13 December 2018

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Via email: native.title@ag.gov.au

Dear Sir/Madam

Re: Exposure Draft – Native Title Legislation Amendment Bill 2018

The National Farmer's Federation thanks the Commonwealth, particularly the Attorney General's department for the opportunity to respond to the exposure draft of amendments to the *Native Title Act (Cth)* 1993.

The amendments proposed are presented in 9 schedules.

- Schedule 1 The Role of the Applicant
- Schedule 2 - Indigenous land use agreements (ILUAs)
- Schedule 3 – Historical Extinguishment
- Schedule 4 – Allowing a registered native title body corporate to bring a compensation action.
- Schedule 5 – Intervention and Consent Determinations
- Schedule 6 – Objections
- Schedule 7 – The National Native Title Tribunal
- Schedule 8 – National Registered Native Title Bodies Corporate
- Schedule 9 – Just Terms Compensation

The NFF notes that the intent of most of the instrument is to bring certainty to the native title process. Attention to streamlining processes, creating greater accountability in PBCs, and enabling the Federal Court to proffer advice to native title holders are all notions that engender a more efficient native title system.

As a matter of principle, the NFF believes that it is good and common sense to have systems that are efficient as that promotes efficiency in business as well as certainty for business. The NFF notes Schedules 1, 2, 4, 5, 6, 7, 8 and 9. At the core of any business is the need for certainty. Certainty of the law is an important element as is certainty of tenure and certainty in terms of who you're dealing with as a business.

It is for those reasons that the NFF wishes to particularly respond to Schedule number 3. Schedule 3 amounts to a vehicle which will undermine certainty and it needs to be examined far more rigorously from a policy perspective.

The intent of this schedule is to make a number of amendments to the act to enable recognition of Native Title which, but for the operation of the Act, would be extinguished. *Inter alia*, the proposed amendments will create a regime by which native title can be resurrected in a park by a state authority as well as clarify/impose a system for the operation of future acts.

Of particular concern is the definition of what a park may be, is so broad that there is little doubt that concession holders in the primary industry sector could potentially be adversely affected were a government to exercise the power this section grants.

Schedule 3 – Historical Extinguishment

As a general principle of the native title regime, once native title is extinguished it cannot be resurrected. However, in some circumstances, for example sections 47, 47A and 47B of the Native Title Act the courts are to disregard extinguishment on unallocated Crown land, reserves set aside for Aboriginal or Torres Strait Islander peoples, and pastoral leases held by traditional owners who seek the establishment of Native Title.

Schedule 3 at Part 1 contains amendments which intend 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 such as national, state and territory parks and reserves.

The amendments in this Part would ensure that native title can be recognised over parks and reserves where there is agreement between parties albethey commonwealth, state or territory governments, over a parks or reserves in circumstances that otherwise extinguished native title.

The new proposed section 47C would apply to allow for the extinguishment of native title in areas of national, state or territory park, to be disregarded. This means those areas could be included in claims for native title, provided that the relevant conditions are established and that any previous acts which may have extinguished native title could be set aside for the purposes of determining the claim.

The provision differs from the other provisions allowing historical extinguishment to be set aside (sections 47, 47A and 47B), in that the relevant federal, state or territory government responsible for the creation of the park would need to agree that extinguishment can be set aside. Once this agreement is reached, it would be open to the Federal Court to declare that native title exists in the area, provided it is established in the usual way.

These provisions are of concern to the NFF. Should this section, (in conjunction with the operation of proposed Section 227), become operational it will open a door to Native Title claims that currently don't exist.

The purpose of the section is to enable both the Commonwealth as well as states and territories to declare that past acts, which have extinguished Native Title to re-establish Native Title by agreement between the parties. The "parties" are the government of the jurisdiction and the Native Title applicant. The NFF is aware that the proposed section is an

enabling provision only, however, if it were to become law such arrangements in any Australian jurisdiction would appear not to have to pass a parliament but will merely become an administrative action by a government exercising its authority under the Act.

Miners, tourism businesses, primary producers or any person with concessions will not be parties to the agreement.

Moreover, the NFF harbours substantial concerns about the proposed definition of "*park area*".

To aid the reader please note comments by the NFF in purple below.

