

31 January 2013

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Ms Dennett,

Submission regarding the *Native Title Amendment Bill 2012*

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to make submissions about the proposed changes to the operation of the *Native Title Act 1993* addressed in the *Native Title Amendment Bill 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 amendments proposed in the Bill may help improve 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 four previous AIATSIS submissions relevant to the Bill in which our arguments concerning the workability and fairness of the Native Title Act remain effectively unchanged:

- *Comments on Exposure Draft: Proposed amendments to the Native Title Act 1993* (October 2012) (see attachment);

- *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 Bill 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,

A handwritten signature in black ink, appearing to read 'Lisa Strelein', with a stylized flourish extending to the right.

Dr Lisa Strelein
Director of Research
Indigenous Country and Governance



Submission of the
Australian Institute of Aboriginal and Torres Strait Islander Studies
to the Senate Legal and Constitutional Affairs Legislation Committee
in relation to the

Native Title Amendment Bill 2012

31 January 2012

AIATSIS welcomes the government's proposal to make amendments to the *Native Title Act 1993*. Since the commencement of that Act, the Native Title Research Unit at AIATSIS has conducted and published research into the Act's legal and practical operation, identifying and analysing areas where reform would be desirable.

In relation to the government's current amendment Bill, AIATSIS' position is essentially the same as was expressed in its October 2012 submission about the exposure draft legislation (attached). 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. In relation to the streamlining of ILUA processes, we support the bulk of proposed changes, but express reservations about the removal of the objection procedure for certified ILUAs and recommend that the period for all objections remain at three months.

1. Historical extinguishment

In its submission about the exposure draft legislation, AIATSIS recommended that:

- the proposed s47C, dealing with parks and conservation reserves, be changed to remove the requirement for government agreement;
- the proposed s47C be changed so that the section applies to marine areas as well as on-shore places;
- a new s47D be drafted which allows for parties to agree to the disregarding of any historical extinguishment; and
- 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.

The current Bill reflects only minor drafting changes to the previous exposure draft, and so AIATSIS reiterates its recommendations.

- 1.1 While AIATSIS welcomes the proposal to expand the Act's capacity for recognising native title, it is disappointing that the proposed amendments will miss the opportunity to correct an aspect of the native title regime that is both logically incoherent and unjust. The proposed amendments appear to recognise that the current law's treatment of historical extinguishment involves an arbitrary denial of rights based on accidents of history. The Bill, however, does not follow through with that recognition by proposing substantive change to the way historical extinguishment is dealt with.
- 1.2 To restate the issue: native title is the recognition of the rights and interests of traditional owners under their own laws and customs, but this recognition is subject to a compromise whereby the rights that have been already granted to other people (and the laws already passed by state and Commonwealth parliaments) will not be diminished. So extinguishment is part of a trade-off designed to protect public and private interests that already existed at the time that native title was recognised in Australian law. **Where, however, an extinguishing interest has come to an end, there is no reason in policy or in the jurisprudential logic of native title to withhold recognition of the rights and interests held under traditional laws and customs (subject to any other ongoing inconsistent rights and interests).** There is no other party whose existing interests are affected. And yet under the current law, governments are able to avoid negotiating with traditional owners when (for example) making decisions about the management of national parks, because of the vestigial effects of long-forgotten prior dealings with the land. In effect this amounts to the circumvention of the future acts process by reliance on a technical loophole the existence of which has no policy justification.
- 1.3 Accordingly, it is inappropriate to leave the disregarding of historical extinguishment to the prerogative of governments – where claimants are found to have traditional rights and interests in relation to a park or reservation area, only the current use of that area is relevant to the question of how far those rights and interests may be recognised, and previous dealings with the land should be disregarded automatically. Governments should not be able to avoid proper engagement with traditional owners on the basis of quite fortuitous and arbitrary accidents of history.
- 1.4 Further, there is no apparent policy or legal reason for limiting the disregarding of extinguishment to on-shore areas, or for limiting the consensual disregarding of extinguishment to parks and reserves. If the matter of disregarding extinguishment is to be left to negotiations between governments and traditional owners, there is no apparent reason to make such negotiations available in the case of parks and reserves alone, and no apparent difference between on-shore and off-shore places.
- 1.5 The Commonwealth has the opportunity to significantly enhance the health and wellbeing benefits that accompany Aboriginal and Torres Strait Islander peoples' ownership of, access to, use and enjoyment of their traditional lands.¹ Expanding the capacity to disregard

