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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

January 2013

Introduction

1. The *Native Title Amendment Bill 2012* (the Bill) was introduced into the House of Representatives by the Attorney-General on 28 November 2012. It was referred to House Standing Committee on Aboriginal and Torres Strait Islander Affairs on 29 November 2012. On that same day the Bill was also referred to the Senate Legal and Constitutional Affairs Committee. As part of its inquiry, the House Standing Committee on Aboriginal and Torres Strait Islander Affairs is calling for submissions addressing:
   - whether a sensible balance has been struck in the Bill between the views of various stakeholders, and/or
   - proposals for the future reform of the Native Title process.

2. This submission will be presented to both Committees. In summary, the submission indicates support for the general terms of the Bill particularly as these relate to improvements in the technical aspects of Indigenous Land Use

Agreement (ILUA) registration process, although some slight alteration to the proposed amendments to s 251A(2) is proposed. The submission goes on to suggest improvements to the provisions relating to:

- The definition of the requirements of good faith negotiations; and,
- The terms of the proposed s 47C regarding the circumstances where historical extinguishment can be disregarded.

3. Significantly, the submission also suggests the inclusion in the Bill of provisions relating to:
   - The evidential requirements in the establishment of a traditional connexion; and,
   - The ensuring of adequate safeguards for claimant groups in the disbursement of monies derived from future act agreements.

4. The submission has been prepared by Native Title Services Victoria (NTSV). NTSV was registered as a company limited by guarantee in August 2003 for the purpose of providing professional services to native title claimant groups in Victoria. It is funded under s 203FE of the *Native Title Act 1993* (Cth) (NTA) to carry out the functions of a representative body as prescribed in that Act. NTSV also receives funding from the Victorian Government to assist Traditional Owners in negotiations under the *Traditional Owner Settlement Act 2010* (Vic) and to assist Traditional Owners with Natural Resource Management projects. It is governed by a Board of Management comprised of Victorian Traditional Owners. NTSV exists to deliver sustainable Native Title outcomes to Aboriginal people in Victoria that will respect, protect and transmit Aboriginal culture and identity for present and future generations.

5. NTSV welcomes the opportunity to comment on the Bill and is committed to working with policy makers to develop legislative reforms targeted at improving the native title system and would be pleased to discuss further any of the issues raised in this submission.

1. Improvements to the ILUA registration process

A. Processes for amendments to ILUAs

6. Currently the NTA does not provide a clear process of enabling minor amendments to be made to ILUAs. NTSV broadly supports a simplified registration process for minor ILUA amendments, as provided for in the proposed section 24ED. This can enhance the flexibility of ILUAs and minimise costs and resources involved in requiring an amended ILUA to be re-registered. In particular, NTSV supports the proposed section 24ED insofar as it itemises specific variations that may be made to an ILUA, rather than creating an open-ended and discretionary scheme for ILUA amendments.

B. Authorisation and Registration processes for ILUAs

Registration of certified ILUAs

7. NTSV supports the proposed amendment to section 24CK, which removes the objection process for ILUAs certified by a Native Title Representative Body or Service Provider. NTSV believes that such an amendment will lead to a reduction in the duplication of registration requirements. Further, NTSV believes that the amendment would also reduce delays associated with ILUA registration in circumstances where the certification of the representative body or service provider provides a safeguard of probity. NTSV believes that this approach would assist in expediting settlements under Victoria's *Traditional Owner Settlement Act*.

Authorisation of Area ILUAs

8. The proposed section 251A (2) defines persons who may hold native title as *persons who can establish a prima facie case that they may hold native title*. NTSV submits that the application of this provision should be clarified to ensure that the requirement for the establishment of a *prima facie case* is **not** automatically equated with a requirement that those authorising the ILUA have a

registered determination application in circumstances where the ILUA has been certified pursuant to section 24CK.

9. Altering the proposed provision in this way gives effect to the intent of the amendment through ensuring that only those claimants with a credible claim are appropriate to authorise an ILUA. The credibility of the claim is assured by the section 24CK certification on one hand or by the requirement for prima facie evidence otherwise.

