The Queensland Government's Submission on the Native Title Amendment Bill 2012

Outline

1. The Native Title Amendment Bill 2012 covers three main areas, namely amendments in relation to:

   - historical extinguishment (Schedule 1 of the Bill);
   - good faith negotiations (Schedule 2 of the Bill); and
   - Indigenous land use agreements (ILUAs) (Schedule 3 of the Bill).

2. References to sections in this submission are references to current or proposed sections in the *Native Title Act 1993* (Cth) (NTA) unless otherwise stated.

3. The Queensland government does not support the Bill for the reasons detailed below.

Historical Extinguishment Provisions in Schedule 1 of the Bill

Summary

4. In an effort to ameliorate the effect of the High Court's decision in *Western Australia v Ward* (2002) 191 ALR 1 (Ward), the amendments proposed by Schedule 1 will allow the recognition of native title by agreement over "park areas" and public works in the park area, where native title would otherwise have been partially or wholly extinguished.

5. As well as being applicable to existing or future claimant applications, previous litigated or consent determinations (approved native title determinations) may be the subject of revised native title determinations claiming the benefit of section 47C.

6. The introduction (through proposed section 47C and associated amendments) of such a major change to the NTA has inherent technical difficulties.

7. It has significant implications for the Queensland government and may lead to increased costs and likely delays in the claim determination process.

Historical Extinguishment – Section 47C

8. The NTA currently provides for extinguishment of native title to be disregarded in certain circumstances under sections 47, 47A and 47B, namely in respect of pastoral leases held by native title claimants, reserves held by claimants and vacant Crown land.

9. The Bill includes proposed section 47C and associated amendments which will allow for extinguishment in relation to "park areas" and "relevant public works" situated on those areas to be disregarded by agreement between native title parties and government.

10. Several broad issues and technical drafting anomalies are raised by the Bill. These include the applicability of the Ward case in Queensland, agreement making, public works, the definition of park area, and delays and costs pressures. Each of these issues are explored in further detail.

Applicability of the Ward case in Queensland

11. The explanatory memorandum to the Bill states that the introduction of section 47C goes towards ameliorating the effect of the High Court's decision in Ward. This decision concluded, notwithstanding section 23B(9A)[1], that the vesting of Crown reserves under the *Land Act 1933* (WA) extinguished native title in reserve areas.

12. Although not insignificant, the impact on native title determinations in Queensland, in the sense of the area of land that will ultimately be subject to native title, will not be as great as in Western Australia or other jurisdictions with similar land management legislation as Western Australia. Generally speaking, Queensland legislation that sets aside or dedicates land for "park" purposes is considered to have the effect of extinguishing exclusive native title rights and interests, so that non-exclusive native title can exist over national parks etc, subject to investigations about possible prior extinguishing acts. As a result, Queensland routinely recognises non-exclusive native title over areas set aside for purposes which might be termed "preserving the natural

[1] Section 23B(9A) provides that an act is not a previous exclusive possession act if the grant or vesting concerned involves the establishment of an area, such as a national, State or Territory Park, for the purpose of preserving the natural environment of the area.

environment"[2]. With regard to national parks, non-exclusive native title is commonly recognised, and the Queensland government has developed Protected Areas ILUAs to regulate the exercise of native title rights and interests in these circumstances.

13. Modifying the consequences of the Ward decision, which was made in the context of Western Australian land legislation, will mean that claimants and determined native title holders in Queensland will now expect that exclusive native title will be recognised over areas where previously only non-exclusive native title was recognised, despite any previous extinguishing acts. This will cause considerable uncertainty and raised expectations of native title parties that may well not be met, as well as a considerable drain on monetary and human resources as applicants seek agreement that section 47C applies. It also will likely delay the efficient consent determination process Queensland has developed, which has determined more native title applications than any other jurisdiction in Australia.

Agreement making

14. Agreements under section 47C(1)(c) are problematic from a drafting and practical perspective.

15. Section 47C(1)(c)(i) refers to agreements being made by applicants for a native title claim group and does not state that the agreement can be made by a registered native title claimant as is the case with ILUAs. Consequently, a section 47C agreement can be made with an applicant for a new claimant application before the claim is registered with the National Native Title Tribunal (NNTT).

