantial benefits. And, of those, only perhaps twelve agreements could be said to be 'good' or model agreements.[1]

[1] *Native Title Payments Working Group Report*. Accessed 30 November 2010 at http://www.google.com.au/search?q=Native+Title+Payments+Working+Group+Report&rls=com.micr

Government policy must address the experience of both the minority of native title corporations who have received substantial benefits from development agreements, and in particular from mining agreements together with the majority of native title groups, Registered Native Title Bodies Corporate (RNTBCs) and other native title corporations, who have not received significant benefit from native title agreement-making. Moreover, proposed measures must be appropriate to the scale of the problem, based on the evidence, and not unnecessarily undermine the importance of native title groups managing their own affairs. Nevertheless there is undoubtedly benefit to native title groups from better access to information about how to make good agreements and better access to resources to improve implementation of agreements and sustainability of benefits, including effective communication and dispute resolution.

The unique nature of native title often challenges the public/private divide. Primarily, native title has been treated under Australia law as private property, not a sovereign jurisdiction. In any case, financial benefits from native title agreements are not public funds over which governments can assert undue control. Any government action in this area must be cognisant of issues of equity and discrimination in the treatment of native title land and the private funds of Aboriginal and Torres Strait Islander peoples.

A. Governance measures

The Discussion Paper proposes several governance measures:

1. incorporation of entities that receive native title payments;
2. independent directors on the Board of entities that receive native title payments;
3. adopting enhanced 'democratic controls' to improve transparency and accountability to native title beneficiaries; and
4. linking such measures to beneficial tax treatment.

The Discussion Paper notes that many of these governance features are relatively common and are recommended practice by ASIC. The *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (CATSI Act) includes significant accountability and transparency measures for Directors of Corporations, and has a significant emphasis on compliance, as does the governance training conducted by the Office of the Register of Indigenous Corporations (ORIC). There are also legal remedies available to individual members of a native title group and corporation members as well as beneficiaries under trust law.

There is no rationale for making additional measures compulsory for Indigenous entities in a racially discriminatory manner. Nor is there a rationale for denying access to all generally available legal forms (including unincorporated trusts). Rather, the government should invest in existing organisations and mechanisms to allow them to improve their own practice. The sector has shown a willingness to adopt best practice, for example in the separation of commercial activities from native title holding bodies.

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Keys to sustainable outcomes – investing in process

Given Australia's history of depriving Aboriginal and Torres Strait Islander peoples of their economic freedom and their land and resources, and given the particular power imbalances inherent in the native title process, Governments have a role to play in ensuring a level playing field in native title agreement-making, and in particular by funding agreement making that involves skilled and appropriate third party community facilitation processes that build good governance for the future.

Consistent with the principles of free prior and informed consent, research has shown that sustainable outcomes with intergenerational benefits can only be achieved through processes that ensure that native title holders and other land owners are involved, informed, and own the outcomes that are negotiated.[2] That is, the nature of the negotiating process itself will have a major bearing on maximising outcomes from native title benefits, including any implementation measures.

Research has also demonstrated that agreements reached with the support of native title representative bodies and service providers (NTRBs) provide much greater and more sustainable benefits.[3] This relationship reflects the importance of good advice and negotiating experience.

Learning from mistakes

Issues around transparency and accountability are critical governance issues that require significant on-ground community facilitation, communication and education. Government investment that improves access to good advice and good information in order to assist decision making should be encouraged. In particular, investments should be made at the front end of the agreement making process, and in the organisational capacity of native title groups to sustain their agreements and benefits while avoiding paternal regimes that increase the compliance costs. Promoting the development of good decision-making may require the acceptance of some level of failure. Part of learning to make good decisions is learning from mistakes.[4]

Independent Directors

Independent directors should not be mandated. Native title groups face difficult decisions in designing their corporations in trying to balance culturally appropriate governance and decision-making processes that are also commercially/corporately

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[2] Between 2003 and 2006 AIATSIS ran the Indigenous Facilitation and Mediation Project funded by FaHCSIA. Many of its findings and recommendations regarding native title decision-making and dispute management remain relevant to this inquiry, though have not been implemented. See T. Bauman, 2006, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Indigenous Facilitation and Mediation Project. Report No. 6. Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

[3] C. **O'**Faircheallaigh**,** 2007, 'Unreasonable and Extraordinary Constraints: Native Title, Markets and the Real Economy', *Australian Indigenous Law Review*, 11, 18-42; C. O'Faircheallaigh & T. Corbett, 2005, *Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements,* Department of Politics and Public Policy, Griffith University, Brisbane; C. O'Faircheallaigh, 2007, 'Native Title and Mining Negotiations A Seat at the table, But No Guarantee of Success', *Indigenous Law Bulletin*, March- April, Vol 6, Issue 26 p 18.

[4] S. Cornell, 2008, *Cornell Lecture* to the National Press Club, 11 September 2008, Lecture One, Reconciliation Australia's Closing the Gap Conversations Series, Canberra. Accessed 30 November 2010, http://www.reconciliation.org.au/home/get-involved/events/closing-the-gap/dr-stephen-cornell

robust. Culturally appropriate decision making and governance arrangements may not accommodate independent directorships. However, evidence suggests that some corporations have adopted independent Directors, informed by best practice. Others have instead adopted creative options such as advisory bodies or paid consultancy advice to fulfil this role. This may include establishing an independent commercial entity that is related to the RNTBC but includes professional independent directors. Independent directors lose their effectiveness when they are mandated and are not welcomed by the members. It should be noted that mandating independent directors would impose a fixed cost on native title corporations that may not have the funds to meet this requirement or to provide equity in payments to other board members.

Communication and transparency

There is a recognised constraint on native title bodies that are under-funded and unable to meet the most basic compliance requirements (Registered Native Title Bodies Corporate in particular). As a result, most RNTBCs and native title groups do not have the capacity to:

- Ensure implementation, monitor compliance and secure benefits contained in agreements;
- Communicate and work effectively with members and native title holders to arrive at sustainable outcomes.

There is a strong argument for increased funding and resources for NTRBs and RNTBCs to provide a basic level of corporate capacity to undertake these functions.

Tax treatment

The proposal in the Discussion Paper to link governance measures to tax treatment is ill-conceived. It would create greater complexity and diversity rather than certainty and simplicity and is thus anathema to good tax policy design.

