

Western Australia's Submission

to the

**Senate Standing Committee
on Legal and Constitutional Affairs**

about the

Native Title Amendment (Reform) Bill 2011

August 2011

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1 Introduction

The Western Australian Government (**WA Government**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Inquiry (**Inquiry**) on the proposed *Native Title Amendment (Reform) Bill 2011* (Cth) (**Bill**). The WA Government's assessment is that the proposed amendments to the *Native Title Act 1993* (Cth) (**Act**) will compound existing delays, costs and uncertainty in the native title system.

The WA Government's view is that there are more effective options for the Commonwealth Government to assist in the process of resolving native title claims than further changes to the Native Title Act 1993. Those options include the Commonwealth engaging in good faith negotiations with the States and Territories to develop functional policies to expedite the resolution of native title claims and native title agreements.

2 Commonwealth-State Native Title Compensation Agreement

2.1 History to the issue of the Commonwealth's contribution to compensation

Beginning in 1992-93 with Prime Minister Keating, the Commonwealth made various offers to the WA Government to assist it manage and respond to its obligations under the *Native Title Act 1993* (Cth). Those negotiations continued under Prime Minister Howard in 1996 through until 1998, when eventually the Commonwealth offered to the WA Government that it would contribute:

- (a) 75% of past act compensation for the period from 1 October 1975 up to 23 December 1996;
- (b) 75% of future act compensation arising from the "Wik" ten point plan amendments, including negotiated settlements as well as determinations;
- (c) 75% of future act compensation arising from future acts done on vacant crown land and the intertidal zone; and
- (d) to compensation arising out of Indigenous Land Use Agreements.

The Premier of Western Australia accepted this offer (**the Agreement**) and a draft financial arrangement was developed to give effect to the terms agreed. Then Prime Minister Howard also agreed to consider broad regional agreements with native title claimants.

Efforts to conclude the terms of a financial arrangement continued irregularly until 2008 when the Commonwealth and the States and Territories agreed to finalise the arrangement. However, the Commonwealth sought to abandon its commitment to fund 75% of compensation costs and instead sought support for a National Partnership Agreement on Native Title Financial Assistance (**Proposed Partnership Agreement**). The Partnership Agreement was based on a different set of financial and policy objectives.

Western Australia participated in these negotiations, but maintained its position that the Partnership Agreement must honour the terms of the Agreement, particularly that the Commonwealth provide a 75% contribution.

In August 2009, the Commonwealth withdrew its commitment to the Partnership Agreement and proposed an alternative (and further reduced) funding arrangement which, in the view of the WA Government was an unacceptable retreat from fundamental terms made in both the Agreement and in the Proposed Partnership Agreement.

2.2 Current situation

The Commonwealth government's refusal to honour its commitment to the agreed contribution to compensation arising from comprehensive native title agreements for claims and future acts in Western Australia is the State's dominant concern with the current administration of the *Native Title Act 1993* (Cth). The Prime Minister's most recent advice to the Premier of 18 March 2011 is that "there is no legal or other obligation to Western Australia for the cost of native title compensation and settlements". This is noted against the fact that many of the proposed amendments in the current Bill increase the scope of compensable native title rights in Western Australia and thereby increase the contingent liabilities of the State.

Western Australia has a higher level of exposure to native title rights than any other jurisdiction, yet it is proud that it also possesses the most progressive record for recognizing native title rights and entering into substantial agreements. However, the Commonwealth government's refusal to honour the terms of the Agreement negotiated in good faith with the State, and the absence of any alternative arrangement or obligation to which the Commonwealth has accepted a commitment must inevitably impede the State's scope to expedite the resolution of native title claims and enter into further agreements with native title holders.

3 Declaration on the Rights of Indigenous Peoples

The WA Government acknowledges Australia's signatory status to the United Nations Declaration on the Rights of Indigenous People (**Declaration**), and is committed to sustainable economic and social development in native title and other Indigenous communities. However, the WA Government is concerned that the Bill's intention of transforming the Declaration from a declaratory statement into an implementation code, has the effect of removing the discretion State and Territory jurisdictions currently have to take the Declaration into account when implementing their strategic goals and framing their operational procedures.

