**SUBMISSION TO THE INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL 2012 BY THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS**

On 18 December 2012 we received an invitation to make a written submission regarding proposals to amend the *Native Title Act (1993)* ("the NTA") as set out in the *Native Title Amendment Bill 2012* ("the Bill"). We previously made comments to the Government on the exposure draft and the submissions we make below are in addition to those comments.

**Primary Submission**

The Bill, if not substantially amended, should be withdrawn because it has the potential to make the process of obtaining authorisation of Area Indigenous Land Use Agreements (ILUA's) unworkable and the remaining issues that the Bill seeks to address are not of sufficient urgency or importance on their own to warrant legislative intervention.

**Schedule 1 – Historical extinguishment**

1. We generally agree with those who submit that as a matter of principle, past extinguishment in National Parks and other Protected Areas should in most circumstances be ignored. Generally, however, it makes very little practical difference due to the fact that by operation of s23B (9A) of the Native Title Act such areas are deemed not to be previous exclusive possession acts and in such areas, because native title will need to co-exist with other public rights, it is not possible to obtain an exclusive determination of native title. Never the less, the proposed provision, in circumstances where the State has discovered old tenure documents, may have some application where prior exclusive tenure operated before the area concerned was vested as a National Park or other Protected area. From our experience, such instances have never been a sticking point preventing a consent determination of Native Title because the State has been prepared to accommodate indigenous interests by other forms of title or in negotiations for a consent determination simply has not pressed the case for extinguishment.

2. We note the proposed provision also extends to public works. Our experience is that in practise Governments and Local Councils only insist on having public works specified in the schedules as an area excluded from a Native Title Determination where such public works are still actively being utilised or monitored for health reasons (such where gas emissions from old refuse tips are being monitored). In most cases, whether public works have in the past extinguished native title and to which degree does not become an issue in negotiations for a consent determination of native title because the parties do not wish to embark upon a largely artificial exercise of locating old records which establish the scale and extent of the public work and arguing about the extent that Native Title may have been extinguished because of it.

3. We note that the provision is only enlivened where the relevant Government Party is willing to enter into an agreement with the RNTBC/applicant/Representative Body. Unlike the rest of the section 47 'suite', the benefit of the new provision will not take effect unless the factual requirements of the proposed section are established and the agreement of the relevant Government Party is obtained. This introduces the possibility of inconsistency as

Government Parties are free to exercise the discretion granted to them under the provision in a different manner from one "park area" to the next. In our view, a provision which is intended to benefit a native title party should not be made conditional upon the exercise of a discretion granted to a Government Party. Like the other parts of the section 47 'suite', there should be a presumption that past extinguishment within "park areas" is disregarded with such presumption being rebuttable. We recognise that there may be some circumstances where it may be necessary to protect the interests of public use and enjoyment and third party commercial interests, particularly where the claimed native title is inconsistent with the purpose of the protected area. However, in our experience, these circumstances are generally best accommodated by an ILUA aimed at regulating the circumstances of when and where native title rights and interests may be exercised on the parcel of land in question.

**Schedule 2 – Negotiations**

As a general proposition we would agree that there should be further legislative encouragement to parties to genuinely negotiate in relation to Future Acts for the purpose of achieving better outcomes for Indigenous people. This is particularly so on the East Coast of Australia where the outcomes for Aboriginal people from Future Act agreements have been miserable.

However, in our view, the proposed S31A provision relating to requirements for negotiations in good faith has a number of serious shortcomings and by itself is unlikely to achieve that goal:

1. It seems that it is intended that the proposed provision S31A will only apply to Future Acts which attract the right to negotiate. However, area ILUA's are increasingly the preferred means of dealing with Future Acts particularly where large projects are involved. Proponents often find it convenient to have all the Future Acts on land affected by their projects dealt with by an area ILUA. If the intention is to encourage parties to genuinely engage with each other to reach agreement, it makes no sense to confine the requirement to negotiate in good faith only to Future Acts attracting the right to negotiate.

2. We note S228 of the *Fair Work Act 2009 (Cth),* contains good faith bargaining requirements and the Explanatory Memorandum for the Bill states that Paragraph 31A(2)(b) contains similar provisions to those in the *Fair Work Act* and they are also broadly consistent with what are known as the Njamal Indicia (set out in Western Australia v Taylor (1996) 134 FLR 211). However, by comparing the two provisions, and even allowing for changes in context, it is apparent that the proposed S31A in the Bill attempts to go further than the provision in the *Fair Work Act*. However, we agree that the differences between the two provisions are not likely to materially affect the behaviour of participants in negotiations. We have elicited the view of experienced Counsel as to whether, as a general proposition, S228 of the *Fair Work Act* has encouraged opposing parties in the industrial relations arena to genuinely engage with each other with a view to reaching agreements. The considered view of Counsel was that it had but it was misleading to consider S228 in isolation of the general statutory scheme embodied in the *Fair Work Act* and the effect that this scheme as a whole has had upon encouraging good faith negotiations. We note that in contrast to the Native Title Act, the *Fair Work Act*:
    - requires agreements to meet or be better off overall than a set of minimum standards

(S272);

- in respect of disadvantaged employees (low paid employees) provides for arbitration or determination of particular points of difference between negotiation parties (S240 and S261);
- prohibits the inclusion in agreements of Unlawful and Discriminatory terms (S193 to S195);
- provides for intervention by the Fair Work Commission on its own motion where it is satisfied the bargaining process is not proceeding effectively or fairly (S230); and
- Provides protection against a party engaging conduct against another that amounts to retaliatory action, coercion, undue influence and misrepresentation (S340 to S345).