10. NTSV submits that a failure to adopt this alteration to the proposed amendment to section 251A(2) may reduce the ability of native title groups to achieve settlements through negotiated agreements as an alternative to pursuing a Federal Court determination of native title, inadvertently undermining the Commonwealth Government's objectives of encouraging such agreement making. By way of example, Victorian Government policy relating to settlements under the *Traditional Owner Settlement Act 2010* (Vic) allows for that Government to enter into ILUAs with persons other than registered claimants or registered bodies corporate in settlements.[1]

C. Scope of Body Corporate ILUAs

11. NTSV supports the proposed amendments to section 24BC, to ensure that Subdivision B ILUAs are available to parties that have an ILUA which includes areas where native title has been extinguished.

2. 'Good Faith' and associated amendments under the 'right to negotiate' provisions

12. Where section 31(1)(b) NTA applies to a Future Act, parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act. This good faith negotiation requirement is an important legal safeguard afforded to native title parties under the Future Acts regime.

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[1] Department of Justice Victoria, *Victoria's submission to the exposure draft: proposed amendments to the Native Title Act 1993* (19 October 2012): 2.

D. The meaning of good faith

13. The current drafting of section 31(1)(b) NTA provides little guidance as to the meaning of the "good faith". Further, the National Native Title Tribunal and Federal Court of Australia have offered restrictive interpretations of the meaning of the term. This has meant that it is very difficult, under the current law, for native title claimants or native title holders to establish that a proponent has failed to act in good faith. This makes section 31(b) difficult to enforce and diminishes the significance of the safeguard for native title parties.

14. NTSV supports the Bill's inclusion of explicit criteria as to what constitutes "good faith." The proposed criterion requires the Court or Tribunal to look beyond the mere surface of negotiations to determine whether there has been a lack of good faith.

15. NTSV submits that the Bill should not provide an exhaustive codification of the "good faith negotiation requirements". The criteria listed should only form part of the matters that might be indicators of "good faith". The National Native Title Tribunal and the Federal Court should have the power to find an absence of good faith even where all of the good faith negotiation requirements, as listed in the Amendment Bill, are satisfied.

16. NTSV submits that further consideration should also be given to the following:
    (a) including a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith;[2]
    (b) inserting a "reasonable person" test which may be used in assessing the conduct of a proponent seeking an arbitral determination when negotiations are at a very early stage;[3] and

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[2] See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011* (12 August 2011): 9.
[3] Ibid

(c) supplementing the legislative criteria pertaining to good faith with a code or framework to guide the parties as to their duty to act in good faith.[4]

E. Good faith negotiations

Timeframes for right to negotiate

17. NTSV submits that the right to negotiate, as currently drafted, is limited insofar as the proponent is able to apply for a determination by an arbitral body under section 35 after only six months. In certain circumstances this timeframe will be insufficient to allow for adequate negotiation. NTSV therefore welcomes the Bill's extending the time before a party may seek a determination from the National Native Title Tribunal to eight months. However, NTSV considers that there should also be a statutory requirement to negotiate for a period of less than eight months where circumstances support a shorter negotiation period.

Onus of proof in relation to good faith negotiations

18. NTSV supports the Bill's proposed amendments to section 36(2) NTA, which will require the party seeking arbitration to show that they have negotiated in good faith where it is asserted that that party did not negotiate in good faith. NTSV believes that this is an important measure in improving the fairness of the right to negotiate procedure. It is hoped that this amendment will have a positive effect in terms of altering the behaviour of negotiating parties, for instance by discouraging the premature termination of negotiations and leading to more beneficial negotiated agreements.

