SENATE LEGAL & CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE:

INQUIRY INTO THE NATIVE TITLE LEGISLATION AMENDMENT BILL 2019

Australian Human Rights Commission

Response to written questions on notice from the Chair of the Senate Legal and Constitutional Affairs Legislation Committee, Senator Amanda Stoker, in relation to the Native Title Legislation Amendment Bill 2019.

1. The Commission has stated its opposition to the extension of the majority default rule to section 31 agreements. Has the Commission considered what safeguards the proposed amendments to the authorisation process might have on these negotiations and agreements? Why do you submit that a higher threshold should be applied to the default positions on section 31 agreements than on other agreements?

The Commission is concerned that the proposed amendments to the authorisation processes in ss 251A and 251B of the Native Title Act, particularly the explicit provision in proposed s 251BA to allow conditions to be imposed on relevant people, will not provide an adequate safeguard to balance the potential impact of the majority default rule applying to section 31 agreements.

In its submission to the Attorney General's Department Exposure Draft, the Commission noted that it is unclear that the bolstered authorisation process would apply to section 31 agreements. The Explanatory Memorandum at [72] appears to suggest that an authorisation of people as native title applicants under s 251B would permit them to enter into a section 31 agreement, presumably on the basis that such an agreement by a registered native title claimant is a 'matter arising in relation to' a native title claim. If this is the intention, it could be made more explicit.

However, even if the authorisation process in s 251B does apply to section 31 agreements, the new process in s 251BA is not sufficient to ensure that there are equivalent safeguards in relation to section 31 agreements as there are in relation to ILUAs. In particular, as the Government states in its Explanatory Memorandum, 'Unlike ILUAs, there is no formal authorisation or registration process for section 31 agreements.' (p15, Explanatory Memorandum). This leaves native title groups without an effective remedy when agreements are signed in the absence of the consent of the whole native title group.

Section 31 agreements tend to be binding from the moment they are signed, regardless of whether the native title party is properly authorised to sign it. In contrast, the Native Title Registrar has to register an ILUA before it is binding and, as part of that process, native title holders have an opportunity to oppose its registration based, for example, on the claimants not being properly authorised.

In the absence of a registration process that includes an oversight and approval element, the application of the majority default rule to section 31 agreements would make it easier for majority groups to ignore the wishes of minority subgroups within a native title group (even if those subgroups had traditional decision-making responsibility over the country

and subject matter) and leave no effective remedy for those subgroups to challenge the making of the agreement in a meaningful way.

An additional consideration in this context is that the amendments would allow the majority of named claimants to sign a section 31 agreement without providing notice in advance to the named claimants in the minority. Proposed s 31(1D) provides that the majority only needs to notify the other persons within the native title claim group after becoming a party to an agreement. This provides no opportunity for those in the minority to take any remedial steps that they may consider necessary, for example if it appears that the proposed agreement by the majority does not reflect the wishes of the native title claim group as a whole. Potential remedial steps that would be foregone could include approaching the native title claim group to seek the imposition of conditions under s 251BA or approaching the Federal Court under s 66B to have the applicant replaced.

Further, proposed s 31(1D) goes on to provide that 'a failure to comply with this subsection does not invalidate the agreement'. This does not provide any incentive for the majority to give notice of entering into a section 31 agreement at all, let alone in time for a minority who believes the agreement is not properly authorised to take effective remedial action.

The Commission maintains its view that the majority default rule should not be extended to section 31 agreements until the authorisation requirements for section 31 agreements, and the implications of not complying with those requirements, are comparable to those for ILUAs. There should be no difference in the level of control that a native title group has over the validation of ILUAs and section 31 agreements.

In summary:

i. There should be no difference in the level of control that a native title group has over the validation of ILUAs and section 31 agreements. Therefore, the majority default rule should not apply to section 31 agreements unless there are also other amendments to ensure that section 31 agreements are underpinned by comparable safeguards to ILUAs and comparable remedies for an agreement that is executed without the consent of the whole native title group in the way agreed by the group.

ii. Suggested safeguards:

- Include authorisation and registration processes for section 31 agreements that are comparable to those for ILUAs to ensure that section 31 agreements properly reflect the wishes of the native title claim group before they become binding.

- Further, or in the alternative, ensure that when a majority of native title claimants intends to sign a section 31 agreement pursuant to the majority default rule, they are required to give a reasonable period of notice to the minority of named claimants and that failure to do this results in the agreement being invalid.

2. **The statement of compatibility concludes that the bill is compatible with human rights. Are you aware of concerns about whether the bill is compatible with human rights obligations?**

The Commission is concerned about the impact of the majority default rule on the right to culture of minority subgroups within broader native title groups. This is of particular concern if the majority default rule is implemented in relation to section 31 agreements, in circumstances where there is no safeguard of a registration process prior to the agreements becoming binding as there is in relation to ILUAs, and no meaningful notice period of intent to execute an agreement.

While it can be argued that the majority default rule is reasonable, necessary and proportionate for expediency and convenience in the context of ILUAs, with the safeguard of the authorisation process and the registration process prior to an ILUA being binding, the balance falls differently for section 31 agreements due to the lack of comparable safeguards. In particular, as discussed above, section 31 agreements are more likely to be binding from the moment they are signed, regardless of whether the native title party signing it is properly authorised. There is no registration process assessing the validity of the authorisation of the native title party to enter into the agreement. Nor is there a meaningful notice period requiring the majority to notify the minority of the intent to execute a section 31 agreement. Given the above, the Commission is of the opinion that applying the majority default rule to section 31 agreements has the potential to impose on the right to culture in a way that means it is not a reasonable, necessary and proportionate measure.

The Commission also urges the Committee to consider the discussion in section 2.2(a) of its submission to the Attorney General’s Department Exposure Draft, which discusses the right to free, prior and informed consent and its relevance to the majority default rule and the authorisation process in general.

In addition, the Commission reiterates its concern that six months is not sufficient time for many native title groups to come to grips with the new provisions, and call and hold an authorisation meeting of the whole native title group in order to override the majority default rule if it chooses to. Meetings of the whole native title group are also expensive, especially in more remote locations. It is unreasonable to expect a group to hold an otherwise unnecessary meeting at great cost when they may have an AGM, for example, in nine months. The Commission therefore believes it is appropriate to have a longer period before the majority default rule comes into force.

The Commission urges the Committee to seek information from the Department on what proactive measures it will take to ensure that all native title groups are aware of the new requirements, and what resources it will make available to assist groups to get the advice and take the action needed in a timely way to consider whether to overrule the majority default rule. Such proactive measures are needed to ensure the right to culture and the right to free, prior and informed consent are respected in practice. Without such steps, there is a real risk that the default rule may not in fact represent the wishes of the native title groups.

Further, the Commission directs the Committee to section 5 in Appendix A of our submission, which addresses the Commission’s human rights concerns with the Native

Title Act as it stands and as it will remain if this Bill is passed. The Bill omits to amend several key aspects of the existing Act which are incompatible with Australia's human rights obligations. The Commission considers this a missed opportunity to significantly strengthen the capacity of the Native Title Act 1993 to deliver positive outcomes for Aboriginal and Torres Strait Islander peoples.

3. Can you provide detail about any specific groups that may be particularly affected by the amendments?

The Commission is of the view that all traditional owner groups will be affected by these amendments. The Commission has particular concerns regarding native title groups with fewer resources and limited capacity to get the type of advice needed to use the safeguards potentially offered by the amendments. As noted above, unless groups are assisted to understand these changes and make decisions in the short six-month window, decisions may be made on the basis of a default rule that does not reflect their wishes.