The question that arises is whether the inclusion of good faith bargaining requirements (even the "beefed up version" as proposed for the NTA) will alone bring about changes in the negotiating behaviour of the Parties and more importantly better outcomes for Aboriginal people?

Our view is that it will not for the reason that there is inequality of bargaining power between most proponents of Future Acts and Traditional Owner groups. In our experience, most proponents are financially well off and sophisticated. The mining industry in particular is dominated by very large corporations. In bargaining negotiations on the whole, proponents and their representatives behave in a cordial and responsive manner and therefore the proposed S31A will have very little affect. By contrast, Traditional Owner groups are reliant upon proponents for reimbursement of travelling fees and for funding their representation and meeting costs. Many members of Traditional Owner groups are relatively poorly educated, suffer from chronic health problems and are financially impoverished. They have no experience or training in bargaining techniques. They are not able to match the proponents with access to expert opinion (particularly valuers and financial experts). They may be readily manipulated, susceptible to coercion and threats. For many, they have been engaged in the process for nearly two decades, trying to prove their native title with no resolution in sight. They are informed by proponents that if they don't agree, they will have to take their chances in being able to prove their native title before there is any prospect of obtaining compensation for their people. In respect of large resource companies involved in projects of economic significance, native title claimants are constantly reminded by proponents that compulsory acquisition is a real possibility.

In relation to the exposure draft, we commented that the provisions relating to misleading or deceptive conduct, unconscionable conduct, unfair contractual terms and harassment and coercion in schedule 2, the *Australian Consumer Law of Competition and Consumer Act 2010* would appear to be suited to regulating the negotiation and outcomes of native title agreements and area ILUA's

Upon further consideration, we are of the view that some of the provisions of the *Fair Work Act* may also be suitable for inclusion into the NTA.

We note that Paragraph 31(1)(c) of the Bill provides that the scope of the negotiations must include consideration of the effect of what is proposed by the doing of the future act, on the

registered rights and interests of the native title party or parties. The Explanatory Memorandum states that the purpose of this requirement is to overcome the affect of the decision of the Full Federal Court in FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49 and compel negotiations about the doing of the future act in question.

However, by contrast with the *Fair Work Act* there are no minimum requirements that Future Act agreements must meet. The emphasis is on behaviour rather than outcomes and in our view this is a significant shortcoming. While it would be difficult to provide for a standard set of minimum conditions that must be incorporated agreements, it is feasible to specify that agreements should address certain subject matter if they are to take effect. For example, agreements that provide for the payment of compensation over the life of a project should include provisions for establishment of entities or trusts which are accountable for the proper administration and equitable distribution of those funds and for capacity building and training of Indigenous persons to run them. Other issues that should be required to be addressed in such agreements are employment, training and contracting opportunities for Indigenous persons in the project and there should be a review period and mechanism specified in the agreement. Because compensation for the impairment and extinguishment of native title rights and interests is a vexed question, with all Parties to date shying away from judicial determination, the legislature should give consideration to the inclusion in the NTA of a set of principles which are applicable to the calculation of compensation. As it stands, the effect of Sections 51, 51A, and 53 of the NTA is unclear and provide very little assistance to parties in S31 agreements and ILUA negotiations.

Other concepts included in the *Fair Work Act* that warrant consideration by the legislature are the provisions allowing arbitration or determination of particular points of difference between parties arising during negotiations (with agreed points being maintained), the ability of an arbitral body to intervene of its own motion where it is satisfied the bargaining process is not proceeding effectively or fairly and protection against a party engaging conduct against another that amounts to retaliatory action, coercion, undue influence and misrepresentation.

3. For the exposure draft, we commented that the proposed S31A would not address current uncertainty and may create a new area of conflict. We note, however, that the version proposed in the Bill has addressed most of our concerns. One possible exception is that the proposed S31A makes no attempt to address the question of the inability of a native title party to properly engage in the negotiation process because it lacks the financial capacity to do so. To this end, we note that it is intended that S31A will apply equally to all negotiation parties with the result that a native title party may be found to be in breach of the provision because it simply lacks the capacity to get to meetings or to respond to a proponents offer. We suggest that a clause be added to the Bill to the effect that: **"A Native Title Party which is a Negotiation Party will not be in breach of the good faith negotiation requirements set out in Sections 31A (2) (a) (i), (iii), (vi), (v) and (vii) where it lacks the financial capacity to do so."**

**Schedule 3- Indigenous Land Use Agreements**

1. We note that the proposed Bill does not attempt to address our comments in relation to the

exposure draft.

2. In our view, the Bill if implemented in its current form will result in the provisions relating to area ILUA's becoming unworkable in relation to Future Acts. Having regard to the increasing popularity of area ILUA's as the preferred means of dealing with major resource projects this would be a major setback not only for proponents but for Indigenous people as well.

3. By far the most troubling aspect of the Bill is that it facilitates objections by individuals to the registration of an area ILUA on the basis that they are members of a competing group of native title holders and ought to have a right to separately and independently authorise the ILUA. This effectively provides such persons with a right to veto the authorisation of an area ILUA even though:

   (a) They may constitute a small minority of persons who may hold native title and the ILUA may have been authorised by a majority of persons claiming to hold native title in the ILUA area;

   (b) There may have been nothing but an assertion (not tested by a court or even at a preliminary level by having to pass the registration test) that such persons are a different group holding Native Title by virtue of observing traditional laws and customs from others who also claim to hold Native Title in the proposed ILUA area;

   (c) There may be a registered Native Title claim over the ILUA area; and

   (d) They may have been notified and in fact participated along with others (including members of a registered native title claim group) in the authorisation process for the ILUA.

