Law Council
OF AUSTRALIA

# Native Title Amendment (Reform) Bill 2011

## Senate Legal and Constitutional Affairs Committee

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# Introduction

1. The Law Council is pleased to provide the following submissions in response to the *Native Title Amendment (Reform) Bill 2011 (***"the Bill**").

2. It is noted that the Bill proposes a number of important reforms to the *Native Title Act 1993* ("**the NTA**") with the intent of "enhancing the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples".[1]

3. The Law Council has strongly advocated for reforms of this nature in the past. Historically, the native title system has fallen short of its broad intent and has, in some ways, been hampered by narrow judicial construction of its provisions. In some cases, this has led to permanent dispossession of traditional owners and Aboriginal communities, for whom evidence of their connection with their traditional lands has been swept away by the 'tide of history'.[2]

4. The Law Council notes that the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which has been widely adopted by over 143 members of the UN General Assembly, embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples. Article 19 of the UNDRIP affirms that States are to

> "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[3]

5. In the context of the native title system, substantial reform is required in order to ensure this affirmation is realised for native title holders and claimants. At present, there is no enforceable obligation for parties to demonstrate good faith in native title negotiations. It is also clear that native title claimants have a heavy burden of proving an unbroken connection with their lands and continuous observance and practice of their traditional laws and customs. Moreover, the native title system does not require free, prior and informed consent before decisions can be made affecting native title holders' rights to land.

6. In most cases the native title parties have fewer resources and the least capacity to obtain documentary evidence in support of their claim. However, under the current system they shoulder the burden of proving every element of their claim, regardless of whether any dispute has been raised over the asserted facts. Both Tom Calma, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, and Les Malezer, co-Chair of the National Congress of the First Australians, have stated that the onus on Aboriginal peoples and Torres Strait Islanders of proving they have a customary connection to their lands is one of the "fundamentally discriminatory aspects" of the NTA.[4]

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[1] *Native Title Amendment (Reform) Bill 2011,* Explanatory Memorandum, p 2.
[2] *Yorta Yorta v State of Victoria & Ors* (2001)
[3] *United Nations Declaration on the Rights of Indigenous Peoples*, Article 19, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007).
[4] Tom Calma, *Native Title Report 2009*, Australian Human Rights Commission, Commonwealth of Australia, page 80; Les Malezer, *2009 Mabo Lecture* (Speech delivered to the 10th Annual Native Title Conference, Melbourne, 5 June 2009), p 4.

7. The Law Council considers the Bill may go some way toward addressing these concerns and make the native title system fairer for Aboriginal peoples and Torres Strait Islanders.

8. The following comments respond to each clause in the Bill and aim to provide some constructive feedback in relation to a number of the proposed reforms, having regard to the experiences of legal experts practising in the area of native title.

9. The Law Council would be pleased to elaborate on any of their submissions or respond to any questions the Senate Legal and Constitutional Affairs Committee might have.

# Item 1 – objects clause

10. The Law Council supports the inclusion of an objects clause, in principle.

## Principles

11. The Law Council notes there may be drafting problems with sub-clause 3A(1). For example, the "principles" enumerated are not explicitly described as such in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and not all of (a)-(f) are formulated as principles (for example, (a) & (d) are in the language of rights. The Law Council notes the seven 'principles' outlined in sub-clause 3A(1) are not the only 'principles' in UNDRIP. However, sub-clause (1) urges implementation of the seven principles, whilst sub-clause (2) requires consistency with the Declaration, which is primarily concerned with rights.

12. Further, sub-clause 3A(1) is a wide-ranging object that, *prima facie*, is not tied to the *Native Title Act 1993* (Cth) ("NTA") or what the NTA seeks to regulate. At least some of the principles appear to go beyond what the NTA regulates and in other respects it is difficult to envisage how they will affect that the operation of the Act. For example, how does the 'reparation for injury to or loss of Indigenous interests' principle mesh with the compensation provisions of the NTA?

