Native Title Amendment Bill 2012

Introduced into the House of Representatives on 28 November 2012
Portfolio: Attorney-General

Summary of committee view

1.158 The committee considers the bill broadly promotes the right to enjoy and benefit from culture and the right to self-determination.

1.159 The committee seeks clarification as to why it is necessary to restrict the objection processes to an Indigenous Land Use Agreement and how this is consistent with the right of all members of a community, including individual members, to enjoy their culture.

1.160 The committee also seeks clarification in relation to the omission from the bill of provisions addressing the burden of proof in relation to native title applications and whether the current burden of proof provisions in the *Native Title Act 1993* are compatible with the right to self-determination.

Overview

1.161 This bill seeks to amend the *Native Title Act 1993* (the Act) and is aimed at improving the operation of the native title system. The bill seeks to make three main amendments to:

- allow historical extinguishment of native title to be disregarded over areas in national, state and territory parks and reserves which have been set aside for the preservation of the natural environment, where the native title party and relevant government party agree. This seeks to partly ameliorate a 2002 High Court decision[1] that held that the vesting of Crown reserves under state legislation extinguished native title in those areas; and
- clarify the meaning of good faith in the Act and the conduct and effort expected of parties in seeking to reach a negotiated agreement on native title applications. It will extend the time (from six to eight months) before a party can seek arbitration (to encourage negotiation) and require a party who has been alleged not to have met the good faith negotiation requirements to establish that they have before seeking an arbitral determination; and
- streamline registration and authorisation processes in relation to Indigenous Land Use Agreements (ILUAs), which are agreements

1 *Western Australia v Ward* (2002) 213 CLR 1.

> between a native title group and others about the use and management of land and waters. The intention is that the amendments will ensure parties are able to negotiate flexible, pragmatic agreements to suit their particular circumstances.[2]

1.162 The committee deferred its consideration of this bill in its *First Report of 2013* as the bill had been referred to two other parliamentary committees. The Senate Legal and Constitutional Affairs Legislation Committee tabled its report on the bill on 18 March 2013 and the House Standing Committee on Aboriginal and Torres Strait Islander Affairs tabled its report on 20 March 2013.

Compatibility with human rights

1.163 The bill is accompanied by a statement of compatibility that states that the bill engages the right to enjoy and benefit from culture and the right to self-determination, and concludes it is compatible with human rights as it promotes these rights.

1.164 The statement notes that the right to take part in cultural life is contained in article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 27 of the International Covenant on Civil and Political Rights (ICCPR). Article 15 of the ICESCR promotes the right of all persons to take part in cultural life while article 27 of the ICCPR protects the right of individuals belonging to minority groups within a country to enjoy their own culture. International human rights jurisprudence has held that Indigenous peoples' cultural values and rights associated with their land should be respected and protected.

1.165 These rights are also central to the right of self-determination guaranteed by article 1 of the ICESCR and article 1 of the ICCPR, which guarantees the right of groups of peoples to have control over their destiny and to be treated respectfully.

1.166 The statement of compatibility also notes that while the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) is not included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*, the principles in the Declaration provide 'some useful context on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples'.[3] In particular, article 8(2)(b) of the Declaration provides that States shall provide effective mechanisms for the prevention of, and redress for, any action that has the effect of dispossessing Indigenous peoples of their lands, territories or resources.

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2 Explanatory statement, p. 20.

3 Statement of compatibility, p. 5.

Disregarding historical extinguishment of native title

1.167 The statement of compatibility notes that the amendments in Schedule 1, which allow for the historical extinguishment of native title to be disregarded, promote the right to enjoy and benefit from culture as:

> This amendment will provide more opportunities for native title to be recognised and claims to be settled by negotiation and will provide incentives for parties to reach agreements, such as opportunities for joint management of parks or reserves with native title holders.[4]

1.168 The committee notes that submissions to the other two parliamentary inquiries were broadly supportive of this proposal, although some raised concerns about the need for the consent of the government before historical extinguishment could be disregarded.[5] The government provided the justification for the need for consent to the Senate Legal and Constitutional Affairs Legislation Committee:

> The government takes the view that the provisions in the [B]ill are a compromise between a situation in which all third parties possibly have an interest and would need to be a party to the agreement, and a situation in which there is no agreement. So, the government believes that, by introducing a provision that requires the agreement of their relevant state or territory government, that is a reasonable balance between what the various positions might have been.[6]

1.169 The committee understands from the explanatory memorandum, statement of compatibility and submissions to the other two parliamentary committees, that consultation with a wide group of people, including Indigenous groups, has been undertaken since 2010 (including a release of exposure draft legislation) and that the position reached in the bill has taken into account these views.