16. In the absence of an RNTBC or applicant, agreements may be executed by all representative Aboriginal/Torres Strait Islander bodies for the agreement area. This will allow representative bodies to seek to initiate negotiations with government to enter into agreements for areas that are not the subject of a determination or claim, with the aim of the agreement being utilised later in an application for the agreement area which includes section 47C.

17. The State of Queensland questions the utility of representative bodies commencing negotiations, or the willingness of governments, to enter into agreements over areas which may never be claimed under section 47C, or if claimed connection is not found.

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[2] See definition of park area in proposed section 47C(2).

18. If the Queensland government was actually minded to enter into agreements with representative bodies ahead of a claimant application, consideration would need to be given to whether the act of entering into the agreement has the consequence that the State was estopped from undertaking future tenure dealings or legislative change in the area.

19. For the above reasons, the Queensland government recommends removing the reference to representative bodies in section 47C(1)(c)(i).

20. In the case of agreements for the variation of approved native title determinations, agreements should only be made with the Registered Native Title Body Corporate (RNTBC) and not the applicant as the RNTBC only has standing under section 61(1) to file a revised native title determination application. If adopted, amendments should be made to the Bill to account for this, either to section 47C(1)(c) or section 61(1).

21. There is also some doubt as to whether agreements made with the applicant for a native title claim group may continue to be relied upon if there is a change in the composition of the applicant, or whether it is sufficient for the agreement to be with the named applicant at the time it is executed.

22. In relation to government parties to agreements, the explanatory memorandum states that "only the government by or under whose law the park area was set aside or vested can agree to disregard historical extinguishment over the area". Section 47C(1)(c)(ii), however, is not so limited. The provision uses the terms "whichever" and "or" to suggest that it is only the government whose legislation set aside, granted or vested the *current interest* that is required to act as a signatory. In practice though there could be park areas, especially if the term "interest" in section 47C(2) is interpreted broadly, where legislative action at both the State and Commonwealth level has created two separate overlapping interests which both satisfy the requirements of "park area" set out in section 47C(2).

23. Accordingly, there is the potential for the current interest holder, either the State or the Commonwealth, to agree to disregard the extinguishing effect of their interest without taking into account the overlapping interest. Native title recognition over the current interest would then cause the prior interest of the other government party to be disregarded, without that party having any input into the agreement. Alternatively, the extinguishment disregarded by one government may include historical extinguishment caused by another.

24. Instead consultation should be required between the State and Commonwealth before any agreement is entered into, with the minimum standard of the State, and not the Commonwealth, being the lone government signatory to agreements.

Public works

25. Section 47C(7) provides that the extinguishment of native title rights and interests by the construction or establishment of public works that are the subject of an agreement under sections 47C(1)(c) and 47C(4) must be disregarded. As native title will only be disregarded on the area on which the public work is constructed or established, the extinguishment disregarded would be limited to the footprint of the public work, and not any adjacent land or waters under section 251D. Interests in the public works, including the right to access by the public, are preserved under section 47C(8).

26. From the definition of "relevant public work" in section 47C(10), under section 47C(3) the only government party that can agree to disregard extinguishment in relation to a public work under an agreement referred to in s 47C(1)(c) is the party that directly established or constructed the public work, or the party on whose behalf the public work was constructed or established.

27. If a public work is constructed or established by a party that is not a party to an agreement made in accordance with section 47C(1)(c), a separate agreement is to be entered into under section 47C(4). As an example, the State could not agree to disregard the extinguishment of a Commonwealth public work on a national park in an agreement made between the State and a native title party for the national park under section 47C(1)(c), and extinguishment in respect of the Commonwealth's public works would need to be the subject of a separate agreement with the native title party under section 47C(4).

28. This raises similar issues in regard to agreements to disregard extinguishment over park areas where there are overlapping interests issued by the State and Commonwealth. In many instances, public works built by the Commonwealth are under the operational control of, or ownership has been passed to, the State. The Commonwealth should not be the lone government party to agreements under section 47C(4), regardless of the fact that the proposed agreement will require notification under section 47C(5), as the Commonwealth may be able to press ahead with the agreement in spite of negative comments received from a State party.