The current proposals to address the tax treatment of native title are based on a conceptual difficulty in determining the appropriate tax treatment of native title payments and the imperative to avoid uncertainty and potential for litigation.[5] To make 'beneficial' tax treatment dependent on some qualifying criteria would undermine the primary purpose of clarifying the tax treatment. In any event, native title groups could successfully argue in the courts that the payments are tax exempt under the general law and as such there is no 'incentive'. As a result the proposal would become conceptual nonsense in this particular circumstance.

The government should quarantine the tax reform proposals from agreement governance and compliance matters.

[5] L. Strelein, 2008, 'Taxation of Native Title', *Research Monograph* 1/2008, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

B. Improving governance and native title agreements

The Discussion Paper proposes a new independent body to register, review and assess native title agreements. The rationale for the new body is to support parties to maximise positive outcomes.

There is a clear intent in the Discussion Paper to improve outcomes from agreement making for native title groups specifically, not necessarily improving the system or outcomes for non native title parties. There is therefore a policy rationale for investing in the NTRB/RNTBC sector to carry out the functions identified in the Discussion Paper. AIATSIS has conducted a successful pilot project to establish a database of agreement precedents for use by NTRBs. The resource has no guaranteed funding into the future but its utility has been acknowledged and potential exists for the development of resources, practice commentary and research on the agreements included on the database.

The agreements precedents database is an example of effective sector self-regulation. The process is intensive and requires active engagement from NTRBs in identifying clauses and agreements of precedential value and managing the confidentiality concerns. AIATSIS would recommend further investment in this resource to meet the needs identified in the Discussion Paper.

There are a number of concerns about the capacity of the proposal as presented in the Discussion Paper to address the issues identified. This will be discussed in some detail below. In summary, however, the following points are worth highlighting:

- Regulating the content of native title agreements may give rise to minimum compliance approach by causing a ‘rush to the bottom’, if generic standards are established. A precedent for this exists in the case of the Fair Work Australia tribunal set up in 2009 to assess enterprise agreements against specified standards (s.193 *Fair Work Act 2009* (Cth)).
- It is not clear how the proposed review body could cause parties to change the terms of an agreement, where the terms of the agreement are of a low standard, given the review body has no direct or indirect powers of compulsion.
- The key term ‘benefits’ is insufficiently defined. ‘Financial benefits’ alone form a broad category including compensation, benefit sharing, and commercial components. Incorporating non-financial benefits would extend the scope of the proposal dramatically. In either case a proportion of the ‘benefits’ the proposal seeks to regulate are not native title related. The extent of this proportion is not clear due to the definitional imprecision.
- Analysis of the available empirical data suggests the number of agreements subject to registration by the proposed regulatory body is very low.

B.1 Review Function

i) Overview

Maximising outcomes from native title 'benefits' encompasses a hierarchy of processes:

1. Maximising the effectiveness of the legislative framework regulating the rights and interests of parties coming to agreement (the Future Acts framework);
2. Maximising the quality of agreements reached within that framework (including benefits provisions, where they exist); and
3. Maximising the implementation, distribution and (where required) enforcement of any resultant benefits.

The Discussion Paper proposes that additional regulatory requirements be imposed at the third tier of the above hierarchy. To the extent that the following practical and procedural considerations apply, AIATSIS does not support the proposal.

The term 'benefit' is not defined in the Discussion Paper. The practical implications of the proposal hinge on the definition of this term; definitional clarity is therefore important. Although stating that the proposed review function would apply to both 'financial and non-financial benefits', all of the reasons cited for the need to regulate relate to risks around the management and use of financial benefits. The focus on financial benefits is a theme throughout the Discussion Paper.

If 'benefits' in this context can be taken to mean financial benefits, such a limitation in scope still includes several distinct elements in the context. These include compensation for impairment of native title rights, profit sharing, and various commercial incentives (including, for example, in relation to efficiency or certainty). Only the first of these has a direct nexus with native title. It seems however the Discussion Paper has not differentiated between these forms of financial benefit and, as such, it is proposing to regulate both native title and non-native title benefits.

On the other hand, if 'benefits' were not limited to financial benefits, then the ambit of the proposal would increase dramatically. Theoretically, the single most significant non-financial benefit in this context would be the right to say 'no' to a proposed development, through the implementation of an unqualified right to free, prior and informed consent.

ii) Functions

There are several practical issues with the proposed functions of the review body.

Given the non-binding nature of the decisions made by the proposed review body, it appears its primary function would be to gather information. It does not appear the review body would have any power to cause the provisions of an agreement to be altered to comply with 'leading practice', save where parties were in complete agreement – in which case the review function would be largely superfluous.

AIATSIS is of the view that there may be a conflict of objectives where the review body has the power to advise 'relevant Ministers' of unspecified matters, if the contents of agreements are to be kept confidential.

It is not clear how the regulatory body, presumably established by Commonwealth statute, will be able to take a consistent approach when assessing agreements against leading practice principles, when those agreements arise within a decentralised regulatory and policy context. For example, a leading practice exploration agreement arising in a state in which the expedited procedure is not asserted as a matter of policy, will be very different from such an agreement arising in a state in which the expedited procedure is asserted as a matter of course.

If the register of agreements is kept confidential, parties will not be in a position to draw on the information contained in the register of their own volition. From a knowledge management perspective, the value of this register to parties would therefore be limited, as parties would be subject to the discretion of the review body. This can be contrasted with the extant AIATSIS Agreements Precedents database – a fully searchable online resource accessible to all NTRBs, containing legal precedents and related information contributed by NTRBs themselves.

On the other hand, to be in a position to provide accurate advice or relevant assistance to parties in a given instance, the review body would require a level of contextual information not available from the agreement in question on its face.

AIATSIS agrees that there would be significant value in increasing the level of information available on trends and issues in future act agreement making. AIATSIS is of the view that such information should be gathered in a manner that does not increase the regulatory burden on parties to native title agreements.

iii) Establishing the body

It is likely that the volume of agreements being processed by the proposed body, if established, would be low (see following point). This would need to be taken into account in the design of any such body.

iv) Agreements subject to registration

The Discussion Paper identifies development-related future act agreements as the subject of the proposed regulatory measures. It does not, however, specify whether all or only certain categories of future act agreements would be captured.