¹ 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.

historical extinguishment, particularly in areas of high ecological and cultural value, is likely to contribute to the government's objectives in 'closing the gap'. **AIATSIS would encourage the Committee to embrace this opportunity more fully than has been done in the current Bill, and to consider the recommendations outlined above.**

2. Negotiation in good faith

AIATSIS' submission about the exposure draft legislation commended several aspects of the proposed the 'right to negotiate' amendments, and made four further recommendations in relation to them:

- that s 38(2) be amended to allow the National Native Title Tribunal to impose 'profit-sharing' conditions;
- that s 36 be amended to clarify that the Tribunal may not make an arbitral decision until negotiations have reached the point where it is clear that the parties are unable to agree; and
- that the proposed s 31A(2) be amended:
 - to re-frame the factors as cumulative mandatory criteria rather than as factors to be weighed; and
 - to add a requirement for parties to give reasons for their responses to other parties' proposals; and
- 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.

Disappointingly, these recommendations have not been adopted in the drafting of the current Bill. AIATSIS now makes the same recommendations to the Committee.

2.1 At the National Native Title Conference in 2012, the Attorney-General described the proposed reforms as 'incremental changes' in contrast to 'radical changes'. We would argue, though, that the effect of the current Bill risks being so minimal as to amount to a confirmation of the status quo.

2.2 Certainly, the Bill represents a welcome step forward in that it would:

- require the use of 'all reasonable efforts' to reach agreement;
- explicitly allow the Tribunal to consider the reasonableness of offers;
- increase the minimum time before a s 35 application may be made;
- put the evidentiary burden on the party seeking an arbitral decision; and
- allow the Tribunal to impose a further period of negotiation if it finds a lack of good faith.

2.3 Nevertheless, the matters listed in s 31A(2) largely reproduce the existing law. They are merely factors to be considered and balanced by the Tribunal, rather than stipulating a

minimum code of conduct for negotiations. It is difficult to imagine circumstances in which a proponent who had failed to satisfy any of those requirements should still properly be said to have negotiated in good faith, and yet it would still be open for the Tribunal to make such a finding.

2.4 We would submit that the Bill in its current state will not achieve the objective that the Attorney-General has set for it, namely to end the situation where parties can simply ‘sit back and wait for the clock to tick down until an arbitrated outcome is available’.² The current law makes that approach a realistic option for proponents, and the proposed s 31A(2) does not represent a significant change to that aspect of the law. In June 2012 the Attorney-General made a commitment to ‘legislate criteria to outline the requirements for a good faith negotiation’.³ The current Bill does not do this; instead, it specifies considerations for the Tribunal to have regard to ‘where relevant’. **We would encourage the government to follow through on its commitment, and amend the Bill to re-frame s 31A(2) as a list of minimum criteria.**

2.5 We note that the current Bill has removed a provision from the previous exposure draft that would have specified that the good faith negotiation requirements do not require a negotiation party to make concessions during negotiations. This removal is to be welcomed, as we consider that a willingness to consider concessions is a key element in the concept of negotiation. We would encourage the Parliament to go further and include in s 31A a requirement for parties to give reasons for their responses to other parties’ proposals. This modest change would ensure that good faith negotiations involve genuine and effective communication about the issues to be agreed.

2.6 Finally, the results of AIATSIS research have repeatedly emphasised the critical importance of negotiation capacity and sound processes, elements that in our opinion should be included in the definition of the ‘good faith requirements’. Research carried out for the Indigenous Facilitation and Mediation Project (2003-2006) and the Indigenous Dispute Resolution and Conflict Management Case Study Project⁴ 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. 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. This ideally

² Attorney-General Nicola Roxon, 6 June 2012, <http://resources.news.com.au/files/2012/06/06/1226385/856700-aus-na-file-nicola-roxon-on-mabo.pdf>

³ Ibid

⁴ 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.

would be done by third party community engagement facilitators (or positions with similar functions) with highly specialised communication skills. In order to put these research findings into practice, it would be appropriate for the Act to stipulate that arbitral decisions should 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.

