AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

Lawson Crescent,
Acton Peninsula, Acton ACT 2601
GPO Box 553, Canberra ACT 2601
ABN 62 020 533 641

P | 02 6246 1111
F | 02 6249 7310
W | www.aiatsis.gov.au

Native Title Research Unit
P | 02 6246 1161
F | 02 6249 7714
E | ntru@aiatsis.gov.au

31 January 2013

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Ms Dennett,

Submission regarding the *Native Title Amendment Bill 2012*

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to make submissions about the proposed changes to the operation of the *Native Title Act 1993* addressed in the *Native Title Amendment Bill 2012*. AIATSIS is one of Australia's publicly funded research agencies and is dedicated to research in Indigenous studies. AIATSIS includes the Native Title Research Unit, established following the *Mabo* decision, which conducts research and provide analysis on the law, policy and practice of native title.

AIATSIS has been integrally involved in debates over reform to the Native Title Act since its inception. Through events such as the annual National Native Title Conference, AIATSIS has promoted informed discussion and debate on the Act and its ability to fulfil the objectives set out in the preamble, to recognise and protect the rights of Indigenous peoples to their traditional lands. We remain fundamentally committed to improving legal process and policy in order to ensure better and more sustainable land justice outcomes for Aboriginal and Torres Strait Islander peoples.

In summary, it is our position that while the amendments proposed in the Bill may help improve some areas of native title law and practice, they still do not go far enough in addressing existing inequalities between native title groups and other parties. In particular, further measures should be taken to give greater weight to the free, prior and informed consent of native title parties negotiating in 'good faith' towards future act and other agreements.

I draw your attention to four previous AIATSIS submissions relevant to the Bill in which our arguments concerning the workability and fairness of the Native Title Act remain effectively unchanged:

- *Comments on Exposure Draft: Proposed amendments to the Native Title Act 1993* (October 2012) (see attachment)*;*

- *Submission to the Inquiry into the Native Title Amendment (Reform) Bill 2011* (August 2011);
- *Response to the joint Attorney-General and Minister for Families, Housing Community Services and Indigenous Affairs' Discussion Paper, 'Leading practice agreements: Maximising outcomes from native title benefit'* (July 2010); and
- *Submission on Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* (March 2010).

Attached also please find the March 2010 submission by Queensland South Native Title Services regarding *Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* which also supports our views.

Our comments regarding the Bill are based on over 15 years of research and practice by AIATSIS researchers in the native title sphere. We trust that they will assist you and your colleagues in further refining the operation of the NTA into the future.

Yours sincerely,

Dr Lisa Strelein
Director of Research
Indigenous Country and Governance

AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

Submission of the

Australian Institute of Aboriginal and Torres Strait Islander Studies

to the Senate Legal and Constitutional Affairs Legislation Committee

in relation to the

Native Title Amendment Bill 2012

31 January 2012

AIATSIS welcomes the government's proposal to make amendments to the *Native Title Act 1993*. Since the commencement of that Act, the Native Title Research Unit at AIATSIS has conducted and published research into the Act's legal and practical operation, identifying and analysing areas where reform would be desirable.

In relation to the government's current amendment Bill, AIATSIS' position is essentially the same as was expressed in its October 2012 submission about the exposure draft legislation (attached). We offer qualified support for the changes proposed related to 'good faith' negotiations and historical extinguishment, but argue that the reforms do not go far enough towards rectifying inequities inherent in the existing legislation. In relation to the streamlining of ILUA processes, we support the bulk of proposed changes, but express reservations about the removal of the objection procedure for certified ILUAs and recommend that the period for all objections remain at three months.

1. Historical extinguishment

In its submission about the exposure draft legislation, AIATSIS recommended that:

- the proposed s47C, dealing with parks and conservation reserves, be changed to remove the requirement for government agreement;
- the proposed s47C be changed so that the section applies to marine areas as well as on-shore places;
- a new s47D be drafted which allows for parties to agree to the disregarding of any historical extinguishment; and
- the requirement for claimants to prove occupancy be removed from ss 47A and 47B, and that it not be reproduced in the proposed ss 47C and 47D.

