



18 March 2010

The First Assistant Secretary
Social Inclusion Division
Attorney-General's Department
Robert Garran Offices
National circuit
BARTON ACT 2600

Dear Secretary

Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances

There is an artificiality associated with historical extinguishment that has long been the subject of judicial and academic comment. As a result, the extension of beneficial measures under the Native Title Act through this proposed amendment is welcome.

The form of the amendment requires some comment.

Requirement for consent:

The proposed amendment requires consent of both native title claimants AND the relevant government before extinguishment can be disregarded. There are already provisions allowing for the disregard of historical extinguishment in certain circumstances in the Act. These can be found in ss47, 47A and 47B. These provisions do not require State or Commonwealth consent for specific historical extinguishment to be ignored. No rationale is given for the different treatment of disregard of historical extinguishment in these amendments.

Where extinguishment is to be disregarded, all current interests in the land will prevail over native title. These are beneficial provisions and there seems no reason why the current structure of the "disregard of extinguishment" provisions of the legislation should not be followed.

The Commonwealth has power to provide for disregard, as it has done in ss47, 47A and 47B and there seems no reason for this power not to be used to provide for disregard of extinguishment in the proposed s47C as it does in these sections.

To require consent opens up the disregard to manipulation as part of broader negotiations. This appears to confuse the entitlement to have historical extinguishment disregarded with procedural measures designed to achieve negotiated outcomes. While the latter may be an admirable goal, it should not be confused with the entitled to have historical extinguishment recognised as it has been in ss47, 47A and 47B.

The requirement for advertising that flows from the consent requirement may similarly give rise to the use of the consent requirement as a negotiating carrot, again confusing what should be an entitlement with the procedural matters.

Given that prior interests (and presumably permitted renewals) are protected, the purpose of both the consent and advertising provisions is unclear.

The requirement for consent should be removed and the proposed section should mirror ss47, 47A and 47B.

Application of s47A to certain national parks or areas set aside for the purpose of preserving the natural environment

It is possible that some parks or areas of land to which s47C applies might also be covered by s47A. In order to avoid doubt, the proposed amendment should be expressed as applying only if none of the other provisions of the Act allowing for the disregard of extinguishment applies.

Treatment as a new application (s47C 5 (3)(b))

No rationale is provided for requiring the application to be treated as a new application and thus attracting the registration test. Where the amendment forms part of a broader application which has already been registration tested, the need for the amended application to be registration tested should be exempted.

The requirement for further registration testing will add delay and cost in circumstances where this is difficult to justify. It is counter-productive to the implicit and explicit goal of achieving negotiated outcomes.

I am happy to provide further comments and information if required.

Yours sincerely



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