1.170 The committee is of the view that enabling more areas to be made available for native title broadly promotes the right to enjoy and benefit from culture and the right to self-determination. The requirement to seek the consent of the government to disregard historical extinguishment may, on the face of it, be seen to limit the right to self-determination. However, on the basis of the extensive consultation and the need to consider the interests of third parties, the committee

4 Statement of compatibility, p. 4.

5 See, for example, the submission by the National Congress of Australia's First Peoples, *Submission 24*, p. 10, to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs.

6 Mr Kym Duggan, AGD, *Committee Hansard*, 6 March 2013, p. 34, as quoted in the Senate Legal and Constitutional Affairs Legislation Committee report on Native Title Amendment Bill 2012, March 2013, p. 20.

is of the view that this is a reasonable and proportionate limitation that seeks to address a legitimate objective.

Good faith requirements in negotiation

1.171 The right to negotiate provisions in the *Native Title Act 1993* allow Aboriginal and Torres Strait Islander people to negotiate benefits for their communities in return for their consent to certain activities on their lands. It does not allow them to stop or veto projects from going ahead. Over the years the Native Title Tribunal and the courts have developed a set of indicia as a guide to negotiating in good faith under the Act. This bill seeks to clarify in the legislation the conduct expected of parties in future act negotiations.

1.172 The committee notes that many of the submissions to the other two parliamentary committee inquiries were broadly supportive of these provisions as strengthening the right to negotiate. However, there was concern from various submitters about the specific drafting of some provisions and what the exact terminology should be. The Senate Legal and Constitutional Affairs Legislation Committee recommended that, instead of criteria on good faith negotiation being based on the criteria in the *Fair Work Act 2009*, it should be based on the 'Njamal Indicia' which were set out in a Federal Court case[7] and which have been extensively tested.[8] Concern has also been expressed that these provisions may not be necessary and may lead to less certainty and more litigation.[9]

1.173 The statement of compatibility notes that the amendments in Schedule 2 promote the right to enjoy and benefit from culture and the right to self-determination:

> The amendments to the good faith provisions under the right to negotiate regime encourage parties to focus on negotiated, rather than arbitrated outcomes, promote relationship-building through agreement-making, and improve the balance of power between negotiating parties. In doing so, the amendments will enhance the ability of native title holders to participate in genuine negotiations about future activity on their traditional lands. By placing an emphasis on interests-based negotiation and agreement-making, the amendments also promote sustainable, long-term outcomes for Indigenous communities.[10]

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7 *Western Australia v Taylor* (1996) 134 FLR 211 at 224-5.

8 Senate Legal and Constitutional Affairs Legislation Committee report on Native Title Amendment Bill 2012, March 2013, recommendation 1 at para 3.91, p.37.

9 See House Standing Committee on Aboriginal and Torres Strait Islander Affairs, Advisory Report: Native Title Amendment Bill 2012, Coalition Minority Report, p. 52.

10 Statement of compatibility, p. 4.

1.174 The committee accepts that the right to negotiate – including the requirement that the negotiations be undertaken in 'good faith' – are an important part of respecting the rights of Indigenous peoples over their land and culture. From an international human rights perspective, whether the indicia for good faith negotiations are contained in agreed court and tribunal judgments or in legislation (which are in substance largely the same) does not determine whether human rights are respected. As the good faith criteria do not appear to be incompatible with human rights, the committee considers that Schedule 2 of the bill does not appear to give rise to any human rights concerns.

Indigenous Land Use Agreements (ILUAs)

1.175 Schedule 3 of the bill streamlines processes in relation to ILUAs. An ILUA is a voluntary agreement that includes the use and management of an area of land or waters made between native title groups and other parties (for example, mining companies). These are then registered with the Native Title Registrar. This bill seeks to streamline the processes around this.