The vast majority of development related future act agreements arise in relation to mineral resource projects. Analysis of the data produced by the various state government departments responsible for mineral tenement applications shows that in 2009 a total of 2,660 exploration and mining tenements were granted Australia-wide. Of these, 2,224 were exploration tenements. In the context of native title agreement making, exploration agreements do not generally involve the provision of benefits – financial or otherwise – to the relevant Indigenous group. It is therefore presumed that this category of agreement would not fall within the purview of the proposed regulatory body. Instead it is agreements relating to the grant of mining tenements that

would make up the bulk of the proposed review body's work. In 2009, 436 mining tenements were granted nationally, of which 278 or almost two thirds were granted in Western Australia.

These figures are important for two reasons. First, they indicate that the great bulk of high-level future act agreement making is clustered in specific regions. The implications of this for the proposed review body are that its workload would naturally be biased toward those regions. This – along with the fact that the Northern Territory, South Australia, Victoria and New South Wales have alternatives to the future act regime in place – indicates that the proposed review body would in fact have either diminished functions or no function at all in the majority of the country.

Further, of the 436 mining tenements granted in 2009, a proportion would not coincide with native title land and of those that did, only a small percentage would involve a level of 'benefits' sufficient for regulatory scrutiny. While there are no material statistics to draw on in this context, it can reasonably be asserted that the proposed body would have a very low workload. Anecdotal evidence suggests that the figure may be as low as 50 relevant agreements per annum nationally, and this, during a period of high activity in the mineral resources sector.

Another issue is that parties may seek to enter into 'side deals' to avoid any new regulatory obligations, as they have done in relation to Indigenous Land Use Agreements. It is not clear to what extent this could be managed or avoided.

v) Review against leading practice principles

As with the term 'benefits', there are definitional questions around the term 'leading practice' – particularly where specific standards are to be established. AIATSIS' primary concern is that establishing a generic set of leading practice standards could have a perverse effect by causing a 'rush to the bottom'. That is, development proponents may take a minimum compliance approach instead of engaging with Indigenous groups on a case-by-case basis, where standards are imposed. A precedent for such a 'rush to the bottom' exists in the case of the Fair Work Australia (FWA) tribunal set up in 2009 to assess enterprise agreements against legislated standards (s.193 *Fair Work Act 2009* (Cth)). Paradoxically, the establishment of standards and model clauses in the FWA legislation was criticised as resulting in inflexibility and settling for the minimum standard.[6]

The potential for the same to occur in the present context is particularly problematic given the significant variance in agreement-making environments around the country: leading practice in one area may constitute poor practice in another. This reflects the fact that leading practice by definition requires something more than mere compliance with standard requirements.

In addition, and as mentioned above, the review function would be largely superfluous in the absence of coercive power (save for its information gathering role).

[6] Australian Mines and Metals Association 'Individual Flexibility Arrangements (under the Fair Work Act 2009): The Great Illusion' (research paper, 2010) at: http://www.amma.org.au/home/publications/AMMA_Paper_IFAs.pdf.

The relationship between any proposed review body and the National Native Title Tribunal in registering and documenting agreements would also have to be clarified. It is unclear why the role of the NNTT could not be expanded to account for the contents of agreements rather than establishing a new regulatory body.

Assessing agreements against leading practice principles runs the risk of considering only the content of agreements and not the contextual and negotiation processes by which they were arrived at. These processes have a major impact on outcomes.

Effectively evaluating negotiation processes requires substantial participatory evaluation processes to establish:
- whether free prior and informed consent was arrived at;
- the impact of the relative skills of negotiators;
- the relative resources which parties bring to the table; and
- the power plays both within and across groups which can have a major impact on outcomes.

B.2 Leading practice agreements toolkit

AIATSIS is of the view that there is a clear need to rationalise and where possible centralise the resources relating to native title agreement making. The diversity of these resources, however, reflects the decentralised and rapidly evolving regulatory and policy context in which native title agreement making occurs.

AIATSIS has recently been involved in scoping a native title negotiation toolkit and suggests that similar issues will arise in the scoping of any leading practice agreements toolkit.[7] Investigations have shown that clarification of the audience is critical as is the type of information required. There is a demand for three classes of information: practical capacity building tools (eg, facilitation exercises, training, power points, for use with native title holders in building negotiation capacity); sets of practice principles (eg, legal principles and templates) and substantive information (eg, identification of human resources and the content of agreements).

Within these categories, NTRBs, native title holders, lawyers, developers, governments and other parties also have significantly different requirements. These relate to the three components of agreements-making: context; process (both as legal procedural process and engagement and communication processes at local, state and national levels, within and across native title groups, governments and developers); and substantive content.

A toolkit, depending on its content, might have limited utility since each agreement is context specific and must match local circumstances and seek the best fit with local actors and factors. No two agreement-making scenarios will be identical. Similarly, legal procedural issues and frameworks are also context dependent and a toolkit would require frequent updating to keep abreast of regulatory and policy developments including within State and Territory jurisdictions.

[7] For a comparative Canadian toolkit, see G. Gibson and C' O'faircheallaigh, 2010, *IBA Toolkit, Negotiation and Implementation of Impact and Benefit Agreements*, Gordon Foundation, Canada.

In developing any tool kit, care must also be taken not to duplicate existing research materials[8] and initiatives such as the AIATSIS Legal Precedents Database. Rather, AIATSIS suggests that a review of existing materials could be useful and that the expansion of the Database should be supported.

Any leading practice toolkit initiative should thus not proceed without considerable scoping which addresses the following questions:

- Who is the audience?
- Is the tool kit intended to address only native title agreement-making substantive content? Or is it also to address changing contexts, jurisdictional variations, and best practice process - ideally not only legal procedural issues but also engagement and specialised communication processes?
- Does the tool kit produce practical tools?
- What research material already exists and can this be collated into a useful form?
- How could the AIATSIS Legal Precedents Data Base be built upon and supported?

There is an urgent need to develop a community of agreement-making practice and AIATSIS would be pleased to be involved in any scoping activities.

C. Future acts reforms

Disputes amongst Indigenous people over the distribution of benefits, overlapping claims and group membership, are a major issue in Future Act negotiations, consuming the time and resources of NTRBs and depleting agreement benefits. They are a significant cause of delays in the native title system, and raise complex issues of individual and communal rights. There are further implications when beneficiaries identified in Future Act and other agreement-making processes are not congruent with subsequent Federal Court native title consent determinations, and when matters are listed for trial because of disputes, but allow little or no time to address the disputes effectively.

