UNIVERSITY OF TECHNOLOGY SYDNEY

Jumbunna Indigenous House of Learning

Submission for the Inquiry into the Native Title Amendment (Reform) Bill 2011

Prepared for the Senate Standing Committee on Legal and Constitutional Affairs

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Jumbunna Indigenous House of Learning Research Unit

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1. Jumbunna welcomes the opportunity provided by the Senate Legal and Constitutional Legislative Committee to comment on the Australian Greens' *Native Title Amendment (Reform) Bill 2011.*

2. Jumbunna Indigenous House of Learning Research Unit at the University of Technology Sydney ('Jumbunna') aims to undertake and promote excellence and innovation in research and advocacy on Aboriginal and Torres Strait Islander legal and policy issues. Jumbunna aims to produce the highest quality research on Indigenous legal and policy issues and to develop highly skilled Indigenous researchers.

SUMMARY

3. From its beginnings, the native title system in Australia has been exceedingly complex, excessively technical and incapable of acknowledging the complicated realities of contemporary Aboriginal and Torres Strait Islander Traditional Owners and communities. The drafting of the *Native Title Act* ("**the Act**") was undertaken against a background of an orchestrated response to the High Court's decision in *Mabo v Queensland [No 2] (1992) 175 CLR 1* (*'Mabo'*) that was bitter and divisive, and was intended to be so, which forced considerable compromise in the drafting of the Act.

4. Currently, native title claims take an inordinate time to resolve, cost millions of dollars and, despite rhetoric from Australian governments suggesting support for negotiated outcomes, have been characterised by hard fought litigation. Outcomes differ for different claim areas depending on the value of the area to non-Indigenous interests, respondents' attitudes and the technicality of connection guidelines. In addition, the native title system has been responsible for creating and exacerbating deep divisions within and between Indigenous communities and between Indigenous and non-Indigenous people.

5. A profound injustice of the native title system is that the Aboriginal and Torres Strait Islander peoples who have experienced the greatest degree of harm and interference are those least likely to be recognised as owners of their country. Another is that the system has been incapable of making reparation for dispossession, as much as monetary compensation is able to make such reparation.

6. Previous amendments to the system, rather than simplifying claims and facilitating land justice, have failed to benefit native title claimants and have brought international condemnation by the United Nations Committee on the Elimination of Racial Discrimination. In short, the native title system has failed the aspirations of Indigenous peoples and has privileged the interests of non-Indigenous stakeholders, resulting in deep disenchantment.

7. The failure of the native title system is especially profound when it is understood that native title is no mere property right but is one aspect of an Indigenous sovereignty which has never been ceded. Native title rights and interests arise from continuing Indigenous normative systems, through which Indigenous peoples continue to exercise jurisdiction over land. Indeed, the interpretation that native title rights and interests are more fragile than mainstream property rights reverses the more robust protection and recognition that should be afforded to inherent, sovereign native title rights emerging from a different legal regime.

8. It is therefore Jumbunna's position that the native title system requires elemental reform that would deliver Aboriginal and Torres Strait Islander peoples' aspirations for autonomy and self-determination and should provide a genuine vehicle for decolonisation. Litigation has not served Aboriginal and Torres Strait Islanders peoples well and Jumbunna considers that native title should be conceived within a comprehensive land justice framework with restitution at its centre. Such a comprehensive settlement process would deal with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development, would deal with the realities and consequences of dispossession and should promote and embody Indigenous peoples' exercise of sovereignty.

9. Where parties are unable to resolve claims or where litigation has a role in resolving complex questions, Jumbunna considers that the proper characterisation of native title is that it is a right to the land itself and recommends the formulation proposed by Strelein and Pearson that native title is best understood as full ownership, less the extinguishment of particular incidents of title by valid Crown or legislative act.

10. In determining whether valid extinguishment has taken place, Jumbunna considers that the appropriate test for extinguishment is that of factual inconsistency rather than legal inconsistency. While potentially onerous

on its face, it is likely that agreement could readily be reached on acts that by their effect, rather than legal potential, have extinguished native title.

11. However, Jumbunna is aware of the political realities that may preclude such overhaul and in those circumstances generally supports the proposed amendments. In summary, Jumbunna:

    - supports the insertion of the reference to the United Nations Declaration on the Rights of Indigenous People and considers that such reference should be included in all legislation that affects the lives of Aboriginal and Torres Strait Islander people;

    - supports the proposed presumption of continuity but is concerned that, without more, the presumption may not have the desired effect. Jumbunna suggests an additional requirement that the actions of settler or State cannot be relied upon to demonstrate substantial interruption;

    - supports the view that native title is possession arising from occupation at the time of the imposition of Crown sovereignty, such that 'traditional' laws and customs are relevant only insofar as they apply to internal regulation of native title rights and interests. Against that background, Jumbunna supports the amended definition of the term 'tradition';

    - has some concerns that, within the context of such dramatic inequality in the strength of negotiating parties, prior extinguishment by agreement may provide another area for states to withhold consent to determinations. Jumbunna would instead propose the introduction of the factual inconsistency test for validation of prior extinguishment;

    - agrees that the scope of native title rights and interests includes those of a commercial nature.