## Interpretative provision

13. The Law Council strongly supports the inclusion in the NTA of an interpretative provision such as proposed in sub-clause (2), which would have the provisions of the statute interpreted and applied in a manner that is consistent with the UNDRIP.

14. Such an interpretive provision would go some way to addressing the concern outlined by Callinan J in *Western Australia v Ward* (2002) 213 CLR 1 at [955]-[956]. There, Callinan J rejected a submission made by the (then) Human Rights and Equal Opportunity Commission (**HREOC**) that the Court should strain to construe the NTA 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 (the UNDRIP not then having been adopted by the UN General Assembly).

15. In *Western Australia v Ward*, HREOC had submitted (inter alia):

> 10. It is a long-established presumption that a statute is to be interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations and established rules of international law [18]. If the Legislature intends to

effect inconsistency "it must express its intention with irresistible clearness to induce a Court to believe that it entertained it."[19] More recently, the High Court has apparently limited the operation of the presumption to cases of ambiguity. Where there is ambiguity, the Court has held, courts should favour a construction of a statute which accords with the obligations of Australia under an international treaty.[20] This is because, the Court has said, a common sense approach suggests that Parliament intended to legislate in accordance with its international obligations.[21] In more recent cases, the Court has indicated that a narrow conception of ambiguity is to be rejected.[22]

11. The better approach, the Commission submits, is not to limit the operation of the presumption to cases of ambiguity. Rather, wherever the language of the statute is susceptible of a construction which is consistent with the terms of the relevant international instrument and the obligations which it imposes on Australia, that construction must prevail.[23] That is, where the text is susceptible of a construction consistent with the terms of the international instrument and general international law, then the Court must strain to adopt that construction.

12. Such an approach is analogous with the presumption in favour of the validity of a statute. Where the language of a statute is not so intractable as to be incapable of being consistent with the presumption that Parliament did not intend to pass beyond Constitutional bounds, then the presumption in favour of validity must prevail. This approach accords in turn with section 15A of the *Acts Interpretation Act 1901* (Cth).[24]

13. The presumption which the Commission contends ought be preferred is not only consistent with older authority, long-established in Australia and elsewhere.[25] It also avoids, to the extent that the text of the statute allows, conflict between domestic statutes and international treaty obligations which Australia, in accordance with the principle of *pacta sunt servanda*, is required to perform in good faith.[26] The extent to which Australia will be responsible in international law for violations of obligations owed under international treaties and customary law is thus minimised.[27]

14. Where a provision of an international human rights instrument is transposed into a statute, the *prima facie* legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.[28] The same presumption applies where Parliament has transposed only part of an international instrument, or where the relevant domestic statute follows quite closely the language of the international treaty.[29] In Australia, treaties are interpreted in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties.[30] Reliance may be placed on articles 31 and 32 in order to come to an interpretation that is likely to be the same or similar to that which would be construed by an international court or tribunal.[31] In construing the provisions of an international human rights instrument, Australian courts give weight to the views of specialist international courts and bodies such as the International Court of Justice, the European Court of Human Rights[32] and the human rights treaty bodies established to supervise implementation by States parties of their obligations under the provisions of particular human rights treaties.[33]"

(footnotes omitted, but available to be supplied)

16. In rejecting this submission, Callinan J said as follows:

"[955] The first submission was that the Court should strain to construe the Native Title Act in a way consistent with Australia's obligations under the Convention and the International Covenant on Civil and Political Rights ("the ICCPR"). HREOC contended that the presumption that the courts construe domestic statutes to accord with international obligations should not be limited to cases of ambiguity, and that the courts, wherever possible, should read statutes consistently with international law. On this basis, partial extinguishment ought to be rejected and native title should be recognised as something akin to an estate in land of a kind familiar to the common law.

[956] I would reject these submissions. 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. In this case, the Native Title Act makes it abundantly clear that partial extinguishment is possible - a position that, incidentally, accords with the common law. Consequently, there is no substance in HREOC's submission to the contrary."