The proposed section 3A of the Bill will fetter the WA Government's ability to determine how to balance native title interests with other interests or to take into account its key

strategic goals (State building, financial and economic responsibility, outcomes-based service delivery, a stronger focus on the regions and social and environmental responsibility) through legislation, particularly with regard to land and development approvals. These are significant issues for Western Australia and for its continued economic and social growth which should be significant issues for the Commonwealth Government

The WA Government is particularly concerned about proposed section 3A(1)(c) which relates to the free, prior and informed consent of Indigenous peoples in matters affecting them. The Commonwealth Government highlighted this aspect of the Declaration as an area of concern in 2007 when it stated that the article could require States to "consult with indigenous people about every aspect of the law that may affect them."¹ There are already effective processes to consult and negotiate with Indigenous groups in instances where their land is affected. To mandate that the WA Government take something as abstract as "all necessary steps" to implement the Declaration principles would be difficult to implement in any meaningful way. It is questionable whether these additional administrative burdens would make any difference to the outcomes in decision making other than to increase costs and time frames.

4 Presumption in favour of native title's continued existence

Whilst it may be challenging for applicants to discharge the onus of proof of cultural continuity that the Act requires, the introduction of a presumption in favour of native title's continued existence is unlikely to have the desired result. The Bill proposes to alter significantly how connection is determined through the insertion of new sections 61AA and 61AB. The intention is two-fold: to shift the onus of proof away from native title claimants and to broaden significantly the criteria for demonstrating the continuity of connection. While intended to expedite the resolution of native title claims, its impact is expected to disrupt radically the existing processes for resolving claims as result of:

- (a) the need to make wholesale changes to policies and guidelines;
- (b) the likelihood of further litigation to test and determine the meaning and effect of the resulting new statutory provisions; and
- (c) the need of the State to undertake the time consuming tasks of clarifying tenure arrangements prior to commencing negotiations.

¹ Permanent Representative to the United Nations for Australia, transcript from UN General Assembly meeting: *Official Records, Sixty-first session, 107th plenary meeting*, UN document A/61/PV.107, United Nations, 13 September 2007, available from
< <http://daccess-dds-ny.un.org/doc/UNDOC/G EN/N07/504/29/PDF/N0750429.pdf?OpenElement?>

4.1 Presumption

State and Territory Government connection guidelines are a reflection of government native title policy and relevant case law, both of which have evolved since 1994. Different jurisdictions have developed different strategies aimed at resolving native title claims. Those strategies are not centred solely on matters related to native title connection. The proposed amendments pre-suppose Governments have a singularly adversarial approach to native title proof. They also overlook the fact that most consent determinations require a generous interpretation of claimant evidence by respondent parties to adopt inferences that address gaps in the available evidence. Very few claims generate incontrovertible proof. The effect of the proposed amendments will very likely be counter-productive by requiring State and Territory Governments to place renewed emphasis on identifying the flaws in connection evidence. The overall effect will limit rather than assist the resolution of native title claims by consent. The sweeping nature of this proposal is likely to have a more significant impact on claims resolution than the pivotal *Yorta Yorta* decision².

The WA Government understands that under proposed section 61AA the initial burden of establishing the existence of relevant facts giving rise to the presumption falls upon the applicant. It appears that for the presumption to arise under proposed s 61AA, the applicant would need to provide sufficient evidence to establish the following facts:

- (a) there is a native title determination application;
- (b) the native title claim group in that application assert rights and interests which are possessed under traditional laws and customs;
- (c) the members of the group reasonably believe that these laws and customs are traditional;
- (d) the members of the claim group have, through these traditional laws and customs, a connection with the land and waters the subject of the application; and
- (e) the members of the claim group reasonably believe that that the predecessors of one or more of them acknowledged these laws and customs at sovereignty and that these traditional rights and interests gave rise to a connection with the land and waters the subject of the application.