- 2.7 The future acts process represents the primary mechanism by which traditional owners can use their native title rights to achieve economic outcomes and protect their social, cultural and environmental values. Yet its effectiveness in this regard is currently hamstrung by the uneven playing field on which negotiations take place, with proponents often able to avoid making any serious concessions and arbitral decisions almost guaranteed to allow projects to go ahead (without any monetary awards). **Redressing this structural imbalance in the Act is likely to improve outcomes for traditional owners, but will require more substantive changes than those proposed in the current Bill.**

3. Indigenous Land Use Agreements

In the AIATSIS submission about the exposure draft legislation, recommendations were made 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.
- 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.
- s 24CL be amended to include a condition equivalent to that in s 24CK(2).
- s 24CH(6)(b) refer to ‘the requirements of sub-paragraphs 24CG(3)(b)(i) and (ii)’, rather than simply s 24CG(3)(b).
- s 251A(3) refer to ‘paragraph (1)(a) or (1)(b)’.
- 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.

Of these, the fourth recommendation is reflected in the current Bill and the third has become redundant in light of other changes in the current Bill. We encourage the Committee to consider the remaining recommendations, and in addition we recommend that:

- **the registration of NTRB-certified ILUAs remain subject to an objections mechanism;**
- **the reference to ‘common or group rights’ be removed from the proposed s 251A(3). For clarity, the order of subsections (2) and (3) should be reversed accordingly; and**
- **the reference in s 24CL(3) to ‘s 24(CG)(b)’ should be changed to ‘s 24CG(b)(i) and (ii)’.**

3.1 The most significant change to the current Bill as compared to the previous exposure draft is the new treatment of NTRB-certified ILUAs. Under the existing Act (and under the previous exposure draft) the registration of ILUAs that have been certified by NTRBs is subject to an objection process (ss 24CI and 24CK). The current Bill proposes removing that objection process for certified ILUAs such that registration is essentially automatic – in effect giving NTRBs the final decision about registration, even potentially in the face of disagreement. In this sense the proposed amendments would effectively outsource the Registrar’s function to NTRBs in cases of certification.

AIATSIS has reservations about this change to the scheme of checks and balances in NTRB functions. NTRBs already combine a wide range of functions, involving elements of advocacy, mediation, and decision-making. These elements may in some circumstances be in actual or perceived tension. NTRBs’ exercise of advocacy and assistance functions in relation to their claim-group clients may raise concerns among other stakeholders about NTRBs’ perceived ability to exercise impartial objective judgment in relation to certification of ILUAs. To take away the Tribunal’s ability to respond to objections would be to remove an important aspect of procedural fairness.

- **AIATSIS recommends that the registration of NTRB-certified ILUAs remain subject to an objections mechanism.**

3.2 .We note that the current Bill, like the exposure draft, proposes to reduce the period for objections from three months to one month. If the notification procedure is to be anything other than an empty formality, it must be assumed that in at least some cases the objectors will not have learned of the ILUA previously and that receiving the notification marks their first opportunity to take action. On that assumption, one month will in most cases be insufficient. Preparing an objection capable of demonstrating a ‘prima facie case’ that the objectors may hold native title involves a potentially significant research and drafting task. 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, we consider that a three month notice period represents a more appropriate timeframe.

- **AIATSIS recommends that the one month ‘notice period’ set out in s 24CH(5) for the lodging of objections be extended to three months, and that the same period be retained for objections to the registration of certified ILUAs.**

3.3 We note that the references in the exposure draft to the making of an overlapping native title application (as an alternative to lodging an objection) have been removed in the current Bill. AIATSIS’ submission about the exposure draft noted that the proposed timeframe for lodging new claims would effectively render that option nugatory: at current processing rates, the Registrar would be unlikely to *register* a fully completed application within three months, and so the prospect of preparing, authorising and registering a claim within *one* month seems practically unachievable.

In light of the short timeframe (whether it be one month or three), AIATSIS considers that it is more appropriate to provide a sound objections process than to encourage the lodging of hastily-prepared claims. Accordingly, the current Bill’s version of the proposed s 24CH(5) is preferable to the exposure draft’s proposed s 24CH(6).