The current Bill reflects only minor drafting changes to the previous exposure draft, and so AIATSIS reiterates its recommendations.

1.1 While AIATSIS welcomes the proposal to expand the Act's capacity for recognising native title, it is disappointing that the proposed amendments will miss the opportunity to correct an aspect of the native title regime that is both logically incoherent and unjust. The proposed amendments appear to recognise that the current law's treatment of historical extinguishment involves an arbitrary denial of rights based on accidents of history. The Bill, however, does not follow through with that recognition by proposing substantive change to the way historical extinguishment is dealt with.

1.2 To restate the issue: native title is the recognition of the rights and interests of traditional owners under their own laws and customs, but this recognition is subject to a compromise whereby the rights that have been already granted to other people (and the laws already passed by state and Commonwealth parliaments) will not be diminished. So extinguishment is part of a trade-off designed to protect public and private interests that already existed at the time that native title was recognised in Australian law. **Where, however, an extinguishing interest has come to an end, there is no reason in policy or in the jurisprudential logic of native title to withhold recognition of the rights and interests held under traditional laws and customs (subject to any other ongoing inconsistent rights and interests).** There is no other party whose existing interests are affected. And yet under the current law, governments are able to avoid negotiating with traditional owners when (for example) making decisions about the management of national parks, because of the vestigial effects of long-forgotten prior dealings with the land. In effect this amounts to the circumvention of the future acts process by reliance on a technical loophole the existence of which has no policy justification.

1.3 Accordingly, it is inappropriate to leave the disregarding of historical extinguishment to the prerogative of governments – where claimants are found to have traditional rights and interests in relation to a park or reservation area, only the current use of that area is relevant to the question of how far those rights and interests may be recognised, and previous dealings with the land should be disregarded automatically. Governments should not be able to avoid proper engagement with traditional owners on the basis of quite fortuitous and arbitrary accidents of history.

1.4 Further, there is no apparent policy or legal reason for limiting the disregarding of extinguishment to on-shore areas, or for limiting the consensual disregarding of extinguishment to parks and reserves. If the matter of disregarding extinguishment is to be left to negotiations between governments and traditional owners, there is no apparent reason to make such negotiations available in the case of parks and reserves alone, and no apparent difference between on-shore and off-shore places.

1.5 The Commonwealth has the opportunity to significantly enhance the health and wellbeing benefits that accompany Aboriginal and Torres Strait Islander peoples' ownership of, access to, use and enjoyment of their traditional lands.[1] Expanding the capacity to disregard

[1] See for example: Weir J (ed), *Country, native title and ecology* (Aboriginal History Monograph 24), ANU E-Press, Canberra, 2012; Altman J and S Kerins (eds)*, People on Country: Vital landscapes Indigenous futures,* Federation Press, Melbourne 2012; Australian Institute of Aboriginal and Torres Strait Islander Studies*, The Benefits Associated with Caring for Country*, AIATSIS 2011, www.environment.gov.au/indigenous/.../pubs/benefits-cfc.doc.

historical extinguishment, particularly in areas of high ecological and cultural value, is likely to contribute to the government's objectives in 'closing the gap'. **AIATSIS would encourage the Committee to embrace this opportunity more fully than has been done in the current Bill, and to consider the recommendations outlined above.**

2. Negotiation in good faith

AIATSIS' submission about the exposure draft legislation commended several aspects of the proposed the 'right to negotiate' amendments, and made four further recommendations in relation to them:

- that s 38(2) be amended to allow the National Native Title Tribunal to impose 'profit-sharing' conditions;
- that s 36 be amended to clarify that the Tribunal may not make an arbitral decision until negotiations have reached the point where it is clear that the parties are unable to agree; and
- that the proposed s 31A(2) be amended:
  - to re-frame the factors as cumulative mandatory criteria rather than as factors to be weighed; and
  - to add a requirement for parties to give reasons for their responses to other parties' proposals; and
- that amendments be introduced to ensure that Tribunal decisions not be made unless the Tribunal is satisfied that the native title party had capacity for effective negotiation and had access to assistance by experts in negotiation processes, where appropriate.