17. While the Law Council strongly supports the inclusion of the clause, there appear to be a number of issues with the present drafting of the interpretive clause:

    (a) First, in a number of respects the seven "principles" in clause 3A(1) depart from the language of the UNDRIP. The rationale for this approach is unclear, and the interpretive consequences problematic; for example, should a Court have regard to the language of the legislation or the UNDRIP? The Law Council considers that the language of any statutory reference to the UNDRIP should use language consistent with the international instrument.

    (b) Second, it is unclear why the drafters of the Bill have distilled these 7 "principles" from the UNDRIP's 46 articles, and posited these as an exhaustive statement of the relevant "principles".

    (c) Third, it is unclear why some are formulated as "principles" and others as "rights", particularly having regard to the fact that all are recognised as rights in the UNDRIP.

    (d) Fourth, and related to the third point, it is unclear why subclause (2) identifies only seven "principles" which "governments in Australia" are to take all necessary steps to implement, whereas subclause (3) provides for the Act "to be interpreted and applied in a manner that is consistent with the Declaration"; that is, all provisions of the UNDRIP.

## Item 2 – strengthening heritage protection

18. The Law Council supports the amendment. The Law Council is unaware of cases in which this has been a particular issue or of commentary on the subject. Section

24MB(1)(c) is a provision relating to *future acts*. It is arguable that the amendment merely reflects what was originally intended.

## Item 3 – non-extinguishment

19. The Law Council supports the amendment, but notes the following:

- The effect of the amendment to s 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 behalf of any party.

- A second issue is that once the State or Commonwealth acquires the native title rights and interests, how does the applicant achieve return of the rights and interests? Do they have to repay the State or Commonwealth the compulsory acquisition just terms compensation? Arguably the Applicant wouldn't be able to seek recognition of those rights and interests by the Court as they are not interests which they hold at the time of the determination, they are held by the State or Commonwealth.

## Item 4 – right to negotiate regarding offshore areas

20. The Law Council supports repeal of s 26(3).

21. The present dichotomy in the NTA between claims and acts affecting native title over land and sea has been largely dispelled at common law. Finn J in *Akiba v State of Queensland (No 2)* [2010] FCA 643 said at [11] of his summary:

> "11 It also requires emphasis that, to the Islanders, land and sea are seamlessly and culturally associated: there is no 'sea-land dichotomy'."

22. Finn J further elaborated at [594]-[595]:

> "594 I would note at the outset that the Islander evidence is as one in not asserting a land-sea dichotomy. Despite variations between communities as to how rights are allocated across and beyond the tidal zone, the Islander evidence is consonant with both the idea of spatial projection (though not its limited extent) identified by Haddon (1908, 167 fn 1) and to the concept of the marine territory radiating out from a community's islands (which is agreed to by the anthropologists).
>
> "595 The evidence is overwhelming that that radiating out does not stop when fringing reefs or beaches are crossed and deep water is met. It incorporates deep waters. I would add, in light of the State's exclusion of deep waters from its concession, that Kris Billy enlarged above on the use made of such waters, as did other witnesses. He indicated in evidence-in-chief how the deep waters were "trawled" to catch mackerel, barracuda and trevally. Other deep water fish were

caught using fishing lines. Coral trout was caught that way: Kapua Gutchen. Some number of hunting or fishing activities could only be conducted at all, or else at certain times, in deep waters, for example, turtle hunting – a fact recognised by Haddon, above, and attested to by a number of Islander witnesses: eg Father John Manas."

## Items 5-9 – negotiating in good faith

23. The amendments are supported, subject to the following concerns:

    a. one of the most contentious issues in such negotiations are the costs and expenses of the negotiation team including legal and other expert costs, and sitting fees. The Law Council suggests consideration should be given to requiring a government or commercial party to meet the reasonable costs of the native title parties participating in the negotiations, which would assist them to meet the good faith requirement.

    b. Item 7 has potential for abuse, particularly against native title claimants. For example, it may be a simple matter for a commercial party to allege lack of good faith in negotiations by a native title party that fails to respond to requests in a "timely fashion".