   This is precisely the factual situation which gave rise to the litigation in QGC Pty Ltd V Bygrave (2011) 199 FCR 1019 ("*Bygrave No3*") where Justice Reeves found that by the inclusion of the words "the common or group rights comprising" in Paragraphs 251A (a) and (b) of the NTA, the Legislature intended that area ILUA's must be authorised by members of a claim group of a Registered Native Title Claim (having passed the registration test). Accordingly, Justice Reeves held that only the members of the claim group of a registered native title claim had a right to object to the registration of an ILUA on the basis that they have not independently authorised it. In effect, Justice Reeves found that the only persons with a right of veto over the registration of area ILUA's were claim group members of registered native title claims. One of the policy reasons cited by Justice Reeves in *Bygrave No3* was the Legislature's intention to encourage persons who may hold native title to submit to the process of filing and obtaining registration of Native Title Claims under the NTA. If persons could so easily frustrate the registration of area ILUA's (and the benefits payable to Indigenous persons under them) as facilitated by the Bill, they would have very little incentive to submit to the processes set out in the NTA for obtaining a determination of Native Title.

4. While it was unnecessary given the factual circumstances in *Bygrave No3* for Justice Reeves to decide the issue, he does say that Indigenous persons who are not part of a registered native title claim group who assert native title in the area proposed to be covered by an area ILUA must continue to be identified and be involved in the authorisation process (presumably in conjunction with members of a claim group of a registered native title claim if such exists). It is, however, clear from Justice Reeve's decision in *Bygrave No3* that such persons do not have the right to insist that they *separately* authorise an area ILUA.

5. In our view, the decision of the Court in *Bygrave No3* is deserving of legislative support because it has provided parties involved in the negotiation of ILUA's with some long-awaited certainty in relation to who must be involved in the authorisation process and the process that must be followed (i.e. there is no need to obtain separate authorisations from each group of Indigenous persons who claim to be different to others by mere assertion).

6. The Bill seeks to undo the effects of *Bygrave No3* by deleting the words relied upon by Justice Reeves in S251A (a) and (b) for arriving at his conclusion. As we commented in relation to the exposure draft, not only will this render the provisions for area ILUA's unworkable by swinging the balance back in favour of individuals as opposed to collective or group native title interests, it will mean that legislative policy for the authorisation of area ILUA's will be different from that required by the NTA for the authorisation of Native Title claims. The Federal Court has held that the NTA requires that the authorisation of native title claims by individuals or subgroups is invalid because such claims must be authorised by *all* the persons who hold the common or group rights comprising the particular native title claimed (see for example, Risk V National Native Title Tribunal [2000] FCA 1589 at [36] to [38] and most recently Laing v South Australia (No 2) [2012] FCA 980). For these reasons we are of the view that the current wording of 251A (a) and (b) should be retained with the exception of the amendment proposed in section 14 of the Bill.

7. The Bill seeks to clarify the process required for authorising area ILUA's by providing for the insertion of a new paragraph (Section 251A (2)) to the effect that only persons who hold or establish a prima facie case that they **may** hold native title are able to authorise an ILUA. In our comments on the exposure draft we have suggested to avoid ambiguity and any suggestion of a lower standard that the word "**may**" not be repeated, so the paragraph reads: **"In this section, a reference to persons who may hold native title is a reference to persons who can establish a prima facie case that they ~~may~~ hold native title."** In this way it is clear that it is the intention of the legislature that to be involved in the ILUA authorisation process Indigenous persons must establish on a prima facie basis that they hold native title. However, there are more fundamental problems with the proposed new paragraph. No indication is given in the Bill as to the manner in which or to whom a person must establish a prima facie case that they hold native title. While it is clear by amending s24CL (4) the Registrar is entitled to take into account in deciding whether to register an area ILUA objections made that it has not been appropriately authorised, it is not certain whether the Registrar, the Court or in the case of certified ILUA's, an NTRB or service provider, must find that a person has established a prima facie case they hold native title. Having regard to the fact that substantive rights are likely to be affected by any decision to register or not an area ILUA, it is arguable that on the authority of Brandy v Human Rights and Equal Opportunities Commission 183 CLR 245 (*Brandy's case*) it is beyond the power of the Registrar of the National Native Title Tribunal to ultimately determine who may hold

native title (even on a prima facie basis). It is even more doubtful that the Legislature can vest the power in an NTRB or service provider to determine the issue. To overcome the possibility of invalidity, the Legislature should give consideration to providing a right for a person who is aggrieved by a decision to not register an ILUA to have the matter determined *de novo* by the Federal Court. Assuming the power to decide who may hold native title for the purposes of deciding whether an area ILUA is properly authorised is validly vested in the Registrar of the National Native Title Tribunal or an NTRB or service provider, there remains the question of how the Registrar, NRTB or service provider must decide the question. Presumably, he or she must do so according to principles of natural justice. In circumstances where there are many persons who may hold native title, this could lead to substantial delays and disputes by persons who assert that they have not been provided with a proper opportunity to make submissions on the issues. This is especially the case for an NTRB or service provider with responsibility for making decisions based on the merits. The process and procedure of a Court is better equipped to deal with the resolution of such disputes. Most importantly, the Bill gives no guidance as to what an objector or disgruntled constituent of a NTRB or service provider must do to establish that they may hold native title. It is not clear for example, whether a person who is a claim group member of a registered native title claim is taken to have established a prima facie case that they hold native title or they must further satisfy the Registrar of the National Native Title Tribunal or NTRB or service provider that on a prima facie basis they meet all the elements of s223 of the NTA. It is therefore important that the proposed new paragraph S251A (2) should be amended by adding to the end of the paragraph the words: **"or are members of a native title claim group"**.