3.4 Finally, there are four minor drafting issues in the current Bill

- (a) AIATSIS understands that part of the rationale for changing the ILUA authorisation provisions is that the decision in *QGC*⁵ identified some complexities in the interpretation of the Act, in particular arising from the apparent distinction between the term ‘persons who hold or may hold the common or group rights comprising the native title’ and the term ‘persons who hold or may hold native title’. The current Bill removes ‘common or group rights’ from the proposed s 251A(1), but reintroduces the term in s 251A(3). The reasoning behind this is unclear, but there is a strong risk that it will bring confusion and unpredictability to the authorisation process. Reeves J in *QGC* held that the term ‘persons who hold or may hold the common or group rights comprising the native title’ means ‘registered native title claimants’.⁶ To introduce that term in a context in which there are *no* registered native title claimants (as the proposed s 251A(3) does) is inconsistent with that interpretation. It would be more consistent and simple overall to specify that ILUAs must be authorised by (a) any registered claimant group and (b) any other persons who can establish a prima facie case that they may hold native title.
- **AIATSIS recommends that the reference to ‘common or group rights’ be removed from the proposed s 251A(3). For clarity, the order of subsections (2) and (3) should be reversed accordingly.**
- (b) AIATSIS is pleased to note that our recommendation in respect of specifying ‘s24CG(3)(b)(i) and (ii)’ in s 24CH(5) has been adopted. For consistency, that change should now be carried through to s 24CL(3). In its current form, s 24CL(3) is capable of being interpreted to refer to the mere fact of including of the relevant statement, rather than to whether or not the statement is accurate.
- **AIATSIS recommends that the reference in s 24CL(3) to ‘s 24(CG)(b)’ should be changed to ‘s 24CG(b)(i) and (ii)’.**
- (c) Section 24CG(3)(b) refers to the identification of ‘all persons who hold or may hold native title’, and to the need to ensure that ‘all of the persons so identified have authorised the making of the agreement’. The note to s 24CG(3)(b)(ii) says that ‘The word *authorise* is defined in section 251A’. The proposed s 251A(2) introduces a stipulative definition for ‘may hold native title’, but the current Bill does not carry that definition through to s 24CG(3)(b)(i). The potential for inconsistency between s 24CG and s 251A in this regard is arguably what gave rise to much of the controversy in relation to *QGC Pty Limited v Bygrave* [2011] FCA 1457.
- **AIATSIS recommends that the definition in proposed s 251A(2) be specified to apply to s 24CG(3)(b)(i).**
- (d) As mentioned in the previous AIATSIS submission, it is inaccurate for the proposed s 251A(3) to refer to ‘paragraph (a) or (b)’ without specifying the subsection in which those paragraphs are to be found (presumably subsection (1)).

⁵ *QGC Pty Limited v Bygrave* [2011] FCA 1457.

⁶ *QGC Pty Limited v Bygrave* [2011] FCA 1457 at [121].

- **AIATSIS recommends that the proposed s 251A(3) be changed to read ‘in accordance with paragraphs (1)(a) or (b)’.**

3.5 AIATSIS supports the Bill’s objective of clarifying and simplifying the procedures for authorising ILUAs, but considers that the Act should retain the objections process for certified ILUAs and should retain the 3 month period for making objections.

Contributors

Nick Duff

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Attachment 1:

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

October 2012

AIATSIS Native Title Research Unit

**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

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.

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 unforeseen 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.

¹¹For 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

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

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.

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 s 24CG(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.

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Attachment 2:

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



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 created¹ 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'.

