

Dear Ms Dennett

NATIVE TITLE AMENDMENT BILL (NO.2) 2009

Having considered the responses of the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department, the Law Council is concerned that the issues raised by the Law Council in its supplementary submission to the Senate Community Affairs Committee have not been properly addressed.

The central point of the Law Council's supplementary submission, which paraphrased the Law Council's oral submissions to the Senate Committee's public hearings on 28 January 2010, is that the amending act will, in the main, apply to areas where native title has already been suppressed.

The Law Council stated in its supplementary submission that

"Furthermore, this Bill is expressed to have application to areas where either the non-extinguishment principle applies because the land is subject to a determination of native title, or will apply once native title is determined to exist.

This is because section 24JAA(1)(b) of the Bill mirrors section 47A(1)(b) of the NTA which operates to engage section 47A which allows prior extinguishment to be disregarded over the relevant areas.

"The result is that where there is a freehold or exclusive leasehold estate held by Aboriginal or Torres Strait Islanders on land where there has been a determination of native title, the non-extinguishment principle applies so that native title is suspended entirely for the duration of that interest: see sections 238(3) and 47A(3)(b) of the NTA.

Where there is a reserve for the benefit of Aboriginal or Torres Strait Islander people on determined native title land, native title will be partially suspended for the duration of the interest: see sections 238(4); s47A(3)(b) of the NTA.

This is complicated by the possibility of total extinguishment over areas where there were "public works" constructed on the area before 23 December 1996 – see *Erubam Le v Queensland* (2003) 134 FCR 155 at [91].

The scenario then is that the Bill is expressed to apply to areas where native title has been suppressed, in whole or part, or where native title may have been already extinguished by past public works.

In respect of those areas, the question arises whether there is a future act at all?

To be a "future act", the act in question must affect native title to some extent: see section 233(1) of the NTA.

Where native title has already been extinguished by public works the Bill will have no application as there can be no affect on native title.

In relation to land covered by freehold or a lease to which the non-extinguishment principle applies, it is difficult to see how an act of the kind provided for in section 24JAA would affect the continued enjoyment and exercise of the native title rights and interests, so long as the freehold or lease remains in place. If that is the case, then the act would not be a “future act” at all.”

The only areas the Bill will have any practical application will be in those areas which are freehold, exclusive leasehold or reserved (under s 47A), where there has not a determination of native title. The Government’s response does not address the very narrow application of the Bill, which in the Law Council’s view brings its necessity into question.

If anything, the difficulty with the Bill is that it places native title claimants, who have yet to receive a native title determination, at a disadvantage compared with traditional owners who have already received a native title determination. Native title claimants will be placed in a position of greater disadvantage because the ordinary “future act” process may be set aside, removing any requirement for negotiation of an Indigenous Land Use Agreement, which would be indicative of consent. It is clear that there will be no requirement for good faith negotiation and consent under expedited process proposed under the Bill.

The Law Council would be pleased to assist the Senate Committee if there are any further queries regarding these matters.

I will attempt to provide these further comments to the members of the Senate Committee, but would be grateful if you could do the same.

Kind regards,

Nick Parmeter
Law Council of Australia