National Native Title Council

Spirit of Change

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The First Assistant Secretary
Social Inclusion Division
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Sir / Madam

Thank you for the opportunity to provide comments into the proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances. Set out below are some general comments in response to the Attorney-General's invitation to provide feedback to the proposed amendment.

The National Native Title Council (NNTC) is a national alliance of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSs). It was informally established in August 2005, and incorporated in 2006. Its objects are, amongst others, to provide a national voice for NTRBs/NTSs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The proposal to amend the Native Title Act to enable historical extinguishment to be disregarded in certain circumstances is generally regarded as a positive amendment; the NNTC would argue however that significant improvements can be made to the proposal to ensure a more just outcome for traditional owners.

In light of the Government's stated recognition that native title is an important property right that should be recognised and protected, the NNTC would strongly argue that the key premise underpinning all amendments to the Native Title Act is the principle for ***just and proper*** ascertainment of native title rights and interests. It is arguable that going back to this fundamental principle should be the aim of resolving native title, a going back to basics, if you like, as set out in the Preamble of the Act.

Agreement of the Parties

The proposed amendment, as set out in s.47C(1)(c), requires that prior extinguishment of native title is disregarded only when there is agreement in writing by both the relevant government and the applicant. However similar provisions in ss.47, 47A and 47B do not require agreement between the parties. The NNTC would query the necessity to obtain the consent of the relevant government in order for s.47C to apply, particularly when considering that other interests in the land would prevail over native title under s.47C(5).

Relying on the States and Territories to exercise goodwill by agreeing to disregard historical extinguishment may not result in the opportunities that the Federal Government may hope the amendment will produce such as more claims to be settled by negotiation rather than litigation. In some States or Territories the amendment may result in protracted negotiations or unavoidable litigation.

The NNTC would therefore strongly advocate for s.47C(1)(c) to be removed from the proposed amendment.

However, should s.47C(1)(c) remain in its current form, at the very minimum the legislation must also provide a presumption that the State agrees to disregard the extinguishment, and the onus would be on the State to rebut the presumption by providing reasons why it does not intend to disregard extinguishment. That is, there is a presumption that the State agrees to disregard historical extinguishment unless it indicates otherwise.

Section 47C(1)(a)

Clearly the proposed amendment only applies to claims that have not been determined, which seems to be an inequitable approach to claims that have already been determined. It actually could act as a disincentive to have a claim determined in the short term (i.e. while the Bill is being debated), because claim groups will want to hold off from a determination until the Bill is passed (where disregarding of prior extinguishment of parks will be an option).

The NNTC submits that there should be the ability for already determined claims to avail themselves of the section.

Amended Claims

The proposed amendment also requires that the relevant area exists as conservation tenure at the time the native title application or amended application is made. This means that for areas of land that have been added to parks since the making of the claim, claims will have to go through an amendment or a new claim to avail themselves of the ability to disregard the extinguishment.

This will mean claims will have to again pass through the registration test. It is submitted that if claims are amended to avail the claim of this opportunity, then the section should explicitly state that the claim does not have to go through a further registration test, where it is already registered.

Application to other Tenures

The proposed amendment applies to areas that are, or are part of, an area such as national, State or Territory Parks by or under a law for the purpose of preserving the natural environment of the area. The NNTC submits that the amendment should be expanded to include other areas or tenures.

For example in New South Wales other areas could include State Forests, Travelling Stock Reserves, and various Crown Reserves. In Western Australia it could be expanded to include land that has reverted to the Crown but over which native title is impacted by historical tenure that either impedes or extinguishes it.

Native Title Amendment Bill No. 2

The NNTC takes this opportunity to reiterate its opposition to the Native Title Amendment Bill No. 2 for the provision of housing and infrastructure on the grounds that it winds back the beneficial, non discriminatory treatment of certain future acts.

Rebuttable Presumption of Continuity – Burden of Proof
As cited in the introductory remarks to the Attorney-General's proposal, one of the triggers for the amendment was the suggestion in July 2008 by High Court Chief Justice, Robert French for a number of proposals to improve the operation of the Act. The NNTC would encourage the Attorney-General to consider the most significant suggestion made by French CJ and that would be to make "a change to the law so that some of the elements of the burden of proof are lifted from applicants".[1] This could be satisfied by introducing a rebuttable presumption of continuity, reversing the onus of proof so that the State or Territory (or other respondent parties to a claim) bears the burden of rebutting such a presumption.

The NNTC would therefore like to reiterate its submission to the Attorney-General for more significant amendments to the Native Title Act to reverse the onus of proof for connection purposes. As stated by the NNTC in its submission of 13 April 2009 to the Senate Inquiry into the Native Title Amendment Bill 2009, given that in many instances (particularly in remote locations) there is little foundation for significant dispute over continuity,[2] the adoption of a rebuttable presumption of continuity should help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims.

Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonized or asserted its sovereignty over a claim area. This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.[3]

Importantly, the burden placed on the State by virtue of such a presumption may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g., genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a paradigm shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.[4]

A rebuttable presumption would also have a significant impact on the negotiation process. With State Governments being required to rebut continuity and justify extinguishment with the associated costs involved they may be more inclined to negotiate earlier and more openly with the aim of spending less on the process and more on possible opportunities for Traditional Owners.

The NNTC provided a submission to the Attorney-General dated 27 August 2009 setting out a suggested amendment to the Native Title Act for implementing a rebuttable presumption of continuity. Implementing this amendment would be a significant step towards ensuring a more equitable and just system for traditional owners as well as delivering more efficient and timely resolutions of claims throughout the country.

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[1] Justice French. 'Lifting the burden of native title – some modest proposals for improvement'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) at para 27.
[2] Justice Mansfield. 'Re-Thinking the Procedural Framework'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) at 2.
[3] Op Cit, Smith K,
[4] ibid

I trust the above comments are useful for your purposes, however if you require any further information or have any queries please do not hesitate to contact the A/Executive Officer, Carolyn Betts on (08) 9263 8718 at your convenience.

Yours faithfully

Brian Wyatt
Chairperson