1.176 While the submissions to the other two parliamentary committee inquiries were broadly supportive of the intention to streamline these processes, concerns were raised around changes to reduce the time by which parties could object to an application to register an ILUA (from three months to one month).[11] Objectors might be third party Indigenous persons who may not agree with the approach being taken by native title representative bodies or land councils. The committee notes that the Senate Legal and Constitutional Affairs Legislation Committee recommended that this be amended to reinstate the three month objection period as the right to object 'may be rendered meaningless and of no benefit to legitimate objectors if compliance is patently impracticable'.[12] In addition, objections were raised over the removal of a provision[13] to seek internal review of a Registrar's decision to register an ILUA, meaning that the only option would be to seek judicial review (which is often cost prohibitive and limited in scope).[14]

1.177 The committee considers that the ILUA process can help promote the right of persons to benefit from culture and the right to self-determination in providing Indigenous custodians the right to negotiate with others about the use and management of land and waters. However, as article 27 of the ICCPR provides,

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11 Proposed new subsection 24CH(5) of the bill.

12 Senate Legal and Constitutional Affairs Legislation Committee report on Native Title Amendment Bill 2012, March 2013, recommendation 2 at paras 3.2-3.3, p.37.

13 Current section 24CK of the *Native Title Act 1993*.

14 See Senate Legal and Constitutional Affairs Legislation Committee report on Native Title Amendment Bill 2012, March 2013, pp 32-33.

persons belonging to minority groups are not to be denied the right, in community with other members of their group to enjoy their own culture. There will not always be unanimity among members of a group on how land and waters should be used, and as such, the right to enjoy one's culture requires that there be a meaningful opportunity for individual members of that community to object to how land is intended to be used. The UN Human Rights Committee has previously held that a restriction on the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole. No justification is given in the statement of compatibility or in the explanatory memorandum as to why it is justifiable to restrict the processes for objecting to an ILUA, other than that this streamlines the processes.

1.178 The committee intends to write to the Attorney-General to seek clarification as to why it is necessary to restrict the objection processes to an ILUA and how this is consistent with the right of all members of a community, including individual members, to enjoy their culture.

Burden of proof in relation to native title claims

1.179 The committee notes that a number of submissions to both the Senate Legal and Constitutional Affairs Legislation Committee and the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs raised the issue of the burden of proof in the context of native title claims. For example, the Australian Human Rights Commission recommended in its submission to the House Committee that consideration be given to:

> the following outstanding recommendations in the Native Title Report 2009 in relation to shifting the burden of proof for native title:
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> - That the *Native Title Act 1993* be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.
> - That the *Native Title Act 1993* provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.

1.180 The committee notes that shifting the burden of proof for native title claimants may be seen as enhancing the right to self-determination. The committee notes that the United Nations Special Rapporteur on the Rights of Indigenous Peoples has expressed concern that the requirement for indigenous claimants to show proof of continuous connection to the lands may be viewed as onerous and

unjust.[15] In particular, the Special Rapporteur noted that the Declaration on the Rights of Indigenous Peoples (which the statement of compatibility acknowledges provides 'useful context on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples'[16]):

> …effectively rejects a strict requirement of continuous occupation or cultural connection from the time of European contact in order for indigenous peoples to maintain interests in lands, affirming simply that rights exist by virtue of "traditional ownership or other traditional occupation or use".'[17]

1.181 **The committee intends to write to the Attorney-General to seek clarification regarding the omission from the bill of provisions addressing the burden of proof in relation to native title applications and claims and whether the current burden of proof provisions in the *Native Title Act 1993* are compatible with the right to self-determination.**

15 United Nations Special Rapporteur on the Rights of Indigenous Peoples, *Report on the situation of indigenous peoples in Australia* A/HRC/15/37/Add.4 (1 June 2010), p.8 para 26.

16 Statement of compatibility, p. 5

17 United Nations Special Rapporteur on the Rights of Indigenous Peoples, *Report on the situation of indigenous peoples in Australia* A/HRC/15/37/Add.4 (1 June 2010), p. 9 para 29.