

Committee Secretary
Senate Legal and Constitutional Affairs Committee

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RE: Submission regarding the Native Title Amendment (Reform) Bill No.1 2012 (the "Bill").

Prepared for the Senate Standing Committee on Legal and Constitutional Affairs

Jumbunna Indigenous House of Learning, Research Unit ("**Jumbunna**")
25 February 2013

Dear Committee Members,

Jumbunna refers to the proposed Bill and welcomes the opportunity to add briefly to its initial submissions¹ on the amendments proposed to the *Native Title Act 1993 (Cth)* (the “Act”).

In summary, we endorse a number of the changes proposed in that Bill intended to address and improve elements of the Act, and its practical operation upon Native Title parties. As we noted in our prior submissions, there are significant problems with the system as it currently operates. Whilst containing improvements to the Native Title system which are welcomed, the proposed amendments will not address many of the fundamental issues raised in those submissions.

In particular, the proposed amendments do not recognise or address the fact that native title is not merely a property right but is one aspect of an Indigenous sovereignty that has never been ceded. Native title rights and interests arise from continuing Indigenous normative systems, through which Indigenous people continue to exercise jurisdiction over land. Whilst the amendments within the Bill will address some of the practical imbalances in the determination of Native Title claims (in addition to remedying the aberrant practice of allowing the State to rely upon its own acts as a basis for arguing interruption), the Bill would have been strengthened by reconceptualising the concept of Native Title. Instead of being seen as a bundle of rights, it should be seen as a comprehensive land justice framework with restitution at its centre, dealing with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development and should promote and embody Indigenous’ people’s exercise of sovereignty.

With regard to the Bill, we support the insertion of a presumption of continuity into the Act (and the resulting effect upon onus of proof), and the disregarding of interruption to cultural laws and customs arising from the actions of a State or Territory. We also welcome the introduction of the development of the definition of, and criteria relating to, the question of ‘good faith’. However, we note that in our experience, we are told that it is usually those communities who take a robust approach to negotiation who obtain the best results. In our view it would be counterproductive if nations that were taking a commercial and robust approach to negotiations were liable to be accused of good faith as a result.

¹ Jumbunna Indigenous House of Learning, Research Unit, Submission to Senate Standing Committee on Legal and Constitutional Affairs, July 2011.

We hold reservations in relation to some elements of the Bill. One area of Native Title practice that has been raised many times by both practitioners and community members is a tension that can exist between native title representative bodies, land councils and individual community members over who has the cultural responsibility for, and authority to speak in relation to, the area the subject of a claim (and associated ILUA). The reality is that there is often disagreement as to the legitimacy and/or authority, and the extent of the power, of some native title representative bodies to negotiate in relation to an area, and/or concerns over whether the position adopted by a native title representative body or Land Council is in fact in the best interests of all community members. Whilst it may seem that streamlined ILUA processes are in the best interests of expedience, the capacity of other parties to raise objections to the registration of ILUA's provides a check and balance to the significant powers of the native title representative bodies in this area. Consequently, we do not endorse the following amendments introduced by the Bill:

- (a) The reduction of the notice period in which an individual may object to registration of an ILUA from three (3) months to one (1) month. In our view such a reduction is unnecessary and has the potential to limit the participation of parties that were not part of the negotiation of an ILUA from having input; and
- (b) The removal of the ability to object to the registration of an ILUA certified by a Native Title representative body. In our view the availability of judicial review for those Individuals imposes an unjustifiable cost and expense upon them, particularly given possible exposure to consequent costs orders.

Further to this concern, Jumbunna is aware that there has been suggestions made in the context of native title that Land Councils who become involved in Native Title disputes, and who have legal representation in those disputes, should be subject to a system of regulation similar to that which the Native Title representative bodies currently. In our view such suggestions, if they are being considered, ought not to be. The relationship between Native Title representative bodies, Land Councils and state parties community members, and the respective negotiating power of each, differs throughout jurisdictions in Australia. Consequently, the 'one-size-fits-all' approach that would result from attempting to regulate these relationships through the Native Title Act could not deliver a level playing field in such negotiations. Rather, in our view, a preferred approach would be to improve the litigant behavior of state parties to litigation, and provide for increased regulation regarding allegations of fraud and/or misbehavior in such Land Councils. Further, we note that any

Solicitors acting in Native Title matters are already regulated by the relevant Legal Professional Acts. Finally, we believe that the capacity of traditional owners to challenge the decisions of both Land Councils and Native Title Representative Bodies should be retained as discussed above.

Finally, and in addition to these concerns, and as set out in our initial submissions, we believe that the following additions to the Bill would have been appropriate:

1. The inclusion of a reference to the United Nations Declaration on the Rights of Indigenous People. Whilst we note the comments of Senator Siewert² we submit that the current Bill was an opportunity to insert such a reference that has now been missed.
2. The introduction of the test of legal inconsistency rather than factual inconsistency for determining whether there has been interruption of continuation of laws and customs;
3. The extension of the requirements for Good Faith negotiations to ILUA's and other agreements involving compensation. Jumbunna has spoken informally with many Native Title practitioners, representative bodies and claimants, and there is significant evidence to suggest that often Government parties exert pressure in the negotiation of such agreements that could not be considered to be in good faith. This is concerning given that these agreements are typically executed as part of the settlement of Native Title claims.

On a related note, we wish to make the following observation in relation to the Statement of Compatibility with Human Rights that is recorded in the Explanatory Memorandum to the Bill.

Whilst we agree that the Bill strengthens the Native Title system, it is important to acknowledge that it does not provide for the enjoyment of cultural rights and self-determination to the extent that it could have. In this regard it is important to recognize that while this legislation may be compatible with Human rights instruments; this Bill is only improving upon a flawed system. The Bill does not however give the fullest effect to those rights; instead it is a weakened (albeit improved) version of it.

² Commonwealth, *Parliamentary Debates*, Senate, 29 February 2012, 1238 (Senator Rachel Siewert).

Notwithstanding our concerns regarding those omissions, we believe the Bill, whilst it could and should go further, nonetheless contains provisions which will assist Native Title claimants.

Yours Sincerely,

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