29. It is acknowledged that disregarding extinguishment may have merit where a public work is no longer utilised or has been demolished, but the Queensland government questions the utility of the provision in regard to public works that are currently in operation. For example, should another telecommunications entity wish to utilise an existing pre-96 telecommunication tower in the future, presumably this may result in further complexity if native title rights are revived on a site where they were previously extinguished. Further, recognising native title over public works will limit the State government's ability to accommodate any necessary expansion or upgrade within the footprint, as native title will have to be addressed if not covered by section 47C(8)(a).

30. As noted above, there is no provision to allow extinguishment to be disregarded in section 251D areas. This may lead to what could be called "swiss cheese extinguishment", where native title is found to exist over the public work but not the section 251D area.

31. In addition to the Bill's failure to account for section 251D, it does not provide for agreements with regard to public works constructed or established by local governments, which may result in a "Swiss cheese" effect for some agreement areas.

Definition of park area

32. As presently drafted, it is arguable that the areas that can be claimed under section 47C are areas that are set aside under *legislation whose purpose*, is or includes the preservation of the environment, rather than areas *set aside for the purpose* of preserving the environment. This expands the types of areas that would able to be claimed beyond obvious interests such as those created under the *Nature Conservation Act 1992* (Qld) and the *Forestry Act 1959* (Qld). For example, the following Queensland legislation has, as part of its objects or purpose, provisions in relation to the preservation of the environment:

    - *Wet Tropics World Heritage Protection and Management Act 1993*[3](Qld) ;
    - *Vegetation Management Act 1999*[4] (Qld);
    - *Dangerous Goods Safety Management Act 2001*[5] (Qld);
    - *Wild Rivers Act 2005*[6] (Qld);

[3] See for example, the objective and sections 1(f), 41 and 56
[4] See for example, sections 3, 11, 16 and 19ZA
[5] See for example, sections 7 and 32

- *Cape York Peninsula Heritage Act 2007*[7](Qld) ; and
- *Greenhouse Gas Storage Act 2009*[8](Qld).

33. The Queensland government recommends that the proposed definition of park area be amended so as to not capture interests granted under legislation with environmental purposes or objects. Alternatively, or in addition, it may be preferable to allow interests or legislation to which section 47C will apply to be declared by regulation or listed in the NTA in a similar way to that in which each State's scheduled interests are listed in the NTA. This latter course would also serve to limit expectations about the areas over which governments may be willing to enter into agreements.

Delays and cost pressures

34. Unlike sections 47, 47A or 47B which are limited to claimant applications, the proposed section 47C will allow the "re-opening" of determinations via revised native title determination applications.[9] To allow the revision of an approved native title determination, native title holders will first require written agreements for "park areas" and public works which they may claim within their determination area. Native title holders may also make new claimant applications to capture areas that are outside their determination area, to which they believe connection could be established but was left out of their claim area due to extinguishment.

35. If the Queensland government was minded to enter into such agreements, then consequent applications to revise approved determinations of native title and new claimant applications for previously completed matters will lead to increased cost and resource pressures on the State, diverting resources from those registered claimants who are yet to have their applications determined.

36. It is estimated that if proposed section 47C were enacted the process required to be followed is likely to add a minimum of 18 months to the timeframe for resolving existing claims. This estimate is calculated as follows:

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[6] See for example, the objective and section 12
[7] See for example, the objective and sections 9 and 24
[8] See for example, the objective and sections 3 and 32
[9] Proposed amendment section 13(5)(c).

- time for negotiations to occur will be needed (three months or more to negotiate and obtain Ministerial approval);
- section 47C(5) prescribes that advertising of the proposed agreement must occur (four weeks to meet advertising deadlines and be published if newspapers or radio are used);
- the minimum period for public comment is two months;
- time will be required for the government to consider the comments received (two months);
- further negotiations may be required about amendments to accommodate public comments (two months);
- the claim group may need to authorise the agreement and proposed amendment to their application (two months);
- the Minister, or Cabinet, will need to be briefed and the agreement executed (two or more months);
- the amendment application will need to be filed, served and the order made by the Federal Court (one month or more);
- the Registrar must notify the amended application and new parties may be joined to the proceedings (three and a half months).

37. Contrary to what is contended in the Commonwealth Attorney-General's second reading speech, the introduction of section 47C will not lead to more flexible and timely claim negotiation outcomes. Negotiation of claimant applications current at the time of commencement and into the future may stall as claimants attempt to secure the necessary agreement to derive the benefit of section 47C. Claimants may have an expectation that section 47C should automatically apply, and if claimants are unsuccessful in reaching an agreement this may have a detrimental effect on the relationship between the negotiating parties causing further delays or possible court action.