AIATSIS's research on Indigenous dispute management indicates the urgent demand for a national Indigenous dispute resolution service - as does the subsequent Federal Court and National Alternative Dispute Resolution Advisory Committee's case study report, 'Solid work you mob are doing' - but no funds have been forthcoming.[9] A funding submission to the Commonwealth Department of Attorney-General prepared by the Right People for Country Project, an initiative of the Victorian Native Title Settlement Framework, with assistance from AIATSIS, was turned down. This submission aimed to pilot the establishment of a panel of Indigenous community facilitators and mediators to work in land related issues in Victoria. It was also aimed at developing some fundamental requirements for a national dispute management

[8] See for example, D. Everard, 2009, 'Scoping Process Issues in Negotiating Native title Agreements', *AIATSIS Research Discussion Paper*, No. 23, AIATSIS, Canberra.

[9] Bauman, T. and J. Pope, 2008, *'Solid Work you Mob are Doing': Case studies in Indigenous dispute resolution and conflict management.* Federal Court of Australia, Melbourne.

service including the development of national standards, monitoring and evaluation procedures, and accredited training. Victoria's Department of Justice is now working on implementing a scaled down version of this proposal with two pilots to commence in 2011 but requires resources to make this project effective.

Where disputes appear to be intractable, there are various third party arbitration contingencies that might be negotiated at the outset of any agreement making process in the event of parties being unable to reach agreement or make a decision. Subject to the agreement of the parties, such contingencies might involve arbitration by a group of regional elders, the NNTT, or Land Councils, or, as Alison Vivian has suggested, a specifically dedicated Tribunal to deal with Indigenous land disputes.[10] Such a Tribunal could be a significant aspect of any national dispute management service and offer conciliation and arbitration services.

[10] A. Vivian, 2009, 'Conflict management in the native title system: A proposal for an Indigenous dispute resolution tribunal', *Reform* vol. 93, 2009, p. 34.

<Attachment C>

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

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[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]

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[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.

<u>The practical problems that emerge from of partial extinguishment</u>

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.

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[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.

COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT

PROPOSED AMENDMENT TO ENABLE THE HISTORICAL EXTINGUISHMENT OF NATIVE TITLE TO BE DISREGARDED IN CERTAIN CIRCUMSTANCES

Submissions from Queensland South Native Title Services

March 2010

Introduction

Queensland South Native Title Services ('QSNTS') welcomes the opportunity to make submissions on the Attorney-General's proposed amendment to enable historical extinguishment of native title to be disregarded in certain circumstances.

QSNTS generally supports any proposal that could provide opportunities for more claims to be settled by negotiation rather than litigation. As such, we support the Attorney-General's proposal that will allow historical extinguishment to be disregarded by agreement of the parties where the area concerned is part of a National, State or Territory park that is set aside or vested under legislation that is for the purpose of preserving the natural environment of the area.

However, as the explanatory note to the Exposure Draft concedes, the proposed amendment is a 'narrow exception' and we expect that it will have limited scope of application on the ground within QSNTS' claim boundaries. This is because the legislation in Queensland under which protected areas are created[1] does not provide for these forms of tenure to be 'vested' with consequential legal implications.

The submissions below will first discuss the need and justification for a comprehensive provision allowing the Courts to disregard historical extinguishment. It will be argued that a comprehensive

[1] For example, the *Nature Conservation Act 1992* (Qld).

provision allowing the Courts to disregard historical extinguishment would be a minor amendment, yet it would result in a range of benefits to all parties to native title litigation. It would allow parties to avoid protracted arguments over the tenure history of a large number of parcels of land where extinguishment may be disputed. This in turn will lead to significant cost savings because detailed tenure analysis over many blocks of land would not be required in order to reach resolution of claims. The overall effect would be a significant savings in time, resources and money and would accord with the Commonwealth's international obligation to eliminate racial discrimination.

Next, it will be argued that while QSNTS views the provisions outlined in the Exposure Draft as a step in the right direction, we do not consider that they go far enough. The proposed amendment will no doubt assist in negotiations in some instances, but we submit that the amendments ought to go much further and address all forms of historical extinguishment.

This will be followed by some alternative proposals for reform offered by QSNTS. A number of examples of historical extinguishment within QSNTS' claim boundaries will be presented that will highlight the absurdity of the potential for certain historical grants and past acts to adversely affect native title negotiations.

Justification for Disregarding Historical Extinguishment

In *Western Australia v Ward*[2], the High Court declared that '[t]he question of extinguishment of native title rights and interests requires attention to the rights that are asserted rather than the use that is made of the land'.[3] The relevant enquiry is about 'inconsistency of *rights*, not inconsistency of *use*'.[4]

Thus, extinguishment can occur by way of a grant or allocation of land by the Crown under which the land is surveyed and gazetted but where the land was never utilised for that purpose, if at all.

QSNTS' definition of historical extinguishment is that it is extinguishment that occurs purely by the grant of an inconsistent interest, and not by the actual enjoyment of that interest. Examples of historical extinguishment that exist within QSNTS' claim boundaries include:

[2] [2002] HCA 28.
[3] Ibid [216] (Gleeson CJ, Gaudron, Gummow, Hayne JJ).
[4] Ibid [215].

- mining leases that allowed residences to be built on them where those residences are long abandoned;
- grants of freehold that are long abandoned (ie, gold rush towns);
- 'historical townships' which were surveyed and gazetted that simply never came into being; and
- reserves which were set aside for purposes that are no longer relevant (eg, timber reserves, police pastoralist reserves).

Where the sort of grants and past acts listed above have occurred within QSNTS' claim areas, they did so in a way that did not confer *any* interests on the present parties to native title litigation. Given this context, there are a number of justifications for a comprehensive amendment to the Act that would allow the Court to disregard the extinguishing effect of those grants and past acts.

