



North Queensland Land Council

Native Title Representative Body Aboriginal Corporation

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

Dear Secretary

RE:

Proposed amendment to enable the Historical extinguishment of native title to be disregarded in certain circumstances- Exposure draft of possible changes to section 47 of the Native Title Act

Please find attached a response to the exposure draft.

Yours faithfully

Martin Doré
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23 January 2010

SUBMISSIONS ON THE PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT RE NATIONAL PARKS

Reference is made to the Attorney-General's exposure draft in relation to the proposed amendments to disregard prior extinguishment in relation to national parks etc. and to the covering Statement of the Attorney-General.

Whilst we applaud any steps towards disregarding historic extinguishment, we do question the method by which it is sought to achieve this in the exposure draft.

Basic Structure of the Proposed amendment

Essentially the proposed section 47C provides that where an application is made and part of the area covered by the application is set aside as a Commonwealth State or Territory national park, the extinguishment that would otherwise occur as a result of that setting aside can be disregarded subject to certain conditions.

The essential condition is that the relevant State, Commonwealth or Territory government (as the case may be) and the Native Title applicants agree that the section can apply.

There is provision for public notification of the intent to come to such agreement and a right to interested persons to comment on the proposal.

There are provisions that protect the validity of the setting aside granting or vesting of the national park and validity of the creation of any other prior interest and the interests of the Crown, statutory authority or other persons in any public works. Any existing public access is also protected. The non-extinguishment is declared to apply to the setting aside, granting or vesting of any other prior interest.

Separate Agreement unnecessary

The requirement that the relevant government and the Native Title parties come to an agreement that the section should apply seems somewhat novel and in our submission, unnecessary.

If previous extinguishment is to be disregarded as though it never happened, why should that require a special agreement between the government and the Native Title parties?

In respect of section 47, 47A, 47B of the Native Title Act, there is no requirement that that relevant parties agree that the section should apply. The section applies if the factual circumstances that are set out in the various sections are demonstrated to be existing on the particular facts on any given instance.

The introduction of requirements in the proposed 47C that there be agreement seems to add an unnecessary step in the process. There is no reason why the interests of the Crown, a statutory authority or other person who may have particular interests in the national park area (for example, the holder of some sort of permit or authority to carry out activities in the park or a statutory authority that has under the legislation creating that authority a right to have infrastructure in and across the national park. For example, an electricity distributor statutory

authority cannot be protected in a way similar to the proposed wording of section 47C(5)). Further, any existing public access right can likewise be protected.

The requirement of an additional step that requires a specific agreement between relevant government and the Native Title parties is by submission, unnecessary and complicates the matter. If we are to disregard certain historic extinguishments then that should be done by way of establishment factual criteria and not having to rely upon a specific agreement.

There is a danger in the requirement of a specific agreement insofar as it may provide the government's party with an unfair bargaining point. A government could for example, seek to negotiate that they will agree that the section should apply in a certain area if concessions are made by the Native Title parties in another area. It seems to raise the question of disregarding extinguishment under the proposed section 47 to a level which has the potential to be unfair. Given that the interests of any other party, including the interests of the public in accessing an area can be protected by other mechanisms it seems totally unnecessary to step outside the realm of establishing factual criteria and into the realm of having to negotiate an agreement that the section should apply with those factual criteria can be clearly demonstrated.

The general discussions and debates that have been had in relation to Native Title over the last couple of years have focussed on the need to find ways to speed up the resolution of native title claims and this would seem to be a backward steps that has the potential to slow down resolution where the government and Native Title parties become sidetracked on a separate question of whether they agree that the section applies which has to be negotiated in addition to any general settlement of the claim by consent and if agreed then has to be subject to a notification period.

Restricting the operation of the section to the time of lodgement of a claim unnecessary

The proposed section also requires that in order for it to operate, there must be, *when the application is made*, a national State or territory park that is covered wholly or partly by the claim. We question as to why there should be the focus for fixing the point in time as the point in which the claim is made.

In Queensland, the State government has embarked upon a process of changing a number of areas that were previously designated and set aside as State forests into national parks. Many of the State forests were set aside or reserved early in the settlement of the State for the purpose of ensuring timber supplies and thus the forests may not qualify as a area that was set aside for the purpose of preserving the natural environment of the area.

It has been the experience the North Queensland Land Council Representative Body area that the change in designation of these areas by the State from forest to national park has occurred even though there are currently upon foot native title claims in the areas in question.

There seems to be no logical reason why the proposed section 47C should not be applicable at any point in time during the lifetime of a claim where a new national park comes into existence as a change of designation from, for example, a State forest. In such a circumstance although the original intention of settling aside a State forest may have had a different primary purpose, the fact that the State is now wishing to preserve the area by having it declared a national park quite clearly indicates that circumstances have changed and that the area is no longer required for the supply of timber that is thought to be worthy of preservation for its natural environmental attributes. Why should the extinguishment that would otherwise apply to the area with that sort of history not be given the same protection and the same disregarding of extinguishment apply.