38. Furthermore, the recognition of exclusive native title over areas previously not possible is likely to result in extra costs to the Queensland government in terms of future act compliance. The State and other parties will have to comply with the future act provisions over areas where extinguishment previously could be relied upon. This

crystallises in the issue of the Queensland government's liability for compensation where future infrastructure impacts on areas where native title is no longer considered extinguished.

Good Faith Negotiations Provisions in Schedule 2 of the Bill

Summary

39. The amendments in Schedule 2 make two main changes to the obligation to negotiate with native title parties in relation to a proposed future act which is subject to the right to negotiate.

40. Firstly, the Bill will incorporate specified criteria which are intended to indicate what is required by good faith negotiations. Secondly, the Bill reverses the burden of proof so, effectively, the burden is on the party which is making the application for a future act determination (usually the grantee party or the government party) rather than the party alleging lack of good faith (usually the native title parties).

41. Both of these changes have significant ramifications for the Queensland government.

42. Several significant issues which are raised by the Bill. These are the proposal to insert specified 'good faith negotiation requirements', the reversal of the onus of proof in relation to good faith negotiations, and time limits for making an application to the National Native Title Tribunal (NNTT).

Good faith negotiation requirements

43. The major change in relation to the right to negotiate provisions is the insertion of section 31A which attempts to specify what is required by the good faith negotiation requirement. Currently, section 31(1)(b) requires the parties to 'negotiate in good faith' with a view to obtaining the agreement of the native title parties to the doing of the future act (including doing the act subject to conditions).

44. The NTA does not set out what is entailed by the requirement to negotiate in good faith, other than specifying that a failure to negotiate on matters unrelated to the effect of the act on registered native title rights and interests will not constitute lack of good faith[10] and that the negotiations may include certain payments related to profits and income of the grantee party.[11]

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[10] Section 31(2).
[11] Section 33(1).

45. Instead, what has occurred is that a substantial body of case law has developed in the Federal Court and the NNTT which has considered what is required to establish that a party has or has not negotiated in good faith. A useful overview of the key points established by the case law was recently set out by the NNTT in a decision on a future act determination application made by Xstrata Coal in relation to the Karingbal # 2 claim and the Bidjara claim.[12] For current purposes, the following points are relevant:

    - The Federal Court has held that the ordinary meaning of negotiation involves 'communicating, having discussions or conferring with a view to reaching an agreement' and good faith requires a 'subjective honesty of purpose or intention and sincerity' but also whether what a party has done is 'reasonable in the circumstances.'[13]

    - The Federal Court also set out a list of indicia of failing to negotiate in good faith.[14] These criteria, in general terms, correspond roughly to the proposed criteria in section 31A(2), although the indicia outlined by the Federal Court are more comprehensive.

    - The NNTT has stated that it considers these indicia as indicative only, with their purpose being to 'provide a guide to assist the Tribunal when evaluating evidence about the negotiations'. The Tribunal has emphasised that it 'will consider all of the material before it and not make a decision mechanistically on the basis that a party has not met all of the indicia or even most of them'.[15]

    - The NNTT has also taken the view that it is necessary to 'consider the behaviour of each party as a whole and in context'. This includes, for example, the conduct and action of other parties and the resources of the parties concerned.[16]

46. There are many examples of proceedings in the NNTT where a lack of good faith has been alleged by native title parties, which has required the Tribunal to consider these principles in light of the conduct of parties in particular negotiations.

47. The explanatory memorandum to the Bill state that 'there remains a lack of clarity about what constitutes good faith negotiations. This lack

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[12] *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal # 2); Brendan Wyman & Ors (Bidjara People)/Queensland*, [2012] NNTTA 93 (23 August 2012) (*Xstrata Coal*) at [55] to [67] per President Neate. Note that this decision has been appealed to the Federal Court, and the outcome of this appeal may have an outcome on the good faith negotiation requirements.

[13] *Western Australia v Taylor* (1996) 134 FLR 211 at 219.

[14] *Western Australia v Taylor* (1996) 134 FLR 211 at 224-225.

[15] *Xstrata Coal* at [64].

