# CHAPTER 3

## Key issues

3.1 This chapter discusses some of the key issues raised during the inquiry, namely:

- the Bill's inclusion of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration);
- compulsory acquisition and the non-extinguishment principle;
- the normal (non-expedited) negotiation procedure;
- profit-sharing conditions;
- agreements to disallow prior extinguishment;
- the rebuttable presumption of continuity;
- the common law meaning of 'native title' and 'native title rights and interests'; and
- trade and other commercial rights.

### United Nations Declaration on the Rights of Indigenous Peoples

3.2 As noted in Chapter 1, one objective of the Bill is to refer to the Declaration and to provide for certain principles to be applied in decision-making under the Act.

#### *Support for proposed new section 3A*

3.3 Many inquiry participants supported inserting as an additional object of the Act a requirement for Australian governments to take all necessary steps to implement particular principles set out in the Declaration.[1]

3.4 There were two main reasons for this support: first, the belief that, by signing the Declaration in April 2009, the Australian Government committed itself to the meaningful implementation of the Declaration;[2] and, second, the belief that the Declaration principle of 'free, prior and informed consent', as proposed in new

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1 For example, Kimberley Land Council, *Submission 2*, p. 2; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 2; Australians for Native Title and Reconciliation, *Submission 6*, p. 5; Torres Strait Regional Authority, *Submission 11*, p. 1; South Australian Native Title Services, *Submission 12*, p. 2; Professor Jon Altman, *Submission 16*, p. 5; Mr Graeme Taylor, *Submission 19*, p. 1; Law Council of Australia, *Submission 21*, p. 6; Ms Carolyn Drew, *Submission 29*, p. 2; National Congress of Australia's First Peoples, *Submission 35*, p. 2.

2 For example, National Native Title Council, *Submission 14*, p. 2; Jumbunna Indigenous House of Learning, *Submission 17*, p. 11; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 1.

paragraph 3A(1)(c), should be a fundamental part of any legislation affecting Aboriginal and Torres Strait Islander peoples.[3]

3.5 However, submissions which supported proposed new section 3A also highlighted problems relating to its potential application and the way in which the Bill seeks to incorporate the Declaration into the Act (due to inconsistencies between the two).[4]

3.6 In this context, various opinions were expressed regarding how the principles of the Declaration could be incorporated into Australia's native title law.[5] The Australian Human Rights Commission (AHRC) and Professor Jon Altman, for example, considered that the Act should be aligned with the Declaration.[6] The Yindjibarndi Aboriginal Corporation and the Law Council of Australia (Law Council) considered that the Declaration could be referenced in the Act.[7] The Queensland Government alternately suggested that the 'proper' way to incorporate principles of the Declaration into the Act would be to enact specific legislation to that effect.[8]

3.7 In relation to the practical effect of proposed new section 3A, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) submitted that the provision could have a substantive impact on the enjoyment of rights in Australia:

> Many of the substantive rights recognised in the [Declaration] are not fully recognised or protected by native title...Utilising the [Declaration] as a touchstone for interpretation would, in the case of any ambiguity, ensure a beneficial interpretation[.][9]

3.8 One particular issue raised by the Law Council, and discussed in some detail at the public hearing, was the case of *Western Australia v Ward*.[10] In that case, the (then) Human Rights and Equal Opportunity Commission (HREOC) (now the AHRC) put forward the view that the Federal Court of Australia should attempt to construe the Act consistently with Australia's international obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. However, in his judgement, Justice Callinan rejected this argument:

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3 Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 2.

4 For example, Torres Strait Regional Authority, *Submission 11*, p. 1; Australian Human Rights Commission, *Submission 24*, p. 6.

5 For example, National Congress of Australia's First Peoples, *Submission 35*, p. 3.

6 *Submission 24*, p. 6 and *Committee Hansard*, 16 September 2011, p. 24, respectively.

7 *Submission 27*, p. 15 and Mr Anthony McAvoy, Law Council of Australia, *Committee Hansard*, 16 September 2011, p. 27.

8 *Submission 27*, p. 1.

9 *Submission 22*, pp 1-2.

10 (2002) 213 CLR 1.

> The task of this Court and other courts in Australia is to give effect to the will of Australian Parliaments as manifested in legislation. Courts may not flout the will of Australia's democratic representatives simply because they believe that, all things considered, the legislation would "be better" if it were read to cohere with the mass of (often ambiguous) international obligations and instruments. Consistency with, and subscription to, our international obligations are matters for Parliament and the Executive, who are in a better position to answer to the international community than tenured judges. Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.[11]

3.9 At the public hearing, Mr Anthony McAvoy from the Law Council did not comment on whether proposed new section 3(A) represents either the HREOC or the Federal Court of Australia position, however, he suggested that the proposed provision is an 'appropriate way forward':

> If the legislation is capable of being interpreted or applied in a manner that is consistent with the Declaration on the Rights of Indigenous Peoples then that is how it should be interpreted.[12]

### *Opposition to proposed new section 3A*

3.10 Not all inquiry participants supported the incorporation of certain principles of the Declaration into the Act, as proposed in new subsection 3A(1).[13] The basis for such objections ranged from the fact that the Declaration is not part of Australia's domestic law,[14] and might therefore only be supported on an aspirational basis,[15] to the negative effect that proposed new section 3A might have on state and territory decision-making.[16]

3.11 The Western Australian Government also questioned the 'abstract' language in proposed new subsection 3A(1) (specifically the phrase 'all necessary steps');[17] and

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11 *Western Australia v Ward* (2002) 213 CLR 1 at 9.56 per Callinan J. The National Native Title Tribunal told the committee that, in its experience, the substantive provisions of the Act are not ambiguous, leaving the tribunal with little need to have recourse to the principles of the Declaration: see *Submission 15*, p. 5. Also see Mr Graeme Neate, National Native Title Tribunal, *Committee Hansard*, 16 September 2011, p. 17 where the tribunal conceded that 'there may be sections [of the Act] where that might occur' (such as section 39).