## Item 10 – payment of royalties

24. The amendment is supported.

25. Although there is no statutory impediment to the payment of royalties (or production payments) and many mining companies are paying royalties as a means of offsetting payment against income, it remains a matter of choice. This provision advances the position slightly. Many mining companies may still refuse to negotiate royalties.

## Item 11 – disregarding prior extinguishment

26. The amendment is supported. The Law Council considers it is important that the parties have the capacity to disregard prior extinguishment. It would add flexibility to the possible outcomes of negotiations and may allow claimants to obtain native title to an area that is particularly important to them and which is not of particular importance to the State.

27. The amendment gives some formal mechanism to the current practice of some State agencies of taking a less rigid approach to the proof of s47A and B claims (which has the effect of disregarding prior extinguishment).

## Item 12 – Presumption of continuity

28. Item 12 inserts new sections 61AA and 61AB providing for presumptions of continuous connection with the land and waters subject to a native title determination. The amendment to introduce a presumption of continuity is strongly supported, in principle.

## French CJ's proposal

29. The presumption of continuity provides a reversal of the onus of proving continuous, unbroken connection with the land. In theory, the presumption would have the effect that prior extinguishment does not become an issue in consent determinations unless an opposing party challenged the assertion and provided evidence disproving the native title clamants' ongoing connection.

30. The insertion of the proposed amended s 61AA was originally advanced by Federal Court Justice Robert French (as he was then) in a speech to the Native Title Users Group in Adelaide, on 9 July 2008, entitled "Lifting the Burden of Native Title: Some Modest Proposals for Improvement".[5] A revised version of Chief Justice French's paper was subsequently published in the Australian Law Reform Commission's *Reform!* Journal.[6]

31. In recommending the introduction of a presumption of continuity, French CJ stated that:

> As the Full Court observed in *Northern Territory v Alyawarr* (2005) 145 FCR 442 (at [63]):
>
> > "The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title rights and interests and provide for their extinguishment, permanent and temporary, for the validation of past acts and for the authorisation of future acts affecting native title."
>
> The normative foundation reflected in the preamble and the stated objects of the NTA indicate its beneficial purpose. **There is a sense that the beneficial purpose has been frustrated by the extraordinary length of time and resource burdens that the process of establishing recognition, whether by negotiation or litigation, impose.** [emphasis added]

32. The Law Council submits that establishing a presumption of continuous possession and custodianship of land, rebuttable by evidence to the contrary, would significantly reduce the time and cost of reaching determinations of native title claims. In addition, such a presumption would be consistent with the beneficial purpose of the NTA.

## The present Bill – proposed sections 61AA and 61AB

33. Section 61AA is cast in similar terms to the amendment proposed by French J. It is noted that French J described his own proposal as 'rough drafting', which was offered as a basis for discussion.

34. The version proposed by French J was as follows:

[5] See http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj35.html
[6] ALRC, *Reform*, (2009) Issue 93, Commonwealth of Australia. See http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/3.html

(1) This section applies to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:

(a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group;

(b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional;

(c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application;

(d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.

(2) Where this section applies to an application it shall be presumed in the absence of proof to the contrary:

(a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty;

(b) that the native title claim group has a connection with the land or waters by those traditional laws and customs;

(c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.

35. Section 61AA of the present Bill goes further than French J's proposal in one significant respect. French J used the word 'found' in clause (1)(a) instead of the word 'asserted', as it appears in s 61AA(1)(a) of the Bill. That is, the presumption proposed under the Bill would be afforded to those who merely assert native title over a parcel of land, rather than only where the rights and interests are found to be possessed, as proposed by French J. This potentially broadens the ambit of the presumption proposed by the Bill.

36. Whilst such a presumption could no doubt affect attitudes taken in negotiations, it would in the end be applied by Judges who have heard native title cases in their entirety. The change from 'found' to 'asserted' sets up the possibility of conflict between a Judge's finding and what is asserted by claimants, though this would not cause difficulty if there is 'proof to the contrary' by reason of which the presumption does not operate. It is unclear how the presumption, as proposed under ss61AA would operate in this scenario.