[16] *Xstrata Coal* at [65] and [67].

of clarity means it is difficult for Indigenous parties in particular to prove a lack of good faith. The aim of the amendments is to clarify the meaning of good faith, and the conduct and effort expected of negotiation parties in seeking to reach agreement.

48. The addition of section 31A does little to achieve this aim. Section 31A(1) defines the good faith negotiation requirements as requiring negotiation parties to 'use all reasonable efforts' to 'reach agreement'. Section 31A(2) then provides a list of particular actions which are to be taken into account in determining whether a negotiation party has negotiated in good faith. Section 31A(3) clarifies that a negotiation party is not required to reach agreement on the terms that are to be included in an agreement. This does not create any greater clarity beyond the current approach of the Federal Court and the NNTT in interpreting the requirement to 'negotiate in good faith' under section 31, as summarised above.

49. The Australian government's rationale for introducing this change is based on the Full Federal Court's 2009 decision in *Cox*.[17]

50. The proposed amendments in section 31A are similar in many respects to amendments proposed by the Native Title Amendment (Reform) Bill (No 1) 2012, a private member's Bill introduced in February 2012 by Senator Rachel Siewert from the Australian Greens. The explanatory notes to this Bill state:

> The decision of the Full Federal Court in *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 has substantially watered down the right to negotiate to the extent that any negotiation may be considered to meet the requirements of the current provisions as long as there is no bad faith. In light of this decision, item 4 strengthens the requirement to negotiate in good faith by including explicit criteria.[18]

51. The Australian government's proposed introduction in the Bill of similar amendments to those proposed by the Native Title Amendment (Reform) Bill (No 1) 2012 suggests that the Australian government's has also adopted this view of *Cox*.

52. In any event, the Queensland government disagrees with the interpretation that the *Cox* decision has watered down the requirements of the NTA. In *Cox*, the negotiations had reached only an 'embryonic' stage at the time of making of the application for a future act determination and the Tribunal had held that this of itself was

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[17] *FMB Pilbara Pty Ltd v Cox and Others* (2009) 175 FCR 141 ('*Cox*').
[18] At page 4.

sufficient to reach a conclusion that the grantee party had not negotiated in good faith.[19]

53. The Full Court of the Federal Court pointed out that the Tribunal had concluded that there had been productive negotiations and that the grantee party had negotiated in good faith (in the conventional sense, i.e. taking into account the grantee party's conduct during the negotiations rather than the stage to which negotiations had progressed) during the six month period.[20] The Federal Court then held that:

> In those circumstances the fact that the negotiations had reached only a preliminary stage before expiry of the six month period and before [the grantee party] had proceeded with an application under section 35 of the Act could not in itself constitute a failure to negotiate in good faith for the purposes of section 31(1)(b).[21]

54. The Federal Court's decision in *Cox* is therefore authority only for the proposition that failure to negotiate in good faith is not established merely because of the fact that negotiations have not reached a particular stage during the 6 month period. It is not authority for the proposition that section 31 will be satisfied provided there is no bad faith.

55. Additionally, it is considered that the addition of certain criteria in section 31A(2) creates several additional issues:

- The requirement in section 31A(1) that the parties use 'all reasonable efforts' to reach agreement may impose a higher burden on negotiation parties than is the case under the current wording and its interpretation in case law. The requirement to negotiate in good faith has been interpreted by the Federal Court as involving 'communicating, having discussions or conferring with a view to reaching an agreement', and in so doing not only to act with both subjective honesty of intention and sincerity but also to do what a reasonable person would do in the circumstances.[22] The scope of the requirement to use 'all' reasonable efforts to reach agreement is not clear but it would appear to potentially require more than the current interpretation of the requirement to negotiate in good faith to reach an agreement.

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[19] See *Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd* [2008] NNTTA 90 (11 July 2008), per Deputy President Sosso at [56]-[58].
[20] *Cox* at [26]-[29].
[21] *Cox* at [30].
[22] *Western Australia v Taylor* (1996) 134 FLR 211 at 219, see also *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at [30].

- The wording of section 31A(2) does not appear to cater for the current practice in Queensland (and other jurisdictions) in negotiating section 31 agreements under which negotiations are, in relation to a future act which is the grant of an interest such as a mining tenement, primarily conducted between the native title party and the grantee party and recorded in an 'ancillary agreement', with the State's involvement being limited to the conclusion of a section 31 agreement following finalisation of the ancillary agreement.

