GOLDFIELDS LAND AND SEA COUNCIL

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

Introduction

1. The Goldfields Land and Sea Council (GLSC) is the recognised Native Title Representative Body for the Goldfields region, in accordance with s 203AD of the *Native Title Act 1993* (Cth) (the Act).

2. The GLSC appreciates that the aim of the Native Title Amendment Bill 2012 (the Bill) is to improve the operation of the native title system, with a focus on improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes by:
   (i) clarifying the meaning of good faith and making associated amendments to the right to negotiate provisions;
   (ii) enabling parties to agree to disregard historical extinguishment of native title in areas set aside, or where an interest is granted or vested, for the purpose of preserving the natural environment such as parks and reserves; and
   (iii) streamlining processes for Indigenous Land Use Agreements (ILUAs).

3. The Attorney-General introduced the Bill into the House of Representatives on 28 November 2012. On 29 November 2012, the Bill was referred to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Senate Legal and Constitutional Affairs Committee.

4. This submission will be presented to both Committees.

Executive Summary

5. In answer to the following two questions asked by the House Standing Committee on Aboriginal and Torres Strait Islander Affairs:
    (a) Whether a sensible balance has been struck in the Native Title Amendment Bill 2012 between the views of various stakeholders; and/or
    (b) Proposals for future reform of the Native Title process.

Whether a sensible balance has been struck in the Native Title Amendment Bill 2012 between the views of various stakeholders

6. The GLSC sees the amendments as a means to:
    (i) improve the balance of power between parties by engaging in meaningful discussions about activities on traditional lands;
    (ii) strengthening the Act's focus on agreement-making and expanding the areas over which native title could be determined to exist; and
    (iii) providing more opportunities for native title to be recognised and claims to be settled by negotiation and will provide incentives for parties to reach agreements, i.e. joint management of parks and reserves.

Proposals for future reform of the Native Title process

7. The GLSC proposes the repealing of s 38(2) of the Act which prohibits arbitral body determinations from including conditions that have the effect that native title parties are to be entitled to payments worked out by reference to:
    (a) the amount of profits made; or
    (b) any income derived; or
    (c) any things produced.

8. Accordingly, whereas s 33(1) requires the same matters listed at s 38(2)(a) –(c) be subject of negotiation and to which the good faith threshold to arbitral jurisdiction may apply – arbitral jurisdiction itself is limited by the prohibitions in s 38(2). This is unfair in practice to the native title parties and means that relevant arbitration is not of equal utility to the parties. As such, the arbitration is not effective as a practical motivator for all of the respective parties to reach agreement.

9. The GLSC submission also proposes further reforms of the Act in relation to:
   (i) reversing the onus of proof in native title claims and to provide for a rebuttable presumption of continuity; and
   (ii) acknowledging that traditions can revive and evolve over time.

Submission on the Native Title Amendment Bill 2012

10. The GLSC is generally supportive of the amendments proposed with respect to:
   (i) permitting a restricted range of minor amendments to ILUAs;
   (ii) removing the objection process for ILUAs certified by Native Title Representative Bodies;
   (iii) broadening the scope of Subdivision B ILUAs;
   (iv) clarifying the meaning of good faith negotiations and introducing a requirement for parties to make "all reasonable efforts";
   (v) extending from 6 to 8 months the time period before a negotiation party can make application to an arbitral body for a determination;
   (vi) reversal of the onus of proof with regard to establishing good faith; and
   (vii) the ability to disregard historical extinguishment on parks and reserves, including public works.

11. However, the GLSC has made submissions in relation to areas where greater clarity is needed to improve the functionality of proposed sections or where the scope of the provision could be broadened such as:
   (i) providing greater clarity within s 251A(2) as to who is authorised to sign ILUAs;
   (ii) expanding the meaning of good faith to include a requirement to "actively" participate in meetings and respond "in detail" to proposals;
   (iii) clarifying that good faith requirements apply until a decision is made by an arbitral body;
   (iv) introducing a mandatory minimum period of time before a proponent can re-apply to an arbitral body if found not to have acted in good faith;
   (v) extending the ability to disregard the historical extinguishment of public works to ss 47, 47A and 47B;

(vi) extending the ability to enter agreements to disregard the historical extinguishment of public works to local governments, statutory authorities and government trading enterprises;

(vii) removing the requirement that prior agreement must be reached before historical extinguishment of native title will be disregarded;

(viii) allowing for automatic disregard of historical extinguishment on Crown land; and

(ix) improving the definition of 'interested person' with respect to the notification requirements for agreements to disregard historical extinguishment.

