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

Thank you for the opportunity to provide the following submission in relation to the *Native Title Amendment (Reform) Bill 2011*. This submission is made on behalf of Board Members and staff from the Centre for Native Anthropology (CNTA) at the Australian National University. CNTA was established in 2010 in response to an identified shortage of skilled and experienced anthropologists to conduct native title research. All of the individuals who are signatories to this submission are qualified anthropologists with experience acting as expert witnesses in native title claims. The opinions contained in this submission are ours alone, and should not be taken as representative of those of our funding partner, Attorney General's Department.

Reflecting CNTA's stated objectives, our submission is primarily concerned with the proposed changes to Items 61AA and 61AB, which introduce a presumption of continuity of traditional laws and customs where connection to lands and waters has been established. The effect of these proposed changes is a shift in the onus of proof to respondent parties who will be required to demonstrate significant rupture of this connection.

Shifting the burden of proof: possible consequences for native title research

CNTA fully supports the main objectives of the Bill as stated in the Explanatory Memorandum, that being to address the barriers claimants face in making the case for a determination of native title rights and interests. In particular, we support the proposed amendments to 61AA and 61AB. We recommend, however, for consideration to be given to the implementation of these changes so as to ensure that they do not in fact

work *against* the interests of Aboriginal and Torres Strait Islander peoples involved in native title research.

In an environment where the presumption of continuity of traditional laws and customs is uncontested, the proposed changes to the onus of proof may indeed be effective in speeding-up the resolution of claims. Demonstration of ongoing continuous practice of certain laws and customs from "sovereignty" will no longer always be required, potentially vastly reducing the need for Aboriginal testimony about the character of laws and customs in the present. Our concern, however, is primarily about the possible impact of these proposed amendments in circumstances where the presumption of continuity is challenged, and relationships between parties involved in a native title claim (which may include respondent parties who are other Aboriginal people or native title claimants) are hostile.

61AA (1): The need to demonstrate traditional connection to lands and waters remains

We are concerned that the proposed shift in the onus of proof to respondent parties will be assumed by some to mean that the research burden for native title claimants, and therefore in the research workload of native title representative bodies, will be substantially reduced. We draw attention to the fact that native title claimants and their representatives will presumably still have to undertake considerable anthropological and ethno-historical research in order to satisfy the Court that the circumstances listed at 61AA(1) exist. We suggest that this will still require ongoing funding of native title representative bodies' research activities at existing levels.

61AA (2): Proving against the presumption continuity

Subsection 61AA(2) provides for the presumption of the continuity of laws acknowledged and customs observed where circumstances in 61AA(1) have been proven to exist, in the absence of proof to the contrary. We fully support the presumption of continuity of laws and customs in these circumstances. However, we have a number of concerns about the possible consequences for the native title research process and research outcomes for native title claimants should respondent parties aggressively seek to challenge presumptions of continuity. Most of these concerns arise from the possibility that, burdened with the onus of disproving continuous practice of law and custom, respondent parties may become significant commissioners of native title research. We outline our concerns in more detail below.

Research under conditions of free and informed prior consent

As it stands, native title research involves complex ethical and professional relationships between those commissioning research, those conducting research (usually but not always anthropologists), and the Aboriginal and Torres Strait Islander peoples who are the subjects of native title research. We are concerned that where respondent parties become significant commissioners of native title research, these

relationships may at times be further compromised. In particular, we are concerned that anthropologists and other researchers may be commissioned to undertake research into Aboriginal law and custom in circumstances where free and prior informed consent of the Aboriginal and Torres Strait Islander peoples involved has not been established.

Loss of control over personal and cultural information

As it currently stands, the native title process makes extraordinary demands on Aboriginal and Torres Strait Islander peoples to participate in research for native title claims. The provision of expert opinion about a group's traditional laws and customs involves considerable primary research with native title claimants. These investigations are at times of a highly personal or culturally-restricted nature. Questions may be asked about individual's birth, death and marriage practices, their interpersonal relationships with family and friends, employment history, religious ritual and other cultural practices. Much of the information recorded during research (for example genealogies and maps) cannot be immediately returned because of concerns around protecting the confidentiality of evidence. But otherwise, for the most part, this information remains under the control of claimants and their legal representatives.

The proposed changes to the presumption of proof will presumably reduce the existing demands on native title claimants to participate in research. We are concerned, however, that if respondent parties become significant commissioners of native title research, Aboriginal and Torres Strait Islander peoples involved in native title claims may lose the capacity to control the circumstances in which research about their history and culture occurs (including deciding who will do such research), and how it is managed in the future. Gaining access to the products of native title research once the claim has been settled may proof difficult, or even impossible.

Exposure of vulnerable witnesses to hostile examination

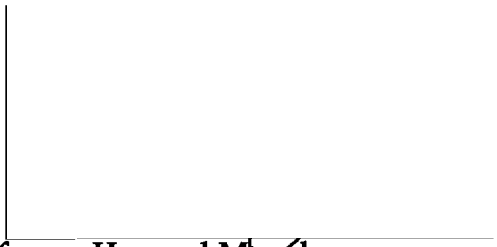
While we acknowledge the proposed changes to 61AA and 61AB will at times reduce the need for Aboriginal people to give lengthy testimony about the ongoing practice of law and custom, we are concerned that vulnerable witness may still be exposed to examination by respondent parties, and in circumstances that are stressful. It may be that Aboriginal testimony will be required to disprove the presumption of continuity, and therefore that key witnesses will at times be subpoenaed to give evidence. It is widely acknowledged that giving testimony in open court can be a particularly stressful experience for Aboriginal witnesses, particularly when they are elderly or frail, are illiterate, or have English as a second language.

This can and does happen as the legislation currently stands. We are concerned, however, that in circumstances where respondent parties seek to disprove continuity and native title claimants do not consent to participate in primary research to this end, the frequency with which Aboriginal people are subpoenaed to give evidence may in fact increase. We are concerned to see that the proposed legislation is implemented in such a way as to address this risk.

To summarise, we broadly support the changes to the Native Title Act proposed by the Reform Bill. But we are concerned that in some circumstances the proposed changes will not always ameliorate some of the injustices inherent in the process as it already exists. In particular, the implications of burdening respondent parties with proving significant social rupture may at times compromise the capacity of Aboriginal people to control and access significant research about their traditional laws and customs.

In order to guard against these risks, we would like to see consideration given to providing some legislative controls around the circumstances in which the presumption of the continuity of laws and customs can be challenged. Vulnerable witnesses could be protected through measures controlling the issuing of subpoenas by respondent parties against native title claimants. Further exploration of possible measures to reduce the burden of proof without diminishing the capacity of Aboriginal and Torres Strait Islander peoples to participate in anthropological research on their own terms and with full and informed consent, is strongly recommended.

Yours faithfully,



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