- In *Xstrata Coal*, the Tribunal considered this practice and rejected an argument that the State had failed to negotiate in good faith with the native title parties due to its lack of involvement in early negotiations between the native title parties and grantee party.[23] The wording of proposed new s 31A(2)(a), in particular paragraphs (i) to (iii), seems to suggest that there will now be a positive obligation on the State to participate actively in negotiations by attending meetings, to disclose relevant information and to make proposals. In a case where negotiations are conducted primarily between the native title party and the grantee party this may not be the case and accordingly the State, and the grantee party, are effectively prevented from making an application for a future act determination.

- Likewise, the wording of section 31A(2) does not appear to allow any flexibility in taking into account the broader context of the negotiations or the conduct of other parties in assessing whether a party has negotiated in good faith, but only seems to require the Tribunal to have regard to whether the negotiation party has done the acts specified in s 31A(2).

- For these reasons, it is considered that if section 31A(2) is included in the NTA, some flexibility should be incorporated into the drafting to clarify that the context of the negotiations, and the conduct of the parties as a whole, should be considered, and that each requirement in section 31A(2) does not need to be satisfied by each party in every case.

56. The inclusion of a requirement in section 31A(2)(a)(iii) that a party has 'made reasonable proposal and counter proposal' seems inconsistent with current case law. The Federal Court has held that the obligation in section 31 does not include an obligation on the government party to make reasonable substantive offers, although failure to advance reasonable proposals may be shown to be part of a pattern inferring that the government has not engaged in a genuine attempt to

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[23] *Xstrata Coal* at [126]. This reflects the approach taken by the Tribunal for quite some time – see for example *Mt Gingee Munjie Resources Pty Ltd v Victoria* (2003) 182 FLR 375.

negotiate.[24] The NNTT has subsequently adopted this approach, finding that 'there is no requirement that the Tribunal be satisfied that the Government or grantee party has made reasonable substantive offers or concessions to reach agreement. However, the reasonableness or otherwise of such offers or concessions may be taken into account in an overall assessment of the party's negotiating behaviour'[25]

57. Section 31A(2)(a)(iii) appears to alter this approach by requiring that regard must be had to whether a negotiation party has 'made reasonable proposals and counter proposals' in order to have negotiated in good faith. Where it is intended that compensation for the effect on native title will be provided by the grantee party and not the State, it is unclear what the State would be in a position to offer and accordingly how the government party would show that it had complied with this requirement.

Reversal of onus of proof

58. The other major change in relation to the right to negotiate provisions is the reversal of the onus of proof which is brought about by item 8 of Schedule 2. Currently, section 36(2) of the NTA prevents the arbitral body from making a future act determination if a negotiation party satisfies the arbitral body that another negotiation party did not negotiate in good faith. In most instances in reported cases, it appears that it has been the native title party which asserts that the Government party or grantee party has not negotiated in good faith.

59. The NNTT has held that the practical effect of the current section 36(2) is 'to place an evidential burden on the party alleging that another party did not negotiate in good faith' and that this 'would normally require it to produce evidence to supports its contentions'.[26]

60. The Attorney-General's second reading speech about this reform notes that if an assertion is made that a party (the second party) did not negotiate in good faith then, the second party must now establish to the arbitral body that they have complied with the requirements and have negotiated in good faith. This is achieved by replacing the current section 36(2) with a new version which prevents the Tribunal from making a future act determination unless satisfied that the second party

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[24] *Strickland v Western Australia* (1988) 85 FCR 303 at 318-321 per RD Nicholson J at [321], *Walley v Western Australia* (1999) 87 FCR 565, per Carr J at [15], *Brownley v Western Australia* (1999) 95 FCR 152 per Lee J at [35] to [36].

[25] *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 196 FLR 52 ('*Gulliver Productions*') per Deputy President Sumner at [18].

[26] *Xstrata Coal* at [62], *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 at [28], *Gulliver Productions* at [10].

has negotiated in accordance with the good faith negotiation requirements.

61. If the Tribunal takes a similar approach to the interpretation of the new section 36(2) as it does to the current section 36(2), this means that the second party will bear the evidential burden of proving that it did negotiate in good faith, and produce evidence to support this contention.