8. The proposed new paragraph 251A (3) is confusing because firstly, it refers to persons who hold or may hold the common or group rights when the reference to such persons has been deleted from 251A (1) and also because it is unnecessary if the intention is that persons who hold or who may hold native title are the persons who are required to authorise an ILUA whether or not there is a registered native title claim. On the other hand, if it is the intention that the situation of who may authorise an ILUA is intended to be different where there is a registered native title claimant, then a provision should be included in the Bill which clearly states who that is. For example, a further paragraph should be added along the following lines:

   **"(4) If an area covered by an indigenous land use agreement includes an area for which there is a registered native title body corporate or a registered native title claimant, this section requires that the determined native title holder for the area or the members of the native title claim group must authorise the making of the agreement."**

9. The Explanatory Memorandum for the Bill states that the purpose of the amendments is to address the current uncertainty in the law about who may authorise an ILUA. It says that this uncertainty is created by the decision of Reeves J in *Bygrave No3* and the earlier decision of Branson J in *Kemp v Native Title Registrar* [2006] FCA 939 ("Kemp"). As stated above, the decision in *Bygrave No3* came about where a minority of persons claiming to hold native title attempted to frustrate the registration of an ILUA which had been authorised at a publicly notified meeting. The ILUA in question had the potential to provide significant benefits to many Aboriginal people over a very large area. The state of the law as interpreted by *Kemp* was responsible for creating the circumstances where this could occur. The state

of the law after *Bygrave No3* (by favouring the principle that the majority may decide) has had the effect of promoting area ILUAs as the preferred means of settling native title issues in relation to Future Acts, especially where projects have an impact over a large and diverse area. The Bill, by favouring an interpretation of the law as determined by *Kemp,* is a retrograde step and will lead to paralysis in the use of area ILUAs to deal with Future Acts involving large projects. While there remains some uncertainty after the decision in *Bygrave No3*, it is not as a result of the contradiction between *Bygrave No3* and *Kemp.* The area of uncertainly arises only in relation to the role of persons who assert native title in an ILUA area but have chosen not to file or obtain registration of a native title claim and where no native title claim has been filed and registered at all. In respect to the former, while we believe such persons should be identified and have a right to be involved in the authorisation process, they should not have a right of "veto" (to independently authorise) where the ILUA has been authorised by a majority. Our view that such a right of "veto" should be reserved for persons who have lodged and obtained registration of a native title claim. To do otherwise, would make a mockery of the statutory scheme of encouraging persons who may hold native title at common law to submit to the processes of the NTA and will perpetuate the view that in native title the will of a majority can be subverted by a minority or individuals. Where there is no native title claim, in our view, the Bill does nothing to resolve existing impediments to the use of area ILUA's. Individuals have and will still be able to assert that they are members of different native title groups forcing negotiations to occur with those persons independently rather than collectively. For example, in a recent ILUA negotiation occurring in Central Queensland, small groups of Aboriginal people identified as Eamon, Iman, Jiman and Yiman. Each demanded separate representation and a seat at the bargaining table. This was despite the fact that in relation to an area just north of the ILUA area such persons were part of the same native title claim group. Rather than amending the NTA by undoing the progress that has been made in the Courts, the legislature should make it plain that: **Where there is no native title claim, area ILUAs must be registered if authorised by a majority of persons who may hold native title in the ILUA area, whether or not such persons observe the same traditional laws and customs.**

10. To date the Federal Court, possibly because of the legislative policy of encouraging the use of area ILUAs for Future Acts, has been responsive to dealing with disputes relating to the registration of area ILUAs when they have arisen. To date, the Court has been successful in resolving controversies between negotiation parties. There is no reason to suggest that the Federal Court will be less successful in resolving any disputes that may arise over the remaining areas of regulation that still require clarification after the decision in *Bygrave No3*. It is our view that it is preferable for the Legislature to refrain from making amendments that risk rendering the use of the area ILUA provisions in the NTA impractical and uncertain.

11. We note that the stated object of the Bill is to streamline the process for registration of area ILUAs. Perversely, the Bill formalises and makes it easier for persons who wish to object to the registration of ILUAs that have not been certified by NTRB's or their equivalent service providers. In addition, by repealing S24CK of the NTA, the Bill effectively removes the right to object to area ILUAs that have been certified by them. The Explanatory Memorandum states that a person who wishes to make an objection can only do so by making application for judicial review to the Federal Court. For most Indigenous persons this is not a realistic prospect because they do not have the means or resources to engage an NTRB or service