Such an amendment would allow parties to avoid protracted arguments over the tenure history of a large number of parcels of land where extinguishment is in dispute. For example, where a town has been gazetted, but nothing was ever built, or where a town has been long abandoned, it arguably does not serve the best interests of any party to enter into what Chief Justice French described as 'arcane argument over long dead town sites'.[5]

The avoidance of 'arcane argument' is a justification for the amendment in and of itself because it would help to prevent negotiations from being sidetracked or blocked by technical issues related to tenure that arise from historical tenure analysis. Parties could then focus on the more important issues of the co-existence of the existing rights and interests resulting in faster resolution of claims. Significant time, resources and cost savings would be realised because detailed tenure analysis over many blocks of land would not be required.

In addition to the justifications outlined above, an amendment to allow historical extinguishment to be disregarded would accord with the Commonwealth's international obligation to eliminate racial discrimination. Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, addressed the issue of historical extinguishment in his *2009 Native Title Report*. Commissioner Calma argues that 'the breadth and permanency of the extinguishment of native title through the Native Title Act is contrary to Australia's international human rights obligations'.[6] Furthermore, 'it is

[5] Justice Robert French, 'Lifting the burden of native title - some modest proposals for improvement'. Speech delivered at Federal Court Native Title User Group, Adelaide (9 July 2008).
[6] Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (December 2009) 110.

also an unnecessary approach, without a satisfactory policy justification'.[7] Calma concludes that the Government 'should explore alternatives to current approaches to extinguishment'.[8]

The preamble to the *Native Title Act* states that 'where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect'.[9] However, in a speech in February 2009, Tom Calma pointed out that this is not what occurs in practice.[10]

The Commissioner noted that the 1998 amendments to the Act 'significantly expanded the situations in which native title rights are extinguished permanently'.[11] He argued that 'amendments that limit extinguishment to the current tenure extinguishment and repeals the provisions that validate past extinguishment would go a long way to addressing this inequity'.[12]

QSNTS submits that Commissioner Calma's comments about Australia's international human rights obligations ought to be fully considered by the Attorney-General in making the proposed amendments. The additional burden posed by historical extinguishment compounds the injustice to native title holders and claimants whose land is already the subject to a plethora of forms of extinguishment provided for under an Act which is supposed to *protect* native title.

QSNTS further submits that a provision for disregarding historical extinguishment would advance the Commonwealth's obligation to uphold the rights of its Indigenous citizens without infringing on the rights of any other citizen. This is because, in the context of native title litigation, it is only their *current* legal interests that parties seek to protect. An order of the Court that allows the disregarding of historical interests that either have never vested or are not currently vested is unlikely to prejudice the interests of any living person.

Since it is only the current legal interests that parties seek to protect, the validity or extinguishing effect of acts that created those interests would not be affected. Instead, it would remove a potential impediment to the resolution of claims and would lead to fairer outcomes for native title claimants.

[7] Ibid.
[8] Ibid.
[9] *Native Title Act 1993* (Cth) Preamble.
[10] Tom Calma, speech delivered to the Informa 3rd Annual Negotiating Native Title Forum, Vibe Savoy Hotel, Melbourne, 20 February 2009.
[11] Ibid.
[12] Ibid.

The Proposed Amendments (Exposure Draft)

The Exposure Draft sets out a new section 47C which would provide a mechanism by which parties could agree to disregard historical extinguishment over areas set aside or vested by a Government law for the purpose of preserving the natural environment of the area, such as a State or Territory park or reserve.

The explanatory note to the Exposure Draft refers to Chief Justice French's speech to the Federal Court Native Title User Group held in Adelaide on 9 July 2008 and it appears that His Honour's suggestion in relation to historical extinguishment was a catalyst for the current proposed amendments.

Justice French (as he then was) put forward the following proposal:

> The second suggestion, by way of modest amendment to the NTA, would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss 47 to 47B. By way of example, arcane argument over long dead town sites might be avoided by resort to such agreements. Presumably some form of registration or formal public record of the agreement would have to be maintained. Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.

QSNTS considers that the proposed provisions in the Exposure Draft are a step in the right direction. In proposing the amendments the Attorney-General has acknowledged the need to address the issue of historical extinguishment.

However, the proposed amendments arguably fall short of His Honour's suggestion by not dealing with the issue of 'long dead town sites' and other such forms of historical extinguishment. Consequently, what would otherwise have been a 'modest amendment to the NTA' under His

Honour's suggestion is now proposed to be something even more modest – almost to the point that it will have an almost negligible effect within QSNTS' area.

QSNTS submits that if the Attorney-General's Department wants to implement Chief Justice French's suggested amendments as His Honour intended, then the proposed amendments ought to address the full range of situations where historical extinguishment arises rather than limiting the area affected to parks and reserves set up for environmental protection purposes.

The following paragraphs will outline a range of proposals for disregarding historical extinguishment that go beyond what is contained in the Exposure Draft but which QSNTS submits ought to be considered. References to actual examples within Queensland are used where relevant.

QSNTS' Suggested Further Amendments

'Fictional' Townships and Suburbs

QSNTS is aware of a number of cases of townships and suburbs within Queensland that were declared, but were never built. By way of example, **Appendix A(i)** displays a map of a subdivision at Midge Point within the Mackay Regional Council area. While the map of this section of the township of Midge Point shows the boundaries of more than 40 town blocks of approximately 600 square metres or more, in reality no such subdivision exists or has ever existed. This is shown at **Appendix A(ii)** which displays a recent aerial photograph of the same land. This is not an isolated example and QSNTS is aware of many more such instances.

QSNTS considers that these declared townships and subdivisions are legal fictions. Even though they are materially non-existent, the legal consequences that result from their declaration are very real because, as described in *Ward*, it is inconsistency of *rights*, not inconsistency of *use* that may result in whole or partial extinguishment. Thus, where these 'fictional' areas exist on paper only, their declaration causes extinguishment.

QSNTS submits that this is perhaps the most absurd of the possible forms of historical extinguishment because it gives primacy to what can be characterised as an overly-ambitious or unduly optimistic administrative act at the expense of native title.

Further, in QSNTS' experience, where these sorts of 'fictional' grants exist within native title claim boundaries, they do not confer *any* legal interests on the present parties to native title litigation.

While no party enjoys any legal interest resulting from these 'fictional' places, it is clear that the State and other respondents benefit from their official declarations. This is because the State owes no obligation to native title holders and claimants due to the extinguishing effect of the historical tenures created by those declarations.