62. This has several practical implications which are of significance for the State of Queensland. Firstly, where the State is the party which makes an application for a future act determination, it may be difficult for the State to prove good faith negotiations, especially in circumstances where negotiations have primarily taken place between the grantee party and the native title parties. Again, the proposed operation of the Bill does not seem to accord with the manner in which negotiations are conducted in practice.

63. Secondly, it is considered that in general it may be difficult to prove good faith, given the criteria which are to be taken into account. For example, it is difficult to see how a party could adduce evidence to show that it has 'refrained from acting for an improper purpose' or 'refrained from capricious or unfair conduct'. In practical terms it would appear to be more appropriate to require a party which alleges that another party has failed to negotiate in good faith to prove this, rather than requiring a party which has acted in good faith to prove that it has done so.

Time for making an application to the NNTT

64. Of significant concern is the proposed amendment to section 35(1)(a) which lengthens the period by two months that parties must wait before applying for a future act determination. This is likely to cause unnecessary delays, especially in relation to consent determinations where parties have reached agreement but have been unable to have the agreement fully executed due to technical issues. While the vast majority of right to negotiate matters in Queensland are in fact finalised by agreement between the parties, where parties are unable to reach agreement, they will now have to wait eight months following notification before they are able to apply for arbitration in the NNTT.

Statistical evidence

65. The statistical evidence is that, in Queensland, from January 1995 to January 2012, 87 per cent of granted tenements subject to the right to negotiate provisions were covered by agreements and did not go to arbitration. Of the remaining 13 per cent subject to arbitration, nine per

cent were then granted following a consent determination. Only the remaining four per cent of finalised right to negotiate matters were granted following contested arbitration. None were determined by the NNTT as being future acts that could not be done.

66. Accordingly, it is considered that the amendments proposed by Schedule 2 are unnecessary.

Indigenous Land Use Agreement Provisions in Schedule 3 of the Bill

Summary

67. Schedule 3 of the Bill is concerned with Indigenous Land Use Agreements (ILUAs) and proposes to make a number of amendments which are broadly directed to:

- confirming when a representative body is a party to an ILUA;
- shortening the notification period required for an area ILUA;
- broadening the instances when objection against the registration of an area ILUA can be made; and
- clarifying the requirements of section 251A, with a particular focus on the classes of persons who are required to authorise an ILUA.

68. The Bill contains some useful amendments which provide clarity about the requirements of notification and authorisation of an ILUA. However, the Bill also contains some unclear or possibly unintended consequences for the proposed amendments to the NTA. A number of these issues will have direct impact where the State of Queensland is a party to an ILUA, and may also have consequential effects on the interests of the Queensland government in resolving native title matters in a timely manner.

Clarification of who must authorise the making of an ILUA

69. Items 14, 15 and 16 of the Bill have the broad purpose of clarifying who is required to authorise the making of an ILUA (whether body corporate, area or alternative procedure).

Item 16 of the Bill Proposed section 251A(2) – prima facie test

70. Proposed section 251A(2) of the Bill provides that for the purposes of section 251A, a person who may hold native title is a reference to persons who can establish a prima facie case that they may hold native title. It is not clear from the Bill, or from the explanatory memorandum, who is required to determine whether a person can establish a prima facie case that they may hold native title.

71. The Registrar is required to consider whether an ILUA is authorised in accordance with the requirements of section 251A (see sections 24CK[27] and 24CL[28]). If those requirements are to include a prima facie test, which is the effect of section 251A(2), it is unclear as to whether the Registrar (or someone else) must simply consider or in fact be satisfied that the prima facie case has been made out.

72. Further, section 24CG(3)(b)(i) requires that all reasonable efforts be undertaken to identify all persons who hold or may hold native title within a proposed agreement area. Section 24CG(3)(b)(i) does not require a party to merely accept such an assertion.[29] That identification process is undertaken by the parties to or proponent of an ILUA prior to the authorisation of an agreement.[30] At the time of deciding whether to register the agreement, the Registrar must be satisfied that the requirement of section 24CG(3)(b)(i) was met: section 24CL (3)).[31]

73. It is unclear as to how section 24CG(3)(b)(i) and section 251A(2) are intended to intersect. For example, even if the Registrar were satisfied that all reasonable efforts had been undertaken in accordance with section 24CG(3)(b)(i), it is not inconceivable that a person may assert, and establish, a prima facie claim to hold native title. If that were done within the notification period, or even when the Registrar proceeds to consider whether to register the agreement, the operation of section 251A(2) may prevent registration of the agreement.