"47C National parks etc. covered by native title applications

When section applies

(1) This section applies if:

(a) a claimant application or a revised native title determination application is made in relation to an area that is, or is part of, a park area (see subsection (2)); and

(b) the operation of this section in relation to an area (the ***agreement area***) that is in an onshore place, and comprises the whole or a part of the park area, is agreed to in writing by:

(i) any registered native title body corporate concerned or the applicant for any native title claim group concerned, or, if there is no such body corporate or claim group, all the representative Aboriginal/Torres Strait Islander bodies for the agreement area; and

(ii) whichever of the Commonwealth, the State or the Territory by or under whose law the park area was set aside, or the interest over the park area was granted or vested, as mentioned in subsection (2); and

(This limits the parties to the claimants and the relevant government. Where these sorts of deals are struck, as they were in the NT when the NT had to validate their parks estate, they became manifest in joint management agreements. Historically some of these agreements often were barely operable because the Native Title group were so poorly organised communicating with them was occasionally difficult. The NT Government subsequently obliged to pass amendments to essentially enable work arounds of joint management partners so the NT could continue to manage the parks estate. Considering that most of the amendments in this Bill are aimed at tightening up controls over surrounding PBC's this raises substantial concerns. The other risk is that concession holders will be bypassed when renegotiating concessions. Questions about the presence of assets put in place by concession holders under the reasonable expectations of renewal will be subject to greater uncertainty. There is also a risk that joint management arrangements may see Native Title holders exercising an effective veto on the renewal of a concession for their own commercial advantage is not governed by these amendments).

(c) none of sections 47, 47A and 47B applies in relation to the agreement area.

*Meaning of **park area***

(2) A ***park area*** means an area (such as a national, State or Territory park):

(a) that is set aside; or (the use of the word "or" here means that to qualify the land merely has to be set aside. There is no boundary as to what "*set aside*" means.)

(b) over which an interest is granted or vested;

by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, ("include" means not limited to .) preserving the natural environment of the area (preservation of the natural environment will be the only test which applies. Does this include hunting reserves and other reserves of a similar nature?, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, declaration, vesting in trustees or otherwise.

(Overall this definition is too broad from a drafting perspective it is difficult to imagine how this section will operate considering the substantial uncertainty it creates. The new subsection 47C(2) would set out which areas would be capable of being included in a native title claim under the provision. The section would cover any area set aside, or any area where an interest is granted or vested, under any law with an environmental purpose. Areas set aside for other reasons, such as agriculture, would not fall within the definition and therefore not come within the scope of the section. However, there are other primary industries that do share a common interest with a parks estate. These provisions have the effect of eroding rather than providing certainty.)

Public works

(3) An agreement referred to in paragraph (1)(b) may include a statement by the Commonwealth, or the State or Territory concerned, that it agrees that the extinguishing effect of any of its relevant public works (see subsection (10)) in the agreement area is to be disregarded. (This is a matter for the government when it is giving exclusive title).

(4) If the agreement area contains one or more relevant public works, the application mentioned in paragraph (1)(a) may also be the subject of an agreement in writing between:

(a) any registered native title body corporate concerned or the applicant for any native title claim group concerned, or if there is no such body corporate or claim group, all the representative Aboriginal/Torres Strait Islander bodies for the agreement area; and

(b) the Commonwealth, the State or the Territory to which the relevant public work relates (see subsection (10));

that any extinguishment of native title by the construction or establishment of the relevant public work is to be disregarded.

New subsections 47C(3) and (4) would allow the extinguishing effect of public works within the park area to be set aside. Subsection 47C(3) will enable the government that is party to the wider agreement to apply section 47C in proceedings to include a declaration in that agreement that prior extinguishment as a result of public works can be disregarded, whereas subsection 47C(4) would ensure that if a different government – for example, the Commonwealth where the park in question is a state park – is responsible for the public work, that different government can also agree in writing to extinguishment as a result of its public works within the park area being disregarded.

Notice and time for comment

(5) Before making an agreement for the purposes of paragraph (1)(b) or subsection (4), the Commonwealth, or the State or Territory concerned, must:

(a) arrange for reasonable notification of the proposed agreement in the State or Territory in which the agreement area is located, whether on the internet, in a newspaper circulating generally in the State or Territory, on the radio or otherwise; and

(b) give interested persons an opportunity to comment on the proposed agreement.

The period for comment must be at least 3 months. (And then….)

(6) The agreement must not be made before the end of the period for comment. (….it is ratified.)