3. Proposed section 47C

F. Historical Extinguishment

19. The NTA currently includes provisions that require historical extinguishment of native title to be disregarded in certain circumstances. The Bill seeks to provide parties with more flexibility to agree to disregard historical extinguishment over

[4] Ibid.

parks and reserves. NTSV supports the expanding of the range of circumstances in which extinguishment can be disregarded and NTSV broadly supports the proposed amendment. However NTSV makes the following observations and submissions on the form of the proposed amendment.

Public Works

20. The Attorney-General's Department *Exposure Draft: Proposed amendments to the Native Title Act 1993* (Exposure Draft) states that the model for the proposed amendment is based on sections 47 to 47B NTA. NTSV notes that there are problems with the drafting of sections 47 to 47B NTA, insofar as the provisions refer only to disregarding prior extinguishment by the grant of previous *interests*. The prevailing view seems to be that this would not extend to allowing the disregarding of extinguishment by previous public works (that is, works constructed by the Crown without any grant of an 'interest' as such). In *Erubam Le (Darnley Islanders) (No 1) v Queensland*[5] it was held that creating or establishing a public work could not be characterised as the "creation of any other prior interest" and accordingly the extinguishment created by such works could not be disregarded.

21. In light of these issues, NTSV welcomes the drafting of the proposed section 47C insofar as it allows for the extinguishing effect of the construction or establishment of public works to be disregarded. NTSV submits that, as a matter of principle and consistency, this amendment should be extended to sections 47, 47A and 47B.

22. NTSV further submits that the provision allowing the extinguishing effect of the construction or establishment of public works should not be limited to public works constructed or established by or on behalf of the Crown, but should be extended to public works constructed or established by or on behalf of statutory authorities and local government bodies.

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[5] (2003) 134 FCR 15

Requirement for Agreement/Consent

23. NTSV notes that the proposed amendment would only allow extinguishment to be disregarded where there is agreement between the government party and the native title parties. NTSV submits that the proposed amendment should be strengthened by removing the requirement that there be an agreement before extinguishment can be disregarded. A number of reasons are offered for this.

24. Firstly, NTSV notes that there is an inconsistency in drafting between the proposed section 47C and other NTA provisions which already allow for historical extinguishment to be ignored. Sections 47 to 47B of the NTA already allow for the disregard of historical extinguishment in prescribed circumstances; however, these provisions do not require State or Commonwealth consent for historical extinguishment to be disregarded and there is no clear rationale as to why the proposed section 47C should be drafted any differently. NTSV notes that the interests of stakeholders other than native title claimants would still be protected without a consent requirement. Section 47C(8) makes it clear that disregarding the extinguishing effect of previous grants or legislation has no impact on the actual ongoing interests held by governments or others in the park area. To the extent that current grants or reserves are inconsistent with native title, they will prevail to the extent of the inconsistency.

25. Secondly, the beneficial operation of the amendment will depend on the willingness of Government to disregard extinguishment. Entrenched interests on the part of Government may limit any such willingness. Accordingly, the reform may not be successful in promoting agreement-making with respect to prior extinguishment.

26. Thirdly, the requirement for consent is likely to create uncertainty and inconsistency between jurisdictions and governments. The provision as currently drafted may also lead to inconsistency and uncertainty within particular jurisdictions as government is free to exercise its discretion to enter into an agreement in a different manner from one "park area" to another.

27. NTSV strongly believes that a provision which is intended to benefit a native title party should not be made conditional upon the exercise of a discretion granted to the government party.

28. Should the proposed consent requirement be retained, NTSV submits that the proposed amendment should be strengthened by providing that, where native title exists over a national park or reserve and the only other interest holder in that land is the Crown, extinguishment should automatically be disregarded.[6]

Advertising Requirement

29. The proposed amendment includes notification requirements. It provides that, before making an agreement under the proposed section, the relevant government party must arrange for reasonable notification of the proposed agreement in the State or Territory in which the park is located, and must provide "interested persons" an opportunity to comment on the proposed agreement.

30. NTSV submits that the purpose of this notification/advertisement requirement is unclear. This is because, as noted above, prior interests in the land will prevail over native title in circumstances where extinguishment is to be disregarded.