provider in a legal battle. The objection process before the Registrar is likely to be more user-friendly and less alienating to Indigenous persons than a contested court proceeding. Further, Judicial Review will not allow an appeal on the merits of whether all persons who may hold native title were properly identified and have authorised the ILUA. In contrast to ILUAs that have not been certified, the Bill doesn't even make provision for persons aggrieved by the decision of the NTRB or service provider to be notified of their right to seek Judicial Review of the NTRB's decision to certify. Rather than streamline the process, it seems that the real purpose of the Bill is to provide incentive to proponents to seek certification of an area ILUA before seeking registration. The Explanatory Memorandum does not explain why ILUAs that have been certified by an NTRB or service provider are to be preferred over those that have not. Our experience is that it should not be taken for granted that, in the absence of a Native Title determination, NTRBs and service providers are in the best position to identify who may hold native title in respect to a particular ILUA area nor should it be presumed that they will make a decision to certify an area ILUA objectively and in an unbiased manner. On the contrary, we suggest that NTRBs and service providers are likely to favour the particular native title groups who are their clients and persons within a group who politically support them. For example, in the circumstances that gave rise to the decision in QGC Pty Ltd v Bygrave (No 2) (2010) 189 FCR 412 the service provider had certified the ILUA but then inexplicably chose to intervene to support the lone dissenting Registered Native Title Claimant who refused to accept the outcome of the authorisation meeting and opposed the registration of the ILUA. While the dissenting applicant continued to support the service provider, ultimately, the action of the NTRB resulted in the removal of the service provider as the legal representative of the Registered Native Title Claimants for that particular claim.

In addition, if the Bill is passed we foresee the potential for litigation and potential awards of damages where individuals have suffered financial loss because NTRBs or service providers have not made reasonable efforts to identify persons who may hold native title and ensure that those persons have authorised the making of an area ILUA. Lastly, we are aware that in the past some proponents have refused to seek certification of ILUAs because of the fees charged by NTRBs and service providers for exercising their certification function. If the Bill is passed in its current form, to minimise the risk of failing registration, proponents will have little choice but to pay the fees demanded by NTRB's and service providers for certification. This effectively expands the monopoly already enjoyed by NTRBs in providing Commonwealth funded legal representations to progress native title claims. We are of the strong belief that there should be only one process of registering area ILUAs and that process should be as fair and transparent as possible. We believe that any process which advantages some Indigenous groups because they are favoured by a NTRB or service provider or a proponent because it has paid the fees and expenses of a NTRB or service provider is fatally flawed.

12. We note that the Bill seeks to introduce a new Section 24ED to allow amendment of registered ILUAs in limited circumstances. In our comments in relation to the exposure draft, we suggested that the basis for amending an ILUA might be expanded. In particular, where an ILUA provides a process for periodic reviews during the life of a particular project, we suggest that that the agreed results of those reviews be eligible for incorporation into the register entry without having to renavigate the registration process. Further, we suggest that the Bill be amended to include a clause based upon S217 of the Fair Work Act to allow amendment of ILUAs to remove ambiguity or uncertainty.

**Schedule 4- Minor Technical Amendments**

1. We support the proposed Amendment in the Bill.

**Improvements to the Native Title System**

In session two of the round table public hearing to be held by House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs we have been asked to consider how the Native Title process may be improved to be responsive to the various parties who use it and to achieve an equitable balance between various interests. As a starting point, we have now reached the stage where there is general acceptance, particularly by pastoralists, resource companies, local and state governments that coexistence of rights is possible and achievable. It is gratifying that we have moved on from the heady days when large sections of the Australian community viewed native title as a threat to their very back yards. Presently, most proponents of major projects accept that addressing native title rights and interests and taking adequate steps to protect the cultural heritage of Indigenous people is simply part of doing business in Australia.

However, the system is far from perfect. It is notoriously slow and inefficient and 20 years on from the passing of the Native Title Act cries out for reform if the legislature is serious about continuing the development of the system.

Below we set out what we regard as the most important steps that should be taken to improve the system.

**Discussion points**

***1. If this Bill were to pass the House, would the legislative arrangements for native title strike a fair balance between the various competing rights and interests over land? What further legislative arrangements should be considered?***

The short answer is 'no'. We consider that amendments are required in the following areas to strike a fair balance between the competing interests in native title proceedings:

- The elements of proof – creating a presumption of continuity;
- Funding – creating a similar funding scheme for Applicants as that in place for Respondents;
- The authority of applicants to native title proceedings – decisions by simple majority and clarifying the operation of section 66B; and
- Negotiation and agreement making – levelling the playing field and promoting best practice.

**Creating a presumption of continuity**

The Courts[1] have interpreted section 223 of the the NTA to require native title claimants to meet the following key elements of proof:

[1] See majority judgment in ***Members of the Yorta Yorta Aboriginal Community v Victoria*** (2002) 214 CLR 422

### (a) The pre-sovereignty society

- *At the time of sovereignty, there was a body of persons ("the pre-sovereignty society") united in and by its acknowledgement and observance of a body of laws and customs("the traditional laws and customs") under which members held rights and interests in the claim area.*

### (b) Continuity from sovereignty to the present

- *The pre-sovereignty society has substantially maintained its identity and existence from generation to generation in accordance with the traditional laws and customs through to the present.*

### (c) Contemporary land holding group

- *Through the continued acknowledgment and observance of the pre-sovereignty society's traditional laws and customs relating to the use and occupation of land, the claimants hold the asserted native title rights in the claim area.*

In a speech delivered to the Federal Court Native Title User Group in Adelaide,[2] His Honour Chief Justice of the Federal Court French (as he then was) outlined a case for amendments to the NTA which would provide certain presumptions in favour of native title claimants. His Honour suggested that there could be a presumption of the 'continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time'[3]. Once triggered, such presumptions would shift the burden of proof from claimants to respondents who would need to rebut the presumptions with proof to the contrary (ie. that claimants do not continue to observe the traditional laws and customs of the pre-sovereignty society).

Various people have since observed that such amendments are neither novel nor inconsistent with the objects and purpose of the NTA[4].