By contrast, the rights of native title claimants are greatly prejudiced by the same declarations. It is perhaps ironic that the Act, and its associated jurisprudence, allows for extinguishment where an inconsistency of *rights* exists even where no party has exercised – nor may *ever* exercise – actual enjoyment of those rights and no party asserts to protect any rights conferred under the relevant grants. QSNTS considers that this situation unnecessarily and unfairly burdens native title claimants with unjustified incidents of extinguishment contrary to the objects of the Act.

QSNTS submits that any amendments to the Act that propose to deal with historical extinguishment should at *minimum* include provisions to allow the Court to disregard extinguishment resulting from 'fictional' places such as the suburb at Midge Point described above. That is, where a use of land is declared or gazetted by a past act creating a right or interest that is wholly or partially inconsistent with native title, but no person or body has ever in fact exercised or enjoyed that right or interest, the Court should be empowered to (with agreement of the parties) disregard any extinguishment that may arise as a result of that past act.

Activities Out of Alignment

In addition to the 'fictional' townships described above, QSNTS is also aware of many cases of activities on land such as roads, infrastructure and pastoral leases that have been built or pegged out of alignment from their actual grants.

Appendix B(i) shows the tenure boundaries of an aircraft reserve located adjacent to a township reserve and a number of road reserves. **Appendix B(ii)** shows the same tenure boundaries superimposed onto an aerial photograph. The photo shows in the top right corner a road that has been constructed out of alignment from the road reserve where it should have been built. Similarly, the airstrip reserve at the bottom of the photo is in a different location to the actual airstrip. The actual airstrip is only partially within its intended reserve and cuts across a township reserve while also encroaching on an unused road reserve.

Appendix C shows satellite imagery of a pastoral lease pegged out of alignment to its grant. There is a one hectare incursion of a sugar cane crop into a reserve. QSNTS is aware that there

are numerous such pastoral leases that are pegged out of alignment to their actual grants. The difference between the grant and the actual activity can be quite significant and when the difference is multiplied by the frequency of the anomalies, the magnitude of the amount of land where native title has been technically extinguished becomes significant.

Extinguishment arising out of situations such as the examples described above is similar in character to that resulting from the declaration of 'fictional' townships and suburbs. But instead of resulting from over-ambitious or unduly optimistic planning they likely occur as a consequence of administrative error.

Unlike the 'fictional' towns and suburbs, the examples above demonstrate actual use of land. However, the use of the land is not in accordance with the underlying grants. Consequently, the effect on native title is potentially doubled. The underlying grant may wholly or partially extinguish or suspend native title rights and interests over the areas that are declared. But simultaneously, the practical use or enjoyment of native title rights and interests is curtailed or substantially disrupted by the activities that take place in the wrong location. QSNTS considers that this is akin to double-extinguishment.

QSNTS considers that this sort of 'double extinguishment' is unjustified and contrary to the objects of the Act. It unnecessarily and unfairly burdens native title claimants as a result of historical errors which have no bearing on the parties' interests.

Consequently, QSNTS submits that the Attorney-General should consider making the following additional amendment to the Act:

- Where:
    - an area of land is granted or declared for a future activity; and
    - the actual future activity takes place out of alignment from the grant;
- The Court is empowered to (with agreement of the parties) disregard any extinguishing effect of the grant or declaration.

The Attorney-General may also wish to consider a provision allowing the parties to negotiate compensation for the loss or suspension of enjoyment of native title rights and interests over the land that is actually affected by the activity.

Ghost Towns

Ghost towns or 'long dead town sites' are numerous within Queensland, especially in the mineral provinces. By way of example, Mary Kathleen, the site of a former uranium mining town, is situated in the Selwyn Range between Cloncurry and Mount Isa. The town, first settled in the 1860s, was named by the Surveyor-General in 1958 and is still a declared town despite laying idle for the majority of its existence before finally being closed down in 1982 and emptied out the following year.

A recent aerial photograph of the central area of Mary Kathleen is displayed at **Appendix D**. The photo shows a number of now vacant blocks that once contained residential dwellings, commercial buildings and public infrastructure. All buildings and infrastructure have been long removed.

It is apparent that when Chief Justice French made his suggestion in 2008 for a provision to deal with historical extinguishment, His Honour specifically directed attention to 'long dead town sites' such as Mary Kathleen. While the extinguishing effect of the grants that created the ghost towns in the first place is not in dispute, there is the potential for negotiations to be stalled or derailed by technical arguments over tenure histories.

Consequently, QSNTS suggests that the Attorney-General introduce an additional amendment that may assist parties to avoid such arguments. The amendment could provide that where a declared town is no longer in use or inhabited, the Court may (with agreement of the parties) disregard any extinguishment caused by past grants.

A Broad Approach

In a similar manner to the explanatory note to the Exposure Draft, Commissioner Calma's *Native Title Report* refers to the Chief Justice's 2008 speech. But the Commissioner goes further than the Attorney-General by calling for the full depth of reform suggested by His Honour. Calma suggests that the *Native Title Act* could be amended to provide a *greater number of specific circumstances* in which extinguishment may be disregarded.[13]

In fact, the Commissioner has suggested that amendments could be made to allow historical extinguishment to be disregarded over:[14]

[13] Tom Calma, above n 6, 111.
[14] Tom Calma, above n 10.

- all Crown land
- other identified classes of land and waters
- any other area which the relevant government decides.

This is a broad approach and would not require compartmentalising all the sorts of historical extinguishment that may arise. Arguably, it would be broad enough to deal with any form of historical extinguishment with a single provision.

Commissioner Calma points out that:[15]

> [t]here will be a number of considerations if this path were followed including:
>
> - the need for a transition process
> - an understanding that such an approach will not do away with all historical tenure research that is required

In addition:

> ... any extinguishment of native title that occurred after the enactment of the Racial Discrimination Act 1975 (Cth) will still need to be examined closely in order to determine whether compensation is payable to the claimants under that Act. But overall, a rule which disregards historical extinguishment should reduce the number of circumstances in which compensation under the Racial Discrimination Act may apply.[16]

The Commissioner concludes his argument about the need for a broad range of circumstances where historical extinguishment should be disregarded by stating that If the extinguishment provisions were amended along the lines of his suggestion (above), the cost and resources required to undertake historical tenure research would be reduced significantly and native title proceedings would be simpler and faster to resolve.[17]

Agreement of the Parties

The proposed amendment requires that historical extinguishment is disregarded only when there is written agreement of the parties. However similar provisions in 47, 47A and 47B do not require

[15] Ibid.
[16] Ibid.
[17] Ibid.

agreement. QSNTS submits that, in relation to the proposed section 47C dealing with areas set aside or vested for the purpose of preserving the environment of an area, the power of the Court to disregard historical extinguishment should *not* be dependent on obtaining the consent of the State and other respondent parties.