12. This submission comprises three sections. Part I provides an overview of the operation of native title over the last 20 years in order to provide a sense of the scope of reform required and the enormous challenge in invoking the political will to undertake such a reform process. Part II addresses the proposed amendments in the *Native Title Amendment*

(Reform) Bill 2011. Part III addresses a number of additional considerations and proposals not covered in the first two parts.

PART I A BROADER VISION FOR NATIVE TITLE

13. The overtly technical and legalistic nature of native title has effectively entrenched dispossession. In particular, the increasingly onerous requirements of 'continuity' situate Indigenous peoples in a historical, pre-European context and do not reflect the reality of vibrant and cohesive contemporary Indigenous communities. Effectively, requirements for a determination of native title ensure that native title cannot exist in areas of intense colonisation, where there has been the greatest dispossession, dislocation and harm.

14. Further, whilst native title is said to exist at the intersection of two normative systems, the reality is that one has been subsumed by the other. It is therefore, disingenuous for the Australia legal system to represent that process as a benign exercise of rights recognition, devoid of violence. The recognition of the continuing existence of Indigenous sovereignty, including by implementing the United Nations Declaration on the Rights of Indigenous Peoples (the **'Declaration'**) and embodying policies and practices that engender self-determination, would provide a more empowering, honest and accurate narrative in describing that interaction than that articulated through the narrow and limited legal regime currently in existence.

15. Any narrative addressing the existence of concurrent normative systems would identify two underlying impediments that must be overcome. First, Indigenous peoples never ceded their sovereignty, yet Australia, unlike the United States, Canada and New Zealand, has never formally recognised their continuing sovereignty, such that there has been no dealing on a nation-to-nation basis. Second, again unlike the United States, Canada and New Zealand, there is no formal legal protection for Indigenous rights. In fact, there has been a conspicuous absence of any rights based discourse. The only weak protection for Indigenous people is afforded by the *Racial Discrimination Act 1975* and the RDA is, and has been, only ever been suspended in order to erode Aboriginal and Torres Strait Islander rights. A rights framework is needed, so that legal, political and resource restraints cannot diminish fundamental, sovereign rights and that Indigenous rights are protected and secured.

16. In relation to land and resource rights in particular, Jumbunna contends that a comprehensive land justice regime is necessary. Such a settlement process would deal with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development, deal with the realities and consequences of dispossession and should promote and embody Indigenous peoples' exercise of sovereignty.

The native title system – compromised from the beginning

17. The environment of orchestrated hysteria within which the *Native Title Act 1993* ('NTA') was drafted explains its current complexity, legal technicality and privileging of non-Indigenous interests. A brief overview of the origins of the native title system may be instructive in assessing the scope of reform required and the task at hand in generating support for such reform.

18. Despite the High Court's recognition of an existing, inherent legal right in the *Mabo* decision, the interests of Indigenous and non-Indigenous Australians were cynically juxtaposed by those who sought to undermine the decision.[1] Although New Zealand, Canada and the United States had been dealing with equivalent native titles for decades, non-Indigenous Australians were told to fear for their backyards and that their well being was at risk – projects would not proceed, loans and investment would not be forthcoming and credit ratings would need to be reassessed. Overtly racist rhetoric was employed to demonise Indigenous people who were described as being at a "primitive state of development",[2] as "stone age people",[3] incapable of dealing with a 'sophisticated' world, and who were employing a 'cultural matter' to put the interests of 18 million people on hold.[4]

19. The need for 'certainty' was the rallying point with demands that native title be extinguished by past and future grants and restitution limited to monetary compensation. Astoundingly, given the power and authority of non-Indigenous Australia over the most disadvantaged people in the nation, native title was attacked on the basis that "all Australians must be

[1] For a description of the response to the *Mabo* decision, see Richard Bartlett, *Native Title in Australia (Second edition)* (Australia, LexisNexis Butterworths: 2004).
[2] Hugh Morgan, former President of the Australian Mining Industry Council cited in Bartlett, ibid,, 36.
[3] Former Chair of the National Companies and Securities Commission cited in Bartlett, ibid, 37.
[4] Jeff Kennett, *The West Australian*, (8 June 1993) cited in Bartlett, ibid 36.

equal", that "special rights and privileges based on race" should be rejected and that the restoration of the "principle of equality" was necessary.[5]

20. Given the high emotion surrounding the native title 'debate', Indigenous negotiators were under significant pressure to compromise to appease hostile interests. Ultimately, a three component package was negotiated to deliver a holistic package, comprising the Native Title Act, establishment of a land fund providing reparation for extinguishment and the Social Justice Package, which has never been honoured. As the former Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma has noted:

