Kimberley Land Council

P.O. BOX 2145 BROOME WA 6725

Phone: (08) 9194 0100 Facsimile: (08) 9193 6279 Website: www.klc.org.au

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PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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SUBMISSIONS OF KIMBERLEY LAND COUNCIL WITH RESPECT TO THE

NATIVE TITLE AMENDMENT (REFORM) BILL 2011

The Kimberley Land Council (**KLC**) supports the changes proposed in the Native Title Amendment (Reform) Bill 2011.

As things currently stand, native title determination applications are a long and complex process that is often beset by delay after delay. Many applications take well over a decade to resolve and, as a result, are expensive to run.

Given that the applicants and their representatives are, in large part, funded by the federal government and that the principal respondents are the states, it is to the benefit of all taxpayers to reduce the cost of reaching a native title determination.

Further, a speedier resolution is something that is desirable for all parties with an interest in the outcome. Speedier resolutions would provide certainty and security for the traditional owners, for the states and the Commonwealth and for commercial interests such as miners and pastoralists.

However, speed of resolution should always be balanced against the requirements of justice and the KLC regards the proposed resolutions as ones which strike a good balance between those two factors.

United Nations Declaration on the Rights of Indigenous Peoples

The KLC supports the insertion of the proposed section 3A into the Act to implement the principles in the United Nations Declaration on the Rights of Indigenous Peoples by requiring that those principles are to be applied by any person exercising a power or performing a function under the Act to interpret the Act in a manner consistent with the Declaration.

However, the KLC notes that any such requirement would need to be handled carefully as it will likely cause additional administrative burden on already overworked government officials to demonstrate and record that they have considered the principles. It further remains to be seen whether such a process would make any real difference to the outcomes of official decision making.

Shifting the burden of proof

As a matter of law, it has already been accepted that native title exists across Australia and the determination process is, theoretically, simply a process to recognise what has always been there. Accordingly, it is correct that the primary burden of proof should be on those who deny the continued existence or extent of native title within an application area – ie, the respondents.

Nonetheless, it remains necessary to establish that the applicant of a particular native title determination application, and the people that the applicant represents, are the right people for the claim area. Issues such as overlapping country, disputes about claim group membership and disagreements about the nature and extent of traditional law have shown the necessity of carefully establishing the who, where and why of a native title claim.

Indeed, it is essential that the Court be satisfied that the determination being made is the correct one. Given that necessity, it is difficult to see what practical difference the proposed section 61AA would make to the process of proving connection.

However, the KLC welcomes the proposal to create a presumption of continuous connection to the land in proposed section 61AB once a more general connection has been established. In the past, the requirement to prove specific connection at particular points in time has created a significant burden on traditional owners to prove that which is difficult to express but which is, in many ways, self evident.

Providing such specific evidence in circumstances where people live in remote communities with no or limited access to telecommunications and which are often accessible only by air is an expensive and time consuming process. It creates unnecessary delays in the determination application proceedings.

Further, the acknowledgement in the proposed section 61AB that more often than not

any interruption in the observation of traditional customs was caused by the actions of governments or non-Aboriginal or Torres Strait Islander persons is one which the KLC considers to be an important one.

The movements of Aboriginal and Torres Strait Islander persons from their traditional lands was, in many cases, either directly or indirectly forced upon them – either through government activities such as the removal of children or, as was common in the Kimberley region, the movement of traditional owners off their lands into the relative safety of the missions to escape violence perpetrated by pastoralists.

Disregarding prior extinguishment by agreement

In the past the KLC has encountered a number of situations where the respondent parties would be happy to agree to disregard prior extinguishment but are hamstrung by the limitations of sections 47A and 47B. There are also circumstances where there is uncertainty about whether there has been prior extinguishment which have created complications in coming to a consent determination.

The proposed section 47C would provide a valuable mechanism for speeding up the process where the applicant and the State respondent are willing to agree to disregard prior extinguishment. It would simplify the process of coming to consent determinations, in many cases significantly reducing the time and cost of doing so.

Changes over time

The KLC supports the addition of the proposed section 223 which loosens the definitions of “traditional laws acknowledged” and “traditional customs observed” to allow for changes in those laws or customs over time.

It is inevitable that any culture, when presented with new materials, new technology and new ideas, will adapt and incorporate those things into its custom, culture and daily life. To require that Aboriginal and Torres Strait Islander cultures must have remained stagnant in the face of so many changed circumstances is unrealistic and places traditional owners at a significant disadvantage.

It should be noted, however, that for practical purposes there is general acknowledgement in the way that native title applications are handled that culture has changed. The replacement of spears with guns for hunting, for example, is something that is rarely remarked upon and which is not usually considered detrimental to native title applications. In many ways the proposed section 223 codifies a practice that is already in place and provides necessary certainty for both applicants and respondents when it comes to these issues.

Commercial rights

It is well documented that various Aboriginal and Torres Strait Islanders have a long history of trade with neighbouring groups and, in the north of Australia, with peoples from Indonesia. The absence of trade and commercial rights in the set of native title rights and interests that are commonly recognised is a major oversight which the proposed amendment to section 223(2) would go some way to repairing.

The absence of a native title right to engage in commercial activities places native title holders in an unfair position both in comparison to historical reality and with respect to the future prosperity of a people who already suffer from economic disadvantages.

In a similar vein, the KLC welcomes the proposed replacement for subsection 38(2) which would allow profit sharing conditions to be determined with respect to future act agreements.

The ability to negotiate profit sharing arrangements, particularly with respect to future acts which may be highly speculative, is an important part of ensuring that native title holders are compensated in a commercially appropriate way for making agreements which affect their native title rights and interests.

Negotiating in Good Faith

The meaning and effect of phrases such as “negotiate in good faith” has for a long time been known as an uncertain requirement. Recent cases such as *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177 have emphasised the need to clarify what “negotiate in good faith” means in specific context. Accordingly, the KLC welcomes the proposed section 31(1A) which provides a firmer definition of good faith.

However, the KLC thinks that the part of paragraph 31(1A)(b), which excludes confidential or commercially sensitive information, is inappropriate. It is within the ability of native title parties, the states and grantees to come to arrangements with respect to the exchange of confidential or commercially sensitive information if it is deemed relevant to the negotiations. Such arrangements are common in commercial negotiations and there is no justification for legislating such a limitation into future act negotiations.

We also note that, in native title, a “timely manner” can mean something very different than it does in ordinary commercial negotiations due to the difficulty of obtaining instructions from native title claim groups as a collective body.

Effectiveness of heritage legislation in the Freehold Test

The proposed amendment to section 24MB(c) would be a welcome change. We view it as having two beneficial effects.

The first is that, in the case of individual future acts, it will give native title holders an expanded ability to protect their cultural heritage where there are concerns that the

existing protective provisions are inadequate.

The second benefit is that it could be a valuable tool to encourage the states to invest more resources towards both improving and enforcing heritage protection legislation where it has found to be ineffective. Such an increase would have benefits beyond any individual disputed future acts.

However, the KLC notes that no definition of effectiveness is supplied in the proposed amendment. For example, will the test consider the terms of the protective legislation only, or will evidence of the success or otherwise of its practical application be able to be considered? We submit that a consideration of the practical application of protective legislation should be required wherever the issue of effectiveness is raised.

Yours sincerely,

Kimberley Land Council