NATIVE TITLE AMENDMENT BILL (NO. 2) 2009

OPINION

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1. The *Native Title Amendment Bill (No. 2) 2009* (Cth) proposes an amendment to the *Native Title Act 1993* (Cth) to provide for the validation of future acts relating to the construction of public housing on land held for the benefit of Aboriginal people. Under the new provisions, the non-extinguishment principle will apply to such an act (s 24JAA(7)).

2. The approach taken by the Bill accords with the past act provisions of the Act (Pt 2 Div 2) for acts before 1 January 1994 that apply the non-extinguishment principle to the grant or vesting of land for the benefit of Aboriginal people (ss 15(1)(d), 229(2)(b), 230(d)) and with the confirmation of past extinguishment provisions (Pt 2 Div 2B) for acts up to 23 December 1996 by which such an act is not a previous exclusive possession act (s 23B(9)). It is also consistent with the approach taken in other provisions of the Act (outlined below) dealing with matters touched on by the Bill, but the Act is not entirely uniform on issues respecting acts done in relation to land held by or for the benefit of Aboriginal people. There are four key provisions.

3. First, where a public work is established before 23 December 1996, Pt 2 Div 2B of the Act provides that native title is taken to be extinguished in relation to land on which the work is situated, and in relation to any adjacent land needed for its operation (ss 23B(7), 23C(2), 251D). Although the confirmation of past extinguishment provisions in Pt 2 Div 2B proceed on the basis that the grant or vesting of land for the benefit of Aboriginal people is not an extinguishing previous exclusive possession act (s 23B(9)), if applicable, s 23C may produce a different result for works established on such land, which is the basis upon which *Erubam Le v Queensland* (2003) 134 FCR 155 (discussed below) was decided. The preservation of reservations and conditions for the benefit of Aboriginal people under s 23D did not

work to protect native title from extinguishment provided by s 23C: (2003) 134 FCR 155 at 164 [36].

4. Second, s 233(3) provides that an act that affects land held for the benefit of Aboriginal people under certain laws of the Commonwealth and of South Australia (listed in the definition of "Aboriginal/Torres Strait Islander land" in s 253) is not a future act. This means that an act that would affect native title to such land that occurs after the commencement of the Act on 1 January 1994 is invalid to that extent (s 24OA); native title therefore remains unaffected and continues to be protected by s 11(1). But not all land held for the benefit of Aboriginal people is excepted from the future act regime; native title to many other areas of land throughout Australia held for their benefit can be extinguished or impaired by future acts. And the protection given for Aboriginal/Torres Strait Islander land as defined is subject to the intermediate and past act provisions in Pt 2 Divs 2A and 2B for acts up to 23 December 1996.

5. Third, s 24KA(4) applies the non-extinguishment principle to a future act that permits or requires, or consists of, the construction or use of certain listed items of infrastructure such as railways, roads and the like (sub-s (2)) established and operated for the general public (sub-s (1)). But if what would otherwise be a future act consisting of the construction of a public work occurs in accordance with a reservation or lease of land made for a particular purpose in existence before 23 December 1996 (s 24JA), s 24JB(2) provides that native title is extinguished. A reservation or lease of land for the benefit of Aboriginal people might be for a particular purpose that engages s 24JB, but as far as I am aware the point is undecided.

6. Fourth, where the Federal Court determines that native title exists in relation to land held by or for the benefit of Aboriginal people, ss 47-47A require that any extinguishment by the grant or vesting of the land, or by the creation of any other prior interest, be disregarded. Section 47B makes similar provision for prior interests in vacant Crown land. The sections apply the non-extinguishment principle to the creation of any prior interest and provide that the determination does not affect the

interests of governments in public works. But the requirement to disregard past extinguishment does not extend to any extinguishment caused by the construction of public works provided by s 23C. In *Erubam Le v Queensland* (2003) 134 FCR 155 a Full Court held that s 47A is "tightly worded", such that although the construction of public works may have "involved", it was not an act consisting of, the "grant or vesting" or the "creation of any other prior interest" covered by sub-s 47A(2) in respect of which past extinguishment could be disregarded: (2003) 134 FCR 155 at 175 [84].