12 *Committee Hansard*, 16 September 2011, p. 27.

13 For example, Ms Rosemary O'Grady, *Submission 3*, p. 1; Minerals Council of Australia, *Submission 4*, p. 2; South Australian Government, *Submission 23*, p. 2.

14 For example, Minerals Council of Australia, *Submission 4*, p. 2.

15 Attorney-General's Department, *Submission 13*, p.1.

16 For example, The Association of Mining and Exploration Companies, *Submission 7*, p. 4; Western Australian Government, *Submission 18*, p. 4.

17 *Submission 18*, p. 5.

drafting issues similarly concerned the Law Council (who supported the Bill overall). Further, in the Law Council's view:

> [S]ub-clause 3A(1) is a wide-ranging object that, *prima facie*, is not tied to the [Act] or what the [Act] seeks to regulate. At least some of the principles appear to go beyond what the [Act] regulates and in other respects it is difficult to envisage how they will affect the operation of the Act.[18]

3.12 The South Australian Government referred to 'obvious and potential difficulties' in importing the Declaration and applying it to decision-making under the Act:

> [T]he 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.[19]

3.13 Both the Attorney-General's Department (Department) and the National Native Title Tribunal (NNTT) submitted that proposed new section 3A requires further consideration. In its submission, the NNTT referred to uncertainty and complexity within the Act:

> It appears arguable that the application of the [Declaration] principles listed [in proposed subsection 3A(1)] would render the provisions of the [Act] relating to the expedited procedure nugatory. It may also precipitate a challenge to the practice of state and territory governments including a statement of expedition in a notice issued under [section]. 29 in relation to an exploration or prospecting tenement as a matter of course. Other parts of the NTA might also be able to be challenged on similar grounds.
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> …
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> [T]he impact of the articles of the [Declaration] (for which Australia has indicated its support, but which it has not ratified) and the complex and interlocking provisions of the [Act] should be considered closely before amendments such as those proposed in the Bill are made. The Tribunal notes that substantive changes to the [Act] in the past have resulted in delays (sometimes significant) and the incurring of considerable expense in resolving claims and future act matters.[20]

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18 *Submission 21*, p. 4.

19 *Submission 23*, p. 2.

20 *Submission 15*, pp 7-8. Also see Attorney-General's Department, *Submission 13*, p. 1.

***Committee comment***

3.14 A number of submissions to the committee raised the issue of an inconsistency between the current provisions of the Act, primarily the right to negotiate provisions, and the principle of 'free, prior and informed consent', as set out in the Declaration. The key concern was that the principle of 'free, prior and informed consent' amounts to a right of veto, which is clearly and intentionally not provided for in the Act.[21]

3.15 The committee accepts the evidence from numerous submitters – including Indigenous stakeholders – who argued that proposed new section 3A is not the most effective means of incorporating the Declaration into Australia's native title law.[22]

3.16 Further, the committee is mindful of several practical difficulties identified with proposed new section 3A, for example:

- it would cause an additional administrative burden on government officials and it may not make any real difference to the outcomes of official decision making;[23]
- there is confusion as to what parts of the Declaration are to be applied because proposed subsection 3A(1) refers to only some of the principles of the Declaration but proposed subsection 3A(2) refers to the entire Declaration;[24] and
- the language of the Declaration is not sufficiently precise to enable application as part of Australian law.[25]

3.17 The committee observes that the objective of the Bill is to enhance the effectiveness of the native title system and considers that the lack of precision in proposed new section 3A and difficulties with its interpretation – such as in the phrase 'free, prior and informed consent' – do not contribute to this objective.

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21 For example, Minerals Council of Australia, *Submission 4*, p. 2; South Australian Government, *Submission 23*, p. 2.

22 For example, Queensland Government, *Submission 27*, p. 1; Chuulangun Aboriginal Corporation, *Submission 28*, p. 3.

23 Kimberley Land Council, *Submission 2*, p. 2.

24 Law Council of Australia, *Submission 21*, p. 6.

25 South Australian Government, *Submission 23*, p. 2.

## Proposals aimed at enhancing the effectiveness of the native title system

3.18 The Bill also amends several provisions in the Act relating to the future acts regime (Part 2 of the Act), including the right to negotiate regime (Subdivision P of Division 3 of Part 2 of the Act). Inquiry participants commented widely on the proposed amendments both for and against the proposals contained in the Bill. These arguments are explored further in the following sections. Many submitters and witnesses were also critical of the lack of consultation on reforms which amount to fundamental changes to the Act.

