

Schedule 1



18 October 2012

Attorney General's Department
Central Office
3-5 National Circuit
BARTON ACT 2600

email: native.title@ag.gov.au

Dear Sir

Submission – Native Title Amendment Bill 2012 – Proposed Reform of Historical Extinguishment Provisions

Please find attached a submission on the above Bill.

The Association thanks the Department for the opportunity to comment.

If you have any further queries, please do not hesitate to contact me.

Kind regards,


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**Native Title Amendment Bill 2012 – Proposed Reform of
Historical Extinguishment Provisions**

Submission

Local Government Association of Queensland Ltd
18 October 2012

The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association setup solely to serve councils and their individuals' needs. The LGAQ has been advising, supporting and representing local governments since 1896, allowing them to improve their operations and strengthen relationships with their communities. The LGAQ does this by connecting councils to people and places that count; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional and political excellence.

1. Summary

The Native Title Amendment Bill 2012 proposes to amend the Native Title Act 1993 (Cth) to, amongst other things, provide for the extinguishment of native title to be disregarded in respect of a park area in certain circumstances and for associated matters. The Bill proposes a new section 47C in that regard.

The proposed new section has significant implications for local governments in Queensland. Some of the implications are adverse to the interests of local governments as they relate to certain park areas. There is also the potential for them to adversely affect public access to some park areas.

This submission does not seek removal of section 47C from the Bill entirely. However it does make important recommendations about necessary changes to certain aspects of section 47C. It is particularly essential that local governments be parties to relevant agreements in respect of park areas which they own or in respect of which they have powers of management and control.

It is further recommended that the provisions relating to the disregarding of extinguishment in respect of public works in such park areas be removed and that further consideration be given to the potential adverse effects of the provision to restrict public access to park areas.

2. Context

His Honour, Chief Justice French, in a speech to the Federal Court Native Title User Group in Adelaide on 9 July 2008, made some suggestions in relation to historical extinguishment requiring statutory reform. They became the basis for the proposed amendments. He put forward the following suggestion:-

"The second suggestion, by way of modest amendment to the [Native Title Act], 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."

Some aspects of section 47C, particularly those that are the subject of this submission, go well beyond the suggestion made by His Honour.

Further, it is not clear what the policy objectives of those aspects are. It is stressed that none of the recommendations in this submission would in any material or practical way be adverse to the interests of native title holders.

3. General Analysis

Section 47C	Analysis
<i>Where the section applies</i>	
<p>(1) This section applies if:</p> <p>(a) a claimant application or a revised native title determination application is made in relation to an area that:</p> <p>(i) is, or is part of, a park area (see subsection (2)); and</p> <p>(ii) is in an onshore place; and</p> <p>(b) none of sections 47, 47A and 47B applies to the application; and</p> <p>(c) the operation of this section in relation to an area (the agreement area) comprising the whole or a part of the park area is agreed to in writing by:</p> <p>(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</p> <p>(ii) whichever of the Commonwealth, the State or the Territory by or under whose law the park area was set aside, or the interest in the relevant area was granted or vested, as mentioned in subsection (2).</p> <p>(2) A park area means an area (such as a national, State or Territory park):</p> <p>(a) that is set aside; or</p> <p>(b) in which an interest is granted or vested;</p> <p>by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, vesting in trustees or otherwise.</p>	<p>1. A native title claim must have been made over a particular area.</p> <p>2. The native title claim must cover a <i>park area</i>. Although the specific example is given of a national, state or territory park, the definition is much broader. It includes any areas which are set aside, granted or vested under law for a purpose which comprises or includes "preserving the natural environment of the area". The definition is likely to encompass extensive areas of reserve land in Queensland in respect of which local government owns, is the trustee of or otherwise has powers of management and control. Local government will frequently have extensive infrastructure and improvements within such park areas. Such areas are also often subject to extensive other local government interests.</p> <p>3. Where 1 and 2 above apply, section 47C is enlivened (i.e. native title extinguishment is disregarded), if in relation to the park area there is a written agreement between any registered native title body corporate, applicant for the native title claim or, if neither of those apply, a representative Aboriginal/Torres Strait Islander body and the Commonwealth, the State or the Territory under whose law the park was established. There is no provision requiring local government to be party to such an agreement. That is despite the fact that for local government owned or managed and controlled park areas, it is local government which has the most substantive interest.</p>
<i>Prior extinguishment to be disregarded</i>	