37. Another point is that, given the form of ss 61AA(1)(d), the presumption may be incapable of operating in cases of succession, or in cases relating to the large part

of remote Australia known as the Western Desert. In each of these situations, it is not uncommonly the case that persons are regarded as having customary rights, albeit that it is accepted that their ancestors did not have rights and interests in the application area at sovereignty. It is undesirable that such persons be precluded from reliance on the presumption and, on this basis, s 61AA may require further amendment.

38. Section 61AB does not emanate from French J and how it would operate is somewhat unclear.

39. The Law Council notes that there are some inconsistencies and difficulties with some of the language used in the provisions establishing the presumption:

- The section as drawn appears to draw a false dichotomy between presumptions and findings. Subsection 61AB(1) refers to a "...presumption under s 61AA...or a finding to that effect..." However, findings are made on the basis of direct and indirect evidence, the operation of presumptions or a combination of such elements.

- Under s 61AA, the presumptions are rebuttable by 'proof to the contrary'. Section 61AB(1), however, refers to the presumption under s 61AA only being 'set aside' by evidence of substantial interruption. Presumptions are rebutted, not set aside. Findings can be set aside *on appeal*, but that is not what the section is dealing with.

40. In addition, the Law Council considers that there is a substantive difficulty of having potentially conflicting bases for overcoming what would otherwise be a presumption, namely 'proof to the contrary' v. 'evidence of substantial interruption'. On the basis of these concerns, the Law Council queries whether s 61AB(1) should be retained in the Bill.

41. Section 61AB(2)(a) appears to be directed toward softening the impact of the Full Federal Court decision in *Bodney v Bennell* [2008] FCAFC 63. In that case, the Court held at [97] that, where there has been a substantial interruption, it is not to be mitigated by reference to white settlement. That is, the inquiry into whether possession has been continuous does not involve consideration of *why* acknowledgment and observance stopped. Section 61AB(2)(b) deals with the reasons for significant change in traditional laws and customs and seeks to require consideration of whether the connection was broken by reason of actions by a State or Territory or a person who is not an Aboriginal or Torres Strait Islander person.

42. A possible simpler alternative to s 61AB(2) is:

> A court may determine that the requirements of s 223(1) of the NTA have been satisfied, notwithstanding that it finds that there has been:
>
> (a) a substantial interruption in the acknowledgement of traditional laws and the observance of traditional customs;
>
> (b) a significant change to traditional laws acknowledged or traditional customs observed,
>
> where the primary reason for such substantial interruption or significant change is the action of a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander.

43. The above alternative draft no doubt requires further consideration, however it is hoped, with the greatest respect to the proponents of the present Bill, the formulation above might achieve the intended objective of ss61AB(2) while clarifying some of the language.

## Item 13 - interpretation

44. It is noted that clause 13 would insert provisions necessary to give effect to the intent of the amendments in clause 12 (inserting ss 61AA and AB).

45. The relevant definitions and interpretative provisions seem appropriate and should be supported.

## Item 14 – commercial rights and interests

46. The Law Council broadly supports the intent behind clause 14, but notes that the provision in not strictly necessary. It is already clear at common law that native title rights and interests may be of a commercial nature. The clause might aid by way of 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.

47. If the amendment were to proceed, the heading for ss 223(2) would require amendment.

## Scope and application of the Bill

48. The Law Council strongly endorses the intent of this Bill, which would assist in bringing the NTA closer to its beneficial purpose.

49. It is noted that the framers of this Bill do not appear to have addressed the scope and application of the amendments. For example, the Law Council submits that it would be desirable and appropriate for the Bill to include a provision to clarify that native title claimants who have already failed to obtain a successful determination (as in the case of the Yorta Yorta and Larrakia claim groups, for example) may resubmit their claim after passage of these reforms. The Law Council submits that failure to so allow those groups would amount to a grave injustice.

## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.