### *Compulsory acquisition and the non-extinguishment principle*

3.19 The committee received several submissions which supported reinstatement of the application of the non-extinguishment principle to compulsory land acquisitions (proposed new paragraph 24MD(2)(c)).[26]

3.20 However, as pointed out by the Law Council, the proposed amendment does not address the issue of who the native title holder is while the land is affected by a compulsory acquisition:

> The effect of the amendment to [paragraph] 24MD(2)(c) appears to be that the Commonwealth or State may be able to compulsorily acquire the native title rights or interests. However, those rights are not extinguished until a further act is done. This raises some complications. Even though the State may hold the land subject to native title rights and can even be said to be under an obligation not to act in a manner that affects the native title rights and interests (without observing the future act regime), the Law Council considers that the State cannot hold native title in its own right or on behalf of any party.[27]

3.21 No other submitters presented their views on this technical legal issue but opponents of proposed new paragraph 24MD(2)(c) also referred to elements of uncertainty that are inherent in the provision.[28] The South Australian Government pointed out that the proposed amendment is not consistent with case law by which extinguishment occurs as a result of the grant of inconsistent land rights.[29]

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26 For example, Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 2; South Australian Native Title Services, *Submission 12*, p. 3; National Native Title Council, *Submission 14*, p. 3; Law Council of Australia, *Submission 21*, p. 7; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 2; Australian Human Rights Commission, *Submission 24*, p. 6.

27 *Submission 21*, p. 7. The Law Council of Australia also queried how an applicant is to achieve the return of the native title rights and interests once they have been compulsorily acquired. On this point, also see National Congress of Australia's First Peoples, *Submission 35*, p. 4.

28 For example, Minerals Council of Australia, *Submission 4*, p. 2; Western Australian Government, *Submission 18*, p. 12; Queensland Government, *Submission 27*, p. 4.

29 *Submission 23*, p. 3.

***Normal (non-expedited) negotiation procedure***

*Support for the proposed good faith requirement*

3.22 Proposed new paragraph 31(1)(b) requires the negotiation parties to 'negotiate in good faith using all reasonable efforts' to reach agreement, for a period of at least six months. The meaning of 'negotiate in good faith using all reasonable efforts' is defined in proposed new subsection 31(1A).

3.23 Submissions and witnesses commented extensively on these two proposed amendments.[30] Many supported the proposals due to, for example, either personal involvement in (or knowledge of) native title negotiations, or on account of the decision of the Full Court of the Federal Court of Australia in *FMG Pilbara Pty Ltd v Cox*.[31]

*Minimum negotiation period*

3.24 Some submitters suggested ways in which proposed new paragraph 31(1)(b) could be improved. For example, the AHRC considered that the proposed provision should allow parties to negotiate in good faith for a period of less than six months (where supported in relevant circumstances).[32] On the other hand, the National Native Title Council (NNTC) called for a minimum 12-month negotiation period due to the practical realities of organising native title group meetings and ensuring that there is free, prior and informed advice.[33]

3.25 At the public hearing, Ms Carolyn Tan from the Yamatji Marlpa Aboriginal Corporation told the committee that, in practice, the proposed amendment would not be onerous as 'in most cases negotiations have gone on for far more than six months'.[34] Mr Graeme Neate, President of the NNTT, noted that, in all the claims up to

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30 For example, Ms Carolyn Tan, Kimberley Land Council, *Committee Hansard*, 16 September 2011, p. 3; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 2; Australians for Native Title and Reconciliation, *Submission 6*, p. 6; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 3; Torres Strait Regional Authority, *Submission 11*, p. 2; South Australian Native Title Services, *Submission 12*, p. 3; National Native Title Council, *Submission 14*, p. 3; Law Council of Australia, *Submission 21*, p. 8; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 3; Yindjibarndi Aboriginal Corporation, *Submission 26*, p. 20; Chuulangun Aboriginal Corporation, *Submission 28*, p. 3; Ms Kirsten Tona, *Submission 32*, p. 1.

31 [2009] FCAFC 49 (30 April 2009). In this case, the Federal Court of Australia held that 'good faith' is to be construed contextually and the ordinary meaning of the phrase applies: see para 27 per Spender, Sundberg and McKerracher JJ.

32 *Submission 24*, p. 8. Also see Queensland Government, *Submission 27*, p. 5.

33 *Submission 14*, p. 3.

34 *Committee Hansard*, 16 September 2011, p. 3.

June 2009, about 66 per cent of claims were negotiated for 18 months or more after the relevant date.[35]

3.26 Ms Tan stated further that the requirements of proposed new paragraph 31(1)(b) would not prevent parties from entering into agreements before the end of the six-month negotiation period. However, she argued that the real importance of the provision is not the length of time stipulated but its capacity to encourage negotiation parties to seriously negotiate before they apply to the arbitral body for a determination.[36]

3.27 The Minerals Council of Australia, which did not support the proposed paragraph, agreed that the quality of negotiations, rather than the length of relevant negotiation periods, should be the focus of the good faith provision.[37]

*Non-exclusive list of indicia*

3.28 In relation to proposed new subsection 31(1A), submitters did not support the exclusion of confidential or commercially sensitive information from disclosure during good faith negotiations (proposed new paragraph 31(1A) (b)).[38] The Western Australian and South Australian Governments specifically questioned the need for the proposed amendment.[39]

3.29 The NNTT noted that the amendment would have little practical effect:

> Most of the criteria proposed in the Bill are similar to those developed many years ago, and regularly applied, by the Tribunal in 'good faith' inquiries. In the Tribunal's submission, codifying the indicia going to show good faith may serve little purpose…[I]f it is decided to codify the indicia, then it is submitted that a provision similar to [paragraph] 39(1)(f) of the [Act] should be included to ensure that the arbitral body has a discretion to take into account any other matter it considers relevant.[40]

3.30 Yamatji Marlpa Aboriginal Corporation agreed that the indicia proposed in new subsection 31(1A) reflect current criteria applied by the NNTT; however,

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35 *Committee Hansard*, 16 September 2011, p. 19.

36 *Committee Hansard*, 16 September 2011, p. 7.

