ADDITIONAL COMMENTS BY COALITION SENATORS

Introduction

1.1 Coalition senators express serious concerns at the potential effect of the Native Title Amendment (Reform) Bill 2011 (Bill) on the *Native Title Act 1993* (Act). They believe it will likely result in a significant shift in the balance of the Act in favour of native title holders and claimants; has not been the subject of extensive consultation with key stakeholders; and will undermine the certainty offered by the Act without commensurate benefits in terms of tangible and lasting outcomes.

Context of the Native Title Act

1.2 The Act is a complex piece of legislation of national significance.

1.3 The Act was originally introduced in response to the High Court's *Mabo* judgement, which determined that it was a legal fiction that Australia was uninhabited or *terra nullius* when sovereignty was acquired by the British Crown.

1.4 At the core of the Act is the recognition and protection of native title within the framework of the Australian legal system.

1.5 The Act was not developed in isolation, without regard to the wider interests of the community as a whole. Its introduction to Parliament followed a year-long process of consultation and policy development, involving extensive talks with Aboriginal and Torres Strait Islander organisations, State and Territory governments and the mining and pastoral industries.

1.6 The Government of the time made clear that it was seeking to achieve twin goals to:

- do justice to the *Mabo* decision in protecting native title; and
- ensure workable, certain land management.

1.7 The Act is intended to deliver justice and certainty for Aboriginal and Torres Strait Islander People, industry, and the whole community.[1]

1.8 Significant amendments were made to the Act in 1998 following the High Court's *Wik* decision. The 1998 amendments also followed extensive public debate and consultation and were finally enacted as a result of a compromise reached in the Senate.

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1 Commonwealth, Parliamentary debates, House of Representatives, 16 November 1993 (Paul Keating, Prime Minister).

1.9 Whilst the Act is intended to right some of the wrongs that resulted from the denial of the existence of Aboriginal title to land for more than two centuries in Australia, the Act also seeks to accommodate the needs and interests of the wider Australian community and others, with particular interests in land. The notion of fairness and balance are fundamental and underpin the substance of the Act.

1.10 Significant amendments to the Act can have major implications for not only the Aboriginal and Torres Strait Islander people who seek to have their native title rights protected, but also other land users, governments and the Australian community, who derive considerable prosperity from the minerals that lie beneath the land.

1.11 Consequently, the proposal presented by the Bill to make further significant changes to the regime established by the Act must be considered with the interests of all stakeholders and the national interest firmly in mind.

Experience with the Act – expectation versus reality

1.12 The Act created high expectations among Aboriginal and Torres Strait Islander people. It is undeniable that not all those expectations have been met.

1.13 Aboriginal and Torres Strait Islander Australians remain some of the most disadvantaged people in Australian society. That more can and should be done to alleviate the disparity between Aboriginal and Torres Strait Islander people and the rest of Australian society is self-evident.

1.14 The means of alleviating this disparity is far less obvious and it is unrealistic to expect that the Act, whatever its form, will by itself achieve major social and economic change that tangibly and directly benefit all Aboriginal and Torres Strait Islander Australians.

1.15 The application and impact of the Act is not uniform. Many Aboriginal and Torres Strait Islander people live in areas where native title has been extinguished or the traditional system of title to land has broken down or become so attenuated as to not support the recognition of native title. This reality was recognised by the architects of the Act who anticipated the establishment of a social justice fund to address the needs and interests of the many Aboriginal and Torres Strait Islander people who will not benefit directly from native title.

1.16 On a practical level, the impacts of the Act are at their most stark in regional and remote areas of Western Australia and, to a lesser but still significant degree, Queensland and South Australia, where native title claims coincide with significant resource development projects.

1.17 The mining industry, particularly in Western Australia, is driving the nation's economy and generating substantial investment and opportunity as a consequence of the prolonged resources boom resulting from the industrialisation of China. Projects worth many tens of billions of dollars are currently under development or

consideration. It is these projects that can offer significant opportunity for those Aboriginal people who claim native title.

1.18 A large number of agreements between resource developers and Aboriginal and Torres Strait Islander people have been and continue to be negotiated and implemented in relation to resource development projects. Anecdotally, agreements already concluded in Western Australia are likely to result in economic benefits worth billions of dollars to Aboriginal people over the development cycle. This presents an unprecedented opportunity to assist alleviating the disparity between Aboriginal and Torres Strait Islander people and the rest of Australian society.

1.19 However, the number and financial value of these agreements has not, so far, been translated into commensurate advancement of the affected Aboriginal communities. The reasons for this failure are complex and have not been examined in detail by this Committee or the submissions received.

1.20 Conversely, it is in Western Australia and remote Queensland and South Australia where the safeguarding of the second of the twin goals of the Act is most vital. It is self evident that a failure of the Act's 'future act' system to facilitate workable and certain land management would run the risk of putting at risk the engine room of Australia's economy.

1.21 In its comprehensive submission to the Senate Committee, the National Native Title Tribunal (Tribunal) observes that, although many native title claims remain unresolved, parties already approach the resolution of native title claims and 'future acts' through constructive agreement making, generally without the need for recourse to protracted adversarial processes.

