CENTRAL DESERT NATIVE TITLE SERVICES

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Submission to the Senate Legal and Constitutional Affairs Committee and the House Standing Committee on Aboriginal and Torres Strait Islander Affairs regarding the Native Title Amendment Bill 2012

Background

1. The *Native Title Amendment Bill 2012* ("NTA Bill") was introduced into the House of Representatives by the Attorney-General on the 28th of November 2012. It was referred to both the House Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Senate Legal and Constitutional Affairs Committee on the 29th of November 2012.

2. The House Standing Committee on Aboriginal and Torres Strait Islander Affairs has called for submissions to address (a) whether a sensible balance has been struck in the NTA Bill between the views of the various stakeholders; and/or (b) proposals for the future reform of the native title process.

3. These submissions have been prepared by Central Desert Native Title Services ("Central Desert"), the recognised native title service provider pursuant to section 203FE of the *Native Act 1993* (Cth), for the native title claimants and native title holders of the Central Desert region.

General Comments

4. While it is not difficult for stakeholders to address the question regarding "sensible balance", it must be acknowledged that such submissions are always going to be highly subjective and influenced by each parties particular position in the native title system and particular local and regional experience. In an area such as native title, it is going to be rare, if not impossible, to have consensus amongst the diverse range of stakeholders about what is a "sensible balance." Furthermore, it is really the role of Government to assess

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all the various submissions and proposals and determine whether, a sensible balance has been struck having regard to stakeholder comments.

5. Although the NTA Bill attempts to redress the imbalance of certain provisions of the current *Native Title Act 1993* (Cth) ("the Act"), it does not go far enough to genuinely address the fundamental flaws in the native title process. Further, the proposed amendments do not, contrary to the statements contained in the Explanatory Memorandum,[1] in any real sense "promote the protection of human rights particularly the right to enjoy and benefit from culture and the right to self determination."[2]

6. While it is encouraging to see the Federal Government looking to the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Australia April 2009, to guide its decision-making and policy, it is Central Desert's submission that the Act and the amendments proposed in the NTA Bill, still fall short of achieving "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"[3].

Schedule 2 – Negotiations

'Good Faith' Negotiations

7. The proposed amendments in the NTA Bill set out good faith criteria to be used in deciding whether or not a party has negotiated in accordance with good faith negotiation requirements.

8. The aim of the criteria is to provide clarity in relation to what constitutes 'good faith' negotiations. Whilst this is a positive step, it should be considered whether the criteria go far enough in terms of requiring negotiation parties to actively participate in 'good faith' negotiations. Additionally, it is important to ensure that, in practice, the criteria of what constitutes 'good faith' negotiations are seen as indicators of good faith, that is, although the list in section 31A(2) is in fact explicitly inclusive it should not be treated as an exhaustive list. To this end, it may be beneficial to include a section 31A(2)(a)(ix) which states "and any other relevant issue that should be considered". This would also allow for the negotiation parties to provide comment on any other matters that should be considered by the NNTT.

9. What the amendments fail to address is the single biggest issue facing native title parties in relation to negotiation; proper funding of their attendance and fully informed participation in the 'right to negotiate' process. This obviously extends to the adequate resourcing of those assisting native title parties in these negotiations.

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[1] Native Title Amendment Bill 2012, Explanatory Memorandum
[2] Native Title Amendment Bill 2012, Explanatory Memorandum, page 6
[3] United Nations Declaration on the Rights of Indigenous Peoples, Article 43

10. The proposed section 31A(2) does not, but should, allow for consideration of the location of negotiation meetings, given the often remote location of members of the native title party. Negotiations should be held on country or at a location where most of the members of the native title party reside.

11. Proposed section 31A(2)(d) would be improved by the addition of a requirement for a reasonable outline of the reasons for the responses provided by the relevant negotiation party. Simply providing a response to proposals will not meaningfully progress negotiations if there is no requirement to provide sufficient information to allow other negotiation parties to not only understand the rationale behind the response but also provide further proposals addressing any issues noted in relation to the negotiations or a proposed agreement.

