CARPENTARIA LAND COUNCIL ABORIGINAL CORPORATION

ABN 99 121 997 933 - ICN 268

Native Title Amendment Bill 2012

Carpentaria Land Council Aboriginal Corporation

Submission to the Senate Legal and Constitutional Affairs Committee and the House Standing Committee on Aboriginal and Torres Strait Islander Affairs

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Gulf Office
87 Musgrave Street
PO Box 71
Burketown, Qld, 4830
Tel: 07 4745 5132 or 4748 6000
Fax: 07 4745 5204
Free call: 1800 445 115

Normanton Office
11 Wurrup Street
PO Box 464
Normanton, Qld, 4890
Tel: 07 4745 1556
Fax: 07 4745 1569

Cairns Office
Level 1, 104 Mulgrave Road
PO Box 6662
Cairns, Qld, 4870
Tel: 07 4041 3833 or 4034 5500
Fax: 07 4041 3533

Introduction

1. The Carpentaria Land Council Aboriginal Corporation (CLCAC) welcomes the opportunity to comment on the proposed changes to the *Native Title Act 1993* (Cth) in the *Native Title Amendment Bill 2012* (the Bill). The Bill was introduced into the House of Representatives on 28 November 2012 and then referred to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs. The Bill was also referred to the Senate Legal and Constitutional Affairs Committee. This submission is made to both Committees. The House Standing Committee on Aboriginal and Torres Strait Islander Affairs is also calling for submissions addressing whether a sensible balance has been struck in the Bill between the views of various stakeholders and for proposals for the future reform of the native title process. CLCAC has not had opportunity to include in these submissions the views of its constituents in relation to these further issues. CLCAC would welcome the opportunity at a later date to provide additional submissions.

2. CLCAC was established in 1982 to represent the rights and interests of Traditional Owners in the southern Gulf of Carpentaria. CLCAC's members are drawn from the nine Aboriginal language groups whose traditional lands and waters are located in the Gulf.

3. On 30 June 1994, CLCAC was recognised as the native title representative body under the *Native Title Act* for the Gulf of Carpentaria Region. The area represented by the CLCAC encompasses land and waters from the Northern Territory border to east of Normanton and includes the islands and seas of the lower Gulf. Today, CLCAC is the largest and most eminent corporate entity representing the rights and interests of traditional owner groups in the southern Gulf of Carpentaria.

4. CLCAC supports the stated intention of the Bill, namely, the introduction of specific measures that address two key areas in the interest of native title claimants:

    - The barriers claimants face in making the case for a determination of native title rights and interests; and

    - Procedural issues relating to the future act regime.

5. The *Native Title Act* does not create a fair process for recognising and adjudicating the rights and interests of Aboriginal and Torres Strait Islander peoples as it contains significant obstacles to the full realisation of those rights and interests.

6. CLCAC therefore supports the general intent of the reforms proposed by the Bill to improve the effectiveness of the *Native Title Act*. CLCAC would be pleased to discuss further with either Committee any of the issues or matters raised in this submission.

SCHEDULE 1: Historical extinguishment

7. The Bill contains proposed amendments to enable parties to agree to disregard the historical extinguishment of native title over an area that has been set aside or vested to preserve the natural environment. Generally, this refers to national, State and Territory parks and reserves.

8. CLCAC broadly supports the proposed amendments insofar as they expand on the range of circumstances in which extinguishment can be disregarded. The *Native Title Act* does not presently allow parties to agree to disregard extinguishment of native title except in the particular circumstances set out in sections 47, 47A and 47B which relate to pastoral leases held by native title claimants, certain reserves and vacant Crown land.

9. Although CLCAC supports increased flexibility under the *Native Title Act* for parties to agree to disregard historical extinguishment, we make the following observations and submissions on the form of the proposed inclusion of a new section 47C:

Requirement for Agreement

10. The requirement for there to be agreement between a government party and the native title party in order to disregard historical extinguishment should be removed.