37 *Submission 4*, p. 2.

38 For example, Northern Land Council, *Submission 1*, p. 1; Kimberley Land Council, *Submission 2*, p. 4; South Australian Native Title Services, *Submission 12*, p. 4; National Native Title Council, *Submission 14*, p. 3; National Congress of Australia's First Peoples, *Submission 35*, p. 5.

39 *Submission 18*, pp 8-9 and *Submission 23*, p. 3, respectively.

40 *Submission 15*, pp 24-25.

Yamatji Marlpa Aboriginal Corporation endorsed codification of the criteria to ensure clarity regarding the good faith requirement.[41]

*Proving good faith negotiations*

3.31 Proposed new subsection 31(2A) imposes upon the party asserting good faith the onus of proving that it has in fact negotiated in good faith.

3.32 The Kimberley Land Council considered that proposed new subsection 31(2A) would improve the effectiveness of the native title system in a large number of cases (where there is no dispute between competing claims).[42] Australians for Native Title and Reconciliation, Professor Altman and the NNTC also expressed support for the proposed amendment.[43]

3.33 However, the Western Australian Government submitted that proposed new subsection 31(2A) appears 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 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.[44]

3.34 The Association of Mining and Exploration Companies (AMEC) and the Minerals Council of Australia expressed similar concerns,[45] while the South Australian Government argued that the existing good faith provision is appropriate.[46]

*Pre-requisites for application to the arbitral body*

3.35 Proposed new subsection 35(1A) provides that a negotiation party cannot apply to the arbitral body unless all the requirements of subsection 31(1) and proposed new subsections 31(1A) and 31(2A) have been met.

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41 Ms Carolyn Tan, Yamatji Marlpa Aboriginal Corporation, *Committee Hansard*, 16 September 2011, p. 3.

42 Ms Justine Toohey, Kimberley Land Council, *Committee Hansard*, 16 September 2011, pp 11 and 13.

43 *Submission 6*, p. 7; Professor Jon Altman, *Committee Hansard*, 16 September 2011, pp 22-23; and *Submission 14*, p. 4, respectively.

44 *Submission 18*, pp 9-10.

45 *Submission 7*, p. 5 and *Submission 4*, pp 2-3, respectively.

46 *Submission 23*, p. 3.

3.36 A few submissions supported the proposed amendment.[47] However, the NNTT questioned 'Who is to judge whether or not there has been compliance?',[48] and neither the South Australian nor the Western Australian Governments endorsed the proposed amendment.

3.37 The South Australian Government considered that the 'vague, nebulous and difficult to prove' requirements of proposed new subsections 31(1A) and 31(2A) create potential for matters to 'bog down in endless argument'.[49]

3.38 The Western Australian Government argued against adding an additional procedural layer to the approvals process, without any apparent benefit. It submitted that the current normal negotiation procedure already covers the matters sought to be addressed by proposed new subsection 35(1A).[50]

*Department comment*

3.39 The Department advised that, on 3 July 2010, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs released for consultation a discussion paper titled 'Leading Practice Agreements: Maximising Outcomes from Native Title Benefits' (Discussion Paper). The focus of the Discussion Paper was a possible package of reforms to promote leading practice in native title agreements and the governance of native title payments.[51]

3.40 The Discussion Paper included a proposal to amend the Act to:

> provide clarification for parties on what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions [sections 25-44 of the Act].[52]

3.41 The Department advised the committee that the Australian Government has agreed to adopt this proposal,[53] while it continues to consider the remaining issues canvassed in the public consultation process.[54]

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47 For example, Torres Strait Regional Authority, *Submission 11*, p. 2; National Native Title Council, *Submission 14*, p. 4.

48 *Submission 15*, p. 24.

49 *Submission 23*, pp 3-4.

50 *Submission 18*, p. 10.

51 *Submission 13*, p. 1.

52 The Hon. Robert McClelland MP, Attorney-General, and the Hon. Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Discussion Paper, Leading practice agreements: maximising outcomes from native title benefits', p. 14, available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms (accessed 6 October 2011).

53 *Submission 13*, p. 2.

3.42 In relation to the Bill, the Department advised that the proposed amendments to the good faith requirement are broader than those upon which the Department has consulted stakeholders. Further, the Department reiterated:

> Detailed consideration of the proposed amendments and full stakeholder consultation is required.[55]

### *Profit-sharing conditions*

*Support for arbitral determination of profit-sharing conditions*

3.43 A significant number of submitters supported the proposal to enable the arbitral body to determine profit-sharing conditions (proposed new subsection 38(2)).[56] These submitters considered it important for native title parties to be able to negotiate with future act proponents, without the latter being able to circumvent profit-sharing negotiations (and payments) by applying to the arbitral body for a determination.

3.44 Supporters of proposed new subsection 38(2) also referred to its potential to promote economic development,[57] with some calling for the NNTT to be properly equipped to fulfil any new function in this regard.[58]

*Opposition to arbitral determination of profit-sharing conditions*

3.45 Some submissions did not support proposed new subsection 38(2). There were a variety of reasons for this lack of support. The South Australian Government,

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54 One such issue is the consideration of means to encourage entities that receive native title payments to adopt measures to strengthen governance: see the Hon. Robert McClelland MP, Attorney-General, and the Hon. Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Discussion Paper, Leading practice agreements: maximising outcomes from native title benefits, p. 6, available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms (accessed 6 October 2011).

55 *Submission 13*, p. 2.