Purpose of Setting aside vesting etc should be subject to presumption.

There is a further potential problem in the requirement that the area must have been set aside for the purpose of preserving the natural environment. How is it to be established that such a purpose was the purpose for setting aside etc.

To avoid unnecessary uncertainty it is submitted that the various legislation in each State, Territory and Commonwealth [both current and all previous legislation] that deals with National or State/Territory Parks be identified and the provision contain a presumption that if the area was set aside granted or vested etc under that legislation then the purpose was in fact for preservation of the natural environment of the area.

Dual Purposes

There may of course be instances where the setting aside granting etc was done pursuant to general powers held by a government to deal with land and not under any particular legislation relating to parks. In such circumstances the facts of each individual matter would have to be looked at to determine a purpose.

It is possible that the setting aside, granting etc be done for two or more purposes one of which was the preservation of the environment. In such circumstance it should be sufficient if one of the purposes was preservation of the natural environment.

Requirement of Public Notification

It is our submission that there be no requirement for a separate agreement between Government and Native Title Parties that the section apply. However if contrary to our submission that idea is persisted with then consideration as to the usefulness of public notification should be given.

Given that the interests of any prior interest, the interest of the Government and the interests of the public regarding access can all be protected in a way similar to that set out in the proposed section 47C (5) what purpose does public notification serve.

Firstly it again has the potential to slow down rather than speed up resolution of claims.

Secondly who is it that can make submissions in response to a notification? The draft says "interested persons"

This is a phrase that is likely to attract a very broad interpretation.

We have already seen the difficulties created in the area of who is entitled to apply to be a respondent to a claim when the claim is publicly advertised.

Instead of confining the interpretation of "interest" in the context of an interest that may be affected by the determination of the claim (which is the criteria for qualifying as a respondent party [section 84 NTA]) to a proper proprietary interest the Courts have given a very wide interpretation so that illegal fishermen and dog walkers qualify.

The expression "interested person" is likely to be broadly interpreted meaning that persons with no specific interests in the area will be able to make submissions.

Once submissions are received by the Government they will have to consider them. There may also be a Natural Justice requirement to provide copies to the Native Title Party and to allow for a response from the Native Title party.

The possibility of administrative appeals against a Ministerial decision to act one way or another may arise.

All of this adds to the potential delay and in our submissions is unnecessary particularly as the interests of those with a definite proprietary interest can be protected in the way discussed above.

Suggested further amendment to section 47 of the Native Title Act.

It is submitted that it would be appropriate when amending section 47 to introduce a new section 47C that there be further amendment to the provisions of section 47 dealing with pastoral leases held by Native Title claimants.

Currently, section 47 provides that if at the time a Native Title application is made, and it is over or partly over a pastoral lease held effectively by or on behalf of native title parties then the prior extinguishment that occurred by the granting of the pastoral lease is to be disregarded. The difficulty lies within the provisions of section 47(1)(b). This dictates that the form of holding has to be one of the following:

1. The pastoral lessees are any of the persons who made the application for Native Title or any other persons with whom the applicants claim to hold Native Title.
2. A trustee on trust for any of the persons mentioned in 1. ;
3. A company whose only shareholders are any of those persons.

The use of the word "shareholders" creates a particular difficulty in relation to properties held by body corporate established under the former Aboriginal Associations and councils Act which has now been superseded by the Corporations (Aboriginal and Torres Strait Islander) Act. Those acts provided a useful and less cumbersome method of incorporating bodies corporate for Aboriginal and Torres Strait Islander People. The structure of bodies corporate created under those acts is that the bodies have members (not shareholders) and elect a board of directors to conduct the day to day affairs of the corporation.

The writer is personally aware of situations where in former days under the old ATSIC or pursuant to programs run by the ILC, pastoral leases have been purchased when they come up for sale to be handed back to the relevant traditional owners/native title holders of the area. In many instances, a requirement of the handing back of the properties was that the lease be placed into the name of a corporation set up under either CATSI Act.

As these type of corporations do not have shareholders, it appears that the benefit of section 47 cannot be claimed instances where the native title holders are effectively the pastoral holders through a corporation under these acts unless a torturous and by no means certain argument is put forward revolving around the ideas of an implied trust to try and come under the second category of a property held in trust.

The failure of section 47 to allow extinguishment to be disregarded where the pastoral lease is held by a body corporate incorporated under the CATSI Act works on an unfair and unnecessary

disadvantage to native title holders who are either required as a condition of the handing back of the station to set up the corporation under those act or chose to do so in preference to setting up mainstream companies act style corporations with shareholders. There is no logical reason why the protection should not extend to pastoral leases held through these vehicles as opposed to mainstream corporations with shareholders.

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23 January 2010