National Native Title Council

spirit of Change

Submission

Senate Inquiry: Native Title Amendment (Reform) Bill 2011

PURPOSE

This Submission is being provided for the Senate Legal and Constitutional Affairs Committee for their Inquiry into the Native Title Amendment (Reform) Bill 2011.

SUBMISSION

The Native Title Amendment (Reform) Bill 2011 (the "Bill") provides a range of amendments to the *Native Title Act* (the "Act"). The National Native Title Council (NNTC) welcomes the proposed amendments to the Act, and believes the Bill sets out provisions that the NNTC has been advocating for several years illustrated through its numerous submissions to inquiries and consultation papers.

The NNTC believes the Bill provides an opportunity to improve the workings of the Act for the benefit of Traditional Owners, their families and communities. All too often amendments to the Act are pursued for other parties' interests in land and it is pleasing to see reform that has the potential to provide significant benefits to Traditional Owners, their families and communities.

Two of the central objectives of the *Native Title Act* are set out it in its Preamble which states:

> *A special procedure needs to be available for the **just and proper ascertainment of native title rights and interests** which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character (emphasis added)*
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> … and:
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> *to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire*

The NNTC believes the current Bill will help to facilitate the realisation of these intended goals.

According to the Explanatory Memorandum of the Bill, the purpose of the proposed amendments is to enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples. The NNTC believes that the Bill currently before Parliament will go some way towards achieving fundamental change in the system for the benefit of Traditional Owners.

Set out below are comments in relation to specific provisions of the Bill.

Item 1: Additional Object – UN Declaration on the Rights of Indigenous Peoples
The NNTC supports the introduction of an additional object into the Act so that "governments in Australia take all necessary steps to implement [various] principles set out in the United Nations Declaration on the Rights of Indigenous Peoples". The key principles stated in the Bill correlate with the various Articles of the Declaration that Native Title Representative Bodies and Native Title Service Providers around Australia agree represent a positive opportunity for Indigenous people, in particular for the purposes of agreement making as well as for access to, and use of, Indigenous land.

A key part of the Declaration, articulated in a number of sections, is the notion of 'free, prior and informed consent', principles that should be central to all negotiations and agreement making relating to Indigenous people, particularly when it involves native title.

Article 32, for example, states that "*Indigenous peoples have the right to determine and develop priorities and strategies*" for their traditional lands and that "*States shall consult and cooperate in good faith … in order to obtain Indigenous peoples' free, prior and informed consent*" before any activity that will affect their lands.[1]

The notion of free, prior and informed consent will possibly be the main area of contention between the various parties and stakeholders concerned with the process of resolving native title and negotiating agreements for access to traditional lands. The NNTC believes however that as Australia has formally supported the Declaration, it is incumbent on the State to introduce measures that will implement the principles of the Declaration as fully as possible.

It should also be noted that all parties in the Senate supported a resolution in June 2010 which "affirms the view that 'free, prior and informed consent' is a fundamental human rights principle for Indigenous peoples; and calls on all current and future Australian governments to ensure this principle is taken into account in developing, implementing and administering their laws and programs".[2]

The Federal Attorney-General's Department has referred to the need for 'free, prior and informed consent' as a means of complying with the processes of self-determination and consultation with Indigenous Australians as outlined in the proposed National Human Rights Action Plan.[3]

The NNTC believes that in order for the Native Title Act to be reconciled with the principles of the Declaration, there needs to be a significant shift in the approach to native title. The proposal under Item 1 to insert an additional object into the Act will therefore be a welcome addition to the Act to facilitate compliance with the UN Declaration on the Rights of Indigenous Peoples.

Item 2 – Strengthen reference to Heritage Legislation
The proposed amendment to Section 24MB(1)(c) enabling the Courts and decision makers to give consideration to the effectiveness of the cultural heritage legislation across State and Territory jurisdictions is a welcome change. Providing Traditional Owners with additional assurance that their heritage will be protected will be beneficial, particularly in those jurisdictions where heritage laws are currently inadequate to provide sufficient protection.

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[1] UN Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, Art 32
[2] Senate Hansard, 24 June 2010, page 4375.
[3] National Human Rights Action Plan, Baseline Study, Consultation Draft, June 2011, p. 20

The NNTC notes, however that there is no benchmark provided in the Bill to determine whether a particular site is sufficiently protected. The NNTC would support the submission of the Kimberley Land Council in that a consideration of the practical application of protective legislation should be required wherever the issue of effectiveness is raised.

Item 3 – Non-Extinguishment of Native Title in Compulsory Acquisition

Item 3 of the Bill is designed to re-introduce the original wording of Section 24MD(2)(c) so that the non-extinguishment principle applies to compulsory acquisition of lands. The NNTC supports this amendment.