The paucity of evidence of the traditional laws and customs of the pre-sovereignty society means that claimants spend a lot of time and money attempting to produce evidence to meet item (b) above. That is, showing that each successive generation of the pre-sovereignty society have continued to acknowledge and observe the traditional laws and customs. The irony is that much of this evidence lies in the hands of the 'First Respondent' – the relevant State Government. For example, much of the documentary evidence used to address the continuity requirement is held by state governments as a result of official policies of removal and relocation of Aboriginal people which were in place for much of the 20th century.

Without repeating the arguments advanced by the many advocates for the creation of a presumption of continuity[5], we perceive the following benefits of such an amendment:-

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[2] Chief Justice RS French, *Lifting the burden of native title: Some modest proposals for improvement,* 9 July 2008.
[3] Ibid at para 29.
[4] See for example: Calma T., Native Title Report 2009 , Australian Human Rights Commission at p81; and Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009) .

- Time and cost savings;
- Addressing inequity;
- Certainty for future act negotiations; and
- Improved disposition of claims.

**Time and cost savings**

The paucity of evidence of the traditional laws and customs of the pre-sovereignty society means that claimants spend substantial amounts of time and money attempting to produce evidence to meet item (b) of the elements of proof. That is, showing that each successive generation of the pre-sovereignty society continue to acknowledge and observe the traditional laws and customs.

At present, unnecessary delays and costs are occasioned by claimants accessing archival material and official records largely held by state governments in order to meet the continuity requirement. Governments are better placed than claimants and have both the resources and capacity to assess material which they hold themselves.

Such an amendment would enable lawyers who represent the claimants to concentrate their time and resources on gathering evidence which they alone are best placed to obtain. That is, expert evidence in the form of anthropological reports to address the "pre-sovereignty society requirement and lay evidence in the form of sworn statements to address the requirement to show that a contemporary land holding group continues to exist and observes traditional laws and customs.

The amendments we and others have suggested would not result in a 'free ride' for native title claimants who must still meet items (a) ("the pre-sovereignty society requirement") and (b) ("the contemporary land holding group requirement") to obtain a positive determination. Equally, state governments are not precluded from producing contrary evidence rebutting a presumption of continuity should they wish to do so. The proposed amendments would simply mean that the respective parties could better focus their efforts on gathering the evidence, whether supportive or otherwise, to determine whether the claim should proceed to determination.

**Addressing inequity**

The suggested amendments would put the onus of proof on the dispossessor rather than the dispossessed to demonstrate that the claimants have not continued to observe the traditional laws and customs[6]. We consider this to be a valid measure to address the imbalance caused by dispossession and relocation. A failure to do so would further entrench what many[7] believe to be a discriminatory requirement of the native title system.

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*5* See for example, speech made by Paul Keating at the 2011 Lowitja O'Donoghue Oration at Adelaide University and subsequently reported in national newspapers such as *"Reverse proof of title, says Paul Keating"* by David Nason*,* The Australian, June 01, 2011.

[6] Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 2.

[7] See for example: L Malezer, *2009 Mabo Lecture* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009), p 4; 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/14 (2005), para 17; D Short, 'The social construction of Indigenous "Native Title" land rights in Australia' (2007) 55(6) *Current Sociology* 857, p 872

**Certainty for future act negotiations**

We believe that the amendments we seek will result in the "right people for the right country" being identified more quickly. This will deliver greater certainty to development proponents that they are dealing with the correct native title party. This would also focus attention upon identifying the descendants of the pre-sovereignty society for any area where future acts are proposed and address the current uncertainty as to who may hold native title which exists in many areas that are subject to mining and other resource developments.

**Improved disposition of claims**

On average it takes almost six years for native title claims to be resolved[8]. For many, it takes even longer. The amendments we seek will provide an incentive for governments to settle by consent claims with good prospects of success. As already mentioned, governments are not precluded from adducing evidence that rebuts the presumption should they wish to do so.

We, along with many others[9], submit that if the primary burden of disproving a claim rested on respondents, it would mean vastly reduced costs and timelines for the resolution of proceedings. This is a benefit for all parties as well as the taxpayer who at present funds the major parties to engage in drawn-out, unduly technical and expensive litigation.

***2. What steps can be taken to improve the functioning of Australia's native title system and its ability to produce tangible benefits for Aboriginal and Torres Strait Islander communities?***

We submit that the following measures could be taken to improve the *functioning* of Australia's native title system:

- **Establish an applicant funding scheme**

  The present service delivery model used by the Commonwealth has effectively created a monopoly for Native Title Representative Bodies and Native Title Service Providers ('NTRBs'). Despite structural changes to NTRBS and an increase in their funding, the resolution of claims continues to be costly and lengthy. This is primarily due to NTRB's having a broader agenda than just claims resolution. They are large organisations that are expensive to run. They have organisational goals and priorities which do not always align with the interests of, or achieving just outcomes for, their constituents. Most of all, from our experience as former senior legal officers in NTRB's, it is our view that the central imperative for NTRBs is to maintain and expand their role and status within the native title system, regardless of the needs and objectives of their constituents. They are not in the business of making themselves redundant by achieving determinations of native title in a cost effective way and strive to frustrate many parties to perpetuate their own existence at the taxpayer's expense.

[8] National Native Title Tribunal, National Report: Native Title, 2008 at p 1

[9] Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 15.

Aboriginal claimants are currently obliged to retain a NTRB as their legal representative if they wish to avail themselves of Commonwealth funding. Those who do not wish to do so must fund their own claims, irrespective of their prospects of success. Stepping outside of the 'Rep Body system' often results in a group being marginalized and punished by NTRBs. This is not conducive to the timely and cost effective resolution of claims and in fact creates further disputes, delays and costs and often results in NTRB's choosing favourites who uncritically support them.