However, in relation to the *additional* amendments suggest by QSNTS above, we consider that a requirement for the agreement of the parties may be beneficial for the reasons that follow.

Firstly, a requirement for agreement of the parties fits well with the underlying principle of the Native Title Act that claims should be resolved through negotiation rather than litigation. As previously stated, QSNTS supports any amendment that could provide opportunities for more claims to be settled by negotiation rather than litigation.

Second, requiring the agreement of the parties will create a degree of confidence that historical extinguishment will not be disregarded in circumstances that would prejudice the rights or interests of any current party to the claim.

Third, the relationship and rapport between the parties is strengthened by entering into negotiations in good faith, especially where the goal of those negotiations is to avoid protracted technical arguments over tenure and to bring about a faster resolution of the claim.

Conclusion

While QSNTS supports the principle behind the proposed amendments in the Exposure Draft, we do not consider that the amendments go far enough to bring about the necessary reforms relating to historical extinguishment.

QSNTS views the ability to disregard historical extinguishment as an important tool in the suite of options needed to make negotiated outcomes more attractive. There are many extinguishing tenures that could be characterised as 'historical extinguishment', not just those related to parks and reserves created for the purpose of the protection of the environment. The preceding section highlights a number of examples within the QSNTS' claim boundaries and there are many more.

QSNTS submits that additional amendments to those contained in the Exposure Draft are necessary. Firstly, historical extinguishment arising from the declaration or gazettal of 'fictional' towns should be disregarded. Secondly, where activities on land take place out of alignment from their grants, the extinguishing effect of those grants should be allowed to be disregarded. Thirdly,

an amendment could be made to allow for the disregarding of extinguishment over 'long dead town sites'. Lastly, the Attorney-General may consider introducing a broadly worded amendment that would allow for historical extinguishment to be disregarded by the Court in circumstances where the parties agree.

As French CJ pointed out, disregarding extinguishment is in no way novel. Indeed, the then Attorney-General in the first reading of the Native Title Amendment Bill 1997 which introduced ss 47A and 47B stated his belief that those provisions 'met the argument that the bill failed to take account of the issue of 'historic' pastoral leases'. In his speech, the Attorney-General described how the adoption of these beneficial provisions enabled 'the court [to] disregard the tenure history of the area in determining the claim'.

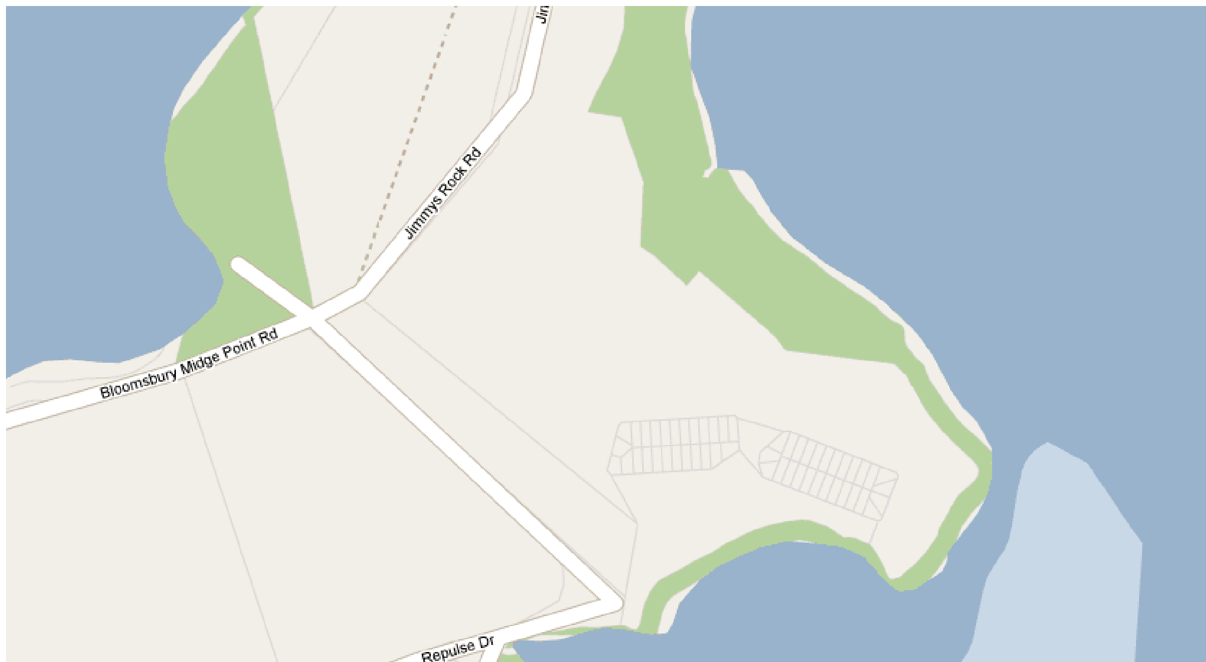
To use the language of the former Attorney-General, the provisions proposed by QSNTS would operate to disregard the extinguishing effect of additional categories of 'historic' tenure. In doing so, it will not affect the validity or extinguishing effect of acts that created the current legal interests that the parties to the proceedings are seeking to protect. It will simply allow the court to disregard the extinguishing effect of past acts which did not confer interests of any kind on the current parties.

In addition to significant savings in time, resources and money and the advancement of the Commonwealth's international obligation to eliminate racial discrimination, QSNTS submits that amending the Act to enable the Court to disregard historical extinguishment will create a level of confidence and flexibility in the system that will drive different, more constructive ways of resolving native title claims.

QSNTS welcomes the opportunity to discuss any aspect of the above submissions.