1.22 Effective agreement making is an important objective of the Act and amendments that are likely to have the opposite effect should not be made.

Proposed amendments

1.23 There are 7 main aspects to the proposed amendments.

UN Declaration on the Rights of Indigenous People

1.24 The Bill proposes a new section 3A of the Act to require all the provisions of the Act to be interpreted and applied, and all functions under the Act exercised, consistently with principles in the United Nations Declaration on the Rights of Indigenous Peoples (Declaration). Those principles include that all matters affecting Indigenous people should be made with their 'free, prior and informed consent'.

1.25 None of the more specific provisions of the Act will be amended to give effect to the principles in the Declaration, and the Bill does not say *how* the principles will be applied in each instance, particularly where the principles may address concepts that are different to or inconsistent with the provisions of the Act.

1.26 Critically, this amendment will reverse the ordinary legal principles that international instruments that are not enacted as domestic law will only affect the interpretation of domestic law where that law is ambiguous.

1.27 There is scope for the 'free, prior and informed consent principle to be interpreted as both creating and giving native title groups a veto over decisions, including the grant of mining tenements, under the Act. A veto is not consistent with the principles that currently underpin the Act, which does not give native title holders a veto and the time frames for notification, negotiation and arbitration are 'tight but fair'.[2]

1.28 In its submission, the Tribunal concludes that the proposed amendment may render some of the provisions of the Act nugatory and its overall effect is uncertain.

Heritage requirements

1.29 The Act currently requires decision makers such as the Tribunal to have regard to potential impacts on places of heritage significance, including the effectiveness of State and Territory laws to protect those places when a 'future act' is done.

1.30 The amendment would make it a pre-condition to the ability of States to use the 'future act' process that State laws are effective to protect heritage places, in each instance.

1.31 No particular changes to any heritage regime are proposed.

Right to negotiate offshore

1.32 The Act currently provides for the 'right to negotiate' to apply to things (particularly mining) that are contemplated to occur onshore. Offshore, native title claimants and holders have the same procedural rights as the holders of equivalent non-native title rights. This reflects the underlying principle that native title holders are to be afforded rights equivalent to the holders of ordinary freehold title.

1.33 The Bill proposes to move away from this principle by applying the 'right to negotiate' offshore. This means it would apply to proposed developments at sea and on the seabed.

Negotiation process

1.34 The Bill proposes changes to the 'right to negotiate' process with the objective of creating stronger incentives for beneficial agreements and to avoid protracted and uncertain outcomes.

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2 Commonwealth, Parliamentary debates, House of Representatives, 16 November 1993 (Paul Keating, Prime Minister).

1.35 The amendments proposed will have the effect of:

- requiring any party that wishes to rely on the powers of the Tribunal to first prove it has negotiated in good faith for at least 6 months; and
- imposing specific and prescriptive requirements as to what constitutes 'negotiations in good faith'.

1.36 The scope of the amendments are wide and go considerably further than amendments proposed for discussion by the Government and will make it considerably more difficult for mining companies to resort to the Tribunal's arbitral powers where agreement has not been reached.

Profit sharing and royalties

1.37 The Act currently allows parties to negotiate agreements that include a requirement that the proponent makes payments based on profit or the value of things produced from the land. Agreements of this nature have been and continue to be negotiated. However, the Act prohibits the imposition by the Tribunal of conditions that require payments of that kind.

1.38 The current provisions of the Act reflect that:

- The Tribunal does not assess or determine compensation for impacts on native title. The right to compensation on 'just terms' exists separate to the functions of the Tribunal and is assessed by the Federal Court.
- The entitlement to compensation applies in a manner that is consistent with the equivalent rights of non-native title holders; which do not extend to the right to a share of profits or a royalty.
- Generally, minerals are owned by the Crown and not native title holders, and consequently royalty rights are not appropriate.
- A right to compensation only crystallises when it is determined that native title exists; whereas the 'right to negotiate' can be exercised based on a registered native title claim where native title has not been determined.

1.39 The Bill proposes to reverse the current position and enable the Tribunal to impose a condition that profit or royalty based payments are made irrespective of whether agreement is reached. These payments would appear to be in *addition* to any rights to compensation and the Bill does not say how they would be assessed and calculated.

Disallowing extinguishment

1.40 The Act presently enables the extinguishment of native title to effectively be reversed in very limited circumstances, where native title holders occupy unallocated Crown land or hold pastoral lease land.

1.41 The Bill proposes that the extinguishment of native title, such as by freehold or a lease, may be reversed by an agreement between a native title party and the State or Territory government.

1.42 The Bill does not provide for other persons whose interests will be affected to give their agreement, be consulted or notified before native title is agreed to be revived. The Bill does not address possible compensation liability that might arise as a consequence of the reversal of extinguishment or other transitional matters.