Disappointingly, these recommendations have not been adopted in the drafting of the current Bill. AIATSIS now makes the same recommendations to the Committee.

2.1 At the National Native Title Conference in 2012, the Attorney-General described the proposed reforms as 'incremental changes' in contrast to 'radical changes'. We would argue, though, that the effect of the current Bill risks being so minimal as to amount to a confirmation of the status quo.

2.2 Certainly, the Bill represents a welcome step forward in that it would:

- require the use of 'all reasonable efforts' to reach agreement;
- explicitly allow the Tribunal to consider the reasonableness of offers;
- increase the minimum time before a s 35 application may be made;
- put the evidentiary burden on the party seeking an arbitral decision; and
- allow the Tribunal to impose a further period of negotiation if it finds a lack of good faith.

2.3 Nevertheless, the matters listed in s 31A(2) largely reproduce the existing law. They are merely factors to be considered and balanced by the Tribunal, rather than stipulating a

minimum code of conduct for negotiations. It is difficult to imagine circumstances in which a proponent who had failed to satisfy any of those requirements should still properly be said to have negotiated in good faith, and yet it would still be open for the Tribunal to make such a finding.

2.4 We would submit that the Bill in its current state will not achieve the objective that the Attorney-General has set for it, namely to end the situation where parties can simply 'sit back and wait for the clock to tick down until an arbitrated outcome is available'.[2] The current law makes that approach a realistic option for proponents, and the proposed s 31A(2) does not represent a significant change to that aspect of the law. In June 2012 the Attorney-General made a commitment to 'legislate criteria to outline the requirements for a good faith negotiation'.[3] The current Bill does not do this; instead, it specifies considerations for the Tribunal to have regard to 'where relevant'. **We would encourage the government to follow through on its commitment, and amend the Bill to re-frame s 31A(2) as a list of minimum criteria.**

2.5 We note that the current Bill has removed a provision from the previous exposure draft that would have specified that the good faith negotiation requirements do not require a negotiation party to make concessions during negotiations. This removal is to be welcomed, as we consider that a willingness to consider concessions is a key element in the concept of negotiation. We would encourage the Parliament to go further and include in s 31A a requirement for parties to give reasons for their responses to other parties' proposals. This modest change would ensure that good faith negotiations involve genuine and effective communication about the issues to be agreed.

2.6 Finally, the results of AIATSIS research have repeatedly emphasised the critical importance of negotiation capacity and sound processes, elements that in our opinion should be included in the definition of the 'good faith requirements'. Research carried out for the Indigenous Facilitation and Mediation Project (2003-2006) and the Indigenous Dispute Resolution and Conflict Management Case Study Project[4] found that typically, over many years, Indigenous communities have experienced pressure to accept proposals, often suggested by non-Indigenous agencies, without having the opportunity to understand the details or implications of their decisions, or to consider other solutions. Inappropriate process can also result in increasing tensions and hostilities between and amongst Indigenous families and individuals. Both reports highlight the importance of parties' ownership of processes, of careful preparation, and of working with the parties to design processes that can meet their procedural, substantive and emotional needs. This ideally

---

[2] Attorney-General Nicola Roxon, 6 June 2012, http://resources.news.com.au/files/2012/06/06/1226385/856700-aus-na-file-nicola-roxon-on-mabo.pdf

[3] Ibid

[4] T. Bauman and J. Pope (Eds). 2008.'*Solid Work you Mob are Doing': Case studies in Indigenous dispute resolution and conflict management*. Federal Court of Australia, Melbourne; T. Bauman. 2006. *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation.* IFaMP Report No. 6. AIATSIS, Canberra: The research findings, recommendations and implementation of the IFaMP project were based on consultations with a wide range of stakeholders including via a number of workshops and case studies. The *Solid Work You Mob are Doing* findings were based on three detailed case studies and a series of snapshot case studies.

would be done by third party community engagement facilitators (or positions with similar functions) with highly specialised communication skills. In order to put these research findings into practice, it would be appropriate for the Act to stipulate that arbitral decisions should not be made unless the Tribunal is satisfied that the native title party had capacity for effective negotiation and had access to assistance by experts in negotiation processes, where appropriate.