56 For example, Kimberley Land Council, *Submission 2*, p. 4; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 3; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 3; Professor Ciaran O'Faircheallaigh, *Submission 9*, p. 1; Torres Strait Regional Authority, *Submission 11*, p. 2; South Australian Native Title Services, *Submission 12*, p. 4; National Native Title Council, *Submission 14*, p. 4; Professor Jon Altman, *Submission 16*, p. 7; Mr Graeme Taylor, *Submission 19*, p. 2; Law Council of Australia, *Submission 21*, p. 8; Yindjibarndi Aboriginal Corporation, *Submission 26*, p. 20; Ms Susan Chalcroft, *Submission 33*, p. 3.

57 For example, the Australian Institute for Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 5.

58 For example, Australians for Native Title and Reconciliation, *Submission 6*, p. 7; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 3.

for example, argued that the Act does not recognise an entitlement to compensation for the 'loss' of resources:

> 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).[59]

3.46 The NNTT was concerned with defining the parameters of monies determined under proposed new subsection 38(2) and future compensation awards, recommending:

> consideration be given to inserting in the [Act] provisions to explain the relationship between any such condition imposed by virtue of a [subsection] 38(2) determination with any prospective compensation award made by the Federal Court pursuant to Division 5 of the [Act].[60]

3.47 AMEC and the Western Australian Government were not convinced that conditions of a commercial nature are a proper matter for determination by an arbitral body, removed from the broader commercial context.[61] The Minerals Council of Australia harboured similar reservations:

> The term profit sharing is too narrow a focus relative to the current approaches being taken in negotiations, which is around benefit sharing. The mining related agreements which are recognised by both industry and native title representative bodies as leading practice are those which contain a mix of both financial and non-financial benefits including education, training, business development and employment. This is in addition to financial compensation for loss/impairment of rights.[62]

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59 *Submission 23*, p. 4. Also see the National Native Title Tribunal, *Submission 15*, p. 26.

60 *Submission 15*, p. 26. The National Native Title Tribunal added that, without legislative guidance, the arbitral body might be reluctant to determine such conditions, other than by consent of the parties: see p. 27.

61 *Submission 7*, p. 5 and *Submission 18*, p. 12, respectively.

62 *Submission 4*, p. 3. Also see Response from Fortescue Metals Group to adverse comment in Form Letters 1-4 and *Submissions 29-34*, p. 5, where Fortescue Metals Group explained its approach to benefit-sharing; the Hon. Robert McClelland MP, Attorney-General, and the Hon. Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Discussion Paper, Leading practice agreements: maximising outcomes from native title benefits', p. 4, where the Australian Government acknowledged non-financial benefits in agreement-making.

3.48 The Australian Government noted that the impetus for the July 2010 Discussion Paper was the growing number, and increasing financial value and importance, of native title payments to Aboriginal and Torres Strait Islander groups. However, the Discussion Paper also indicated problems with the way in which native title agreements are currently operating:

> Indigenous groups and Industry regularly bring concerns around particular negotiations or agreements to the Commonwealth's attention. Stakeholders have raised concerns about agreements that have resulted in poor outcomes, such as benefits being dispersed in ways that achieve limited outcomes for native title holders, including funds being dissipated to expert advisers and being placed at risk by poor governance and trust management practices. Poor agreements and governance arrangements risk impairing the capacity of native title groups to deliver financial security and independence for their community, now and into the future. Native title agreements are commercial agreements, however there is a need to ensure that appropriate arrangements are in place to maximise their sustainability.[63]

3.49 The Australian Government is therefore currently exploring, through the consultation process, measures aimed at delivering practical and sustainable outcomes for native title groups and their communities, both existing and future.[64] There is no indication in the Explanatory Memorandum or the Second Reading Speech for this Bill that there has been any such consultation in respect of the measure proposed in new subsection 38(2).

***Agreements to disallow prior extinguishment***

3.50 In general, Indigenous submitters supported the proposal that there be a mechanism for prior extinguishments of native title rights and interests to be disregarded. However, while some of these submitters supported proposed new

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63 The Hon. Robert McClelland MP, Attorney-General, and the Hon. Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Discussion Paper, Leading practice agreements: maximising outcomes from native title benefits', p. 5, available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms (accessed 3 November 2011).

64 The Hon. Robert McClelland MP, Attorney-General, and the Hon. Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Discussion Paper, Leading practice agreements: maximising outcomes from native title benefits', p. 5, available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms (accessed 3 November 2011).

section 47C,[65] others expressed reservations regarding the requirement for the agreement of the government party.

3.51 The Cape York Land Council Aboriginal Corporation, for example, submitted:

> [T]he proposed provision obviously relies on the goodwill of the Government party in being willing to agree to disregard the extinguishment. We have previously submitted to the Commonwealth that consideration should be given to an extension of the beneficial provisions contained in [sections] 47, 47A and 47B of the Act, to enable specified categories of historical extinguishment to be ignored without requiring prior State or Commonwealth consent (noting that any current interests in the land would prevail over native title).[66]

3.52 The NNTC cautioned:

> Relying on the States and Territories to exercise goodwill by agreeing to disregard historical extinguishment may not result in the opportunities that the Federal Government may hope the amendment will produce such as more claims to be settled by negotiation rather than litigation. In some States or Territories the amendment may result in protracted negotiations or unavoidable litigation.[67]

3.53 The South Australian and Queensland Governments did not support proposed new section 47C: the South Australian Government called for further consideration and consultation in regard to the terms and potential implications of the proposed amendment;[68] and the Queensland Government did not agree with the way in which the provision has been drafted.[69]

*Department's comment*

3.54 From 14 January 2010 to 19 March 2010, the Australian Government consulted 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

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65 For example, Kimberley Land Council, *Committee Hansard*, 16 September 2011, p. 12; Australians for Native Title and Reconciliation, *Submission 6*, p. 8; South Australian Native Title Services, *Submission 12*, p. 4; Yindjibarndi Aboriginal Corporation, *Submission 26*, p. 20. Also see, for example, Law Council of Australia, *Submission 21*, p. 8; Australian Human Rights Commission, *Submission 24*, p. 7.

