The Hon John Rau MP

Government
of South Australia

Deputy Premier
Attorney-General
Minister for Justice
Minister for Urban Development, Planning and the City of Adelaide
Minister for Tourism
Minister for Food Marketing

45 Pirie Street
Adelaide SA 5000
GPO Box 464
Adelaide SA 5001
DX 336

CSO117802

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Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
CANBERRA ACT 2066

Dear Sir/Madam,

Native Title Amendment (Reform) Bill 2011

Thank you for the opportunity to comment on the *Native Title Amendment (Reform) Bill* 2011.

State and Territory governments are key participants in the scheme that operates under the Commonwealth *Native Title Act* 1993 (NTA). They are the main undertakers of future acts governed by Part 2, Division 3, including, in particular, acts to which the Right to Negotiate (RTN) applies. In South Australia's case, it has its own RTN scheme, modelled on the Commonwealth's, in its mining and opal mining legislation. States and Territories are also automatically the first respondent to all native title claims lodged within their boundaries. Given their crucial role, it is rather surprising that this Bill was introduced into the Parliament without any consultation or discussion with State and Territory governments or (to our knowledge) other important stakeholders.

The Bill proposes a number of significant and, in some cases, fundamental changes to the NTA. The proposals represent a significant re-visiting of a number of the basic precepts of the Act, but no or very little justification has been offered in support of them. There has been no opportunity to debate or discuss the changes, to consider the implications, both intended and unintended, and the effect in the context of other legislation or 'on the ground'. Hence, at this point, the South Australian government is not able to support the proposals in the Bill. It is willing to participate in a dialogue with the Commonwealth and other stakeholders about the proposals so that, where there is a genuine need for change, appropriate and balanced measures can be formulated.

For ease of reference, South Australia's comments on the specific proposals (to the extent that we are able to comment at this stage) are directed to the seven main areas of reform proposed in the Bill:

1. United Nations Declaration on the Rights of Indigenous People

As others have observed, the Australian government committed its support for the UN Declaration on the basis that Australia's laws regarding land rights and native title are not altered by it.[1]

Even if this were not the case, there are a number of obvious and potential difficulties in importing the UN Declaration and having it apply in decision making under the NTA. For instance, the Declaration is not couched in sufficiently precise language to allow for its application as part of Australian law; a number of important terms are undefined; and it is internally inconsistent. Taken at face value, a number of the Articles would affect the existence and exercise of third party property rights and the exercise of decision making powers by government. In particular, the notion of "free and informed consent" (Article 32) could, for example, override arbitration under the 'right to negotiate' provisions of the NTA (or State equivalent) meaning that a 'right of veto' would apply. These sorts of implications need to be carefully considered and fully debated within the Australian community before being incorporated into existing legislation.

2. Changes to Sub-division M

2.1 S 24MB(1)(c)

The proposed amendment to paragraph 24MB(1)(c) to require that a law of the Commonwealth, a State or a Territory must provide effective protection or preservation of areas or sites of particular significance would introduce an element of subjectivity and uncertainty into this provision. What is "effective" protection?

There are already two levels of heritage protection - that afforded under State or Territory legislation and that afforded by the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act*, which provides last resort protection in the event that State or Territory legislation fails to adequately protect Aboriginal heritage. The justification for this proposal is not at all apparent. A discussion and proper consideration of the need for and implications of this proposal is required.

2.2 S 24MD(2)(c)

The proposed amendment to section 24MD(2)(c) to provide that compulsory acquisition does not, of itself, extinguish native title and only the act done in giving effect to the purpose of the acquisition leads to extinguishment would also introduce a significant element of uncertainty. At what point can it be said that an act done in giving effect to the purpose of the acquisition leads to extinguishment?

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[1] Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment (Reform) Bill 2011 by the Commonwealth Attorney-General's Department.

It is important to have clarity around when the interests are acquired and extinguished, so as to avoid on-going disputation and potential litigation that is not in the public or any parties' interest.

This proposal is inconsistent with the case law, in particular, the High Court in *WA v Ward*, in which the Court made it clear that it is not the inconsistent *use* of land that extinguishes native title, but the inconsistency of the rights granted that results in extinguishment. This is a sensible and certain approach and should be maintained in the legislation.

3. RTN applying over off-shore areas

The proposal to apply the RTN over the sea and intertidal zone is a significant change and warrants full and detailed consideration.

4. RTN Changes - "Good faith" requirement and imposition of profit sharing orders

4.1 Changes to the "good faith" requirement

The Act currently requires the parties to a negotiation under the RTN in Sub-division P to negotiate in good faith. The addition of a requirement to "negotiate in good faith using all reasonable efforts to come to an agreement" seems unnecessary. These provisions appear to be working appropriately as they stand, with the NNTT and Federal Court having helpfully elaborated on what is meant by the good faith requirement. Codification of the good faith requirement may reduce the current flexibility to consider all relevant aspect of the parties' behaviour.