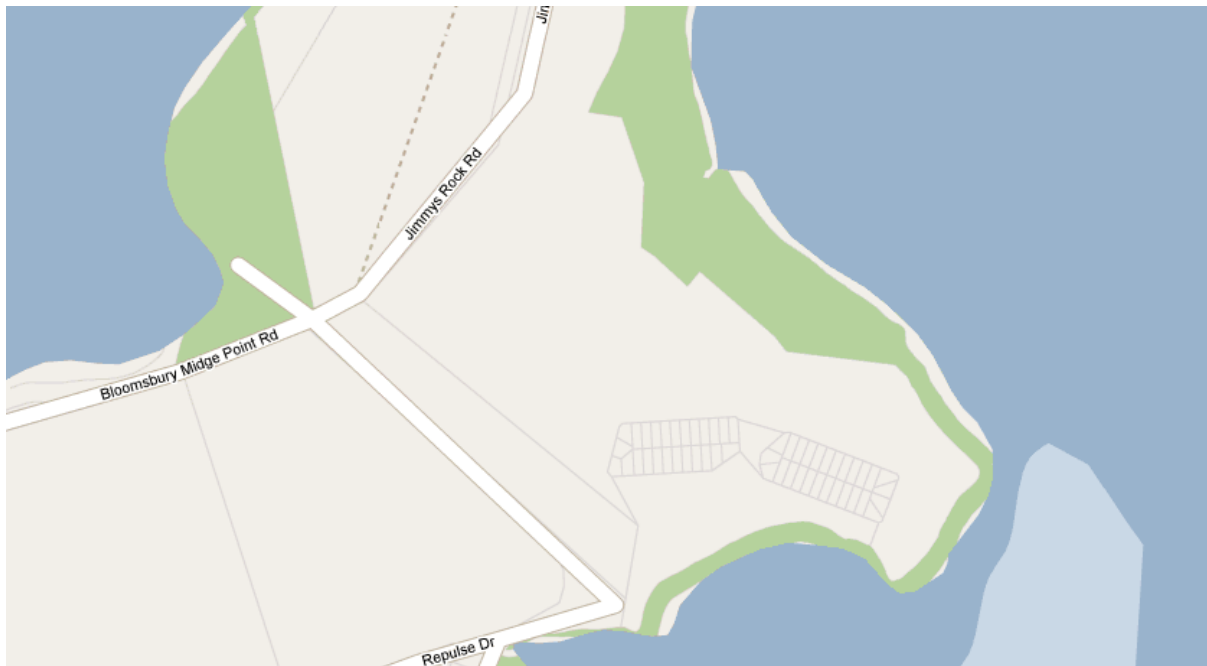
To use the language of the former Attorney-General, the provisions proposed by QSNTS would operate to disregard the extinguishing effect of additional categories of 'historic' tenure. In doing so, it will not affect the validity or extinguishing effect of acts that created the current legal interests 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.

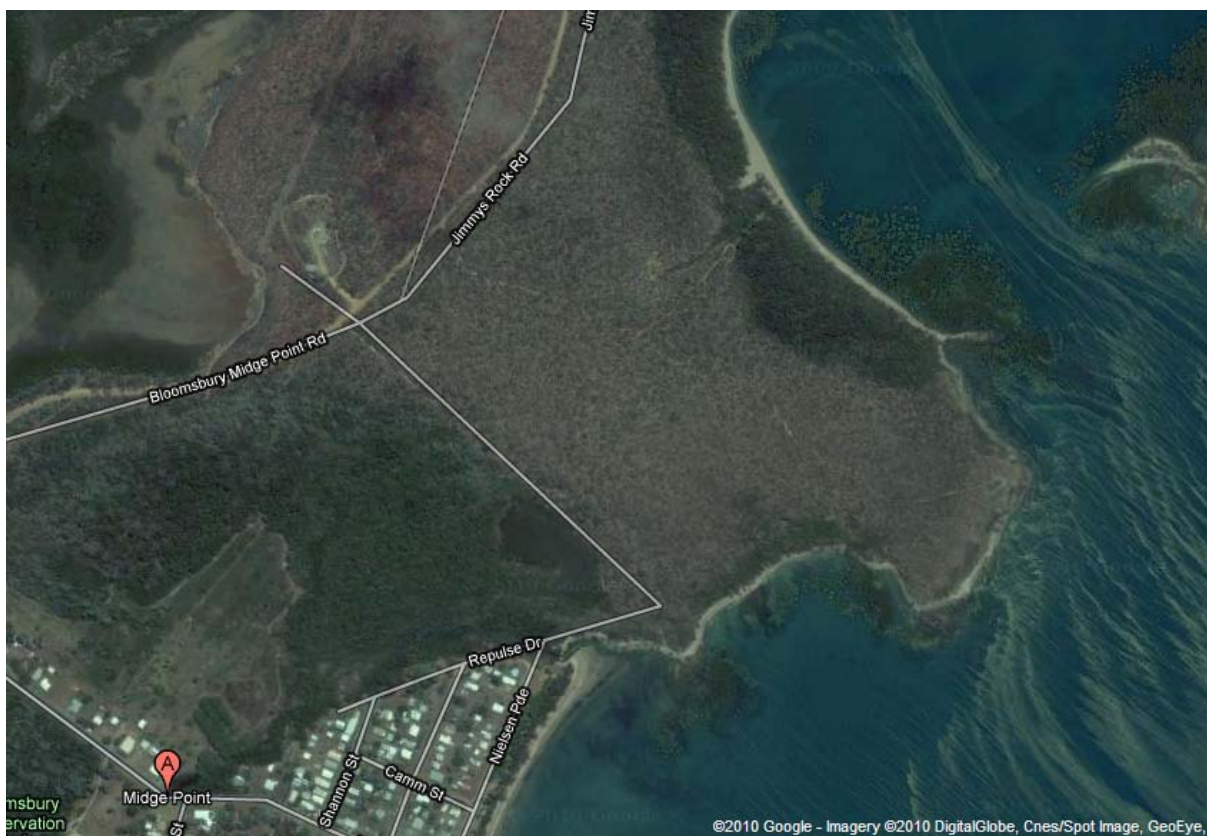
APPENDIX A(i)