66 *Submission 5*, p. 4. For similar comments, also see Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 5; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 6.

67 *Submission 14*, pp 4-5.

68 *Submission 23*, p. 5.

69 *Submission 27*, p. 9.

purpose of preserving the natural environment of an area, in certain circumstances (such as a park or reserve).[70]

3.55 The Australian Government received 17 public submissions, which were broadly supportive of the proposal, and the government is now in the process of considering these submissions. However, in its submission to the committee's inquiry, the Department noted:

> 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.[71]

***Rebuttable presumption of continuity***

3.56 A number of submissions supported the introduction of a rebuttable presumption of continuity for applications for a native title determination under Division 1 of the Act, as proposed in new sections 61AA and 61AB.[72] However, several of these submitters identified concerns with the proposed amendments.

*Requirements of proposed new subsection 61AA(1)*

3.57 Proposed new subsection 61AA(1) sets out the criteria for application of the presumption, including where '(b) the members of the native title claim group reasonably believe the laws so acknowledged and the customs so observed to be traditional'.

3.58 Australians for Native Title and Reconciliation queried whether the bar in proposed new paragraph 61AA(1)(b) is still too high,[73] while the North Queensland Land Council argued that the presumption should apply without the need for any 'trigger points'.[74]

3.59 Other participants in the inquiry commented that proposed new subsection 61AA(1) still requires native title claimants and their representative bodies to

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70 Attorney-General's Department, Native title reform website, *2010 Reforms: Possible historical extinguishment amendment*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#submissions2010 (accessed 6 October 2011).

71 *Submission 13*, p. 2.

72 For example, Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 4; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 4; South Australian Native Title Services, *Submission 12*, p. 5; National Native Title Council, *Submission 14*, p. 5; Centre for Native Title Anthropology (ANU), *Submission 20*, p. 1; Law Council of Australia, *Submission 21*, p. 9.

73 *Submission 6*, p. 8.

74 *Submission 1*, p. 3.

undertake considerable anthropological and ethno-historical research (to satisfy the court that the presumption applies).[75] Professor Altman, for example, submitted:

> [I]t is important to note that these changes will reduce the legal burden of proof that claimants have to demonstrate to a generally non-Indigenous wider jural public and the state. But there will still be a need for detailed and complex connection research both for passing the registration test to lodge a claim and to ensure that the correct native title interests are identified within regional Indigenous domains.[76]

*Effect of proposed new subsection 61AA(2) on Indigenous claimants*

3.60 Proposed new subsection 61AA(2) creates the presumption of continuity in the absence of proof to the contrary. In this context, submitters supportive of the proposed amendment again raised the issue of anthropological and ethno-historical research.

3.61 The Centre for Native Title Anthropology at the Australian National University expressed a number of concerns about the possible consequences for the native title research process and research outcomes for native title claimants, if a presumption of continuity is 'aggressively' challenged (which could be done by respondent parties who are other Indigenous peoples or native title claimants):

> 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.[77]

3.62 Both the Centre for Native Title Anthropology and AIATSIS expressed concern with the effect of respondent-commissioned research on individual claimants and native title claim groups, with the latter commenting on consequential social disruption:

> [I]nformation gathering on behalf of respondent parties would tend, intentionally or unintentionally, to pit groups against one another without their understanding the implications of their actions for the success of their own claims. States and other respondents have neither the responsibility nor the capacity to resolve such disputes, or to understand their location within the broader dynamics of a claimant group or its neighbours.[78]

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75 For example, Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 4; Mr Graeme Neate, National Native Title Tribunal, *Committee Hansard*, 16 September 2011, p. 14; Centre for Native Title Anthropology (ANU), *Submission 20*, p. 2; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 7.

76 *Submission 16*, p. 6. In relation to the issue of the 'right people for the claim area', also see Kimberley Land Council, *Submission 2*, p. 2; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 4; National Congress of Australia's First Peoples, *Submission 35*, p. 7.

77 *Submission 20*, p. 2. Also see Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission 22*, p. 8.

78 *Submission 22*, p. 8.

3.63 The Centre for Native Title Anthropology noted the potential exposure of vulnerable witnesses to examination by respondent parties:

> 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...We are concerned 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.[79]

3.64 The NNTC, which welcomed this 'significant amendment', considered that placing the burden of proof on a government party would be beneficial:

> [T]he burden placed on the State by virtue of such a presumption may also result in positive behavioural changes, with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g. genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a paradigm shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.[80]

*'Substantial interruption' element in proposed new section 61AB*

3.65 Proposed new section 61AB enables the presumption to be set aside by evidence of a 'substantial interruption' (new subsection 61AB(1)), and requires the court to have regard to the primary reason for any demonstrated interruption or significant change (new subsection 61AB(2)).

3.66 A number of submissions supported the proposed amendments.[81] However, some supporters also commented on the drafting and scope of the provisions.

