

## **Native Title Amendment (Reform) Bill 2014**

*Sponsor: Senator Siewert*

*Introduced: Senate, 4 March 2014*

### **Summary of committee concerns**

1.42 The committee draws Senator Siewert's attention to the consideration of 'special measures' in its *Eleventh Report of 2013*. The committee also seeks further information in relation to the provisions dealing with agreements to disregard prior extinguishment of native title.

### **Overview**

1.43 This bill proposes to amend the *Native Title Act 1993* to:

- provide for the right to negotiate provisions of the Native Title Act to apply to offshore areas;
- strengthen and clarify the meaning of negotiations in good faith in relation to the right to negotiate provisions in the Native Title Act;
- provide for extinguishment over nature reserves including national parks to be disregarded, and for extinguishment to be disregarded by agreement;
- insert a presumption of continuity in relation to the observance of traditional laws and customs; and
- expressly provide that native title rights and interests may be of a commercial nature.

1.44 The explanatory memorandum states that the proposed measures are reforms that were promoted 'for a number of years by relevant stakeholders, most notably in submissions to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment Bill 2009 and the 2009 Native Title Report from the Aboriginal and Torres Strait Islander Social Justice Commissioner'.

### **Compatibility with human rights**

#### ***Statement of compatibility***

1.45 The bill is accompanied by a statement of compatibility that states that the bill advances the human rights of Aboriginal and Torres Strait Islander peoples by promoting the right to culture,<sup>1</sup> and the right to equality and non-discrimination.<sup>2</sup>

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1 Article 27 of the International Covenant on Civil and Political Rights (ICCPR).

2 Article 2(1) of the ICCPR; article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The statement of compatibility notes that the bill also promotes the land-related rights outlined in the UN Declaration of the Rights of Indigenous Peoples.<sup>3</sup>

1.46 The statement's overall assessment is that the regulation is compatible with human rights because it is a special measure designed to secure to Aboriginal people the full and equal enjoyment of human rights and fundamental freedoms.

### ***Committee view on compatibility***

#### *Right to self-determination*

1.47 The committee notes that, in addition to the rights mentioned in the statement of compatibility, the bill also engages and promotes the right to self-determination guaranteed by articles 1 of the ICCPR and the ICESCR and which provides the right of all peoples to 'freely determine their political status and freely pursue their economic, social and cultural development.' This is a collective right and, in the Australian context, is particularly relevant to Aboriginal and Torres Strait Islander peoples.

#### *Special measures*

1.48 The committee notes that the statement of compatibility categorises these amendments as 'special measures' within the meaning of article 1(4) of the ICERD.

1.49 In its *Eleventh Report of 2013* our predecessor committee considered the *Stronger Futures in the Northern Territory Act 2012* and related legislation. In its report the committee considered the classification of measures as 'special measures' within the meaning of the ICERD.

1.50 The committee's consideration of the criteria to be satisfied in order for a measure to be characterised as a 'special measure' is set out at pages 21 to 31 of that report. In particular, the committee noted that, as a matter of international law (including under the ICERD), measures based on race or ethnicity do not invariably amount to discrimination that can only be considered legitimate if they can be justified as 'special measures'. The relevant question is whether there is an objective and reasonable justification for the differential treatment. Under international law, the recognition of the traditional land rights of Indigenous peoples and legislative structures to give effect to those rights are generally considered to be non-discriminatory; such measures are not 'special measures' within the meaning of the ICERD. The committee noted that there was a difference between international law and Australian law in this regard, as represented by the High Court's interpretation of the *Racial Discrimination Act 1975*.<sup>4</sup>

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3 Articles 25-29.

4 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, 27 June 2013, pp 29-31.

1.51 The committee expressed concern 'at the tendency for explanatory memoranda to invoke the category of 'special measures' as a justification for legislation that involves differential treatment based on race or ethnic origin, without sufficient analysis of whether the differential treatment may be justified as legitimate differential treatment based on reasonable and objective criteria.'<sup>5</sup>

*Agreements to disregard prior extinguishment*

1.52 The bill provides that at any time prior to a native title determination the applicant and a government party may make an agreement that the extinguishment of native title rights and interests are to be disregarded.<sup>6</sup>

1.53 It is not clear whether other persons whose interests may be affected would be consulted or notified before native title is agreed to be revived. Neither the statement of compatibility nor the explanatory memorandum addresses this issue.

**1.54 The committee intends to write to Senator Siewert to seek clarification whether the proposals in relation to agreements to disregard prior extinguishment could adversely impact on other persons whose interests may be affected.**

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5 Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, p 28.

6 Proposed new section 47D, inserted by item 13, Schedule 1.