> *As I have highlighted in a number of my reports, the Native Title Act was intended to be just one of three mechanisms to recognise, and provide some reparation for the dispossession of Indigenous peoples' from our lands and waters.*
>
> *The Act was to be complemented by:*
>
> - *a social justice package to address broader issues in the relationship between Indigenous and non-Indigenous Australians, and*
> - *an Indigenous land fund, which would ensure that those Indigenous peoples who could not access native title would still be able to attain some form of justice for loss of their lands.*
>
> *While the Indigenous Land Fund was established, the social justice package has never been developed. It was here at Redfern in December 1992, that former Labor Prime Minister Paul Keating, in his famous Redfern Speech, said that there is nothing to fear, or to lose from the extension of social justice.*
>
> *In preparation for the 2007 federal election, the Australian Labor Party promised to honour its commitment to implement a package of social justice measures in response to Mabo (No 2). However, the Labor Party has since removed the reference to the social justice package in its 2009 National Platform. In my view, a social justice package is integral to the effective operation of the native title system. If the government are truly committed to improving the lives of Aboriginal and Torres Strait peoples, this is a priority that must be actioned rather than ignored.*

[5] Association of Mining and Exploration Companies, advertising pamphlet, "Mabo – Protect Your Children's Future"(October 1993) cited in Richard Bartlett, ibid 39.

The Social Justice Package

21. In early 1994, the Acting Prime Minister sought the views of ATSIC in relation to what further measures should be taken to address Indigenous dispossession, as part of the Government's response to the *Mabo* decision. Consultations were subsequently conducted with Indigenous communities in each of ATSIC's 17 zones, over the course of the year. The result was a groundbreaking report, *Recognition, Rights and Reform*,[6] that sought to not only make practical improvements to Indigenous peoples' living standards, but also aimed to modernise Indigenous peoples' participation in Australia's governing institutions and economic life.

22. The proposals contained in *Recognition, Rights and Reform*, fell within the following themes:

> *'The rights of Aboriginal and Torres Strait Islander peoples as citizens;*
>
> *Recognition of their special status and rights as Indigenous Australians and the achievement of greater self-determination for Aboriginal and Torres Strait Islander peoples;*
>
> *Ensuring that Indigenous Australians are able to exercise their rights and share equitably in the provision of Government programs and services;*
>
> *The protection of the cultural integrity and heritage of Indigenous Australians;*
>
> *Measures to increase Aboriginal and Torres Strait Islander participation in Australia's economic life; and*
>
> *Major institutional and structural change, including Constitutional reform and recognition, regional self-government and regional agreements, and the negotiation of a Treaty or comparable document.*[7]

23. The Keating Government failed to act on the above proposals and the Howard Government rejected the policy outright. However, the social justice package remained ALP policy. As recently as 2007, the Party's National Platform contained the following pledge: 'Labor recognises that a commitment was made to implement a package of social justice measures in response to the High Court's *Mabo* decision. Labor will honour this

[6] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform* (1995).
[7] Extracts of *Recognition, Rights and Reform* (1996) 1(1) *Australian Indigenous Law Reporter* 76.

commitment'.[8] However, this commitment was subsequently erased from the Party's 2009 National Platform.[9]

24. We share the Social Justice Commissioner's view that a social justice package is 'integral to the effective operation of the native title system'. The loss of the social justice package enabled native title to be reduced to a question of land management, sanitised of Indigenous cultural and socio-economic aspirations. In reality however, land, culture and economic independence are inextricably tied. To deny this proposition is to deny the most elementary belief of every generation of Indigenous leadership.

25. These broken promises mean that the legislative response, a blunt weapon with extremely onerous evidential obligations on claimants, has become the sole mechanism for advancing land rights in much of Australia and, for many, is the only mechanism for advancing Indigenous rights of any description. Consequently, governments and respondents have conveniently conflated the parameters of that system with the parameters of a broader debate regarding land rights.

26. Worse, although starting from a low base, Indigenous peoples over time have witnessed the further piecemeal diminishment and extinguishment of the common law rights recognised in *Mabo* through legislation and subsequent case law, which have repeatedly asserted the vulnerability and fragility of native title rights, proving to be an abject failure in respecting the existing legal rights of continuing, although diminished, sovereign nations.

27. Unsurprisingly, the dire prophesies of economic and social catastrophe did not eventuate and the native title system is notable for privileging mainstream interests over Indigenous interests. The degree of compromise that attended the negotiations for the land rights package and the ensuing diminishment of native title rights and interests over the last 20 years demonstrate the need for fundamental reform.

Native title as sovereign right

28. Perhaps the underlying failure of the native title system ultimately stems from the fact that it has been treated as a land management issue by non-

[8] Australian Labor Party, *National Platform,* (2007) 216.
[9] Australian Labor Party, *National Platform and Constitution* (2009).

Indigenous interests, contrasting with aspirations by Indigenous peoples for a more fundamental recognition.