1. Improvements to the ILUA registration process

A. Processes for amendments to ILUAs

12. The GLSC is supportive of proposed s 24ED which permits minor amendments to ILUAs in the limited range of circumstances provided by sub-ss 24ED(1)(c)-(f). An unrestricted discretionary ability to make amendments to ILUAs would not be supported.

B. Authorisation and Registration processes for ILUAs

Registration of certified ILUAs

13. The repeal of existing s 24CK, and its replacement with a provision that removes the objection process for ILUAs certified by a Native Title Representative Body (NTRB), is supported as it will further streamline the authorisation and registration process. It is noted that persons wishing to object to an ILUA certified by a NTRB will still have recourse to judicial review.

Authorisation of Area ILUAs

14. Although generally supportive of proposed s 251A(2), the GLSC is concerned that defining persons who may hold native title as "*persons who can establish a prima facie case that they may hold native title*" may be interpreted as an ILUA can only be authorised by persons with a registered determination application and hence reduce the ability of those with credible claims to achieve negotiated agreements without pursuing a Federal Court determination of native title. Further clarification

is required to remove the potential for the definition to be interpreted in this manner.

C. Scope of Body Corporate ILUAs

15. The GLSC is supportive of proposed s 24BC(2) which broadens the scope of body corporate agreements (Subdivision B ILUAs) to include areas which are either:
    (i) wholly determined, but include areas where native title has been extinguished; or
    (ii) where an area has been excluded from a determination, and native title would have been held by the relevant native title group had native title not been extinguished over that particular area.

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

16. The GLSC strongly supports amendments to the Act that clarify the meaning of good faith under the right to negotiate regime, and the conduct and effort required of parties in seeking to reach agreement. However the GLSC makes the following comments, and recommendations for improvement, on the form of the proposed amendment.

D. The meaning of good faith

17. The proposed inclusion of s 31A, which provides a set of non-exhaustive indicia of "good faith negotiation requirements", is supported as a means of ensuring all parties act in an appropriate and productive manner when working towards an agreement.

18. The ability for the arbitral body to find an absence of good faith, even where all of the indicia in s 31A are met, must be retained and should ameliorate the effect of the decision in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 where embryonic negotiations that did not substantially discuss the actual doing of the future act were found to have been in 'good faith'.

19. The necessity for parties to use "all reasonable efforts" should permit a closer examination beyond "commenced" negotiations and make it easier for native title parties to establish that a proponent who is "just sitting through negotiations, waiting for the clock to tick and time to expire before rushing off to an arbitral body"[1] has failed to comply with the good faith negotiation requirements.

20. The GLSC supports the National Native Title Council submission[2] that consideration be given to amending:
    (i) s 31A(2)(a)(i) to require parties to "actively" participate in meetings as well as, where reasonably practicable, meetings being held "at a location where most of the members of the native title parties reside, if so requested by them"; and
    (ii) s 31A(2)(a)(iv) to require parties to respond to proposals "in detail".

21. In addition the GLSC believes that it should be made clear in the Act that the good faith negotiation requirements apply until the making of any determination by the arbitral body.

E. Good faith negotiations

Timeframes for right to negotiate

22. The GLSC supports the amendment to s 35(1)(a) to increase, from 6 months to 8 months, the length of time required from the notification day until any negotiation party may apply to an arbitral body for a determination.

Onus of proof in relation to good faith negotiations

23. The reversal of the onus of proof in good faith negotiations is strongly supported as a mechanism to improve the quality of offers made by negotiating parties, discourage opportunistic conduct and encourage agreement making.

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[1] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2012, 13650 (Nicola Roxon, Attorney-General).
[2] National Native Title Council, *Native Title Amendment Bill 2012 – Exposure Draft – National Native Title Council – Submission*, 23 October 2012, p 4.

24. Proposed s 36(2A) allowing arbitral bodies to make orders prohibiting a negotiation party, who has been found not have satisfied the good faith requirements, from seeking a future act determination for a period of time is also welcomed.

25. Consideration should be given to legislating a minimum period of time, i.e. a "moratorium period", in which a proponent who has been found not have satisfied the good faith requirements, is prevented from making an application for determination to an arbitral body. This should act as an additional deterrent to negotiation parties considering submitting an application at the end of the 8 month time frame regardless of what stage negotiations have reached, as well as prevent arbitral bodies setting excessively short time frames in which a proponent can reapply. A moratorium period of 4 months is suggested.