2.7 The future acts process represents the primary mechanism by which traditional owners can use their native title rights to achieve economic outcomes and protect their social, cultural and environmental values. Yet its effectiveness in this regard is currently hamstrung by the uneven playing field on which negotiations take place, with proponents often able to avoid making any serious concessions and arbitral decisions almost guaranteed to allow projects to go ahead (without any monetary awards). **Redressing this structural imbalance in the Act is likely to improve outcomes for traditional owners, but will require more substantive changes than those proposed in the current Bill.**

3. Indigenous Land Use Agreements

In the AIATSIS submission about the exposure draft legislation, recommendations were made that:

- the one month 'notice period' set out in s 24CH(5) and (6) for the filing of claims or lodging of objections to notifications of ILUAs be extended to at least three months.
- s 251A or s 24CG be amended to specify the authorisation requirements for objecting claimants who are members of an overlapping registered native title application.
- s 24CL be amended to include a condition equivalent to that in s 24CK(2).
- s 24CH(6)(b) refer to 'the requirements of sub-paragraphs 24CG(3)(b)(i) and (ii)', rather than simply s 24CG(3)(b).
- s 251A(3) refer to 'paragraph (1)(a) or (1)(b)'.
- the clarification of the definition of persons who 'may hold' native title in proposed s 251A be reproduced in s 24CG or otherwise stated to apply to that section.

Of these, the fourth recommendation is reflected in the current Bill and the third has become redundant in light of other changes in the current Bill. We encourage the Committee to consider the remaining recommendations, and in addition we recommend that:

- **the registration of NTRB-certified ILUAs remain subject to an objections mechanism;**
- **the reference to 'common or group rights' be removed from the proposed s 251A(3). For clarity, the order of subsections (2) and (3) should be reversed accordingly; and**
- **the reference in s 24CL(3) to 's 24(CG)(b)' should be changed to 's 24CG(b)(i) and (ii)'.**

3.1 The most significant change to the current Bill as compared to the previous exposure draft is the new treatment of NTRB-certified ILUAs. Under the existing Act (and under the previous exposure draft) the registration of ILUAs that have been certified by NTRBs is subject to an objection process (ss 24CI and 24CK). The current Bill proposes removing that objection process for certified ILUAs such that registration is essentially automatic – in effect giving NTRBs the final decision about registration, even potentially in the face of disagreement. In this sense the proposed amendments would effectively outsource the Registrar's function to NTRBs in cases of certification.

AIATSIS has reservations about this change to the scheme of checks and balances in NTRB functions. NTRBs already combine a wide range of functions, involving elements of advocacy, mediation, and decision-making. These elements may in some circumstances be in actual or perceived tension. NTRBs' exercise of advocacy and assistance functions in relation to their claim-group clients may raise concerns among other stakeholders about NTRBs' perceived ability to exercise impartial objective judgment in relation to certification of ILUAs. To take away the Tribunal's ability to respond to objections would be to remove an important aspect of procedural fairness.

- **AIATSIS recommends that the registration of NTRB-certified ILUAs remain subject to an objections mechanism.**

3.2 .We note that the current Bill, like the exposure draft, proposes to reduce the period for objections from three months to one month. If the notification procedure is to be anything other than an empty formality, it must be assumed that in at least some cases the objectors will not have learned of the ILUA previously and that receiving the notification marks their first opportunity to take action. On that assumption, one month will in most cases be insufficient. Preparing an objection capable of demonstrating a 'prima facie case' that the objectors may hold native title involves a potentially significant research and drafting task. While we understand the need to balance the interests of the parties to the ILUA on one hand, with the interests of the unregistered claimants on the other, we consider that a three month notice period represents a more appropriate timeframe.