29. It is crucial to recognise that the native title system is an artificial construct, established through mainstream institutions to attempt to recognise Indigenous sovereignty, albeit in a particularly limited sense. It does not arise from Indigenous institutions and cannot be characterised as Indigenous rights per se but is the schema by which the Australian legal system attempts to recognise the continuing existence of an Indigenous normative system.

30. Native title jurisprudence has struggled with, as Justice Callinan describes, "finding any conceptual common ground between the common and statutory law of real property and Aboriginal law with respect to land."[10] This lack of conceptual resonance is illustrated in the narrow and legalistic nature of native title jurisprudence as judges schooled in mainstream law and legal culture attempt to articulate rights and interests arising from an alien normative system.

31. Native title, existing in the unique position at the intersection of two legal systems is notoriously difficult to categorise. On the one hand, Australian courts have emphatically rejected any notion of residual Indigenous sovereignty and have rejected the concept of domestic dependent nations. Yet it was implicit in the reasoning of the *Mabo* decision that native title is a remnant of the sovereign rights exercised by the Indigenous peoples of Australia in relation to use and control of the land and its resources, prior to the imposition of British sovereignty.

32. Although held to be fragile, subordinate to mainstream property interests and capable of extinguishment by Crown act, native title is no mere property right. Native title is *sui generis*, situated within a 'recognition space' at the intersection of Indigenous and non-Indigenous normative systems. Thus, no positive act is required by the Crown for native title to exist. Native title rights and interests have their origin in pre-existing Indigenous normative systems and are not analogous with other common law property rights. The Native Title Act does no more than provide a compromised schema by which the Australian legal system struggles to recognise the content of native title rights and interests.

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[10] *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 per Callinan J at [969]

33. Ironically, while the High Court has repeatedly held that two sovereign systems cannot co-exist, in truth, what the Court requires from native title claimants is proof that they are continuing sovereign societies. A determination of native title requires proof of a continuing Indigenous 'society' bound by traditional laws and customs, though not necessarily related to land. There must have been continuity of the normative system of that society and continuity of the acknowledgment and observance of the traditional laws and customs from which the native title rights and interests are derived. Thus, the Courts have acknowledged that regulation of the native title rights and interests is a matter for native title holders. For example, the Federal Court has held that membership of the native title group is a matter to be determined by the holders of native title according to their traditional laws and customs. Combined, these elements are strong indicia of sovereign entities.

34. In any event, native title rights and interests continue to be exercised notwithstanding external recognition. Indeed, it is arguable that the very existence of agreement making processes accompanying formal native title recognition is itself an acknowledgment of the unique status of Indigenous peoples/societies as sovereign peoples, although wielding unequal levels of power. Post *Mabo*, it is no longer appropriate for one sovereign to overtly subordinate to itself control over the enjoyment of any benefit arising from Indigenous territory and resources, notwithstanding that it may have the legal authority to do so.

35. Given their sui generis nature, native title rights and interests, while subject to Crown regulation and derogation do not have simple parallels with mainstream property law, given their origin in another legal system. In those circumstances, and particularly given the Court's unequivocal rejection of *terra nullius* it is inappropriate to perceive native title rights as property rights under the Australian law. As described, Traditional Owner communities retain remnants of sovereignty and so should be afforded the same status as other sovereign entities which in relation to land, entails control of land and resources. Although challenging, Indigenous land rights may remain for the purpose of the Australian legal system, undefined, but which should entail rights to control not less than fee simple ownership.

36. We do not propose a challenge to Crown sovereignty but argue that the time has come for Australia to eschew fear campaigns and allegations that Aboriginal and Torres Strait Islanders seek to secede or create separate

nation states and acknowledge that multiple sovereignties already exist in Australia and are no threat to the nation. It is time for the nation to calmly and with maturity deal with Indigenous peoples on a nation to nation basis, including in relation to jurisdiction over land and resources.

37. Picturing native title as a remnant of Indigenous sovereignty highlights the conceptual difficulty in finding points of intersection in what would otherwise have been parallel lawmaking systems. Thus, more is required than structural or systemic reform, no matter how intensive. Instead, reform must entail a fundamental reassessment of the native title system's very nature and reason for existence. The underlying basis for any new system must provide a vehicle for decolonisation, accentuating Indigenous autonomy and self-determination.

PART II PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT

38. As described above, Jumbunna considers that the native title system is in need of elemental and systemic reform. However, in the absence of a political will to approach land justice afresh, Jumbunna generally supports the proposals in the *Native Title Amendment (Reform) Bill 2011*.

1. Insertion of the reference to United Nations Declaration on the Rights of Indigenous Peoples.

39. Jumbunna considers that any piece of legislation proscribing or affecting the lives of Aboriginal or Torres Strait Islander individuals and/or communities must, necessarily, implement the Declaration. The objects of all such legislation should incorporate the requirement that it must be interpreted by Court in accordance with the principles enunciated in the Declaration.