It seems that under proposed section 61AA(1)(c), the relevant group must have a “connection” with the land and waters the subject of the application. This requirement does not seem to depart greatly from what must currently be proved. Hence, despite its radical

² *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002)194 ALR 538.

conceptual nature the supporters of reversing the onus of proof have failed to demonstrate how it will practically speed up claims resolution.

One might reasonably anticipate that the introduction of such a requirement would also create a degree of uncertainty as applicants and respondents negotiate (and in some cases litigate) on issues such as the level and sufficiency of evidence required to invoke the presumption.

If one considers the proposed section 61AB in this context, one could also foresee a degree of uncertainty as to the nature and evidence of what constitutes 'substantial interruption'. Inevitably this issue would be litigated to establish clear judicial principles on this point.

4.2 Expansion of criteria for determining connection

Proposed section 61AB seeks to expand the criteria for determining connection so that only 'substantial' interruptions will set aside a presumption that a native title claim group has a connection with land or waters by traditional laws and traditional customs. In determining whether there has been a substantial interruption, proposed section 61AB(2) requires the court to 'treat as relevant' circumstances where 'the primary reason for any demonstrated interruption ... is the action of a State or Territory or a person who is not an Aboriginal person or a Torres Strait Islander'.

While the WA Government can appreciate the desire of native title claimants not to have their proof of connection adversely affected as a result of historical government decisions regarding removal/relocation from lands, any expansion of criteria for determination of connection is likely to result in relevant native title holders seeking to modify existing determinations so that they are consistent with current native title law. This would place an additional burden on the native title system.

4.3 Conclusion on proposed sections 61AA and 61AB

Overall, the WA Government suggests that:

- (a) little is gained by introducing the presumption as the facts which would need to be established for the presumption to arise are still reasonably onerous and impose similar (albeit possibly to a lower standard) requirements to those underpinning a determination of native title;
- (b) if the onus of proof shifts to the Government it has no option except to test the proof to its fullest;
- (c) significant uncertainty would be generated with the introduction of the presumption and the requirements for establishing 'substantial interruption';

- (d) the uncertainty would inevitably lead to some delay; and
- (e) the amendments overlook initiatives in different jurisdictions to expedite claims resolution and to expand the content of claim settlement agreements.

5 Proposed definition of 'Traditional'

Caution needs to be exercised before amendment is made to the definition of "traditional", in respect of which significant case law exists. It is settled that the current definition of "traditional" does not mean that change to or adaptation of traditional laws and customs, or some interruption of the enjoyment or exercise of native title rights, is necessarily fatal to a native title claim. Amendment of the definition of "traditional" would give rise to new questions of construction that could potentially lead to confusion currently avoided by jurisprudence.

Further, by expanding the definition of "traditional" in proposed section 223(1), the scope and nature of recognisable native title rights and interests is likely to increase. The WA Government notes that this in turn may give rise to an increased compensation liability. Given the Commonwealth Government's recent refusal to engage in meaningful dialogue with the States and Territories on the matter of its contribution to native title compensation, does the Commonwealth accept liability for increasing the scope of compensable rights that arise from proposed amendments to the Act.

The WA Government notes that the provision as expressed is cast widely and is capable of different interpretations, which could increase the uncertainty in relation to this provision. It also overlooks the fact that various forms of evidence are considered in the assessment of connection and that evidence of physical connection is not the only matter to which respondents have regard. The provision also overlooks the stated position of claimants that evidence of physical connection is significant in proving connection for the purposes of a native title determination.

6 Negotiation in good faith

The Bill proposes to amend radically the good faith provisions by reversing the onus of proof, requiring the party claiming it has acted in good faith to provide proof, and linking good faith to conditions specified by the native title party. The WA Government considers the law in relation to the negotiation in good faith requirement to be sufficiently measured and appropriate so as not to warrant amendment. Furthermore, the motivation for this amendment is based upon a misunderstanding about how the current Act operates. The result would almost certainly be to add extensive delays and costs to the future act system.