Item 4 – Application of Procedural Rights to Offshore Areas

The NNTC welcomes this amendment which repeals section 26(3) of the Act. As Senator Siewert explains in her second reading speech to the Bill, this amendment is consistent with the position of the Attorney General Robert McClelland who advocated this approach in a speech to the Third Negotiating Native Title Forum in 2009 by stating that the "*Government would take a more flexible approach to recognising native title in Australia's territorial waters*".[4]

The NNTC believes that the repeal of s26(3) will provide certainty to allow the right to negotiate over sea country, addressing a key inconsistency in the current legislation.

Items 5-9 – Good Faith in Relation to Future Acts

The NNTC strongly supports amendments to the Act that will provide guidance on the requirements for negotiating in good faith. Item 5 introduces paragraph 31(1)(b) which states that parties must negotiate for "at least six months and to use all reasonable efforts to come to an agreement" about the doing of an act.

The NNTC raised this as an area of concern following the decision of *FMG Pilbara Pty Ltd v Cox*[5] in 2009. This unanimous Full Federal Court decision enabled parties to go to the Tribunal with an arbitration application at any stage of a negotiation provided 6 months had lapsed and there had been good faith on the negotiations to date (regardless of the stage of those negotiations).

Item 6 sets out criteria to provide clarification on the requirement to use all reasonable efforts when negotiating in good faith. The NNTC notes that the criteria are fairly consistent with those contained in Section 228 of the *Fair Work Act 2009* and whilst we believe this is a fair and reasonable set of criteria, the NNTC would suggest that the minimum timeframe for good faith negotiations should be12 months due to the practical realities of organising native title group meetings and ensuring free, prior and informed advice.

The NNTC also has concerns that confidential or commercially sensitive information is excluded from the disclosure of relevant information. The NNTC supports the submission of the Kimberley Land Council in the belief that parties could come to some sort of arrangement with respect to the exchange of information without the inflexibility of this being determined by legislation.

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[4] Siewert, second reading speech, Hansard 21 March 2011, p.1301: R McClelland (Attorney-General), *Speech to the Third Negotiating Native Title Forum, 20 February 2009 (*http://www.attorney general.gov.au/)

[5] *[2009] FCAFC 49*

Item 7 introduces subsection 31(2) which reverses the onus of proof so that a party who claims that good faith was employed is the party that must prove the said standard was reached. Related to item 7 is item 9 which states that a party cannot have recourse to an arbitral body under subsection 31(1) until the party has proven that good faith negotiations as per Sections 31(1) to 31 (2A) occurred. These changes would be considered necessary to alleviate procedural unfairness and are supported by the NNTC.

Item 10 – Profit Sharing Conditions

Under the current Act, agreements that are made during the six month good faith negotiating period that relate to future acts (like mining or compulsory acquisition) can insert clauses for royalties or profit sharing. However, where consensus is not forthcoming during this period and the matter proceeds to the National Native Title Tribunal (NNTT) for arbitration, the NNTT loses the ability to insert clauses in any agreements in regards to royalties or profit sharing.[6]

Item 10 of the Bill therefore proposes a revised Section 38(2) which would allow the NNTT to insert such clauses after a matter has proceeded to arbitration.[7]

Currently, native title claimants appear forced into accepting profit sharing and royalty clauses on the terms proposed by proponents. If native title claimants do not accept these conditions the matter can be moved to arbitration, where profit sharing and royalty clauses will no longer be an option.

The NNTC therefore supports this amendment and believes that this will allow for native title holders to be appropriately compensated through the negotiation of agreements that impact native title rights and interests.

Item 11 – Disregarding Prior Extinguishment

The proposal to disregard prior extinguishment is based on French CJ's suggestion that parties be able to agree to disregard extinguishment.[8] It has been the experience of a number of native title groups and their representatives that respondent parties have been happy to agree to disregard prior extinguishment, but are constrained by the limitations of sections 47A and 47B.

The NNTC believes that the proposed section 47C is an important measure that would provide for more timely negotiations and would simplify the process of coming to consent determinations, in many cases significantly reducing the time and cost of doing so. However, the NNTC believes that the proposed amendment as set out in the Bill has similar constraints to those set out in the Attorney General's 2010 proposal for historical extinguishment of native title to be disregarded on national parks or for the purpose of preserving the natural environment of the area.

The proposal to amend the Act to disregard prior extinguishment is generally regarded as a positive amendment; however the NNTC would argue that significant improvements can be made to the proposal to ensure a more just outcome for traditional owners.