40. Incorporation of the Declaration within the objects of the Act will, it is hoped, have some impact in addressing the prevailing disregard for governments' respective obligations to Indigenous Australians. Importantly, the Declaration does not create new obligations upon the Australian Government, but is a codification or restatement of existing International legal norms and obligations owed by State parties to their Indigenous populations and should provide the basis for all interactions between governments and Indigenous people.

41. It is of concern that the Australian Government has, in the recent past, disregarded the fundamental human rights of Indigenous people and peoples, most notably, through the implementation of the Northern Territory Intervention, a suite of legislative measures which seek to, and have, undermine Indigenous self-determination and jurisdiction. As noted by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor James Anaya:

> *"The right to self-determination, which is affirmed for indigenous peoples in the Declaration on the Rights of Indigenous Peoples (art 3), is a foundational right, without which indigenous peoples' other human rights, both collective and individual, cannot be fully enjoyed. Enhancing indigenous self-determination is also conducive to successful practical outcomes. As noted in the Overcoming Indigenous Disadvantage Report, "[w]hen [indigenous peoples] make their own decisions about what approaches to take and what resources to develop, they consistently out-perform [non-indigenous] decision-makers". (Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, James Anaya; Addendum: The Situation of Indigenous Peoples in Australia; 4 March 2010; A/HRC/15/4 March 2010).*

42. As noted above, the native title scheme in Australia has not merely failed to live up to the expectations of existing Indigenous Australians, but, has had the effect of shifting the conversation from Indigenous sovereignty, to the sparse remnants of such sovereignty – and only if characterised as property rights – deigned to be recognised by the Australian legal system.

43. Given that the native title system exists as a schema through which the Australian legal system attempts to recognise the remnants of an Indigenous sovereignty, the use of the Declaration reminds non-Indigenous Australians that the schema can only be effective when it has recourse to Indigenous Australians' knowledge of the content of their sovereignty, and their ability to translate that content into a form cognisable by the mainstream system. As has been repeatedly emphasised in the case law, it is not a case in which the mainstream legal system is providing labels for concepts that are natural to it, or inherent to its understanding of the world and property. Rather the system is attempting to understand, as best it can with the language it has, a foreign regime of rights. This has been made explicit by Justice North's observation that the term 'extinguishment' tends to overstate the case in that extinguishment of native title is only relevant to recognition by

Australian law but has no operative effect in the exercise of native title rights within the community.[11]

2. Presumption of continuity

44. Jumbunna welcomes the proposed presumption of continuity and agrees that the burden of proof should rest on the respondent parties who would deny the existence of native title. However, we are concerned that, without more, the proposed amendment may not have the intended effect in practice, where applicants have to articulate their claim in relation to specific rights and interests and where respondent parties may defeat native title claims through evidence of significant interruption. Jumbunna considers that more fundamental reform is required.

45. As the system stands, native title rights and interests in Australia have been characterised as a 'bundle of rights', capable of extinguishment one by one. This characterisation of native title as activities on land mischaracterises native title – concentrating on the exercise or attributes of the rights, and not on the rights themselves. Thus, native title rights and interests are described as the right to hunt or fish or camp, rather than conceptualising the underlying or fundamental right itself such as the right to manage or utilise resources and, consequently, explicitly restricts the scope of native title. This activity based characterisation may also explain the non-commercial and non-economic treatment of native title, as it precludes a genuine acknowledgment of rights to land in its entirety. This can be contrasted with Canadian jurisprudence, where Aboriginal title is a right to the land itself, arising from occupation and use of land, albeit subject to the qualification that Aboriginal title must not be 'irreconcilable' with the nature of the group's attachment to the land.

46. The Australian characterisation creates an incredibly complex approach, where native title rights and interests are proven item by item, followed by a consideration of whether they have been extinguished, also item by item. The complexity is compounded by the need for consideration of historical tenure. Unlike Canada, extinguishment is effected by legal effect of grant rather than by actual inconsistency, such that historical grants of title extinguish native title regardless of whether they were ever acted upon. This leads to the absurd possibility of an Indigenous community having occupied country for millennia, unable to obtain a determination

[11] *Western Australia v Ward* [2000] FCA 191 (3 March 2000) per North J at [688].

of native title because of a historical freehold grant that may never have been acted upon.