If the objective of the Legislature is to create a native title system that contribute to the self determination and self reliance of Aboriginal People and Torres Strait Islanders, then the Commonwealth funded service delivery monopoly of NTRBs must cease.

For Native Title claims that have yet to work their way through the system, our suggestion is that a funding system for native title applicants needs to be established that mirrors the respondent party funding scheme formerly maintained by the Commonwealth Attorney General's department. Claimants could then choose amongst a panel of accredited native title legal service providers (including NTRBs) subject to such providers providing competitive cost estimates. Competition amongst empanelled service providers should ensure value for money. To date, this has never occurred in relation to claimant funding and in our experience substantial cost savings are possible. Funding should be tied to work plans and other key performance indicators and be routinely submitted to the relevant agency for approval. Rather than funding being provided in advance, liability for payment should only arise once key performance indicators are achieved.

Most importantly, the practice of providing public funding to enable NTRB's to litigate or support a particular party in an intra-Indigenous dispute should cease and native title claims should only be eligible to receive public funding where they do not overlap others.

Increasing NTRB's have been touting the idea that they have a role to play in providing services to Registered Native Title Bodies Corporate ('RNTBCs') where there has been a determination of Native Title. If NTRBs are given a similar monopoly on Commonwealth funding to provide assistance to RNTBCs, this will simply perpetuate the current reliance on government funded entities. In areas such as the Torres Strait where RNTBC's have no ready income stream, they will have no choice other than to seek the assistance of the relevant NTRB amongst other service providers. It will also further entrench NTRBs as the only government-funded service providers within Australia's native title system. Our view is that in the case of RNTBCs there should be in place a policy of direct funding to them and an emphasis on capacity building. As the number of determinations of native title increases, funding of NTRB's should be wound back in favour of increased support to RNTBC's.

- **Applicant's authority**

The role of the Applicant in native title claims has been subject to conflicting judicial opinion[10]. This has lead to uncertainty over the nature and extent of the Applicant's authority which in turn has resulted in claims resolution and future act negotiations being

[10] See for example: Gilmour J in Tigan v Western Australia [2010] FCA 993; (2010) 188 FCR 533 as followed by Logan J in Weribone on behalf of the Mandandanji People v State of Queensland [2011] FCA 1169 (6 October 2011); and Collier J in Anderson on behalf of the Wulli Wulli People V State of Queensland [2011] FCA 1158.

stalled, intra-Indigenous disputes arising and cost/time blowouts as a result of litigation taken to resolve the uncertainty.

We propose that section 61 (2) (c) of the NTA be amended to provide that **"the person is or the persons are jointly, the applicant but where the native title or compensation claim group so authorise, the persons who are jointly the applicant may make decisions in accordance with the directions of the native title or compensation claim group including making decisions by majority and such decisions will bind each of them."**

- **Operation of section 66B**

More than any other provision of the NTA, uncertainly over the operation of this section has led to significant cost increases and delays to the resolution of native title claims. We submit that section 66B (2) should be amended by adding the words "**and from the date the Court makes such order, the current applicant no longer has power to deal with applications in accordance with S62A and the person or persons specified in the order to replace the current applicant will be entitled to exercise that power."**

We believe that such an amendment is needed to enable the native title claim to be prosecuted between the time that an authorisation meeting is held and the matter is brought before the Court (if at all). The State of Queensland has asserted the applicant's power under S62A ends when the claim group decides that an Applicant is no longer authorised, even though no application to the Court under S66B has been made. In recent times, where it is apparent that the matter is to be contested, the Federal Court has referred the matter to a case management conference held before a Registrar in the hope of resolving the matter by agreement rather than by a contested public hearing.

The amendment we are proposing will support the Court's practice by allowing parties to such disputes to either agree to abandon the S66B application or not to contest it. It also gives appropriate support to the judicial discretion of the Court under S66B (2) not to make an order at all, if the court is satisfied that there are reasons for doing so. For example, in Russell Doctor and Others on behalf of the Bigambul People v State of Queensland and others (unreported pages 43 to 46 of Transcript of Federal Court 8 February 2012), Reeves J took the view that a S66B application resulted from an underlying dispute about the composition of the claim group and declined to make an order at that time under S66B replacing the applicant.

**Tangible Benefits**

We submit that the following measures are required to deliver *tangible benefits* to Aboriginal and Torres Strait Islander Communities

- **Incentives to settle claims**

For many claimants over areas where there has been a lot of extinguishment of native title, the scope of the procedural rights afforded by registration far exceed the benefits which would accrue from a native title determination which will usually be over a more confined area. In these cases, claimants must be given incentives to either permanently discontinue their claims or proceed to a determination of native title. This is particularly the case

where procedural rights are providing an income stream to Indigenous persons which will be severed upon a determination of native title which includes findings of extinguishment over areas previously subject to the right to negotiate. We recommend that the Legislature amend the Native Title Act to provide that the right to negotiate apply in circumstances where a native title group is able to establish before the Court that they are composed of all the descendants of the relevant *pre-sovereignty society* (the first limb of S223 of the NTA commonly referred to as demonstrating that they are the right people for that country) for a particular area whether or not they have made a claim for a determination over that area or whether a determination of native title is capable of being made over the area due to the level of extinguishment.