The amendment includes provisions (subsections 47C (5) and (6)) which would provide that the government party to the agreement to notify the public of its intention to include the park area in a determination under section 47C and allow three months for public comment before the agreement could be made.

There is no security included in the instrument for affected parties. Mere notification isn't consultation and the absence of any other mechanism the potential impact on the concession renewal process is of concern to the NFF.

Prior extinguishment to be disregarded

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

(a) the setting aside, granting or vesting mentioned in subsection (2);

(b) the creation of any other prior interest in relation to the agreement area;

(c) if:

(i) the agreement under paragraph (1)(b) includes a statement of a kind mentioned in subsection (3); or

(ii) there is an agreement under subsection (4);

the construction or establishment of any relevant public works that are the subject of the agreement concerned.

Note: The applicant will still need to show the existence of any connection with the land or waters concerned that may be required by the common law concept of native title.

Effect of determination

(8) If the determination on the application is that native title rights and interests exist in the agreement area:

(a) the determination does not affect:

(i) the validity of the setting aside, granting or vesting; or

(ii) the validity of the creation of any other prior interest in relation to the agreement area; or (This probably includes a concession or licence, however, there is no protection for a later renewal and a joint manager may be able to exercise a future veto under the joint management agreement.)

(iii) any interest of the Crown in any capacity, or of any statutory authority, or of any other person, in any public works on the land or waters concerned (whether or not a relevant public work that is the subject of an agreement), or access to such public works; or (The Commonwealth Parliament passes this legislation public access including footpaths are protected, including access.)

(iv) any existing public access to the agreement area; and (Concession renewals however are that if the Parliament which passes this Bill acknowledges that these elements need to be quarantined then presumably they don't believe or expect to quarantine future concession holders.)

(b) the non-extinguishment principle applies to the setting aside, granting or vesting or the creation of any other prior interest in relation to the agreement area.

Generally, subsection 47C(7) would require historical extinguishment to be disregarded over relevant park areas where the parties have reached the required agreement. The parties however, do not include any commercial interest including farmers or primary producers with concessions.

Where a determination relying on section 47C is declared, it would nevertheless preserve:

- the validity of the act creating the park or any prior extinguishing act;
- the interest of any person in the public works on the land, and access to the public works; and
- public access to the park area, as well as applying the non-extinguishment principle to those acts.

The intent is to ensure that the application of section 47C does not impact upon whether the prior acts were validly done and would preserve public access to park areas; it also would ensure that these acts suppress, rather than extinguish, native title to the extent of any inconsistency.

The effect of this section is also to exempt any acts which deal with the ownership of natural resources by the Crown.

Again, the NFF is of the opinion that the implementation of these provisions will produce potentially adverse outcomes where there currently are none for primary producers who have an ongoing interest in these areas.

Exclusion of Crown ownership of natural resources

(9) For the purposes of this section, a reference to the creation of an interest in relation to an area does not include a reference to the creation of an interest that confirms ownership of natural resources by, or confers ownership of natural resources on, the Crown in any capacity. (The Crown keeps its concession as it does on everybody's property.)

Meaning of ***relevant public work***

(10) In this section:

relevant public work, in relation to the Commonwealth, a State or a Territory, means a public work:

(a) constructed or established directly by the Commonwealth, the State or the Territory; or

(b) constructed or established by another person on behalf of the Commonwealth, the State or the Territory."

The overall effect of these amendments would be to hand to the Commonwealth, State and Territory governments the power to administratively declare these arrangements without any form of parliamentary oversight.

Part 2 of Schedule 3

Section 47 of the Native Title Act enables prior extinguishment of native title to be disregarded in a native title determination over pastoral leases possessed by the native title claimant, a trustee on trust for any of the native title claimants, or a company whose shareholders are any of the native title claimants.

The operation of Section 47 includes companies, shareholders of which are any of the native title claimants but it does not extend to a registered native title body corporate (RNTBC) established in accordance with the provisions of the *Corporations (Aboriginal and Torres Strait Islander) Cth Act 2006*, whose members, rather than shareholders, are native title claimants.

To attend to this matter the proposed approach would amend the Native Title Act to clarify that section 47 can also extend to pastoral leases held by a RNTBC.

Amending subparagraph 47(1)(b)(iii) enables section 47 to extend to a body corporate that has members as opposed to shareholders and retains a pastoral lease over an area subject to an application in accordance with section 61.

