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The Secretary,
Senate Legal & Constitutional Affairs Committee
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Inquiry into *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*
SUBMISSION
"ALRC Report: Further Recommendations re Claimants Onus of Proof"

(1) I refer to:

- The above mentioned Bill;
- The Bill's Explanatory Memorandum, especially Item 4 (referring to the Native Title Act ("NTA") s 251A(b); and item 6 (referring to NTA s 251B(b))
- The COAG Report *Investigation into Indigenous Land Administration and Use* (Dec 2015) referred to in the above Items 4 and 6.
- The Australian Law Reform Commission ("ALRC") Report No 126, *Connection to Country: Review of the Native Title Act 1993* (April 2015) referred to in Items 4 & 6..

(2) The *Explanatory Memorandum* Items 4 and 6 make reference to, and give effect to, recommendations 10-2 and 10-1 respectively of the ALRC Report. Those recommendations were previously supported by the COAG Report, as explained at items 4 and 6 in the *Explanatory Memo* .

(3) **Request Government Response to ALRC Report** The ALRC's Report, which contains many additional important recommendations apart from those mentioned above, all designed to improve the operation of the native title scheme in Australia, was tabled in the Parliament in June 2015. After a lengthy and unacceptable delay of nearly two years, the Turnbull government has not responded to the Report. This Committee should record strong criticism of this failure to respond, and demand that such a response occur without further delay.

(4) **Deficiencies of COAG Report (Dec 2015)** The COAG Report (Dec 2015) refers to the Senior Officers Working Group recommending "further consideration" of a various matters (Table 2, p17) and "a range of actions (unspecified) which could support the efficient and effective resolution of claims." (p 31). Likewise, the COAG Report's Expert Indigenous Working Group "supports policy and legislative reforms and initiatives to make the native title claims and determinations process fairer for indigenous claimants and more efficient, without weakening or compromising the strength of native title rights and interests." (p 31). However, nowhere in the COAG Report is any reference made to one of the most critical problems facing the native title system today: the burden of proof cast upon Indigenous Claimants. This

Committee should draw attention to this omission, and encourage government to address it without delay.

(5) **NTA s 223**: **Onerous Burden of Proof & Denial of Access** A critical area requiring statutory reform is the current very onerous burden of proof cast upon native title claimants, as set out in NTA s 223. The effect of these requirements is that many communities claiming to be traditional owners (eg, along the whole Eastern seaboard) who have been most impacted by, and disadvantaged by, colonization due to dispossession, deaths, developments on their traditional country, etc since 1788, are now unable to access the native title system . Thus those communities most deserving of achieving some redress through recognition of native title, or some compensation for lost country, are locked out of the entire scheme. The Committee should take the opportunity afforded by this Inquiry to alert government, and the community, to this continuing injustice, and demand relevant reforms to the NTA.

(6) **Committee should support ALRC Recommendations re NTA s 223 :** The ALRC Report discusses this problem, and makes substantial recommendations to amend s 223: see Ch 5, pp 133-71, especially the summary at pp 133-4, paras 5.1-5.6. These state (underlining added):

> "[5.1] … native title claimants must satisfy the definition of native title in s 223(1) … Section 223(1)(a) requires that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant (Indigenous peoples). …
>
> [5.2] The ALRC makes recommendations for reform of this aspect of the definition. First … there (should) be explicit acknowledgment in the NTA that traditional laws and customs under which native title rights and interests are possessed may adapt, evolve, or otherwise develop.
>
> [5.3] Second, the ALRC recommends that the definition be amended to clarify that it is not necessary to establish either that:
>
> - The acknowledgment of traditional laws and the observance of traditional customs have continued substantially uninterrupted since sovereignty; or
> - Traditional laws and customs have been acknowledged and observed by each generation since sovereignty.
>
> [5.4] Third … the definition of native title be amended to clarify that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty
>
> [5.5] Finally the ALRC recommends that the definition of native title clarifies that rights and interests may be possessed by a native title claim group where they have been transmitted or transferred between groups, or otherwise acquired in accordance with traditional laws and customs.

[5.6] These recommendations address the technicality and complexity of establishing the existence of native title rights and interests. In many respects, the recommendations endorse the movement in case law and in negotiations towards flexibility in the evidentiary requirements to establish native title. [1] However, they keep in place the doctrinal foundation of native title. That is, they preserve the position that native title rights and interests are those possessed under laws and customs that have their origins in laws and customs acknowledged and observed at sovereignty. As such, they are consistent with the ALRC's guiding principles for reform:

- acknowledging the importance of the recognition of native title rights and interests;
- achieving greater efficiency in the claims process; and
- providing a sound platform for use of native title rights and interests into the future."

(7) **NTA Objectives** In addition to the above, I remind the Committee of the basic aims and objectives of the NTA.

(8) The NTA Preamble states, amongst other things:

"The people of Australia intend: (a) to rectify the consequences of past injustices by the special measures contained in this Act;" and that "A special procedure needs to be available for the just and proper ascertainment of native title rights and interests…"

(9) NTA s 3 sets out the NTA's Objects, which include:

"The main objects of this Act are: (a) to provide for the recognition and protection of native title."

(10) **Submission** It is submitted that if the above ALRC recommendations were enacted, the gross injustice now suffered by many traditional owners who are denied any chance of establishing, in law, their native title rights, would, to some degree at least, be rectified; the objectives of the NTA would be faithfully pursued; and the nation's endeavors to achieve reconciliation greatly enhanced. I request that the Committee, when considering the ALRC's recommendations concerning ILUAs, also address the equally important issue of implementing the ALRC's recommendations concerning the burden of proof, discussed above.

(11) I request an opportunity to address the Committee orally on the matters raised above.

(sgd)

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[1] Foot note to case law omitted.