



Our Ref: 2010/18-1

19 March 2010

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

Dear First Assistant Secretary,

**Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances**

I write in response to the proposed amendment to the *Native Title Act 1993* (Cth) (Native Title Act) to enable the historical extinguishment of native title to be disregarded in certain circumstances. Thank you for the opportunity to comment on this proposed amendment.

I welcome the Australian Government's commitment to improving the native title system. In particular, I congratulate the Government for taking steps to address the impact of historical extinguishment on the rights of Indigenous peoples.

As stated in my predecessor's *Native Title Report 2002*, native title has become 'an archaeological site of extinguishment'. The breadth and permanency of extinguishment across Australia entrenches dispossession and disadvantage.

It is also contrary to Australia's international human rights obligations. As the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people recognised in his recent report on Australia, 'the extinguishment of indigenous rights in land by unilateral uncompensated acts' is incompatible with the *United Nations Declaration on the Rights of Indigenous Peoples* and other international instruments.

It is therefore encouraging that the Australian Government is proposing amendments to enable historical extinguishment to be disregarded over an area such as a national, state or territory park.

I hope this proposal is a precursor to further reforms to address the injustices of extinguishment. I recommend that the Australian Government work with Native Title

Representative Bodies and Native Title Service Providers to develop proposals to expand the range of circumstances in which extinguishment can be disregarded.

Under the proposed amendment, extinguishment is to be disregarded only if the relevant government party agrees in writing. The proposed amendment would therefore have the most impact where government parties are prepared to be flexible and approach agreement-making processes in good faith.

However, the proposed amendment would have little impact if government parties adopt and maintain adversarial positions. I share the view of former Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, that the Australian Government should play a leadership role in encouraging states and territories to change their behaviour, including through using its financial position and the processes of the Council of Australian Governments.

Further, the proposed amendment will not alone remedy the deficiencies of the Native Title Act. Importantly, Indigenous peoples will still have to bear the onerous burden of proving native title.

I consider that the native title system needs to be viewed holistically. A piecemeal approach to reform will not necessarily address the significant barriers to social, economic and cultural development faced by traditional owners.

I acknowledge that the proposed amendment is inspired by the reforms suggested by Chief Justice French. I encourage the Australian Government to examine the full suite of reforms proposed by Chief Justice French and others. This includes the reforms recommended in the *Native Title Report 2009*, such as amending the Native Title Act to provide presumptions in favour of native title claimants (for example, a presumption of continuity in the acknowledgement and observance of traditional laws and customs) and to shift the burden of proof.

I applaud the Australian Government for acting on its commitment to improve the native title system. I encourage the Government to build on this commitment and work in partnership with Indigenous peoples to develop further, substantive reforms.

I would be pleased to discuss these matters with you in more detail. Please also feel free to contact Jackie Hartley or Nick Burrage of the Social Justice Unit, Australian Human Rights Commission on (02) 9284 9600 for further information.

Yours sincerely,



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Social Justice Commissioner**

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