This seems on the face of it another efficiency measure. To enliven this process the pastoralist would have to be an applicant. It is difficult to see, now that the proposed amendment is drafted how this could be used to 'back door' a pastoral lease holder who happens to be a potential native title claimant. The amendment is certainly not intended to operate in such a fashion and is a clarifying rather than necessarily a law changing amendment. Consequently, the NFF does not pass any comment on Part 2

Part 3 – Future acts where prior extinguishment to be disregarded

This Part is intended to make certain that the proposed sections, outlined above, regarding historical extinguishment are to be set aside.

The planned amendment to section 227 would enshrine the notion that an act affects native title if the circumstances outlined in the intended subsection 227(2) exist. Expanding the definition of an act affecting native title in this way would inform the definition of '*future act*' in section 233, which in turn would inform the application of Part 2, Division 3 of the Native Title Act, namely the future acts regime.

By way of illustration an act would impact upon native title (and may then be a future act to which the future acts regime applies) if –

- a claimant application is made in accordance with subsection 227(2)(a)
- section 47B applies in relation to the area (subsection 227(2)(b))
- if prior extinguishment was disregarded, the determination of the claimant application would then be that native title exists in relation to the area (subsection 227(2)(c)), and
- if prior extinguishment was disregarded, the act would then extinguish or be inconsistent with native title rights and interests (subsection 227(2)(d))

Acts affecting native title if prior extinguishment disregarded			
Item	**Column 1** **Application**	**Column 2** **Section**	**Column 3** **Extinguishment to be disregarded**
1	Application under section 61	section 47 (pastoral leases held by native title claimants)	any extinguishment of the native title rights and interests in relation to the area by any of the acts mentioned in subsection 47(2)
2	Claimant application	section 47A (reserves etc. covered by claimant applications)	any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by any

Acts affecting native title if prior extinguishment disregarded			
Item	**Column 1** **Application**	**Column 2** **Section**	**Column 3** **Extinguishment to be disregarded**
			of the acts mentioned in subsection 47A(2)
3	Claimant application	section 47B (vacant Crown land covered by claimant applications)	any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area
4	Claimant application or revised native title determination	section 47C (national parks etc. covered by native title applications)	any extinguishment of the native title rights and interests in relation to the area by any of the acts mentioned in subsection 47C(7)

Part 3 of Schedule 3 if passed into law will amend section 224. This is intended to provide clarity to the phrase '*native title holder*'. The section now applies to circumstances where native title has been determined. The item would amend the meaning of '*native title holder*' to include, for the purposes of an action mentioned in subsection 227(2). The people who would be determined to be the common law holders under the circumstances identified in that subsection.

This measure would ensure that the future acts regime operates consistently across areas where native title has been extinguished, while also ensuring that sections 47, 47A, 47B and new 47C can continue to operate.

The NFF believes that these provisions are an effort to clarify what is generally understood to be the law presently, namely, that the future act provisions at this time apply to areas where historical extinguishment has been disregarded.

Nevertheless, the NFF is aware of other opinions which orbit this issue which suggest that in circumstances occur where previous exclusive possession act lease expires thereby returning the land to vacant Crown land, or the area is within the external boundaries of a native title claim, or a new lease is proposed to be granted, then there will be a new requirement to attend to the future acts regime should these amendments pass.

The NFF offers the observation that if the proposed changes enliven a process that does not exist now then the NFF cannot support the proposed amendments without greater clarity being brought to these issues.

Summary

The NFF is supportive of the rights of Native Title holders to enjoy those rights. Equally, the NFF supports the rules of law which enable people who seek to exert a right to have a claim tested before a court or tribunal that they should be afforded the opportunity to do so.

However, the NFF also supports the rights of all to do business and all who are affected by these amendments to have security and certainty.

With regard to schedule 3 the NFF is aware that these amendments are mere enabling amendments. They do not have the effect of doing anything other than allowing for the administrative recognition of native title rights, particularly over the parks estate.

The NFF's criticism of the exposure draft is particularly focussed on the inherent uncertainty which is manifest in the broadness of the proposed amendments outlined in schedule 3, particularly those that pertain to the definition of parks.

Further, the NFF must also indicate its concern about the policy impacts and the potential for these amendments to impact many NFF members who currently have concessions within the parks estate in particular. Much greater care is needed before the NFF can report to its members that the policy intent of government can provide comfort and certainty to people who are potentially adversely affected by these amendments.

Yours sincerely

TONY MAHAR
Chief Executive Officer