31. NTSV is concerned that the notification process will complicate the operation of the beneficial provision. This is especially the case given that "interested persons" is not defined in the proposed amendments. Any uncertainty surrounding the definition of this term may cause persons with insufficient interests causing unnecessary delays to the determination of applications. The notification process may also provide Government with an additional leverage in negotiations, which may jeopardise the beneficial operation of the provision.

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[6] See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission to Attorney General's Department on Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* (July 2010): 2 <http://www.ag.gov.au/Documents/SUBMISSION%20-%20AIATSIS%20-%20historical%20extinguishment%20-%2022%20March%202010.PDF>

Limitation to Parks and Reserves

32. NTSV submits that further reform is necessary to expand the circumstances in which historical extinguishment can be disregarded so as to include all Crown land and not simply parks and reserves within the meaning of "park area" as defined in proposed section 47C.

33. There appears to be no reason not to permit the disregard of extinguishment in all areas of Crown land. Where the non-extinguishment principle applies and existing interests are protected, this approach would not diminish currently held rights and interests. Whilst this amendment would raise the issue of co-existence between native title and other interests, this issue of co-existence is not new; for instance, under the current law the rights of pastoral lease holders can co-exist with native title rights.

34. If policymakers are hesitant about the creation of a blanket rule of automatic application in which *any* historical extinguishment is disregarded, it may be appropriate to include a requirement for parties to agree to disregard extinguishment in this context of a broader disregarding of historical extinguishment. Specifically, an additional section could be introduced into the NTA allowing for the broader disregarding of extinguishment wherever the relevant government agrees, subject to a clarification to ensure that the new section does not detract from the compulsory effect of sections 47-47B **and** the section 47C proposed in these submissions.[7]

Limitation to onshore places

35. The proposed section 47C only applies to park areas that are in an "onshore place." Accordingly, section 47C would not apply to marine parks. NTSV submits that this limitation is inappropriate and there seems no reason in principle why section 47C should be restricted in this manner. Assuming that the relevant connection under traditional law and custom can be shown, and the rights and

[7] See Australian Institute of Aboriginal and Torres Strait Islander Studies, *Comments on exposure draft: proposed amendments to the Native Title Act 1993* (19 October 2012): 6. See also Australian Lawyers for Human Rights, *Comments on exposure draft: proposed amendments to the Native Title Act 1993* (23 October 2012): 6.

interests claimed are otherwise consistent with the laws of Australia, there is no relevant difference between on-shore and off-shore places. In those circumstances, the issue of whether or not the creation of parks and reserves has extinguished native title would not appear to be affected by the on-shore or off-shore location of the claimed area.

36. Allowing section 47C to apply to offshore places does not limit the ability of government to regulate activities occurring offshore (such as commercial fishing) because the disregarding of extinguishment has no effect on the validity of the extinguishing act, and the ability of governments to regulate effectively is entirely unrestrained.[8]

4. Reversing the onus

G. Shifting the burden of proof / Rebuttable presumption of continuity

37. NTSV strongly supports the amendment of the NTA so as to reverse the onus of proof in native title claims and to provide for a rebuttable presumption of continuity.

38. The need to reverse the onus of proof has been raised on many occasions by Native Title Representative Bodies and Service Providers and other Indigenous leaders and spokespersons. Significantly, Chief Justice French AC of the High Court of Australia has suggested that the NTA could be amended to provide for a presumption in favour of the existence of native title rights and interests if certain conditions are satisfied.[9] His Honour described this as a presumption subject to proof to the contrary, which "could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time".[10] His Honour described this

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[8] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Comments on exposure draft: proposed amendments to the Native Title Act 1993* (19 October 2012): 5-6.
[9] 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): 2.
[10] 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): 10.

amendment as a "modest change" which does not affect "the skeletal structure of native title law."[11]

39. The application of the tests for continuity has been a significant obstacle to the full realisation of Aboriginal and Torres Strait Islander peoples' land rights and has had a detrimental effect on native title claims. The significant evidential burden of proving continuity has operated in an unjust manner, in circumstances where proof of continuity is required despite historical acts of government being directed at severing Indigenous peoples' connections to their land. Under the current approach Indigenous Australians who have experienced the greatest degree of dispossession and interference are those least likely to be recognised as native title holders over their country.

