



COMMONWEALTH OF AUSTRALIA

Submission

Senate Legal and Constitutional Affairs Legislation Committee
Inquiry into the Native Title Amendment (Reform) Bill 2011

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The Commonwealth is grateful for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Native Title Amendment (Reform) Bill 2011 (Bill).

This submission was prepared by the Attorney-General's Department in consultation with relevant Commonwealth Government Departments. It sets out key facts and actions previously undertaken by the Government in relation to some of the proposed areas for reform.

The Government is committed to improving the native title system through practical, considered and targeted reforms. The Government will only undertake significant amendments to the *Native Title Act 1993* (the Act) after careful consideration and full consultation with affected parties to ensure that amendments do not unduly or substantially affect the balance of rights under the Act.

The amendments proposed by the Bill are considered below:

1. Subsections 24MB(1)(c), 24MD(2)(c), 26(3), and 38(2)

These proposed amendments to subsections 24MB(1)(c), 24MD(2)(c), 26(3), and 38(2) are significant amendments to the Act. Detailed consideration of the full implications of the proposed amendments and consultation with affected parties is required.

2. Section 3A - Objects of the Act

The Government was pleased to support the United Nations Declaration on the Rights of Indigenous Peoples, noting that it sets out important principles for the fundamental human rights of Indigenous people. The Government's statement of support for the Declaration made it clear that Australia's laws concerning land rights and native title are not altered by its support of the Declaration.

The proposal to include section 3A is a significant amendment to the Act. Detailed consideration of the full implications of the proposed amendments and consultation with affected parties is required.

3. Subsections 31(1)(b), 31(1A), 31(2A), 35(1) and 35(1A)

On 3 July 2010, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs released a discussion paper titled 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits' for public consultation on a possible package of reforms to promote leading practice in native title agreements and the governance of native payments. This included a proposal to amend the Act to provide clarification for parties on what negotiation in good faith under the right to negotiate provisions entails.

Public consultations were held in July and October 2010 and the Government is currently considering the 29 written submissions received.

The Government has decided to clarify the requirement for parties to native title claims to negotiate in good faith, to ensure that parties understand what negotiation in good faith entails, and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions.

The Government sees this amendment as having a number of benefits, including:

- improving benefits from negotiations by encouraging more meaningful and transparent negotiations between parties
- improving efficiency of negotiations by providing clear guidance on what is needed to satisfy the good faith requirements, and
- facilitating greater consideration of the ability and requirements of all parties to engage in the negotiation process.

The proposed amendments to sections 31(1)(b), 31(1A), 31(2A), 35(1) and 35(1A) are broader than those consulted upon. Detailed consideration of the proposed amendments and full stakeholder consultation is required.

4. Section 47C – Coexistence of native title by disallowing extinguishment

From 14 January 2010 to 19 March 2010, the Government invited public comment on draft legislation that would allow parties to agree to disregard the extinguishment of native title in areas which have been set aside or vested for the purpose of preserving the natural environment of an area, such as a park or reserve. The proposed reform is based on a suggestion made by the Chief Justice of the High Court, Chief Justice French AC. The proposed reform could provide more opportunities for claims to be settled by negotiation and could provide incentives for parties to reach agreement.

The Government received 17 submissions broadly supportive of the proposal and is considering these submissions.

The amendments proposed by the Bill would allow parties to agree to disregard any extinguishment which is far broader than the proposal consulted upon and is a fundamental change to the Act. Detailed consideration of the proposed amendment and full stakeholder consultation is required.

5. Sections 61AA and 61AB – Presumptions relating to applications

The proposed amendments seek to put into legislation amendments offered by Chief Justice French ‘as a basis for discussion of the use of presumptions in this area’.¹ The operation of the proposed amendments and transitional arrangements require detailed consideration and discussion and full stakeholder consultation.

¹Chief Justice Robert 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), pp. 11-12.

6. Subsections 223(1A) – (1D) and 223(2)

The proposed amendments to subsections 223(1A) – (1D) and 223(2) are significant amendments to the Act. Detailed consideration of the full implications of the proposed amendments and consultation with affected parties is required.

The Government notes in relation to the proposed amendment to subsection (1C) that the Full Court of the Federal Court has recognised that subsection 223(1) does not require claimants to show a continuing physical connection to the land.² In addition, it is assumed that the reference in the proposed subsection 223(1C) to ‘paragraph (1)(c)’ should be a reference to ‘paragraph (1)(b)’.

7. Conclusion

For the reasons outlined above, the Government submits that the Committee should recommend that detailed consideration of the full implications of the proposed amendments and consultation with stakeholders be undertaken.

² *De Rose v South Australia (No 2)* [2005] FCFCA 110 at paragraph 62.