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[27] In respect of certified applications for registration of an area agreement.
[28] In respect of uncertified applications for registration of an area agreement.
[29] See *Murray v Registrar of the National Native Title Tribunal and Others* [2002] 77 ALD 96 at 114 [75].
[30] See section 24CG(3)(b)(i) in respect of uncertified applications for registration and section 203BE(5)(a) in respect of certified applications for registration of an ILUA.
[31] The requirement of section 24CL(3) is concerned with uncertified area agreements. Section 24CK(2)(c) requires the Registrar to consider a similar requirement which is set out at section 203BE(5)(a) (and is directed to certification of an application for registration of an area agreement). In respect of section 24CK(2)(c), the Registrar must be satisfied that the requirements of section 203BE(5)(a) and (b) were *not* met. Nonetheless, it is clear that the Registrar must turn their mind to the efforts undertaken to identify those persons who hold or may hold native title in an ILUA area.

74. Further, if the Registrar is required to be satisfied that section 251A(2) is satisfied, it is possible that the Registrar may form the view that a party to an ILUA cannot establish their claim to native title on a prima facie basis. If that occurred, it is not clear what the consequences of such a finding would be.

75. Proposed section 251A(2) has the practical effect of introducing an additional test or requirement than presently prescribed by the NTA. It appears that the intention of the proposed amendment is to provide guidance about, or to define, what is meant by a person who "may hold native title".

76. While section 251A(2) is unclear, it is the Queensland governement's view that there is merit in the NTA providing guidance about what "persons who hold or may hold native title" means and what is required to demonstrate that a person may hold native title.

77. Accordingly, the Queensland government recommends that proposed section 251A(2) be enacted as section 24CG(3A) in respect of uncertified applications and section 203BE(5A) in respect of certified applications.

78. This would have the effect of defining "persons who ... may hold native title" and would not enable or require the Registrar to consider whether the prima facie test is established.

79. The Registrar is required to consider whether section 24CG(3)(b) is satisfied. Suggested section 24CG(3A)[32] would give guidance to the Registrar (and parties to a proposed ILUA) about what is meant by a person "who may hold native title", without requiring the Registrar to consider whether a party had established a prima facie test in every instance.

Proposed section 251A(3) – persons required to authorise an ILUA

80. Section 251A(3) is unnecessary and unclear. The Queensland government seeks the removal of this proposed sub-section.

81. Proposed section 251A(3) explicitly states who must authorise an ILUA where the agreement area is not wholly covered by a registered native title body corporate or a registered native title claimant. The intent of this amendment appears to clarify that it is not only a registered native

[32] And the equivalent sections in respect of certified applications; section 24CK(2)(b) and suggested section 203BE(5A).

title claimant that is permitted to authorise the making of an agreement: see Items 14 and 15.

82. While that may be the intent of section 251A(3), the proposed sub-section is unclear. It requires the persons who hold or may hold native title in a "designated area" (defined to be the area not covered by a registered body corporate or claimant) to "authorise the making of the agreement, so far as it affects the designated area, in accordance with paragraph (a) or (b)".

83. It is unclear what "*so far as it affects* the designated area" means and who would consider whether that requirement was satisfied. For instance, it may be that the proposed sub-section requires the Registrar to merely consider whether those persons have authorised the making of the agreement (which is consistent with section 24CG(3)(b)(ii)).

84. Alternatively, it may require the Registrar to first consider how the agreement affects the designated area and then whether the relevant persons have authorised the agreement in accordance with section 251A and to the extent it affects the designated area. Even if the Registrar were not required to consider that matter in every instance, it is a matter that may be raised by an objecting party.

85. It is also not apparent from section 251A(3) whether those persons who are required to authorise the agreement in respect of the "designated area" are required to do so collectively or separately, according to whether those persons claim to hold native title within different areas or under a different system of laws and customs.

86. The question of whether section 251A requires or permits a single authorisation decision to be made by two or more people who hold (or assert to hold) native title under different systems of law and custom has been considered but is not settled. In addition to the matters raised above regarding proposed section 251A(3), the Bill does not otherwise deal with, or resolve, this question.