40. Chief Justice French has noted that there is a sense that the beneficial purpose of the NTA has been frustrated by the extraordinary length of time and resource burdens that the process of establishing native title, whether by negotiation or litigation, impose.[12] NTSV believes that a rebuttable presumption of continuity would significantly reduce the time and cost of reaching determinations of native title claims and would be consistent with the beneficial purpose of the NTA.

41. NTSV believes that the amendment can help reduce the resource and cost burden of the native title system by resulting in significant savings in the cost of research, analysis and expert opinions and reports on documentary evidence. From a practical perspective NTSV believes that it is more appropriate to place the burden of proof on States and Territories which, by virtue of its "corporate memory", is likely to hold significant material concerning Indigenous peoples and communities and the history of colonisation applicable to its jurisdiction.[13]

42. NTSV believes that the amendment would encourage government parties to settle native title claims, particularly where claims have a strong prospect of

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[11] Ibid 2.
[12] 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): 3.
[13] Cape York Land Council, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 201* (29 July 2011): 5; National Native Title Council, *Comments on exposure draft: Native Title Amendment Bill 2012* (23 October 2012): 7.

success. By encouraging settlement of claims, the amendment may also improve the quality of positive outcomes for native title claimants.

43. The Australian Government has previously been criticised by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for its approach to native title and CERD has expressed concerns about the onerous evidential burden imposed on native title claimants.[14] NTSV submits that an amendment to the NTA which includes a rebuttable presumption will provide an opportunity to address the criticisms and concerns of CERD and will provide an opportunity to create a just and fair native title system.

H. Unfreezing Tradition

44. NTSV submits that the problem with current tests of continuity is not simply that claimants carry the burden of demonstrating continuity of rights and interests under "traditional laws acknowledged" and "traditional customs observed" or in the need to demonstrate the maintenance of connection with lands and waters since colonisation. It is submitted that the current law is also problematic because judicial interpretation of these requirements has resulted in Indigenous Australians being constrained by an interpretation of "traditional" which is frozen at the time of colonial contact and which may not allow for traditional laws and customs to develop and progress over time in the way that all cultures adapt and change over time.[15] In this way the current law fails to acknowledge the complicated realities of contemporary Traditional Owners and communities.

45. NTSV submits that the NTA needs to be amended so that the notion of "traditional" is recognised as evolving and adaptive to change. NTSV submits that any presumption of continuity would be undermined if respondents could rebut the presumption simply by establishing that a law or custom is not practised as it

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[14] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), [18].

[15] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011* (12 August 2011): 10; Jon Altman, Centre for Aboriginal Economic Policy Research (Australian National University), *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011* (1 August 2011): 6.

was at the date of sovereignty.[16] NTSV submits that an appropriate amendment to the NTA that would avoid these problems is to define "traditional laws acknowledged" and "traditional customs observed" to encompass laws and customs that "remain identifiable through time".

46. NTSV further submits that the amended NTA should explicitly state that actions of a settler or the State cannot be relied upon to establish an interruption or substantial change in the traditions of native title claimants. NTSV submits that it would be unacceptable for the State to successfully argue that it is the effect of deliberate State or settler dispossession and interference which makes continuity impossible. NTSV notes that any issues of extinguishment arising from such settler or State action would need to be considered separately from the issue of continuity.

47. In addition, NTSV believes that the NTA should be amended to provide explicit recognition of the possibility for traditional laws and customs to be revived. This is especially important where interruption to the observance of laws and customs has occurred as a result of external intervention.