Map of Midge Point, Queensland.



APPENDIX A(ii)

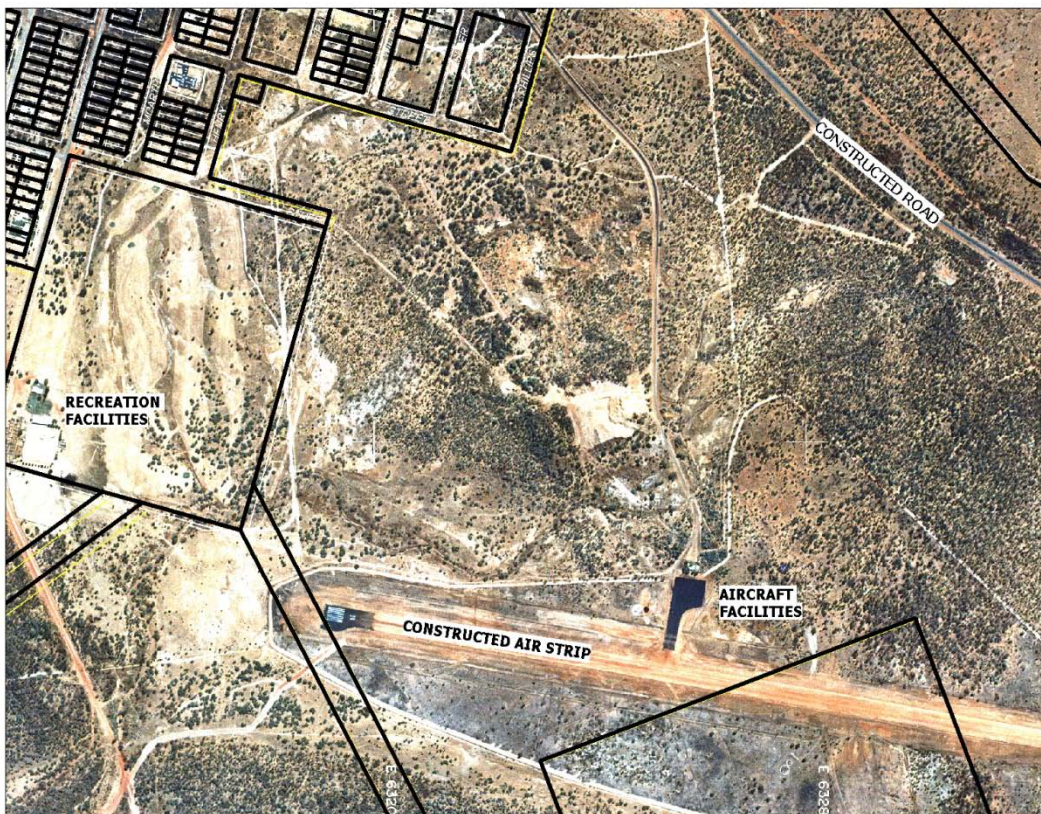
Current aerial photo of Midge Point, Queensland.



APPENDIX B(i)



APPENDIX B(ii)



APPENDIX C



APPENDIX D

Aerial photograph of Mary Kathleen, Cloncurry Shire.