12. Given the proposed section 31A(3), it would be desirable that s31A(2)(e) contain a requirement that parties be required to give "demonstrable" genuine consideration to the proposals and that participation as required by s31A(2)(a) be "active" participation. This would ensure that, whilst concession or agreement on proposals is not required for 'good faith' negotiation, parties are not simply "going through the motions" of complying with the good faith criteria.

Extension of time for negotiations from 6 to 8 months.

13. The NTA Bill proposes to extend the time, from 6 to 8 months, that the parties must engage in good faith negotiations before a party may seek a determination from the NNTT.

14. Central Desert submits that an extension of time to the period which parties must negotiate in accordance with the good faith criteria is a sensible proposal and provides additional time for parties to meaningfully progress the negotiations. This extension is particularly relevant given the remoteness of many members of native title parties; periods where negotiations may be on hold for various cultural or other reasons, and, the often broad range of issues to be negotiated between parties.

15. Central Desert supports the NTA Bill's proposed section 36(2) requiring the 'second negotiation' party to demonstrate they have negotiated in good faith, in order for a determination to be made. The amendment provides additional encouragement to negotiation parties to actively negotiate in good faith, rather than waiting out the statutory time period, or, engaging in behaviours that are anything but demonstrable 'good faith'. This amendment should also apply to any further period of negotiations which are conducted pursuant to orders of the NNTT.

16. Allowing, but not obliging, the NNTT to make orders in relation to a further period of 'good faith' negotiations provides for further meaningful negotiations to occur prior to the application for a new section 35 arbitral body

determination. It should be noted that, depending on the parties involved and the content of any initial application for determination under section 35 of the Act, forcing negotiation parties to negotiate in good faith for a further time period may be inappropriate and, without adherence to the explicit criteria set out by section 31A(1), may lead to negotiation parties simply doing enough to comply with the letter of section 31A(1), but not the intent behind the section.

Historical extinguishment

17. Unlike the current sections 47, 47A and 47B of the Act, the NTA Bill provides for extinguishment to be disregarded over areas such as parks and reserves (and public works within those parks and reserves) only when the government party and the native title party have reached an agreement as to the disregarding of the extinguishment. It also appears from the way the amendments are drafted, that the benefit of the proposed section 47C can only be obtained if the agreement forms part of the native title determination application or an application for a revised determination of native title.

18. Central Desert submits that there is no reason why the proposed section 47C should not operate in the same way as section 47, 47A and 47B and allow for prior extinguishment over parks and reserves to be disregarded as of right, without any requirement for agreement with government parties. Section 47B could simply be amended so as to extend its operation to parks and reserves.

19. A new section 47C could also provide, in addition to extinguishment being disregarded as of right for national parks and reserves, that extinguishment in relation to other areas may be disregarded by agreement between the parties. In this instance, the benefit of an agreed outcome pursuant to s47C, is not restricted to extinguishment to parks and reserves, but extends to any agreement between parties about extinguishment.

Agreement of the Parties, Right to Comment and Interested Persons

20. The NTA Bill proposed amendments provide no guidance as to timeframes for negotiations; nor the conduct of the parties ("good faith") and places no restriction as to what a government party may require in order to reach agreement. The success of the provisions are entirely dependent on the good will of the Government Party and the particular political landscape at any given point in time. Negotiations could be commenced and abandoned without any consequence and at great financial and human cost to the native title party.

21. Additionally, the two month notification requirement and the ability of 'interested persons' (whomever they may be) to comment, is inappropriate and an unnecessary complication to the native title determination process. On a basic level, it is not clear to what extent, if at all, the government party must consider or act on comments provided or whether the native title party will be required to address such comments.

22. More fundamentally however, the "interested person" process proposed by the NTA Bill varies from the usual native title determination processes which requires that once a native title determination application is made, any person whose interest in relation to the area may be affected by the determination has the right to become a party to the determination proceedings (section 84(3)(a)(iii)).

23. Central Desert submits that it is not appropriate to vary the native title determination process in the way being proposed by the NTA Bill, and, that the forum for parties with a relevant interest to make submissions is that provided to them by virtue of being party to the native title determination application. Both the current section 66A(1) of the Act and the proposed additions to section 66(1) would allow for interested parties to be notified at that stage of the proceedings.[4]

24. Given that any determination made under section 47C does not affect the validity of the park or reserve, nor the validity of the creation of any prior interest, nor the interest of the Crown, nor any existing public access right (proposed section 47C(8)(a)), the effect of the determination on any interested persons could readily be addressed as part of the management of the determination application, as per the way that interests are dealt with in relation to sections 47, 47A and 47B areas under the Act.