5. Future Act safeguards for Native Title groups

I. Current Regulatory Arrangements

48. Under section 203B(1)(a) and (e) Native Title Representative Bodies (NTRBs) have functions in relation to their defined area to represent native title holders and claimants (collectively "native title parties") in pursuing native title determination applications, future act agreements and ILUAs. In general these functions can only be performed at the request of the native parties. In performing these functions NTRBs are bound by the extensive regulatory regime contained in Part 11 of the NTA. In addition, the legal practitioners employed by NTRBs to undertake these functions are bound by the legislative and ethical standards

[16] Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011* (12 August 2011): 10.

applicable to the broader legal profession under the relevant professional conduct rules. Under section 203FE, Native Title Service Providers (NTSPs) are subject to the essentially the same regulatory regimes, as are their employed legal practitioners. Further, both NTRBs and NTSPs (collectively Native Title Organisations – NTOs) are subject to the prescriptive terms of their Program Funding Agreements (PFAs). The current PFAs include requirements going to (*inter alia*) consultation with FAHCSIA regarding key personnel appointments and accounting for "program generated funds" which would include fees or commissions arising from future act negotiations). The ability of FaHCSIA to withdraw funding from an NTO operates effectively as a further regulatory mechanism.

49. There is nothing in the NTA that requires native title parties to utilise the services of NTOs in pursuing native title determination applications, future act agreements and ILUAs. In addition, while a party can only be represented in the Federal Court by a person other than a legal practitioner only by leave of the Court (s 85), there is no such limitation in relation to future act proceedings before the National Native Title Tribunal (NNTT). In practice the funding provided to NTOs to pursue native title determination applications and the "no costs" provision contained in section 85A ensures that, with few exceptions, only NTOs (or legal practices funded by NTOs) represent native title claimants in determination application proceedings. The same is not true in relation to future act negotiations and agreements.

50. The current scheme of the NTA allows native title parties to appoint an "agent" (not being an NTO) in relation to future act negotiations and for that agent to secure for themselves a proportion of any benefits arising from those future act negotiations. In the case of future acts involving mining projects even a small percentage of the benefits arising from the proposals can represent a significant amount that would otherwise be available for the native title parties. In the event that these agents are a legal practise the only regulatory regime is that applicable under the relevant professional conduct rules. In the event that the agents are an entity that is not a legal practise, even one that employs legally qualified staff, there is no regulatory regime.

J. The mischief to be remedied

51. Recently it has become apparent that, particularly in resource rich areas, there is an increasing prevalence of predatory behaviour by native title "agents". In general the pattern of behaviour in these cases appears as follows. An "agent" will approach a member of a native title claim group that has had notice of a significant future act proposal. The agent will suggest that the relevant NTO is not securing for the claim group that quantum of benefits that the agent could secure (and) or that these benefits could be secured more quickly by the agent. The agent will then facilitate a meeting of the native title party group (often of dubious legitimacy) to appoint them to undertake the future act negotiations. The negotiations conducted by the agent will not result in any overall higher level of benefits or more expeditions outcomes. However, the agent will secure for themselves a proportion of the benefits; the balance is paid to the native title party without regard for the structuring of these benefits to delivering long term economic development outcomes to the native title party. At times the balance of the funds may be paid to a nominated corporate entity which is not inclusive of the overall claimant community.

52. In cases where the agent is a legal practise the only recourse available to the NTO is to lodge a complaint with the relevant Law Society regarding approaching the NTO clients. Information received from some NTOs suggests that Law Societies are loath to pursue these complaints due to a reluctance to become involved in what is often seen as intra-Indigenous disputes. As noted above, where the agent is not a legal practise there is no recourse available to the relevant Law Society. Anecdotally it also appears that involvement by agents in these circumstances can lead to significant delays in progressing the underlying determination application.