3.67 The Law Council noted inconsistencies and difficulties with some of the language used in proposed new section 61AB. For example, the 'substantive difficulty of having potentially conflicting bases for overcoming what would otherwise be a presumption' ('proof to the contrary' under proposed new subsection 61AA(2) as opposed to 'evidence of substantial interruption' in proposed new subsection 61AB(1)).[82] In the Law Council's view, proposed new subsection 61AB(1) should be

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79 *Submission 20*, p. 3.

80 *Submission 14*, p. 6.

81 For example, Kimberley Land Council, *Submission 2*, p. 2; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 4; Torres Strait Regional Authority, *Submission 11*, p. 2; South Australian Native Title Services, *Submission 12*, p. 5; Centre for Native Title Anthropology (ANU), *Submission 20*, p. 1.

82 *Submission 21*, p. 11.

removed from the Bill, and proposed new subsection 61AB(2) could be replaced with a simpler alternative.[83]

3.68 The Yamatji Marlpa Aboriginal Corporation sought to extend proposed new paragraph 61AB(2)(b) to enable the Federal Court of Australia to recognise the long history of forced and institutionalised dispossession from traditional lands experienced by Indigenous peoples, including by non-government organisations and institutions.[84]

3.69 Similarly, Australians for Native Title and Reconciliation suggested that the Commonwealth should be named in proposed new subsection 61AB(2).[85]

*Opposition to proposed new sections 61AA and 61AB*

3.70 The Queensland Government highlighted numerous evidential difficulties with proposed new sections 61AA and 61AB,[86] while the South Australian Government argued that proposed new section 61AA represents a very substantial change to the Act, warranting full and careful consideration. Further, 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.[87]

3.71 AMEC, the NNTT and AIATSIS also commented on the uncertain language in proposed new sections 61AA and 61AB, which, in their view, would lead to litigation and delays in the determination of native title applications.[88]

3.72 A representative from the NNTT suggested that some aspects of the Bill could lead parties to reassess their position.[89] Its submission cautioned:

> The practical approach to agreement-making (both in terms of determinations of native title and broader or alternative settlements) was developed within the current legal framework and not without considerable effort on the part of all major participants in the system. It is not possible to

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83 *Submission 21*, p. 11. The submission sets out an example substitute provision.

84 *Submission 8*, p. 4.

85 *Submission 6*, p. 9.

86 *Submission 27*, pp 9-12.

87 *Submission 23*, p. 5. In this regard, also see North Queensland Land Council, *Submission 1*, p. 2.

88 *Submission 7*, p. 4, *Submission 15*, pp 12-14 and *Submission 22*, p. 8, respectively.

89 Mr Graeme Neate, National Native Title Tribunal, *Committee Hansard*, 16 September 2011, p. 14.

> predict with any certainty what impact the introduction of proposed [sections] 61AA and 61AB (along with proposed [section] 3A and the changes to [section] 223) might have on the approach of one or more government parties[.][90]

3.73 On this point, the Western Australian Government submitted that, if introduced, proposed new sections 61AA and 61AB would radically disrupt existing processes for claims resolution. Its submission concluded:

> [I]f the onus of proof shifts to the Government it has no option except to test the proof to its fullest[.][91]

***Common law meaning of 'native title' and 'native title rights and interests'***

3.74 Several submissions supported defining the meaning of 'traditional laws acknowledged' and 'traditional customs observed' in current paragraph 223(1)(a) as the laws and customs that remain identifiable through time (proposed new subsections 223(1A) and 223(1B)).[92] However, not all submissions supported the proposed new definitions.

3.75 The South Australian Government described proposed new subsections 223(1A) and 223(1B) as 'vague and largely unhelpful'. In its view, there is no need for the proposed amendments:

> Native title jurisprudence already accommodates the concept of evolving laws and customs and this [proposed] 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'…[T]his is an issue that requires careful consideration and full consideration.[93]

3.76 AIATSIS considered that proposed new subsections 223(1A) and 223(1B) would clarify contradictory and ambiguous case law, but did not agree with the approach taken in the Bill:

> [The 'loose' language 'identifiable through time'] may generate more apparent uncertainty than is necessary, and could be remedied by more

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90 *Submission 15*, p. 12.

91 *Submission 18*, p. 7.

92 For example, Kimberley Land Council, *Submission 2*, p. 3; Australians for Native Title and Reconciliation, *Submission 6*, p. 9; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 5; Torres Strait Regional Authority, *Submission 11*, p. 2; South Australian Native Title Services, *Submission 12*, p. 5; National Native Title Council, *Submission 14*, p. 6; Professor Jon Altman, *Submission 16*, p. 6; Jumbunna Indigenous House of Learning, *Submission 17*, p. 15; Australian Human Rights Commission, *Submission 24*, p. 10; Mr Paul Marshall, *Submission 34*, p. 3; National Congress of Australia's First Peoples, *Submission 35*, p. 8.

93 *Submission 23*, p. 5. For similar comments, also see Western Australian Government, *Submission 18*, p. 8.

> clearly articulating the relevant characterisation of present-day law and custom. We would recommend the use of language emphasising the linkage rather than the similarity between contemporary and historic law and custom; focusing on the means of transmission and the idea of inherited law and custom.[94]

### *Trade and other commercial rights*

3.77 Several submissions supported amending the Act to provide a mechanism for the recognition of commercial rights, as anticipated by proposed new subsection 223(2).[95] A recurrent theme in these submissions was the non-recognition of trade and other commercial rights in the current Act. Another theme was that Aboriginal and Torres Strait Islander peoples should be entitled to derive the maximum short- and long-term benefits possible from their native title rights and interests.