Extinguishing effect of public works which occur within the park to be disregarded by agreement with the relevant Government party.

25. Although the inclusion of the disregarding of the extinguishing effect of public works in this section is positive, Central Desert submits that there is no reason why any regime established by section 47C for disregarding the extinguishing effects of public works by agreement should not also extend to public works on land or waters to which ss47, 47A or 47B applies.

ILUAs

Amendments to 24BC

26. Central Desert supports the proposed amendment to section 24BC which would allow Indigenous Land Use Agreements ("ILUAs") to include areas in which native title has been extinguished or where an area has been excluded from a determination but where the native title group would have held native title had it not been extinguished over the relevant area.

Authorisation and Registration Process for ILUAs

27. It is Central Desert's view that the proposals outlined in relation to the authorisation and registration of ILUAs appear to swing in favour of making the registration of ILUA's easier. Central Desert is concerned to ensure that those who hold or may hold native title rights and interests are provided with a proper opportunity to assert those interests.

28. The reduction on the period for lodging an objection against an application to register an ILUA from 3 months to 1 month is not acceptable. It is often the case that those who hold or may hold native title live in remote areas, speak languages other than English and can be unavailable due to cultural reasons or weather events; all of which makes seeking advice from or providing instructions to representatives extremely difficult. Imposing a 1 month limitation period on objections is unduly harsh. It is Central Desert's submission that, for the purposes of procedural fairness, the 3 month objection period remains.

29. Central Desert understands the need for clarity around the law surrounding authorisation as a result of the decisions of *Bygrave*[5] and *Kemp*[6], however Central Desert is not certain that the new proposed section 251A (2) achieves this. It is not entirely clear what establishing a *"prima face case"* requires and whether it equates to having a registered native title claim. Central Desert notes that in order for a native title claim to be registered, one of the conditions that must be met is that a "prima facie case" can be made out, ie. at least some of the native title rights and interested claimed in the application can be established (section 190B(6) of the Act). Central Desert submits that the new proposed section does not in fact create any additional certainty.

Process for amendments to ILUAs

30. Central Desert supports amendments to the Act which allows minor and technical amendments to be made to ILUAs without requiring the ILUA to be re-registered.

Other Amendments

Shifting the Burden of Proof

31. Central Desert submits that the NTA should be amended so as to reverse the onus of proof in native title determination applications and to provide for a rebuttable presumption of continuity. The Greens Bill[7] proposed amendments, which would implement suggestions made by Chief Justice French of the

[5] *QGC v Bygrave* [2011] FCA 1457
[6] *Kemp v Native Title Registrar* [2006] FCA 939
[7] Native Title Amendment Reform Bill (No.1) 2012

High Court[8] (while a judge of the Federal Court), would make the NTA the "beneficial legislation" it purports to be, reduce the time and costs (both financial and human) of prosecuting a native title claim and would significantly improve Australia's human rights record.

Changes to the definition of native title

32. Central Desert supports the proposal in the Green's[9] Bill to amend section 223 of the Act so as to:

    a. Allow laws and customs, or the manner in which they are observed, to change over time;

    b. Avoid doubt that connection does not have to be 'physical';

    c. Remove the requirement that acknowledgement or observance of traditional laws and customs, and connection to land and waters, be continuous; and

    d. Make it clear that native title rights and interests include the "the right to trade and other rights and interests of a commercial nature".

33. Implementing proposals such as these will significantly reduce the human and financial costs associated with progressing and determining native title determination applications. It will also ensure that the Act truly operates as beneficial legislation; provides redress for the progressive dispossession of Aboriginal and Torres Strait Islander Peoples of their lands; implements international standards for the protection of universal human rights; further advances the process of reconciliation and provides a 'just and proper' process for Aboriginal and Torres Strait Islander Peoples to have their native title recognised.

Yours sincerely

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[8] Justice R French, "Lifting the Burden of native title – some modest proposals for improvement" (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008
[9] *Ibid* n7