The proposed amendment requires that prior extinguishment of native title is disregarded only when there is agreement in writing by both the relevant government and the applicant. However similar provisions in ss.47, 47A and 47B do not require agreement

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[6] (s 38(2) of the Act)
[7] (Siewert, second reading speech, p. 10).
[8] R S French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, 13. Available at http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/

between the parties. The NNTC would query the necessity to obtain the consent of the relevant government in order for s.47C to apply, particularly when considering that other interests in the land would prevail over native title under s.47C(5).

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.

The NNTC would therefore strongly advocate that the legislation must also provide a presumption that the State agrees to disregard the extinguishment, and the onus would be on the State to rebut the presumption by providing reasons why it does not intend to disregard extinguishment. That is, there is a presumption that the State agrees to disregard historical extinguishment unless it indicates otherwise.

Item 12 – Rebuttable Presumption of Continuity

This is a significant amendment that will reset the negotiation table between Traditional Owners and respondent parties. The NNTC has advocated for this amendment over several years and through many submissions. As outlined in his speech to the Negotiating Native Title Forum, Kevin Smith, Chief Executive Officer of Queensland South Native Title Services, outlined that:

> The major issue for the native title party is discharging the crushing burden of proof as required by the *Ward*[9] and *Yorta Yorta*[10] tests. Having to establish concepts of society and continuity and then having to particularize each law and custom and right and interest to the requisite standard borders on cruelty. When Respondents insist upon a strict linear approach in negotiations that the applicant must prove connection to almost a trial standard and then respondents deal with extinguishment in this very long convoluted process, the system is going to and does exact a toll; often to the detriment of the native title party.[11]

Smith goes on to say that this "process virtually accepts that respondents can hang back, and wait to see if the native title party either implodes from the burden of proving connection or is struck out by the Court".[12] Thus the process also becomes unnecessarily long and expensive.

Given that in many instances (particularly in remote locations) there is little foundation for significant dispute over continuity,[13] the adoption of a rebuttable presumption should help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims. Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonized or asserted its sovereignty over a claim area.

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[9] *Western Australia v Ward* (2002) 213 CLR 1.
[10] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[11] Smith, K., *Minefields, Minor Amendments and Modest Changes: an outline of the inherent dangers in native title negotiations and the opportunities to sweep them away,* Negotiating Native Title Forum, Melbourne, 19 February 2009
[12] ibid
[13] Justice Mansfield. 'Re-Thinking the Procedural Framework'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) at 2.

This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.[14]

Importantly, the 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.[15]

The Australian Government has previously been criticised by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for its approach to native title since the 1998 amendments. The Committee raised concerns about the high standard of proof required for the Courts to demonstrate continuous observance and acknowledgement of the laws and customs of Indigenous people, resulting in Traditional Owners not being able to obtain recognition of their relationship with their traditional lands.

These concerns have been consistently raised by the Committee since the 1998 amendments to the Native Title Act, concerns that are shared by NTRBs and NTSPs around Australia. The NNTC believes that the current Reform Bill provides a significant opportunity to address those criticisms and to adopt the recommendations put forward by CERD.

Item 13 – Clarification of Definition of "Traditional"

The NNTC welcomes the insertion of s223(1)(1A) and (1B), which provide that indigenous laws and customs are "traditional" if they remain identifiable through time, regardless of whether there is a change in those laws or customs or the manner in which they are acknowledged or observed.

The NNTC also welcomes the insertion of s223(1D), which clarifies that traditional laws, customs or connections to land and waters do not have to be observed, acknowledged or maintained continuously, subject to the "substantial interruption" test in the proposed s61AB.

As the Second Reading Speech acknowledges, there is a wealth of evidence surrounding indigenous customary trade rights and practices.[16] Nevertheless, an approach which takes the indigenous economy as "frozen in time" and does not allow for some degree of change and adaptation in indigenous commercial and trade practices, is clearly incommensurate with indigenous economic development.

These changes 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.

The proposed amendments remove many of the obstacles to indigenous people achieving the "full recognition and status" as set out under the Preamble to the Act, and, as such, are applauded by the NNTC.

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[14] Op Cit, Smith K,
[15] ibid
[16] Second Reading Speech, Native Title Amendment (Reform) Bill 2011 (Cth)

Item 14 – Commercial Rights and Interests

The NNTC welcomes the proposed amendment of s223(2) of the Act to encompass the right to trade and other rights and interests of a commercial nature.[17] The NNTC firmly believes that the proposed amendment provides an important mechanism to secure economic development, while recognizing the value of existing cultural economies.

Whilst the Preamble to the Act states that the legislation is a pathway to the "full recognition and status" of Indigenous people, this has not been borne out with regard to Indigenous economic aspirations.

The Bill will go some way to fulfilling such aspirations, squarely embedding commercial rights and interests within Australia's native title regime.

[17] Native Title Amendment (Reform) Bill 2011