6.1 Sufficient certainty

The Full Federal Court decision in April 2009 of *FMG Pilbara Pty Ltd v Cox*³ concerned the applicability of the good faith provisions to future act negotiations. In October 2009 the High Court dismissed the native title party's application seeking special leave to appeal the Full Federal Court decision.

The WA Government considers that the Full Federal Court decision has provided sufficient certainty to actively progress right-to-negotiate matters through to an arbitral inquiry where a non-native title party has engaged in good faith negotiations, but the parties cannot reach agreement on a future act matter.

Furthermore, the WA Government is concerned that if the proposed amendment is enacted, it would introduce an unsustainable procedural constraint on the efficient operation of the *Mining Act 1978* (WA) and the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

In the Second Reading Speech for the Bill, Senator Siewert states that the current Act is 'procedurally unfair' to native title parties and that 'proponents who are not inclined to enter into serious negotiations with native title holders can effectively stonewall and sit on their hands for six months' and await arbitration. These comments demonstrate little understanding of the work that is currently undertaken by the National Native Title Tribunal (**Tribunal**) to address these matters and of the approach most miners and native title claimants bring to future act mediation.

6.2 Indicia of negotiation in good faith

The indicia or codification of aspects of negotiation in good faith as proposed in a new section 31(1A) are largely matters which are currently applied by the Tribunal. Negotiations are varied and the Tribunal has stated that determining whether or not the parties have negotiated in good faith during the prescribed six month period is 'not a formulaic exercise', but must take into account the detail of how the matters were addressed. Proposed section 31(1A) does little to advance the already established principles related to negotiation in good faith.

6.3 Party asserting good faith must prove that it has negotiated in good faith

The WA Government also opposes the proposal to reverse the onus of proving negotiation in good faith to the party asserting that it has negotiated in good faith. Proposed section 31(2A) seems to operate so that the native title party need merely raise the issue of good faith negotiation and this would give rise to an obligation on the proponent or State to

³ *FMG Pilbara Pty Ltd v Cox & Ors* [2009] FCAFC 49; (2009) 175 FCR 141.

marshal evidence that negotiations were conducted in good faith. This could create unnecessary delays in a process that already allows for challenges on the basis of good faith.

6.4 No application to arbitral body until complied with obligation to negotiate in good faith

The proposed section 35(1A) states that a party may not apply to the arbitral body under section 35(1) unless the negotiation party has complied with the codified negotiation in good faith in accordance with the requirements in section 31. Presumably this is satisfied by affidavit and other evidence of matters pertaining to the indicia of good faith.

This appears to add an additional layer of procedure in the approvals process without benefit. The current section 31 deals with the normal negotiation procedure and requires that parties negotiate in good faith with a view to obtaining agreement on various matters. The obligation is evident. The current section 35 provides that subject to certain conditions, a negotiation party can apply for an arbitral body determination. Section 36 states that the arbitral body may not make such a determination if any other negotiation party satisfies the arbitral body that the negotiating party seeking the determination did not negotiate in good faith. So, essentially:

- (a) good faith is presumed;
- (b) the organisation seeking the determination is open to challenge on the basis of good faith; and
- (c) a good faith challenge can be brought and must be determined before the arbitral body determines the substantive matter.

This means that a determination cannot be obtained in the absence of good faith. To require compliance with good faith in the proposed manner adds a layer of complexity to a system that is already predicated on parties negotiating in good faith.

7 Disregarding extinguishment by agreement

The WA Government has reservations about the practical implications of the introduction of a statutory mechanism allowing parties to disregard extinguishment by agreement. The proposed amendment raises further questions about native title compensation and the Commonwealth's obligations in this regard.

8 Reference to “effective” heritage legislation in section 24MB(1)(c)

Section 24MB(1)(c) currently addresses future acts where Commonwealth, State or Territory laws ‘make provision in relation to the preservation or protection of areas, or sites, that may be ...of particular significance to Aboriginal peoples ... in accordance with their traditions’. The Bill proposes to repeal this aspect and modify its focus so that it will take into account whether such laws provide ‘effective protection or preservation of areas, or sites, that may be of particular significance...’