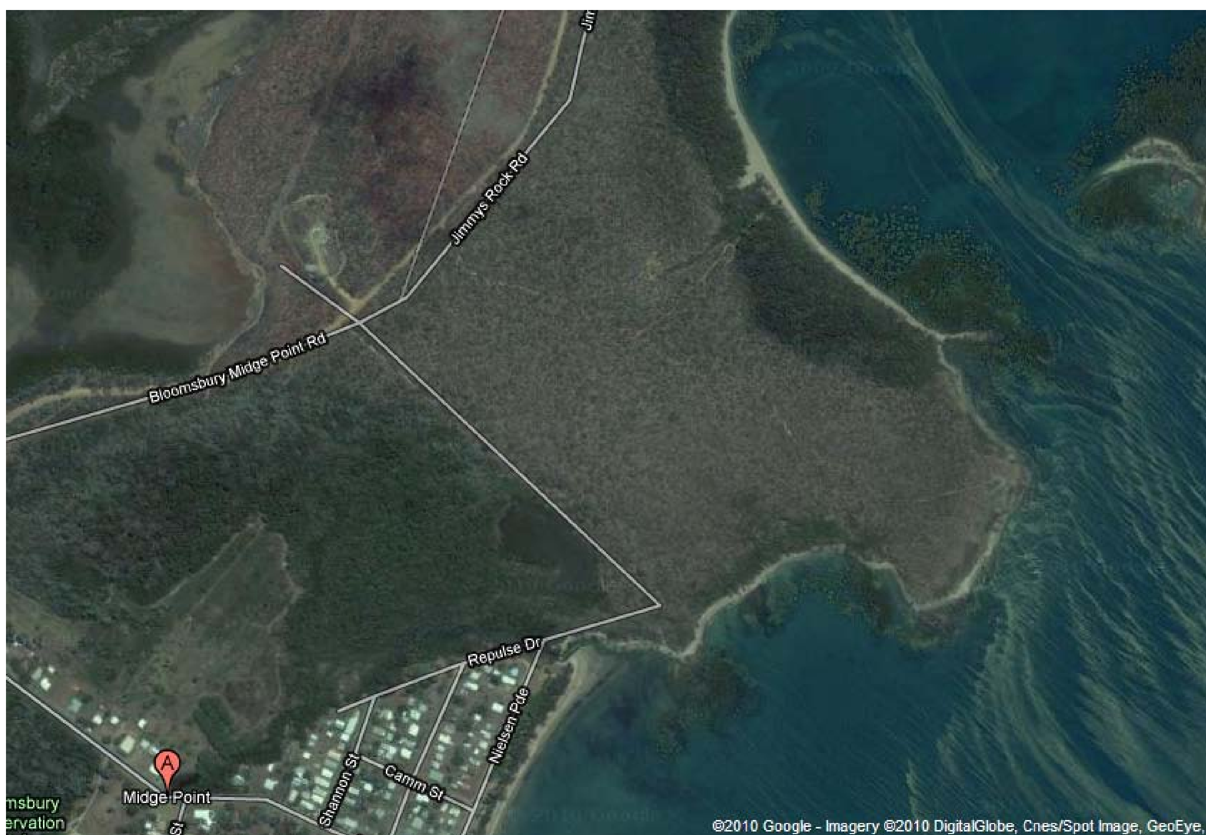
APPENDIX A(i)

Map of Midge Point, Queensland.



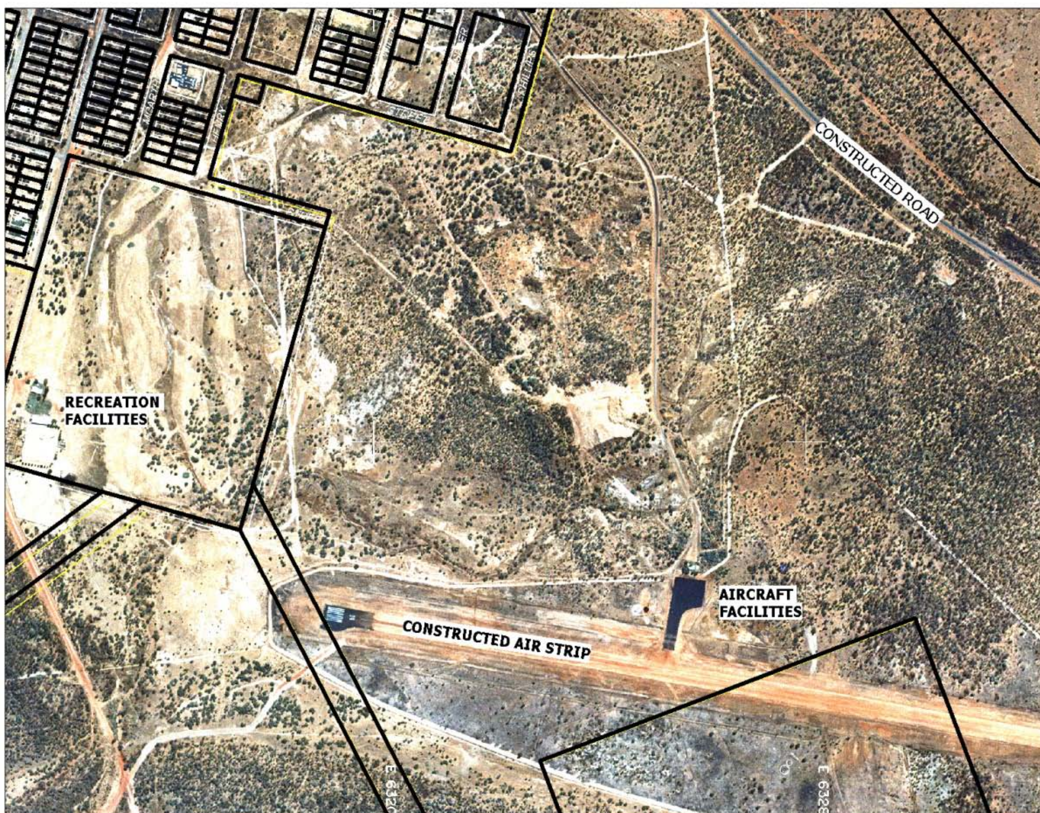
APPENDIX A(ii)

Current aerial photo of Midge Point, Queensland.



APPENDIX B(i)

APPENDIX B(ii)



APPENDIX C

APPENDIX D

Aerial photograph of Mary Kathleen, Cloncurry Shire.