- **No benefits where there are no resources – developing a valuation formula**

The status quo privileges some claimants over others purely because of the geographical location of their traditional lands and waters. The majority of Aboriginal and Torres Strait Islander Communities are located in capital cities and regional centres. They are unlikely to see any tangible benefits delivered by a successful native title determination.

Many traditional owners whose country is located in remote areas where exclusive native title is a reality may still not see any tangible benefits from a native title determination. This has been the sad reality for much of the Torres Strait, the birthplace of native title.

Unless native title is appropriately valued, many native title holders will not receive any tangible benefits from a native title determination. In fact, for many RNTBCs, managing the determined rights and interests without an income stream is a compliance nightmare.

We submit that the Commonwealth must develop an equitable and fair method of valuing native title so remote communities that do not have access to income from resources and mining can derive tangible benefits from community infrastructure being located on determined areas. This would mean that traditional owners are properly compensated for the use of their traditional lands.

- **A national alternative settlement framework**

The NTA was enacted as part of a three-pronged strategy to address the effects of Indigenous dispossession. Along with the NTA, the Commonwealth Government established the ILC and IBA to increase the Indigenous estate and promote economic wellbeing. In fact, part of the ILC's role was to purchase property for Indigenous Australians who would not be able to establish native title. It is arguable whether it has fulfilled that role. The third measure, often referred to as the 'social justice package', was never realized.

In our submission, the Commonwealth, State and Territory government need to collaborate to 'finish the job' by developing a national alternative settlement regime. We believe that many claims which, if determined, would deliver limited native title rights and benefits to the claimants could be resolved quickly if a package of benefits were offered in return for settlement of the proceedings.

Without a beneficial alternative, claimants will continue to institute proceedings to derive what limited benefits the native title system provides.

**3** ***What changes to the native title system would encourage non-litigious agreement-making when there are competing interests over land?***

Many of the changes we have already identified when dealing with schedule 2 of the Bill but by way of summary we submit that the following changes to the native title system are required to encourage agreement making between competing interests.

- **Extensions of good faith requirement to all future act ILUAs**

  We re-state our comments made earlier in this submission that the requirement to negotiate in good faith should not be restricted to future acts attracting the right to negotiate but applied to all future act ILUAs. This will discourage parties to opt in or out of different negotiating streams and their respective legislative requirements to gain strategic advantage. It would also create a requirement for parties to genuinely and constructively engage towards reaching agreement irrespective of the particular agreement being negotiated.

  Although we advocate for an extension of the good faith requirement, such a measure will not of itself deliver improved agreement making and negotiation. It needs to be included in a package of changes that together will deliver this objective.

- **Prohibition against a party engaging conduct against another that amounts to retaliatory action, coercion, undue influence and misrepresentation.**

  There should be a prohibition against the stronger party conducting itself in a manner designed to undermine the bargaining position of another negotiation party. Such behaviour may not be confined to those at the negotiation table and may involve direct attempts to by the stronger party to frighten or intimidate the members of a wider group of people (such as the individuals who comprise the native title claim group) in the hope that they will accept that party's offer. Where such behaviour is identified, the arbitral body should have power to intervene and decide the issue in dispute and where an agreement has already been concluded the Court should have power to set it aside.

- **Mandatory Requirements for Agreements, pro-forma clauses and agreements data bases**

  Although it would be difficult to specify minimum standards which are universally fair and equitable in the same way as for Enterprise Agreements under *Fair Work Act* we submit that it is possible to derive a set of subject matter which that should be canvassed in agreements relating to the grant of mining tenements and other future acts. This subject matter should be broader than just the requirement to provide compensation for the affect of the Future Act on native title rights and interest and should include such things as the establishment of an accountable entity to administer benefits, employment of contracting opportunities, access rights for Indigenous persons and a review period. The Legislature should also amend the NTA to specify heads of compensation for impairment of the exercise of native title rights and interests. We note that the Queensland Government as part of its six point action plan dealing with the overhaul of land access laws has agreed to review the scope of heads of compensation payable under state legislation to landowners by resource companies (other than under the *Mineral Resources Act 1989 (Qld)* which are dealt with

separately) to ensure the rights of landholders are not eroded. The specification of heads of compensation in the NTA will provide an opportunity for Native Title holders to be treated equitably with other land holders and assist in the negotiation of fair levels of compensation.

In addition, best practice agreement making and negotiation would be promoted by a database of pro-forma clauses and provisions being maintained by the National Native Title Tribunal (NNTT). Subject to information being removed that is commercial in confidence, such a database could also include entire agreements that relate to particular future acts such as pipeline agreements, gas field agreements, exploration agreements and agreements which provide for land tenure resolution.

- **Level the playing field – arbitration and intervention by an arbitral body where the native party is disadvantaged**

  We submit that amendments need to be made to provide for intervention and arbitration by an arbitral body where negotiations are not being conducted effectively or fairly. This would encourage proponents to invest in the negotiation process towards achieving a consensual outcome rather than 'going through the motions' before applying to the NNTT for a determination that the future act may be done. The NNTT or arbitral body should be empowered to decide whatever matters remain in contention between the negotiation parties with the only limitation being that for compensation matters an award should not be less than the last offer made by the proponent.

- **Court to have power to set aside any agreements that are unfair**

  There should also be a focus on outcomes rather than behaviour. Where a Native Title Party is able to demonstrate that an agreement is unfair the Court should have the power to set the agreement aside and award damages.

We thank the committee for the opportunity to make this submission and we welcome the opportunity to give evidence to the committee.

Colin Hardie
Ted Besley

**Just Us Lawyers**