7. It seems anomalous that s 47-47B do not produce a uniform outcome when it comes to disregarding past extinguishment. (I put to one side the limited exception found in s 47A(2)(b) relating to a freehold estate within a reserved area granted for the provision of services, the purport of which is opaque). It would also seem anomalous to treat the establishment of works on land held for the benefit of Aboriginal people as an extinguishing act (ss 23C, 24JB), when the grant or vesting of the land engages the non-extinguishment principle (ss 15(1)(d), 229(2)(b), 230(d)) and is not treated as previous exclusive possession act (s 23B(9)), and when the Act applies the non-extinguishment principle to a future infrastructure act (s 24KA).

8. There is no apparent reason why public works on land held for the benefit of Aboriginal people should be treated differently to the land itself. Sections 47-47A preserve the interests of governments in any public work on the land concerned (ss 47(3)(a)(ii), 47A(3)(a)(iii), 47B(3)(a)(ii)) and under the non-extinguishment principle that interest, and things done under that interest, prevail over native title (s 238(3)-(4)). And in cases where the land is covered by a fee simple estate or a lease held for the benefit of Aboriginal people (s 47A(1)(b)(i)), the decision in *Erubam Le* about s 47A does not sit well with the reasoning in *De Rose v South Australia (No. 2)* (2005) 145 FCR 290. There a Full Court held that when a pastoralist effects improvements the grant of the pastoral lease operates, at that point of time, to affect native title to the areas of land on which the improvements are made: (2005) 145 FCR 290 at 333 [157]. In other words, the relevant legal act that affects native title is not the construction of the works, but the anterior grant of the right to do so.

9. If the reasoning in *De Rose* is applied to s 47A, the non-extinguishment principle would be engaged in relation to the grant or vesting of the land and, in most cases, the construction of works as something done under the grant or vesting. Section 47, dealing with pastoral leases, specifically applies the non-extinguishment principle to the doing of any act under the lease (par s 47(2)(c)). It is unclear why s 47A, added in 1998, does not adopt the same drafting.

10. *Ermbam Le* decided separate legal questions on an agreed basis that native title was affected by the construction of the relevant public works: (2003) 134 FCR 155 at 157 [3]-[4], 167 [49]. It did not address the effects of the grant of the fee simple estate, the holder of which carried out the works. As always, it is necessary to examine the legal basis for the power that has been exercised that is said to affect the continued existence, enjoyment or exercise of the native title rights: *Ward v Western Australia* (2001) 213 CLR 1 at 115 [151]. Where, as a category D past act (ss 15(1)(d), 229(2)(b)) that is not a previous exclusive possession act (s 23B(9)), the non-extinguishment principle applies to a fee simple estate granted for the benefit of Aboriginal people, native title will continue to exist but the native title rights will be wholly ineffective in relation to that interest during its currency (s 238(3)). The suspension of native title will be entire.

11. As the non-extinguishment principle applies to the grant, things done in exercise of the rights granted, will, or at least should, be treated in the same way. If the holder of the fee simple estate permits or requires improvements to the land, as native title continues to exist but its enjoyment in relation to that interest is wholly suspended, native title is not further affected. If the making of improvements is seen as something done under the grant, that too should engage the non-extinguishment principle. Upon the fee simple estate being removed or ceasing to operate, the native title rights will again have full effect (s 238(6)). On this view, no question arises about the extinguishment of native title rights in relation to land on which the improvements are situated; the initial grant and the later works engage the non-extinguishment principle.

12. By providing that the non-extinguishment principle will apply (new s 24JAA(7)) to an act that permits or requires, or consists of, the construction of certain works on land held by or for the benefit of Aboriginal people (s 24JAA(1)(b)-(c)), the *Native Title Amendment Bill (No. 2) 2009* will reverse the holding in *Ebrubam Le*, but only in a limited fashion. The new provisions, in that respect, are confined to public works consisting of public housing, community facilities and associated infrastructure established within the next 10 years (s 24JAA(1)(c)-(d), (3)). The Bill recognises that where land is held by or for Aboriginal people, and public facilities are established for their use, it is incongruous that this should result in the extinguishment of their traditional rights to land (s 24JAA(7)). The approach taken in the new provisions can be extended to the areas outlined above and the limitation identified in *Ebrubam Le* corrected.

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