11. This is for the following reasons:

    a. The success of the amendment will simply depend on the willingness of Government to agree to disregard prior extinguishment. Interests on part of the Government will vary depending on political interests and the government of the day and are unlikely to be firmly set out in government policy. This may lead to vastly different, uncertain and inequitable native title outcomes for native title claimants within the same jurisdiction, while also increasing the time and costs of mediation. Providing governments with the opportunity to exercise greater discretion to agree or disagree extinguishment in a process already heavily weighted against native title claimants is therefore opposed.

    b. Extinguishment of native title on park areas should not be restricted to "onshore" areas. This is particularly relevant where native title is granted over seas and oceans. The section must be amended to provide for historical extinguishment to be disregarded over marine parks and reserves. Such an amendment would not in our view constrain the ability of governments to regulate fisheries or provide for other regulatory regimes to protect our seas and oceans.

    c. Inconsistency. The current provisions set out in sections 47, 47A and 47B do not require government consent for historical extinguishment to be disregarded and there is no logic or rationale provided for proposed section 47C to be drafted differently.

12. Therefore, the CLCAC recommends that the amendment be strengthened to provide that, where native title exists over a park or reserve and the only other

interest holder in the land is the Crown, extinguishment be automatically disregarded, including in relation to offshore areas.

Public Works

13. CLCAC supports the inclusion of s47C(4) to create specific reference to "the construction or establishment" of specific public works as a prior activity capable of having prior extinguishment disregarded. This circumvents findings in case law that public works may not always constitute 'the creation of any prior interest'[1]. Accordingly, this amendment should be extended to cover sections 47 to 47B of the Act.

Notice and Time for Comment

14. With regard to proposed subsections 47C(5) and 47C(6), it is not clear why notification is required, nor to what purpose comments received will serve. It is also not clear who are "interested persons" entitled to notice. Further clarification on this is requested.

Exclusion of Crown ownership of natural resources

15. CLCAC submits that proposed subsection 47C(9) be removed, and references to same be removed from existing ss47 and 47B. This is because it is not sufficiently clear what the "creation of an interest that confirms ownership of" or the conferral of ownership of natural resources on the Crown means. It is submitted that the subsection be narrowed to refer only to the creation of an interest by legislation over an area deemed at the time to be natural resources, and that act is still in force at the time a claim is made.

Insertion of proposed subsection 64(2A)

16. CLCAC gives in-principle support to this amendment, insofar as it provides flexibility to amending applications. However, the CLCAC refers to its submissions on the insertion of proposed sections 47C(1)(c) and 47C(4) (above).

SCHEDULE 2: Negotiations

17. The Bill includes proposed amendments to clarify the meaning of good faith under the right to negotiate scheme of the *Native Title Act*. It includes specific proposals for the conduct of parties in seeking to reach agreement in relation to certain future acts.

18. CLCAC supports the narrowing of the definition of "good faith". In the absence of a clear definition in the current legislation, there has been a great deal of uncertainty in relation to this requirement and a view expressed by the judiciary that it is not necessary for parties to have reached a particular point

[1] See *Erubam Le (Darnley Islanders) (No 1) v Queensland* (2003) 134 FCR 155

in negotiations before they can apply to the National Native Title Tribunal for a determination. [2]

19. However, the CLCAC fears that the proposed amendments focus too heavily on reaching agreement to the doing of acts and that this will in the long term be detrimental to native title parties.

20. Further specific comments are provided below.

Subsection 31(1)

21. CLCAC believes that the proposed inclusion of subsection 31(1)(c) does not go far enough to ensure that native title parties have access to an even playing field in negotiations.

22. The phrase "with a view to obtaining the agreement of each of the native title parties" at the outset of subparagraph 31(1)(b) pits the subsection in favour of grantee parties obtaining agreement from native title parties to the doing of "the act", which, if an unreasonable proposal, may be greatly detrimental to native title parties' ability to continue to participate in cultural practices and maintain connection with land.

23. CLCAC is of the view that subsection 31(1)(b) be further amended by omitting "with a view to obtaining *the agreement of* each of the native title parties" and substituting those words with **"***an agreement about."*

Insertion of Subsection 31A

24. CLCAC supports the addition of this subsection insofar as it removes ambiguity about the meaning of negotiating in good faith. However, the CLCAC makes the following comments and further submissions:

25. CLCAC supports the proposed insertion of "using all reasonable efforts" as it does for all proposed similar amendments throughout this Bill. However, we are concerned that defining 'good faith negotiation requirements' in the way proposed in the Bill is biased against native title parties in that it still creates pressure on them to 'reach agreement' about 'the doing of the act'.