47. Jumbunna adopts the position advanced by Noel Pearson and Lisa Strelein of the proper characterisation of native title as possession arising from occupation of land at the time of the imposition of Crown sovereignty.[12] This conception identifies native title as a right of 'ownership' where native title is a communal title to exclusive possession. Native title is, therefore, a uniform concept such that variability in native title arises from extinguishment and derogation and not because titles were originally diverse.[13]

48. Remnant native title "rights and interests, therefore, are rights and interests arising from possession, as regulated by law and custom, and subject to any valid derogation or regulation by valid act of the Crown or legislature",[14] neatly articulated in the simple equation: remnant title = full possession minus valid entitlements.[15] The enquiry looks to a descent of title and not a descent of people.[16] As Pearson identifies, laws and customs are only relevant to the internal allocation of rights interests and responsibilities among members of the community but not relevant to the definition of content.[17]

49. We support the insertion of a presumption of continuity, however, are concerned that the current proposal may reverse the procedure but have insufficient substantive effect. The concern is that if current understandings of 'significant interruption' were to be maintained, the injustice that those communities that have suffered from the impact of hostile and violent colonisation, including that of forcible relocation, forced separation of families and active suppression of the exercise of traditional law and customs, would be available to Crown respondents to

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[12] Noel Pearson, "Land is Susceptible of Ownership" in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People* (Carlton, Melbourne University Press: 2004) 83, 94-95; Lisa Strelein, *Compromised Jurisprudence. Native title cases since* Mabo (Canberra, Aboriginal Studies Press: 2006), 131ff

[13] Lisa Strelein, *Compromised Jurisprudence. Native title cases since* Mabo (Canberra, Aboriginal Studies Press: 2006), 132 citing Noel Pearson

[14] Noel Pearson, "Land is Susceptible of Ownership" in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People* (Carlton, Melbourne University Press: 2004) 83, 95-96

[15] Noel Pearson, presentation at *Native Title Users Group Meeting*, Federal Court, Adelaide (9 July 2008)

[16] Ibid.

[17] Noel Pearson, "Land is Susceptible of Ownership" in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds) *Honour Among Nations? Treaties and Agreements with Indigenous People* (Carlton, Melbourne University Press: 2004) 83, 94

disprove continuity. To borrow a phrase from the law of equity, currently in Native Title the Crown is able to rely upon its bloodied, rather than clean, hands. This position should be reversed.

50. Jumbunna considers that, in addition to the reverse onus, section 61AA should explicitly provide that actions of a settler or the State cannot be being relied upon to establish an interruption or substantial change in the traditions of an applicant group. Without such protection, the untenable possibility exists of states being able to argue that State and settler violence and deliberate suppression of Aboriginal culture and tradition so decimated the society that continuity was impossible. Extinguishment arising from such action is a separate consideration.

3. Proposed definition of the term 'traditional' to mean customs and traditions identifiable over time

51. As noted above, Jumbunna considers that the proper understanding of native title is that of possession arising from occupation at the time of the imposition of Crown sovereignty as demonstrated by Canadian jurisprudence. Thus, 'traditional' laws and customs are relevant only insofar as they apply to the internal regulation of rights and interests within the native title holding community.

52. If the preferred approach is to continue to require Traditional Owners to claim and prove the existence of particular native title rights and interests arising from traditional laws and customs, then Jumbunna supports the amendment of the definition of 'traditional' to ensure that 'traditional' laws and customs are those that are identifiable through time.

53. The starting point for any investigation is the definition of native title rights and interests in s 223 of the NTA. Thus, central to native title jurisprudence is what it is to be 'traditional'. Although the definition is cast in the present tense, judicial interpretations of 'traditional' laws and customs have created an edifice around continuity, which has imposed a frozen rights approach or museum mentality. In effect, the Courts have required proof that the same society operated for over 200 years under a legal regime that does not evolve: a nonsensical proposition. Jumbunna notes Pearson's damning criticism that the *Ward* and *Yorta Yorta* High Court decisions insist that native title claimants prove that they meet

white Australia's cultural and legal prejudices about what constitutes 'real Aborigines'.[18]

54. The failure of the Courts to acknowledge the evolution of traditional laws and customs has resulted in some extraordinary outcomes, exemplifying a frozen rights approach, such as that shopping at a supermarket might evidence modernization that demonstrates a break with traditional laws and customs[19] or that the absence of spearing as punishment for transgression of marriage rules was a relevant consideration in assessing the continuity of traditional laws and customs.[20]

55. Jumbunna supports the proposal that traditional laws and customs be those recognisable over time so long as it is explicit that 'over time' cannot be interpreted as continuity of laws and customs, generation to generation, as interpreted by the Full Court of the Federal Court in *Bodney v Bennell.*[21]

56. Crucially, the legislation must provide explicit recognition of the revival of traditional laws and customs, where significant interruption may have occurred as a result of external intervention. The current system allows for the recognition of a continuing society bound by traditional laws and customs that may fail to prove the existence of native title rights and interests due to substantial interruption. That such a society is able to maintain its vibrancy and cohesion, notwithstanding colonial overt policies of destruction, is a matter for celebration.

4. Prior extinguishment to be disregarded by agreement

57. We have concerns about the bill's amendment relating to the disregarding of prior extinguishment by consent, in so far as such an amendment will potentially allow the State another area in which to withhold consent until an ILUA has been executed (this practice is addressed in more detail below).