Changing the Native Title Claim process – reversing the onus of proof

1.43 The Bill proposes major changes to the way that native title is recognised and what rights it comprises:

- The burden of proof in native title claims would be shifted so that if members of the native title claim 'reasonably believe' that key elements of the native title case are satisfied, then those facts are presumed, and the burden of showing to the contrary shifts to the respondent parties.
- The Bill seeks to re-define the current legal position that, to be considered 'traditional', laws and customs must remain largely unchanged. The Bill will change the meaning of terms used in the Act such as 'traditional laws acknowledged', 'traditional customs observed' and a 'connection to the land or waters'. These terms would now be diluted so that the relevant laws and customs can change to any extent, or not be observed continuously, or not require a physical connection with the land.
- The kinds of native title rights and interests that could be recognised would explicitly include commercial rights and interests.

1.44 The amendments do not address among other things what happens if there is more than one competing native title claim over the same area and consequently the presumption applies in favour of each of the competing claims. Further, key concepts in the Bill, such as 'substantial interruption', are not defined.

Effect of the Bill

1.45 The Bill is a relatively short document but proposes amendments that will make sweeping changes to the way the Act operates and is likely to have far reaching consequences.

1.46 Unlike the original Act and 1998 Amendments, the Bill has not been the subject of extensive consultation with stakeholders. It was developed primarily in

co-operation with Aboriginal and Torres Strait Islander interest groups and their representatives.[3]

1.47 Coalition senators believe that the proposed amendments would, if enacted, clearly result in a significant shift in the balance of the Act in favour of native title holders and claimants, making it unsurprising that the proposed amendments are supported by the Aboriginal and Torres Strait Islander interests who made submissions to the Committee.

1.48 Concerns expressed by affected State governments and the mining industry include that the amendments will undermine the certainty offered by the present Act without commensurate benefits in terms of tangible and lasting outcomes.

1.49 The Tribunal made a comprehensive and detailed submission to the Committee. The Tribunal's submission includes detailed information about how the Act currently works in practice and its experience in dealing with 'future act' matters as well as the mediation of native title claims.

1.50 The Tribunal's well-reasoned analysis supports its conclusion that the amendments proposed by the Bill would have a substantial impact on both the architecture and interpretation of the Act. The full extent of that impact cannot be fully understood without testing the meaning of the amendments in court, but the proposed amendments would be likely to give rise to further uncertainty, litigation, delay and expense in respect of both the resolution of native title claims and future act matters. Such an outcome is at odds with the stated intention of the Bill and contrary to each of the original twin goals of the Act.

1.51 The significance of the Tribunal's submission is supported by the submission of the Commonwealth, prepared by the Attorney-General's Department. The Commonwealth submits that amendments to the Act should only be undertaken if they do not unduly or substantially affect the balance of rights under the Act. Moreover, detailed consideration and consultation would be required before any significant amendment could be supported.

How might the objectives of the Act be better achieved

1.52 The submissions and other materials available to the Committee make it plain that the very significant financial dividends from agreements made in relation to native title are not efficiently achieving the outcomes the Act seeks.

1.53 Considerable amounts of money are being paid under major agreements, but this is not resulting in lasting positive social and economic change within the affected communities that is commensurate with the significant financial inputs. Outcomes are

3 Commonwealth, Parliamentary debates, Senate, 21 March 2011, p. 1299 (Senator Rachel Siewert).

patchy at best, and some agreements lack adequate transparency and are resulting in classes of 'haves' and 'have nots' within affected communities.

1.54 The Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs' discussion paper on *Leading Practice Agreements: Maximising Outcomes from Native Title Benefits* seeks to engage on this issue and identify, through consultation, means of improving the quality of agreements and particularly the transparency and governance of benefits under them.

1.55 The Bill fails to address these important issues. The outcomes under the Act could be improved by mechanisms to assist in the effective governance of agreements and transparency of the benefits that are provided under them. It is possible that amendments to the Act and other legislation might facilitate those objectives but non-legislative avenues, including the provision of targeted resources, should be considered as well.

1.56 Coalition senators believe outcomes from native title claims and agreements could also be improved by more effective mechanisms to assist native title groups to transparently identify their membership, rules for that membership and decision making processes.

1.57 Certainty about these matters would help native title groups more effectively participate in agreement making and take advantage of the proceeds in a sustainable and equitable way that reflects the communal nature of most native titles. A lack of clarity about group membership and the making of decisions, not only impairs the effective resolution of native title claims, but can contribute to disputes about entitlements to the benefits from native title agreements. Reference was made in submissions to the Committee about protracted litigation that has resulted from disputes of this nature.

1.58 The native title determination process currently provides little practical certainty about the membership of native title groups and how a group can make decisions affecting its interests. The Act does not require the Court to decide these issues and essentially leaves native title parties to address them for themselves after native title is found to exist. The Act also provides little practical assistance in resolving the competing overlapping claims that not infrequently result from disputes about the often changing membership of native title groups.

1.59 The operation of the Act and its outcomes could be improved by an examination of possible changes to the native title claim determination process, to provide more certainty and transparency about the membership of native title groups and how decisions affecting native title are made.

Conclusion

1.60 For the above reasons, Coalition senators recommend that the Bill not be supported.

Senator Gary Humphries
Deputy Chair

Senator Sue Boyce

Senator Michaelia Cash