In principle, these provisions should apply even-handedly. For example, it should not be assumed that just the non-native title parties need to be precluded from engaging in "capricious or unfair conduct that undermines the beneficial nature of the right to negotiate".

The proposed reversal of the onus proposed in subsection 31(2A) is also replete with unjustified assumptions about the behaviour of non-native title parties.

On the face of it, the existing provision is appropriate in requiring that there has to be some basis for saying that negotiations have not been conducted in good faith. If there are serious issues with this in practice that we are not aware of, we consider these issues should be fully canvassed in a proper consultation process, in which we would happily participate.

The proposed addition of s 35(1A) to provide that a negotiation party can not apply to the arbitral body unless all of the requirements in sub-sections 31(1), (1A) and (2A) have been complied with, viewed in the context of the vague, nebulous and difficult to prove requirements in those provisions (e.g. *actively* participating in meetings, attending locations of the claimants choosing where *reasonably* practicable, disclosing *relevant*

information, making *reasonable* offers and counter-offers, *demonstrably* giving *genuine* consideration to proposals, responding to proposals in a *timely* and *detailed* manner, refraining from *capricious* or *unfair* conduct) mean that there is the potential for matters to bog down in endless argument as to whether the threshold requirements have been met before a matter can be referred to the arbitral body.

Again, we are not aware of any significant problems with the current process and believe an opportunity should be afforded for a detailed consideration and proper consultation on this proposal.

4.2 Profit sharing orders

Sub-section 38(2) that allows for the imposition of profit sharing conditions on a mining proponent is opposed outright.

The current provisions allow for miners and native title parties to agree in negotiations that native title parties may be entitled to a share of profits etc.

Section 33(1) provides:

> *Profits, income etc.*
>
> (1) Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
>
> (b) any income derived; or
>
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

However, if the parties are unable to agree and the matter goes to the arbitral body for a determination as to whether the mining tenement can be granted, section 38(2) provides that the arbitral body cannot impose a condition that has the effect of entitling the native title parties to a share of the profits made, income derived or things produced from any mining activity.

The reasons for this limitation - i.e. the parties can *agree* that the native title parties will receive a share of profits, but profit sharing cannot be *imposed* - were well ventilated at the time the original legislation was passed in 1993. Native title parties do not own the minerals or petroleum. To the extent that they have a compensation entitlement, it is the same as a freehold owner would be entitled to - i.e. to be compensated for the effect of land access, disturbance etc. It is not an entitlement to be compensated for the loss of the minerals *per se*. Thus, while it is open to miners and native title parties to agree on how native title parties may be compensated for the effect of access, it is a very fundamental and important change to suggest that the arbitral body should be able to impose profit sharing conditions (and, by implication, to decide what the profit sharing arrangement should look like).

This issue should be the subject of detailed and full consideration by all stakeholders, including the potential impact in light of the new Mineral Resources Rent Tax and the Carbon Tax.

5. Disregarding prior extinguishment by agreement - proposed s 47C

The proposed section 47C sits with sections 47A and 47B of the NTA that provide for circumstances in which previous extinguishment can be disregarded.

While there may be scope for a provision that allows for prior extinguishment to be disregarded by agreement, the terms of such a provision and the potential consequences need to be fully considered and debated.

6. Reversal of the Onus of Proof - proposed section 61AA presumptions relating to applications.

His Honour Chief Justice French, who made the initial suggestion for a presumption as drafted, suggested in his paper "*Lifting the burden of native title - some modest proposals for improvement*" [2] that the draft clause form the basis for a discussion about the possible use of a presumption. This clause has now been proposed as an amendment to the NTA without the benefit of a proper discussion. It is a very substantial change and warrants full and careful consideration in the context of the NTA as a whole, and, indeed, in the context of how other interests in property are created and asserted.

The presumption as drafted goes further than most statutory presumptions and introduces complex notions such as "reasonable belief" which will make it more open to challenge on threshold issues than most statutory presumptions and may lead to 'trial within trial' which could lead the parties back to complex and lengthy litigation.

7. Subsection 223(1) and amendment to subsection 223(2)

The proposed insertion of subsections 1A and 1B after subsection 223(1) of "identifiable through time regardless of whether there is change in laws and or customs" is a vague and largely unhelpful concept. Native title jurisprudence already accommodates the concept of evolving laws and customs and this concept does not elucidate or simplify the approach already taken by the courts.

Adding the concept of "identifiable through time" may well complicate any presumption of continuity by adding another layer to the meaning of 'traditional'. Again, this is an issue that requires careful consideration and full consultation.

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[2] Federal Court Native Title User Group, Adelaide 9 July 2008

Conclusion

For the reasons outlined above, the South Australian government strongly suggests that detailed consideration should be given to the proposals in the Bill and that all parties should be properly consulted. It submits that the Committee should recommend accordingly.

Yours sincerely

John Rau
Deputy Premier
Attorney-General