58. Instead, Jumbunna proposes the adoption of the factual inconsistency test as applied in Canada rather than the existing legal inconsistency test to

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[18] Noel Pearson, " The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta ", Sir Ninian Stephen Annual Lecture (17 March 2003), http://www.capeyorkpartnerships.com/noelpearson/lecture.doc (accessed 10 June 2008).
[19] *De Rose v State of South Australia* [2002] FCA 1342 per O'Loughlin J at [500].
[20] *Bodney v Bennell* [2008] FCAFC 63 at [57].
[21] *Bodney v Bennell* [2008] FCAFC 63 at [70]-[73], [96]-[97].

prior extinguishing acts. The focus is on the actual impact of the Crown grant on Aboriginal and Torres Strait Islander peoples' lifeways, rather than any legal right to impact on them. Under the factual inconsistency test, even grants of freehold would not necessarily extinguish all incidents of native title. For example, unfenced, vacant freehold land would not necessarily preclude the exercise of hunting rights whereas the building of a school would.

59. The factual inconsistency test also has the advantage of providing for suspension of native title rights and interests for the duration of the inconsistency without requiring outright extinguishment.

5. Good faith requirements

60. We support in principle the amendment of the requirements relating to good faith, however, believe that, again, the amendment does not go far enough.

57. The inequality of the parties in any native title negotiation or litigation is evident. Notwithstanding that the State should be bound by model litigant guidelines, reality paints a very different picture. For example, some state respondents to refuse to make consent determinations in relation to native title claims, even in circumstances where they have publically indicated to the Court that they do not, in fact, dispute connection.

61. State parties have often insisted upon consent determinations being conditional upon the executed of Indigenous Land Use Agreements ("**ILUAs**"). These ILUAs usually deal with the exercise of native title rights and compensation. Notwithstanding that these matters are central to the claimants' legal rights, the negotiations of these agreements occur in secret, with the content of the agreements being protected as commercially confidential. There is no Court oversight of the negotiation processes. This practice has brought condemnation from Courts, which have questioned states' refusal in circumstances where connection is accepted.

62. The State respondents appear to be employing 'blunt' negotiating tactics, effecting, what was always a possibility, an exploitation of their greater power to require claimants to compromise on their claims, or be forced to litigate the native title claim. It is universally recognised by native title complainants and legal representatives that litigating such a claim can

take years and take tremendous emotional toll where claimants must expose their culture to question and dissection for little return. Individuals die, evidence is lost, and the will of the claimant group to prosecute proceedings when they continue, seemingly endlessly, is weakened.

63. Practically the ability of the Court to manage the conduct of Respondents is limited in native title litigation, especially in relation to State Respondents. Sections 37M to 37P of the *Federal Court of Australia Act 1976* (Cth) confer on the Court powers to manage its proceedings. Section 37N requires parties to conduct the proceedings (including relevantly any negotiations of the claim) in accordance with law and as quickly, inexpensively and efficiently as possible. The Court therefore has powers to force parties to conduct themselves properly. However, usually Courts manage litigation through, among other things, the use of costs orders. Such orders are usually effective in civil proceedings, because parties do not want to bear the costs of any delays. In Native Title however, the Crown funds the litigation for both the Respondents and (through the provision of funding to Native Title Representative bodies) the claimants, so costs orders are ineffective. Whilst the Court retains powers to find parties in contempt, or to refer legal practitioners to disciplinary bodies, the use of such powers is extreme and rarely employed by the Courts.

64. In addition, whilst complainants must meet heavy obligations in the pleadings required to be filed when a claim is instituted, the respondent does not have any obligation to provide a verified response denying the content of the claim. This allows the respondent to avoid stipulating to the Court why they deny connection. Unlike the complainant, who, on the basis of their documents is susceptible to the Court's observations as to the merits of their claim, the respondent may present a position to applicants about their view of the merits of the claim in negotiations, that they would not advance before a Judge. In effect, the Crown is entitled to keep its hand to its chest before the public forum of a Court, with no responsibility for justifying its view.

65. The practical reality is that the time taken for the resolution of claims, the extraordinary evidentiary requirements that lie almost exclusively on Indigenous claimants, who are some of the most disadvantaged litigants in any Court in Australia, and the unrivalled power of the Crown in these matters, has created a system in which native title claimants are afforded

legal rights by the legal system, but afforded no effective means for proving and enforcing them.

66. Given the practices currently being engaged in by the state, whilst we support the proposed amendment, we believe the obligation to negotiate in good faith should extent to any negotiations in relation to:

    a. ILUAs; and

    b. Agreements addressing compensation (where not negotiated within an ILUA).

67. In Part III a further proposed amendment of the Federal Court Rules is addressed, intended to assist in addressing the issue of obligations to plead.

6. Native title rights of a commercial nature

68. As described above, Jumbunna considers that native title should properly be conceived of as a right to the land itself, encompassing the full suite of sovereign rights less those extinguished by actual inconsistency. The most analogous land grant in the mainstream system would be that of freehold title. As described, we consider that there has been misdescription of native title rights and interests in concentrating on the exercise of rights, rather than on the underlying rights themselves.