26. Accordingly, the CLCAC does not support this definition of 'good faith negotiation requirements', but supports a list of proposed indicia of negotiating in good faith, as provided in proposed subsection 31A(2)(a), as a guideline of what constitutes good faith negotiation.

27. With regard to the indicia of good faith negotiation requirements in s31A(2)(a), it is submitted that:

    a. "Given genuine consideration" in 31A(2)(a)(v) be preceded by "Demonstrably".

    b. "Capricious" and "unfair conduct" in 31A(2)(a)(vi) be more narrowly defined.

[2] *FMG Pilbara Pty Ltd v Cox* (*FMG*) (2009) 175 FCR 141 at [27] per Spender, Sundberg and Mckerracher JJ. Compare with criteria in *Gulliver Productions Pty Ltd and Ors v Western Desert Lands Aboriginal Corporation and Ors* [2005] 196 FLR 52 (2005) NNTTA 88 at [11]-[18]

28. Furthermore, CLCAC supports the proposal by the Human Rights Commission that the legislative criteria pertaining to good faith be supplemented with a code or framework to guide the parties on to their duty to negotiate in good faith[3]. The CLCAC also recommends:

    a. Amendments to clarify that it is unnecessary to establish misleading, deceptive or unsatisfactory conduct in order to found a failure to negotiate in good faith. This would improve the unfavourable position created through case law about the threshold required before failure to negotiate in good faith is made out.

    b. The inclusion of a provision that states that determining whether or not a negotiation party has negotiated in good faith using all reasonable efforts, the arbitral body must have regard to the financial resources of the negotiation party and, if the negotiation party is a native title party, any demands imposed on the native title party in relation to cultural and religious practices and regional or geographical isolation.

Amendment to Subsection 35(1)(a)

29. The CLCAC supports the increase of the minimum negotiation time from 6 months to 8 months.

30. However, even with an increase in the minimum time from 6 months to 8 months, the CLCAC is of the view that this may still be insufficient time to allow for full negotiation in some circumstances.

31. Accordingly, the CLCAC recommends a further section, to supplement existing Paragraph 35(1)(a), that would allow a party to apply for an extension of the negotiation process where:

    a. There is a request for further information made by a party prior to the consultation period expiring; and

    b. That request is deemed to be “reasonable”; and

    c. There is unlikely to be sufficient time for the party receiving the request to be afforded a reasonable opportunity to both consider and respond to the further information prior to the consultation period expiring.

32. Additionally, in order to allow for cost effectiveness in appropriate cases, the CLCAC proposes the inclusion of a statutory mechanism that would allow for negotiation periods of less than 8 months where circumstances support a shorter negotiation period and where there is agreement between the parties.

[3] See Australian Human Rights Commission, *Submission to Senate Legal and Constitutional Affairs Committee on Native Title Amendment (Reform) Bill 2011* (2011) at [42].

Amendment of subsection 36(2)

33. CLCAC supports the proposed insertion of this subsection. Clarifying the onus of proof required for an application for arbitration creates a more fair system in light of the disparate resources and interests of parties involved.

SCHEDULE 3: Indigenous Land Use Agreements

34. The Bill includes proposed amendments to streamline processes for Indigenous Land Use Agreements (ILUAs).

35. CLCAC supports these proposals insofar as they generally improve the authorisation and registration processes.

Proposed subsection 24BC(2)

36. Proposed subsection 24BC(2) is supported as it allows for greater flexibility for the use of body corporate ILUAs by also covering areas where there have been determinations that native title has been extinguished or where an area has been excluded from a determination.

37. CLCAC suggests the following further amendment:

> In s24BC(1), omit “The”, substitute “Subject to subsections (2) and (3), the”.

Amendment of s24CK

38. CLCAC supports this amendment insofar as it simplifies the process of simplifying the registration of ILUAs. The CLCAC supports the automatic registration of ILUAs that NTRBs have certified and believes that this will result in the introduction of a speedier and less onerous registration process.

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HELEN TAIT
CHIEF EXECUTIVE OFFICER