3.78 The NNTC predicted that proposed new subsections 223(1A) to 223(1D):

> will do much to encourage the development of indigenous commercial initiatives which take customary trade rights and practices as their starting point, but are not strictly confined to the manner and form of those indigenous trade rights and practices which existed at the time of sovereignty.[96]

3.79 Other submissions commented variously on proposed new subsection 223(2). The Law Council, for example, queried the necessity for the proposed amendment:

> It is already clear at common law that native title rights and interests may be of a commercial nature. The clause might aid…clarification and codification of these particular forms of native title interests, however it may be undesirable to single out two, and only two, types of native title rights that are quite disparate.[97]

3.80 The Western Australian Government, which did not support proposed new subsection 223(2), considered that the amendment would expand the nature of

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94 *Submission 22*, pp 9-10.

95 For example, Kimberley Land Council, *Submission 2*, p. 4; Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 5; Australians for Native Title and Reconciliation, *Submission 6*, p. 9; Yamatji Marlpa Aboriginal Corporation, *Submission 8*, p. 5; Torres Strait Regional Authority, *Submission 11*, pp 2-3; South Australian Native Title Services, *Submission 12*, p. 6; National Native Title Council, *Submission 14*, p. 7; Professor Jon Altman, *Submission 16*, pp 7-8; Jumbunna Indigenous House of Learning, *Submission 17*, p. 19; Australian Human Rights Commission, *Submission 24*, p. 11.

96 *Submission 14*, p. 6.

97 *Submission 21*, p. 12.

compensable rights and interests in a manner which would unduly burden government parties.[98] AMEC expressed a similar concern with respect to mining entities.[99]

3.81 AIATSIS considered that the proposed amendment is inherently flawed:

> [T]he classic formulation of a determination of native title rights and interests to include use of resources for personal, communal, ceremonial and non-commercial purposes is antithetical to the notions of a proprietary interest.
>
> …
>
> There is a need for a provision that specifically states that exclusive possession native title carries with it the full beneficial title to the land and that the rights and interests exercised by native title holders remain a matter internal to the groups, subject to laws of general application.[100]

## Committee view

3.82 Based on the evidence received during the inquiry, the committee acknowledges that there is dissatisfaction among certain stakeholders with particular aspects of the native title system. The committee agrees that reforms which expedite effective native title outcomes are desirable. However, the committee is not persuaded that the Bill will achieve its stated objectives in that regard.

3.83 The committee has serious reservations about the introduction of legislation which seeks to make amendments – particularly in an area as complex and technical as native title – in a piecemeal manner. As a general principle, the committee does not consider that piecemeal amendments represent good legislative practice. A more thorough approach is always favourable, in order to ensure that all relevant issues are considered in a holistic way and that no unintended consequences arise.

3.84 With respect to the efficacy of the Bill, the committee notes that every key provision raised concerns among contributors to the inquiry, whether policy-oriented or relating to technical drafting issues. Numerous comments were also directed toward the lack of attention to practical considerations, which could result in unintended and undesirable consequences, as well as the dearth of comprehensive consultation and consideration. One state government claimed to have had no knowledge of the Bill prior to the committee's inquiry and told the committee:

> 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.[101]

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98 *Submission 18*, pp 12-13.

99 *Submission 7*, p. 5.

100 *Submission 22*, p. 12.

101 South Australian Government, *Submission 23*, p. 1.

3.85 The Department described proposed new paragraphs 24MD(2)(c) and 31(1)(b); proposed new subsections 31(1A), 31(2A), 35(1A), 38(2), 223(1A), 223(1B) and 223(2); and proposed new sections 47C, 61AA and 61AB as significant amendments to the Act, which would require detailed consideration of their full implications and consultation with the affected parties.[102]

3.86 The South Australian Government similarly commented:

> 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'.[103]

3.87 Mr Graham Neate, President of the NNTT, told the committee:

> [I]f the parliament is to go down some of these steps, which in our submission are likely to make some fairly significant changes to the current architecture of the scheme, then we would want those changes to be well-informed and at least some of the consequences thought through.[104]

3.88 It is clear from evidence presented during the course of the inquiry that the Australian Government is cognisant of the need for evidence-based native title reform. In this context, the Department advised that, as a matter of general principle:

> The Government will only undertake significant amendments to 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.[105]

3.89 The submission from the Department provided two relevant examples, namely, its efforts in respect of agreements to disregard prior extinguishment and the good faith provisions.[106] As a result of these processes, the committee notes that the Australian Government has decided to amend the good faith provisions and is determining its position in relation to agreements to disregard prior extinguishments.

3.90 The committee endorses the approach being taken by the Australian Government, and considers that it would be prudent to amend the Act only after comprehensive consultation and full consideration of all competing interests and issues has taken place. The committee supports the Australian Government's

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102 *Submission 13,* pp 1-3.

103 *Submission 23*, p. 1.

104 *Committee Hansard*, 16 September 2011, p. 18.

105 *Submission 13*, p. 1.

106 *Submission 13,* pp 1-2.

commitment to practical, considered and targeted native title reforms;[107] and encourages the Australian Government, in its broader consideration of native title issues, to take note of the views expressed during the course of this inquiry in relation to all aspects of the Bill.

3.91 In light of these views, the committee considers that the Bill should not proceed at this time.

**Recommendation 1**

**3.92 The committee recommends that the Senate should not pass the Bill.**

**Senator Trish Crossin**

**Chair**

107 Ms Kathleen Denley, Attorney-General's Department, *Committee Hansard*, 16 September 2011, p. 31.