<p>(3) An agreement referred to in paragraph (1)(c) may include a statement by the Commonwealth, or the State or Territory concerned, that it agrees that the extinguishing effect of any relevant public works (see subsection (10)) in the agreement area is to be disregarded.</p> <p>(4) If the agreement area contains a public work or public works, the application may also be the subject of an agreement in writing between:</p> <p>(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</p> <p>(b) whichever of the Commonwealth, the State or the Territory for which any given public work in the agreement area is a relevant public work (see subsection (10));</p> <p>that any extinguishment of native title by the construction or establishment of that public work is to be disregarded.</p>	<p>4. An agreement of the kind referred to in point 3 above, may provide for the extinguishment of native title to be disregarded not only as to past acts involving the establishment of the park but also the creation of any other prior interest in the park area and the construction or establishment of any public works.</p> <p>5. Although section 47C(3) and (4) require that any proposed agreement of the kind referred to in point 3 above be the subject of public notification and an opportunity for "<i>interested persons...to comment on the proposed agreement</i>", there is no direct agreement-making role for local government. That is despite it being the party most affected in relation to relevant park areas.</p>
<p><i>Effect of determination</i></p>	
<p>(8) If the determination on the application is that native title rights and interests exist in the agreement area:</p> <p>(a) the determination does not affect:</p> <p>(i) the validity of the setting aside, granting or vesting; or</p> <p>(ii) the validity of the creation of any other prior interest in relation to the agreement area; or</p> <p>(iii) any interest of the Crown in any capacity, or of any statutory authority, or any other person, in any public works on the land or waters concerned, or access to such public works; or</p> <p>(iv) any existing public access to the agreement area; and</p> <p>(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.</p>	<p>6. Despite the disregarding of extinguishment where section 47C applies, a determination of native title does not affect the establishment of the park, the valid creation of any other prior interest in the agreement area, any persons interests in or access to any public works or "<i>any existing public access to the agreement area</i>".</p> <p>7. Upon a native title determination being made, the non-extinguishment principle applies to the establishment of the park and the creation of any prior interest in relation to the agreement area. Although in section 47C(8)(a) a distinction is made between the creation of any prior interest and any interest in any public work, the same distinction is not made in respect of application of the non-extinguishment principle.</p>

4. Submissions

4.1 LGAQ makes the following submissions:-

(a) There is no good reason why section 47C should make any provision for extinguishment to be disregarded in respect of public works in park areas and that especially should not occur where a relevant local government is not a party to an agreement which enables such extinguishment to be disregarded. The following reasons apply:-

- i) The non-extinguishment principle may potentially not apply in respect of interests comprising public works.
- ii) In many cases there is complete incompatibility between the existence of public works in a location and native title existing over that location.
- iii) There is no benefit to native title parties in having native title co-exist with public works in park areas.
- iv) The legislation already provides guidance enabling the location of public works for extinguishment purposes to be separately identified to the balance of a park area (section 251D of the Native Title Act 1993).
- v) There are many practical implications associated with the potential co-existence of native title and public works, including in relation to issues of public liability, insurance, indemnities etc.
- vi) If extinguishment is to be disregarded in respect of the location of public works, local governments (or other owners/operators) would need to ensure that all future activities on the site are undertaken validly for purposes of Part 2 Division 3 of the Native Title Act 1993. That will involve a substantial additional native title compliance burden on local government.

For these reasons, the provisions enabling extinguishment to be disregarded in respect of public works in park areas should be deleted. However, at a minimum, relevant local governments must be parties to any agreements which provide for extinguishment to be disregarded in respect of their public works.

(b) Where a park area is under the ownership or the management and control of a local government, it is essential that the local government be a party to an applicable agreement. The reasons are as follows:-

- i) In Queensland local governments are not the State. They have a separate legal identity.
- ii) They hold the most substantive interests in respect of park areas which they own or manage and control, including their interest in the land itself and improvements to the land.
- iii) Local governments for such park areas have direct statutory responsibility for the management of the land.
- iv) The local government must manage the interests of the whole community in respect of such park areas, including broader public interests in respect of land access and use.
- v) The local government has direct responsibility for preserving the natural environment in park areas of that kind.

- vi) The statutory notification and opportunity for comment provision is completely inadequate in ensuring that local government interests in respect of such park areas are properly addressed. That can only be achieved by the local government being a party to the agreement.
 - vii) The need for the local government to be a party to the agreement is especially acute if native title extinguishment in respect of local government public works in an agreement area were able to be disregarded.
- (c) If native title extinguishment is to be disregarded in respect of park areas, determinations of native title for those areas could recognise native title rights to the exclusive possession, occupation, use and enjoyment of the area. That further heightens the importance of the submissions in paragraphs (a) and (b) above.

It is highly likely that if the amendment is made, current native title claims which assert only non-exclusive native title rights and interests over park areas, will be amended prior to determination to seek the recognition of exclusive native title rights, subject to agreements under section 47C being entered into. Section 47C(8)(b) may not then be sufficient to ensure public access to the agreement area.

Under that provision a "determination does not affect...any existing public access to the agreement area...". However for many park areas there may be no positive legal right of public access. For purposes of section 225(c) where there is no legal right of public access, there may be no such "interest" to be recognised in determinations.

Even if the reference to "existing public access" was construed as a reference to the physical act of access rather than a legal right of access, there will be many parts of park areas at the time of determination in respect of which there is no existing physical access occurring.

The potential effect of section 47C(8)(a)(iv) in these respects needs to be further reviewed and the potentially adverse implications addressed through drafting changes.