- **AIATSIS recommends that the one month 'notice period' set out in s 24CH(5) for the lodging of objections be extended to three months, and that the same period be retained for objections to the registration of certified ILUAs.**

3.3 We note that the references in the exposure draft to the making of an overlapping native title application (as an alternative to lodging an objection) have been removed in the current Bill. AIATSIS' submission about the exposure draft noted that the proposed timeframe for lodging new claims would effectively render that option nugatory: at current processing rates, the Registrar would be unlikely to *register* a fully completed application within three months, and so the prospect of preparing, authorising and registering a claim within *one* month seems practically unachievable.

In light of the short timeframe (whether it be one month or three), AIATSIS considers that it is more appropriate to provide a sound objections process than to encourage the lodging of hastily-prepared claims. Accordingly, the current Bill's version of the proposed s 24CH(5) is preferable to the exposure draft's proposed s 24CH(6).

3.4 Finally, there are four minor drafting issues in the current Bill

(a) AIATSIS understands that part of the rationale for changing the ILUA authorisation provisions is that the decision in *QGC*[5] identified some complexities in the interpretation of the Act, in particular arising from the apparent distinction between the term 'persons who hold or may hold the common or group rights comprising the native title' and the term 'persons who hold or may hold native title'. The current Bill removes 'common or group rights' from the proposed s 251A(1), but reintroduces the term in s s251A(3). The reasoning behind this is unclear, but there is a strong risk that it will bring confusion and unpredictability to the authorisation process. Reeves J in *QGC* held that the term 'persons who hold or may hold the common or group rights comprising the native title' means 'registered native title claimants'.[6] To introduce that term in a context in which there are *no* registered native title claimants (as the proposed s 251A(3) does) is inconsistent with that interpretation. It would be more consistent and simple overall to specify that ILUAs must be authorised by (a) any registered claimant group and (b) any other persons who can establish a prima facie case that they may hold native title.

- **AIATSIS recommends that the reference to 'common or group rights' be removed from the proposed s 251A(3). For clarity, the order of subsections (2) and (3) should be reversed accordingly.**

(b) AIATSIS is pleased to note that our recommendation in respect of specifying 's*24CG(3)(b)(i) and (ii)'* in s 24CH(5) has been adopted. For consistency, that change should now be carried through to s24CL(3). In its current form, s 24CL(3) is capable of being interpreted to refer to the mere fact of including of the relevant statement, rather than to whether or not the statement is accurate.

- **AIATSIS recommends that the reference in s 24CL(3) to 's 24(CG)(b)' should be changed to 's 24CG(b)(i) and (ii)'.**

(c) Section 24CG(3)(b) refers to the identification of 'all persons who hold or may hold native title', and to the need to ensure that 'all of the persons so identified have authorised the making of the agreement'. The note to s 24CG(3)(b)(ii) says that 'The word *authorise* is defined in section 251A'. The proposed s 251A(2) introduces a stipulative definition for 'may hold native title', but the current Bill does not carry that definition through to s 24CG(3)(b)(i). The potential for inconsistency between s 24CG and s 251A in this regard is arguably what gave rise to much of the controversy in relation to *QGC Pty Limited v Bygrave* [2011] FCA 1457.

- **AIATSIS recommends that the definition in proposed s 251A(2) be specified to apply to s 24CG(3)(b)(i).**

(d) As mentioned in the previous AIATSIS submission, it is inaccurate for the proposed s 251A(3) to refer to 'paragraph (a) or (b)' without specifying the subsection in which those paragraphs are to be found (presumably subsection (1)).

---

[5] *QGC Pty Limited v Bygrave* [2011] FCA 1457.
[6] *QGC Pty Limited v Bygrave* [2011] FCA 1457 at [121].

- **AIATSIS recommends that the proposed s 251A(3) be changed to read 'in accordance with paragraphs (1)(a) or (b)'.**

3.5 AIATSIS supports the Bill's objective of clarifying and simplifying the procedures for authorising ILUAs, but considers that the Act should retain the objections process for certified ILUAs and should retain the 3 month period for making objections.

Contributors
Nick Duff
Lisa Strelein