The WA Government opposes the introduction of this provision. The term “effective” is highly subjective and open to differing interpretations, thereby introducing another unnecessary level of uncertainty into this area of the law.

In her Second Reading speech, Senator Siewert raises concern with the adequacy of the *Aboriginal Heritage Act 1972 (WA) (Heritage Act)*. In response, the Government notes that:

- (a) it is the function of the States and Territories to enact heritage legislation;
- (b) State and Territory governments are in the best position to determine the most effective means for heritage protection;
- (c) the WA Government is currently reviewing the Heritage Act; and
- (d) accreditation of the WA legislation under the *Aboriginal and Torres Strait Islander Heritage Act 1984 (Cth)* is under consideration.

9 Revised section 24MD(2)(c) compulsory acquisition doesn’t extinguish native title, only giving effect to the purpose of the acquisition does

The intention of this amendment is to re-state the original wording found in section 23(3) of the Act, prior to the current section 24MD, the effect of which was that native title rights and interests were not extinguished until an act which was inconsistent with the native title rights and interests was done in giving effect to the purpose of a compulsory acquisition.

Currently, section 24MD(2) provides that a compulsory acquisition extinguishes native title, subject to paragraphs 24MD(2)(b) - that the equivalent non-native title interests are acquired; and 24MD(2)(ba) - the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired.

One possible interpretation is that if sections 24MD(2)(b) or (ba) are not satisfied then a compulsory acquisition falls within section 24MD(3) and the non-extinguishment principle applies to the compulsory acquisition. Another possible interpretation, however, is that

compulsory acquisition can only be done under sections 24MD(2) or (2A) and that otherwise native title cannot be compulsorily acquired under Subdivision M."

The case law in relation to section 24MD is by no means uncomplicated. However, some degree of understanding has been reached for the purposes of negotiation of determinations. The WA Government is concerned that this amendment may lead to an increase in litigation of determinations and therefore will be counter-productive.

10 Right to negotiate over off shore areas

The WA Government opposes the repeal of section 26(3). Any extension of the right to negotiate to offshore areas would have far reaching consequences for offshore activity. There are complex issues of ownership and access to the sea associated with offshore native title rights. A right to negotiate offshore would create a level of uncertainty which could render the WA Government's administration of approvals and activities in offshore areas unworkable.

11 Provision allowing profit sharing, including arbitral body ability to impose such a condition

The WA Government does not support proposed section 38(2), which allows for an arbitral body such as the Tribunal to impose conditions related to royalties or profit sharing arrangements. These conditions are commercial in nature and are not matters which should be imposed by an arbitral body removed from the broader commercial context.

12 Proposed inclusion of commercial rights in section 223(2)

The Bill proposes to repeal the current section 223(2) of the Act and replace it with a provision that expands rights and interests to include 'the right to trade and other rights and interests of a commercial nature'.

The motivation for proposed section 223(2) is stated by Senator Siewert as wishing to 'provide a basis for economic and cultural development'. However, the amendment conflates what is in essence a retrospective search for evidence of commercial activity by claimants with contemporary needs for native title holders to be involved in economic decision-making that provides for current and future generations.

The WA Government opposes the expansion of native title rights and interests to include commercial rights and interests. One by-product is that it would expand the nature of compensable rights and interests in a manner which would impose a very high burden on the State.

This, like other measures, would amount to the Commonwealth Government increasing the liability of State and Territory Governments to native title compensation, in the absence of a

shared responsibility. Furthermore, the proposal would inevitably sponsor a review of existing native title determinations and native title agreements.

13 Conclusion

In conclusion, the WA Government is not supportive of the Bill. Many of these provisions are discussed at an abstract, conceptual level, but do not reveal any comprehension of their practical implications. Enacting these provisions will upset what balance there is around the Act. It will also represent further poorly conceived intervention by the Commonwealth Government in State land and resource management. These measures are unnecessary, unworkable and cannot be meaningfully implemented. Whilst the Commonwealth continues to deny it has any legal or other obligation to contribute to the cost of native title compensation and settlements, the only thing which is clear is that their effect will be to further and unfairly burden the State.