



ATTORNEY-GENERAL

THE HON ROBERT McCLELLAND MP

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

The Federal Government is committed to improving the native title system. It recognises that native title is an important property right that should be recognised and protected, and that native title can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians. It also recognises that the efficient operation of the system contributes to long term growth in the resources sector, by facilitating access to natural resources on Indigenous land and the construction of necessary related infrastructure.

In July 2008, High Court Chief Justice, Robert French, suggested a number of proposals to improve the operation of the Act. One of these proposals was an amendment that would allow historical extinguishment to be disregarded over Crown land, or reserves of various kinds, where the applicants and the relevant government party have agreed that it should.

The Act already includes provisions that allow historical extinguishment of native title to be disregarded in certain circumstances, such as where a native title application is made over land that is subject to a pastoral lease held by a native title claimant (section 47).

The attached exposure draft sets out a further possible amendment to the Act. It is similar to section 47, and covers areas set aside or vested by a Government law for the purpose of preserving the natural environment of the area, such as a State or Territory park or reserve. It is a narrow exception and would only allow extinguishment of those areas to be disregarded where the government party and the applicants agree that it should.

The non-extinguishment principle would apply, so that any current interests over the land would continue to exist, and, to the extent of inconsistency with native title rights, prevail. The current interests over the land could include, for example, existing private business interests, leases and easements. Under this possible amendment, an agreement to disregard extinguishment could only be made by the government that brought about the extinguishment. For example, the Commonwealth could not agree to disregard a State-effected extinguishment.

This proposal could provide opportunities for more claims to be settled by negotiation rather than litigation. For example, in Western Australia, the proposed reform could go towards ameliorating the effect of case law that found that Crown reserves extinguished native title at common law.

Consultation and feedback

The Attorney-General's Department invites you to make comments on this possible amendment. If you would like to make a submission, please forward it **no later than close of business Friday 19 March 2010** to:

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

and/or email your submission to native.title@ag.gov.au or send your submission by facsimile to (02) 6141 4928.

This paper is available at: www.ag.gov.au.

Confidentiality

All submissions and the names of persons or organisations who make a submission will be treated as public, and may be published on the Department's website, unless the author clearly indicates to the contrary.

A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

EXPOSURE DRAFT

Amendments relating to national parks etc.

Native Title Act 1993

1 At the end of subsection 13(5)

Add:

; or (c) that the determination relates to an area in relation to which the agreement required by paragraph 47C(1)(c) has been given.

Note: Section 47C provides for certain extinguishment of native title rights and interests in relation to areas such as national parks etc. to be disregarded.

2 At the end of Division 4 of Part 2

Add:

47C National parks etc. covered by native title applications

When section applies

(1) This section applies if:

(a) either:

(i) a claimant application; or

(ii) a revised native title determination application;

is made in relation to an area in an onshore place; and

(b) when the application is made, the area is, or is part of, an area such as a national, State or Territory park:

(i) that is set aside; or

(ii) in which an interest is granted or vested;

by or under a law of the Commonwealth, a State or a Territory for the purpose of preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, vesting in trustees or otherwise; and

(c) the operation of this section in relation to the area is agreed to in writing by:

(i) any registered native title body corporate or the applicant for any native title claim group concerned or, if there is no native title body corporate or native title claim group concerned, all the representative Aboriginal/Torres Strait Islander bodies for the area; and

(ii) whichever of the Commonwealth, the State or the Territory by or under whose law the area was set aside, or the interest in the area was granted or vested.

Notice and time for comment

- (2) Before making an agreement for the purposes of paragraph (1)(c), the Commonwealth or the State or Territory concerned:
- (a) must:
 - (i) arrange for the publication, in a newspaper circulating generally in the State or Territory in which the area is located, of notice of the proposed agreement; and
 - (ii) give interested persons an opportunity to comment on the proposed agreement; and
 - (b) may take any other action to ensure that all persons who might be interested have notice of the proposed agreement.
- The period for comment must be at least 2 months.

- (3) The agreement must not be made before the end of the period for comment.

Prior extinguishment to be disregarded

- (4) For all purposes under this Act in relation to the application, any extinguishment of the native title rights and interests in relation to the area by any of the following acts must be disregarded:
- (a) the setting aside, granting or vesting mentioned in paragraph (1)(b);
 - (b) the creation of any other prior interest in relation to the area.

Effect of determination

- (5) If the determination on the application is that native title rights and interests exist in the area:
- (a) the determination does not affect:
 - (i) the validity of the setting aside, granting or vesting; or
 - (ii) the validity of the creation of any other prior interest in relation to the area; or
 - (iii) any interest of the Crown in any capacity, or of any statutory authority, or any other person, in any public works on the land or waters concerned; or
 - (iv) any existing public access to the area; and
 - (b) the non-extinguishment principle applies to the setting aside, granting or vesting or any other prior interest.

Exclusion of Crown ownership of natural resources

- (6) For the purposes of this section, a reference to the creation of an interest in relation to an area does not include a reference to the creation of an interest that confirms ownership of natural resources by, or confers ownership of natural resources on, the Crown in any capacity.

3 Paragraph 61A(4)(a)

Omit “or 47B”, substitute “, 47B or 47C”.

Note: The heading to subsection 61A(4) is altered by omitting “or 47B” and substituting “, 47B or 47C”.

4 Paragraph 61A(4)(b)

Omit “or 47B”, substitute “, 47B or 47C”.

5 Application

- (1) This item applies if:
 - (a) a claimant application; or
 - (b) a revised native title determination application;made before the commencement of item 2, has not been determined.
 - (2) The amendments made by this Schedule apply in relation to the application.
 - (3) The application:
 - (a) may be amended to state that section 47C applies to it; and
 - (b) if it is so amended—must, for the purposes of sections 63 and 66 of the *Native Title Act 1993*, be treated as if it were a new application filed in the Federal Court under section 61 of that Act.
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