69. The broader conception leads to the description of native title rights and interests as rights to utilise land resources and control access. It follows that native title rights and interests could be of a commercial nature and Jumbunna supports that recognition in the proposed bill.

PART III ADDITIONAL CONSIDERATIONS AND PROPOSALS

70. Part III of the submission deals briefly with a number of additional considerations and proposals not addressed in Parts I and II.

Need for totally new system

71. As this submission describes, and as the Committee will hear from numerous submissions, the native title system has dramatically failed to fulfil the ambitions laid out at the outset in the preamble to the NTA and three component plan. It has utterly failed to fulfil its obligation to the pre-existing sovereigns and has instead acted as a mere land regulation scheme.

72. Unsurprisingly, given the bitter history of the implementation of the NTA, native title has been characterised by hard fought and extremely technical litigation. While negotiated outcomes are possible, the power imbalance is so extensive as to preclude genuine negotiation, let alone nation-to-nation relations.

73. At the time of the drafting of the NTA, a comprehensive land claims system, akin to that of the British Columbia treaty system in Canada, was considered and rejected. However, after two decades of a failing adversarial system, it is time to revisit the proposal, noting that the Canadian comprehensive claims process and in particular, the British Columbia Treaty Commission process, has been widely criticised. Criticisms include that negotiations have a huge imbalance in capacity and resources, for not creating the intended goodwill, for failing to deal with compensation and for involving an excessive time to negotiate comprehensive settlements, the Nisga'a Final Agreement taking 17 years to finalise. However, the Canadian claims processes include a multitude of claims – self government agreements, comprehensive claim agreements, land governance agreements, implementation plans and agreements leading to agreements; agreements in principle, framework agreements and memoranda of understanding.

74. In an Australian context, given the complexity and broad ambit of issues covered, this time scale may contrast favourably with native title litigation, which only deals with proof of native title and extinguishment issues, providing very limited rights that are susceptible to regulation and extinguishment. The National Native Title Tribunal estimates that, on

current trends, it will take about 30 years to resolve current claims and those likely to be lodged in the next few years.

75. Jumbunna does not advocate the Canadian system in particular but does raise the need for a fair and just system that ensures that acts on and in relation to Indigenous land and waters take place only with the free, prior and informed consent of the Aboriginal or Torres Strait Islander people concerned.

Need for achievable compensation regime

76. Notwithstanding the existence of compensation provisions in the NTA, there has never been, to our knowledge, a successful claim for compensation for the extinguishment of Native Title. Claimants in such a claim are required first to meet the extremely onerous evidential task of establishing an existing normative system of a society that has continued from the time of settlement to the time of extinguishment. Currently, the Act allows respondents to rely upon such state sanctioned acts as mass murder, and the forced removal of entire generations from their communities, to argue that no connection could continue. It is little wonder that there have been no successful compensation claims under the Act.

77. The Commonwealth government has fundamentally failed its obligation to provide a means of redress for Traditional Owners whose native title has been extinguished in whole or in part.

78. The failure of the Australian Government to establish a real mechanism for compensation for such extinguishment is reprehensible. The Special Rapporteur has noted that the loss of access to, and control over, traditional lands is one 'crippling aspect' of the racial discrimination faced by Indigenous communities in Australia. It is also contrary to article 26 of the Declaration, which requires that native title should exist simply by virtue of 'traditional ownership or other traditional occupation or use'.

Concerns raised in relation to ILUA negotiations and conduct of litigation.

79. As noted above, Order 78 of the Federal Court Act imposes significant obligations upon a claimant in filing an application, but no similar obligation is imposed by the Rules on the respondent to file a detailed reply. Rather respondents can (and many do), refuse to consent to a determination, without having to stipulate the basis for that refusal.

Consequently, Respondents are able (it is not suggested all do) merely deny a claim for the ancillary purpose of pressuring negotiations. There is evidence that States do adopt this position, refusing to agree to consent determinations, even where there is no bona fide objection to the claim, until an ILUA has been signed.

80. Whilst many of the amendments proposed, if passed, would alleviate some of the pressure, by reducing the burden of native title litigation on applicants, in our view the Crown should be forced to file a specific pleading outlining their conclusions on the claimants' claim of connection, and stipulating the precise basis for not consenting to a determination. Where the Crown's denial of the claim is bona fide, it should be forced to say why. This would have a dual impact in that:

    a. It would require States to put on the public record their position as to the claim, and their position in relation to connection; and

    b. Create a disincentive for legal representatives of the Crown from presenting general refusals to consent, in that they would be required to stipulate that the denials in the pleading have a proper basis in the factual and legal material available at the time (Order 11 Rule 1B).

This submission was prepared by Alison Vivian, Craig Longman and Nicole Watson on behalf of the Jumbunna IHL Research Unit. We would be happy to provide the Senate Standing Committee on Legal and Constitutional Affairs with further information on any of the matters raised above.

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