53. Clearly this is a situation that requires some regulatory intervention. It was never the intention behind the NTA that the future act regime it established would be used to fund a new "industry" of agents. Certainly it was never intended that

these agents should profit at the expense of the Indigenous communities they represent. Nor was it intended that this process would operate to impede the primary objective of the expeditious resolution of determination applications

K. Options for regulation

54. The problem created by unscrupulous native title agents poses a number of regulatory options: restriction of ability to engage in future act negotiations to NTO's; requirement for registration of native title agents; or prescription of the identity of the recipient of future act monies. However, each of these regulatory options has some undesirable implications. A restriction on the ability to engage in future act negotiations to NTO's can be criticised as restricting contestability in these services. This may be unacceptable to certain professional groups such as lawyers and be seen to be restricting native title claimants' freedom of choice.

55. Similarly a requirement for registration of native title agents faces the difficulty of requiring the establishment (or identification) of a registration authority and registration criteria and then enforcement and monitoring of the registration regime. Again, certain groups such as the legal profession may also object to what they may see as an additional, unnecessary regulatory burden.

56. The approach of regulation through prescription of the identity of the recipient of future act monies has the advantage that through regulating the proceeds of future act agreements the incentive for the involvement of unscrupulous future act agents is removed. An example of this model of regulation would be legislative provision requiring monies derived from future act agreements to be paid to a statutory trustee. However, this approach can be legitimately criticised as constituting an unacceptable interference with the right of native title claimants to self-determination through the management of the proceeds of activities on their lands. The establishment of a statutory trustee with a statutory monopoly can also be criticised for reducing contestability in the management of future act funds.

57. Given these difficulties, the approach favoured by NTSV (and it is understood a number of other NTOs and the National Native Title Council) is one that adopts a "light hand" in the management of regulating the proceeds of future act agreements. Under this preferred approach there is no restriction on the identity of the recipient of future act monies but rather legislative provision is made to set standards and rules regarding the management and disbursement of these funds.

58. The approach is similar in structure to that used in relation to the management of solicitors' trust funds in that under that structure rules are made that regulate the manner in which any solicitor manages whatever client trust accounts they establish. The analogy should not be taken too far however. For example, the common prohibition in solicitor's trust accounts on the payment of interest and the establishment of a regulatory structure of trust inspectors is not contemplated. At this stage the main focus of regulation posited is provision that future act generated monies should be disbursed in accordance with the instructions (or for the benefit) of the entire "claim group" (as opposed to the individual named applicants). A further benefit of this "statutory trust" approach is that it could allow for the "tracing" of any funds disbursed in violation of the statutory rules. In general this approach is consistent with articulated Commonwealth objectives of ensuring that benefits from native title agreements are structured to ensure maximum benefit to the native title claim group as the owner of those benefits.

59. In the context of the Bill it is submitted the only amendment that would be necessary at this stage is the insertion of a provision allowing for the making of Regulations regarding the management of funds derived from future act agreements. The detail of such regulations could then be developed after further discussion with key stakeholders such as NTOs (through the National Native Title Council - NNTC), Prescribed Bodies Corporate, the Minerals Council of Australia and the Law Council of Australia.

60. The NNTC has commenced discussion with the LCA, the Commonwealth Attorney-General's Department and FaHCSIA around this proposal which has been received positively. It is proposed the next step in the process is to further

develop the definition of the notion of the "native title claim group" which is central to many of the provisions of the NTA. The proposed insertion of an express regulation making power in relation to this topic would facilitate the implementation of this policy development process once complete.

Conclusion

61. NTSV believes that the Bill represents a significant step in enhancing and improving Native Title processes. In particular the proposed amendments to the ILUA registration processes should expedite the achievement of positive native title outcomes across the nation. Similarly, as discussed in this submission the proposed reforms in the areas of good faith negotiations and the treatment of historical extinguishment are to be applauded.

62. This submission has argued that the Bill creates the opportunity to further advance reform of native title processes. This opportunity arises in the context of a further enhancement of the reforms proposed in the good faith negotiations and the treatment of historical extinguishment. It also arises through suggested inclusion in the Bill of additional reforms in the areas of the onus of proof in the establishment of traditional connexion and in ensuring safeguards in the management of monies derived from future act agreements.

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