3. Proposed section 47C

F. Historical Extinguishment

26. The GLSC is generally supportive of the creation of a new s 47C of the Act to allow historical extinguishment of native title to be disregarded over areas set aside for the preservation of the natural environment. The following submissions identify where there is a need for greater clarity within the proposed provisions, and argue for a broadening of the scope of circumstances where historical extinguishment should be disregarded.

Public Works

27. The GLSC supports the introduction of sub-ss 47(3) and (4) permitting an agreement to contain statements that the extinguishment effect of public works are to be disregarded as well as allowing separate agreements to be made regarding public works if the government party that constructed or established the public works is a different government party to the party entering into the paragraph 47C(1)(c) agreement.

28. The GLSC concurs with the Native Title Services Victoria (NTSV) that "as a matter of principle and consistency, this amendment should be extended to sections 47, 47A and 47B" [3] to remedy the fact that 'interests' have been found not to include public works[4] meaning that historical extinguishment arising from the grant of previous 'interests' cannot apply to public works for these sections of the Act.

29. Additionally it is recommended that the definition of public works is expanded to include public works conducted by local governments, statutory authorities and government trading enterprises.

Requirement for Agreement/Consent

30. The GLSC agrees with the NTSV submission[5] to remove the requirement for agreement to be reached between government and native title parties before extinguishment can be disregarded as:
    (i) this would provide greater consistency with existing provisions in ss 47 to 47B which do not require prior agreement;
    (ii) currently held interests would not be affected due to the protections offered by s 47C(8);
    (iii) the recognition of native title should not be dependent on the exercise of discretion by individual governments as to whether they are willing to consider entering into an agreement; and
    (iv) it would avoid the likelihood of inconsistencies arising in the application of the provision across different jurisdictions and governments.

31. In the absence of broad automatic disregard of historical extinguishment for parks and reserves being achieved then, as a specific exception, historical extinguishment should be automatically disregarded in a national park or reserve where the Crown is the only other interest holder.

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[3] Native Title Services Victoria, Draft Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012*, Parliament of Australia, 31 January 2013, p 7.
[4] *Erubam Le (Darnley Islanders) (No 1) v Queensland* (2003) 134 FCR 15
[5] Native Title Services Victoria, Draft Submission to Senate Standing Committee on Legal and Constitutional Affairs, Native Title Amendment Bill 2012, Parliament of Australia, 31 January 2013, p 8-9.

Advertising Requirement

32. Greater clarity regarding the definition of "interested persons" is required to avoid unnecessary delays to the determination of applications by preventing those with insufficient interests being provided with an opportunity to comment on proposed agreements.

Limitation to Parks and Reserves

33. The ability to disregard historical extinguishment should be extended to all Crown land as provision can be made for the non-extinguishment principle to apply and current interests to be protected. If an automatic disregard of any historical extinguishment on Crown land is not supported, then the Act needs to be amended to create the ability for a government and a native title party to reach agreement to disregard historical extinguishment on all Crown land.

Limitation to onshore places

34. Given that s 47C(8) provides for the application on the non-extinguishment principle and protection of the validity of the setting aside and the creation of any prior interests, as well as s 47C(9) affording protection of the Crown's ownership of natural resources, the necessity of limiting the application of s 47C to 'onshore places' appears unwarranted. Marine parks should be included within this provision.

4. Reversing the onus

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

35. The GLSC supports a reversal of the onus of proof in native title determination applications with a rebuttable presumption of continuity of rights and interests in favour of the society concerned, its traditional laws acknowledged and customs observed. Releasing native title claimants from the substantial evidentiary and resourcing burden of establishing continuity, particularly given the history of dispossession, should provide a less costly and accelerated claims process with improved outcomes and an increase in settlements for native title claimants.

H. Unfreezing Tradition

36. The presumption of continuity should not be able to be rebutted by evidence that a traditional law or custom is not practised as it was at colonisation. Judicial interpretation of 'traditional' laws and customs must not be frozen at the time of sovereignty and must acknowledge that cultures evolve and change over time. Provided the 'traditional laws acknowledged' and 'traditional customs observed' are identifiable through time then that should be sufficient to maintain the presumption. The ability for traditional laws and customs to be revived should also be acknowledged, particularly where dispossession by the State caused the lack of continuity.

37. Similarly, acts of dispossession by a settlor or the State should not be able to be argued in evidence for rebuttal of the presumption of continuity.

Conclusion

38. In general, the GLSC believes that the proposed amendments to the Act will improve the effectiveness and efficiency of native title processes and provide for more beneficial outcomes for native title parties. However, further reforms of the Act are needed in relation to the repeal of s 38(2) as well as reversing the onus of proof and providing a rebuttable presumption of continuity.

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